



German interest rate of 6% for tax refunds and tax arrears unconstitutional as of 2014

29 | 2021

1 Background

The standardized full interest rate of 6% p.a. pursuant to secs. 233a and 238 para. 1 sentence 1 of the German Fiscal Code (AO) has been subject to constitutional concerns for many years. In 2009, the German Federal Constitutional Court declared the interest rate for the periods 2003 to 2006 to be constitutional (decision of 03.09.2009 – 1 BvR 2539/07). Due to the persistent low interest rate level, the Federal Fiscal Court expressed doubts about the constitutionality of the interest rate for periods from 2012 onwards (decisions of 25.04.2018 – IX B 21/18; of 03.09.2018 – VIII B 15/18; of 04.09.2018 – VIII B 128/18). As a result, the Federal Ministry of Finance (BMF) granted a suspension of enforcement of the interest assessment for periods from 2012 onwards (BMF, notifications of 14.12.2018 and of 27.11.2019). In addition, the BMF decreed that the assessment of interest is only to be made on a provisional basis pursuant to sec. 165 para. 1 sentence 2 no. 3 AO (BMF, notification of 02.05.2019).

2 Decision of the Federal Constitutional Court dated 8 July 2021 – 1 BvR 2237/14 und 1 BvR 2422/17

On 18.08.2021, the Federal Constitutional Court published its decision concerning the constitutionality of interest assessments on trade tax arrears pursuant to sec. 233a of the German Fiscal Code. The subject of the constitutional complaints were the interest periods 01.01.2010 to 14.07.2014.

The Federal Constitutional Court declared sections 233a, 238 para. 1 sentence 1 of the German Fiscal Code unconstitutional due to a violation of the general principle of equal treatment insofar as an interest rate of 0.5% per month



Dr. Thomas Streit, LL.M. Eur.
Lawyer

+49 (0) 89 217 50 12-75
thomas.streit@kmlz.de

is used as the basis for the calculation for interest periods from 01.01.2014 onwards. As of 2014, the low-interest rate phase became fixed, in the sense of being of a "structural and permanent nature" such that the statutory interest rate of 0.5% per month is now evidently unrealistic. The full interest rate has an excessive effect. Thus, the interest rate at this level is no longer necessary in order to skim off any potential financial advantage in the event of later tax assessment, which had been the purpose of the law. Interest at a lower rate would be "equally effective" to achieve this objective. The Federal Constitutional Court leaves open which interest rate would be "effective".

Even though the decision was issued on the assessment of interest on trade tax, it is applicable to all other types of taxes covered by sec. 233a of the German Fiscal Code (VAT, income tax, corporate tax). The grounds of unconstitutionality also apply here and also extend to interest on tax refunds under sec. 233a of the German Fiscal Code. However, the declaration of unconstitutionality does not apply to other types of interest under the German Fiscal Code (interest on deferrals, evasion and suspensions). Due to the different characteristics of these types of interest, i.e., among other things, the taxpayer's influence in being subject to interest under secs. 234, 235, 237 of the German Fiscal Code, they must be reviewed separately in terms of constitutional law.

In principle, unconstitutionality leads to the nullity of a law. In this case, however, the Federal Constitutional Court only declared secs. 233a and 238 of the German Fiscal Code to be incompatible with the German Constitution. It orders the continued applicability of the previous law until 31.12.2018. The reason cited for the continued applicability of the unconstitutional law is budgetary uncertainties and the enormous administrative burden of a retroactive change. Furthermore, the legislator is obliged to introduce a new (retroactive) regulation by 31.07.2022, applicable to periods beginning on or after 01.01.2019.

3 Consequences for the practice

For interest periods up to 31.12.2018, the Federal Constitutional Court has ruled that interest on tax refunds and tax arrears will continue to be charged at 6% p.a. despite the unconstitutionality of secs. 233a and 238 of the German Fiscal Code. However, it must be taken into account in regard to VAT that this area of law is harmonized under EU law. Even if member states are free to regulate their national procedural law, they are bound by the principles of union law. The interest must therefore be measured using the principles of proportionality and neutrality. Whether German laws concerning interest stand up to scrutiny concerning these principles may be doubtful, not least due to the decision of the ECJ in the *Senatex* case (judgment of 15.09.2016 – C-518/14) – especially in cases where the VAT owed by the supplier may be claimed as input VAT by the recipient of the supply, i.e. not a single cent is lost at the expense of the tax authorities. The Federal Constitutional Court was naturally not required to comment on this matter in its decision, which concerned trade tax. In the area of VAT, taxpayers could therefore continue to challenge interest assessments for the past using arguments under EU law – and not just in terms of the amount, but in principle. In the case of relevant amounts, this can only be advised. Ultimately, nothing else applies to late-payment penalties.

The legislator should use the regulatory mandate to adjust the interest rate not only for full interest and to reform the interest rate more extensively in the area of VAT. Only assessments that are not yet final will be affected by a retroactive new regulation. In cases of tax arrears, taxpayers should therefore keep the assessment of interest from 01.01.2019 open. In cases of interest on tax refunds, the protection of legitimate expectations pursuant to sec. 176 para. 1 sentence 1 no. 1 German Fiscal Code must be taken into account.