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VAT'S UP

VAT NEWSLETTER

Legislator reduces interest rate to 1.8% per annum

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1 Background

In 2021, the German Federal Constitutional Court (judgement of 8 July 2021 – 1 BvR 2237/14 and 1 BvR 2422/17) ruled that the interest rate pursuant to secs. 233a and 238 of the German Fiscal Code, in the amount of 6% per annum, is unconstitutional (KMLZ VAT Newsletter 29 I 2021). At the same time, it allowed the continued applicability of this unconstitutional interest rate for interest periods up until 31 December 2018. However, it instructed the legislator to newly regulate the corresponding interest rate by 31 July 2022. The initial reaction of the state ministries of finance was to, inter alia, reject all current appeals against interest assessments for interest periods prior to 1 January 2019 as being unfounded by means of a general ruling (KMLZ VAT Newsletter 45 I 2021).

2 Change to the law

Now, the legislator has amended the interest rate for arrears and tax refunds in accordance with secs. 233a and 238 of the German Fiscal Code by means of the Second Act Amending the German Fiscal Code and the Introductory Act to the German Fiscal Code. Both the German Bundestag and the German Bundesrat have agreed to the amendment. Only the signing of the law by the German Federal President and publication in the Federal Law Gazette are still pending – both purely formalities.

The amended version of sec. 238 of the German Fiscal Code provides for the following:

- In the newly inserted para. 1a, the legislator sets the amount of interest, in cases pursuant to sec. 233a of the German Fiscal Code, at 0.15% per month (formerly 0.5% per month). The interest rate is therefore no longer 6% per annum as before, but only 1.8%. The legislator thus intends to follow the market situation more than was

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previously the case: The base interest rate is thereby taken, and a surcharge is added to it. This surcharge is calculated as an average between deposit interest and interest for consumer loans.

- The adjusted interest rate applies to interest periods as from 1 January 2019.
- Additionally, the legislator clarifies, in the new para. 1b of sec. 238 of the German Fiscal Code, that different interest rates may be relevant for an interest course. In this case, the interest is to be calculated on a daily basis using the applicable interest rate. Each calendar month is calculated with 30 interest days.
- Finally, in the new para. 1c, the legislator commits itself to reviewing the appropriateness of the interest rate for interest in accordance with sec. 233a of the German Fiscal Code, at least every two years. The first evaluation is to take place by 1 January 2024, at the latest, taking into account the development of the base interest rate. The adjustment will then apply to future interest periods.

3 Consequences for the practice and recommendation for action

With the amendments to sec. 238 of the German Fiscal Code, the legislator fulfils the minimum requirements imposed by the Federal Constitutional Court. Unfortunately, the legislator has not responded to the demands raised by various associations for a more comprehensive reform of the interest regulations and nor has there been any response to other proposals for a simpler, uniform, and secure application of the law.

With the current amendment of interest rates in accordance with secs. 233a and 238 of the German Fiscal Code, the legislator attempts to follow the market situation by the evaluation obligation to ensure a regular adjustment of the interest rate to the market situation. Initially, such an evaluation was planned for at least every three years (beginning no later than 1 January 2026). At the end the legislator shortened this period to two years in the third reading of the law (first evaluation by 1 January 2024, at the latest).

Interest in other areas, such as suspension of execution, interest on deferral and evasion, will continue to be charged at 6% per annum. The legislator has refused to make any adjustment in this regard. In doing so, the legislator hides behind the Federal Constitutional Court's statement that its decision does not extend to other interest calculation and that these must be subjected to an independent assessment. As a taxpayer, one would have wished for a proactive legislator which tackles problem areas proactively and does not wait until they are forced upon it by courts (as is the case here with sec. 233a of the German Fiscal Code).

For old interest periods prior to 1 January 2019, the legislator will continue to apply the Federal Constitutional Court's order, namely 6% per annum. Taxable persons who are subject to interest on arrears for these periods may consider taking legal action against the interest rate applied in terms of the harmonised VAT law and raise the issue of the possible unlawfulness of the interest rate charged under Union law (KMLZ VAT Newsletter 29 I 2021). It is important to observe the time limits for bringing proceedings, in particular the time limits provided for by the general ruling of 8 December 2021 (KMLZ VAT Newsletter 45 I 2021), which will expire in December 2022.

In addition to the described change in the interest rate, the legislator is currently making further changes to the German Fiscal Code. Sec. 233a para. 8 introduces a regulation according to which interest on arrears cannot be assessed or must be waived if the taxable person has made voluntary advance payments. If a threat of additional tax claims exists (e.g. during an ongoing tax audit), taxable persons may consider making voluntary advance payments to avoid further accrual of interest.

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