



## German Federal Fiscal Court holds 6% interest rate to be unconstitutional as from 2012

### 1 Introduction

The reduction of the interest rate of 6% p.a. in sec 238 para. 1 of the German General Fiscal Code is approaching. In April 2018, the 9<sup>th</sup> Senate of the German Federal Fiscal Court voiced serious constitutional doubts regarding the interest rate. The ruling concerned interest periods from April 2015 (see KMLZ Newsletter 20/2018). Shortly thereafter, the German Ministry of Finance published a letter, which calls upon all tax offices to grant suspension of enforcement for all interest periods from April 2015 if requested to do so by taxpayers (see KMLZ Newsletter 25/298).

The 8<sup>th</sup> Senate of the German Federal Fiscal Court has now not only confirmed the decision of the 9<sup>th</sup> Senate but it has also even extended it to interest periods dating from (November) 2012 to March 2015 in its decision of 3 September 2018 (VIII B 15/18).

### 2 Facts

The judgment concerns the interest which tax offices may impose, if they have granted a suspension of enforcement within the framework of appeal proceedings, which appeal is ultimately rejected (sec 237 para 1 sentence 1 German General Fiscal Code). The taxpayer had unsuccessfully appealed against income tax assessments for 2007, 2008 and 2010. After losing the appeal, the tax office imposed suspension interest for the period from November 2012 to September 2016. The taxpayer again appealed against this suspension interest assessment. He also applied for suspension of enforcement. Both the tax office and the court of first instance rejected the application for a suspension of enforcement. However, the court of first instance allowed the appeal to the German Federal Fiscal Court.



Matthias Luther, LL.M. TAX  
Lawyer

+49 (0) 211 54 095-395  
matthias.luther@kmlz.de

### 3 Decision by the Court

The German Federal Fiscal Court ruled in favour of the taxpayer. It granted the requested suspension of enforcement of the interest assessment. It justified its decision by reference to the constitutional doubts voiced by the 9<sup>th</sup> Senate in April 2018. It confirmed that these concerns apply to all interest assessments which are based on the 6% interest rate in sec 238 para 1 German General Fiscal Code. In addition, the 8<sup>th</sup> Senate expressed doubts as to whether the interest rate was even constitutional in the period November 2012 to March 2015. It justifies this extension with appeals pending before the German Federal Constitutional Court (file no BvR 2237/14 and 1 BvR 2422/17). Finally, the 8<sup>th</sup> Senate held that public interest does not demand the execution of interest assessment, because *“the legislator knows that the interest rate must be adjusted”*. This is a clear mandate to the legislator to act.

### 4 Impact on Taxpayers

Taxpayers should appeal against any interest assessment which is based on sec 238 para 1 German General Fiscal Code. For periods from April 2015, the tax offices will automatically grant suspension of enforcement (see KMLZ Newsletter 25/2018). For periods from November 2012 to March 2015, there is now a very good chance that enforcement will also be suspended.

The German Federal Ministry of Finance may amend its above-mentioned letter with regard to the decision of the 8<sup>th</sup> Senate and extend it to cover interest periods from November 2012. In any case, the German Federal Constitutional Court intends to decide the two appeals mentioned above by the end of 2018. These decisions should provide legal certainty, at least with respect to the past. The legislator has also already taken action. The German Federal States have launched a legislative initiative to halve the interest rate to 3% per annum.