

Period of the Retroactive Effect for Restructuring Measures extended – Does this also apply for tax purposes as part of the German Reorganization Tax Act?

On 27 March 2020, the law for the Mitigation of the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Proceedings Law was announced in the Federal Law Gazette (BGBl. I 2020, page 569). Among other things, the retroaction under commercial law in case of restructuring measures for the year 2020 was extended from eight to twelve months. There were no respective adaptations to the Reorganization Tax Act (*Umwandlungsteuergesetz, UmwStG*) in this connection. Any party concerned planning restructuring measures in this year faces the question as to how this regulation affects tax law.

Does the extension apply to the period of the retroactive effect for restructuring measures for tax purposes as part of the German Reorganization Tax Act?

In case of restructuring measures pursuant to the German Law Regulating Transformation of Companies (UmwG) according to § 17 (2) sent. 4 UmwG the following applies in many cases: the decisive closing balance sheet has been prepared as per a cut-off date preceding the application for entry in the register by no more than eight (8) months. Part of the package of measures under the law for the Mitigation of the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Proceedings Law is a change in transformation law; its consequences for tax law still need clarification.

1. Extension of the period of the retroactive effect pursuant to UmwG

Sect. 2, § 4 of the Law on Measures in Corporate, Cooperative, Association, Foundation and Property Ownership Law to combat the effects of the COVID-19 Pandemic regulates as follows:

"In deviation of § 17 (2) sent. 4 of the German Transformation Act it shall be sufficient for the admissibility of the registration if the balance sheet has been prepared as per a cut-off date preceding the application for entry in the register by no more than twelve months."

This means that the generally provided 8-month term has been extended to a 12-month term.

In the introduction, the legislator gives the following reasons for this regulation (BT Printed Matter 19/18110, p. 29):

"The protective measures for the prevention of the spreading of the COVID-19 Pandemic, in particular, the restrictions of possibilities to convene meetings partially have significant effects on the ability to act of companies of different legal forms as they partially are no

longer in a position to pass resolutions in meetings of the respective organs. This affects (...) extraordinary meetings required due to special measures, in particular, for capital and restructuring measures. In extraordinary situations, like the one we are just in, the latter are possibly of vital importance for the corporations, associations, foundations and cooperatives affected.

The 12-month term is only applicable to registration made in the year 2020 (Sect. 2 § 7 of the Law for the Mitigation of the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Proceedings Law). However, Sect. 2, § 8 provides the following for the Federal Ministry of Justice and Consumer Protection: The Ministry may only extend the effectiveness of, among other things, the new regulation of the 12-month term, by statutory regulation without approval of the Federal Council (*Bundesrat*) until 31 December 2021 at the latest insofar as this seems necessary based on the continuation of the consequences.

2. Synchronization of Transformation and Tax Law disrupted

Neither in the law nor in the materials pertaining to the law (particularly, BT Print Matter 19/18110 and the documents of the Committee on Legal Affairs and Consumer Protection) there is a note whether the regulations of the UmwStG will be adapted respectively. This could lead to a situation where the general synchronization of transformation and tax law cannot be implemented completely. In the following we will explain the regulations affected.

2.1. Mergers of corporations pursuant to §§ 3 et seq. 11 et seq. UmwStG as well as split-ups and spin-offs pursuant to §§ 15, 16 UmwStG

The 12-month term is probably also applicable for mergers pursuant to §§ 3 et seq. UmwStG (merger to a partnership) and pursuant to §§ 11 et seq. UmwStG (merger to another corporation). The relevant regulation of § 2 UmwStG (retroactive tax effect) does not include its own retroactive term. The beginning of the retroactive period is based on the link to the "balance sheet in connection with the transfer of assets". This refers to the closing balance sheet under commercial law.

This means that mergers in the year 2020 can be registered with a fiscal transfer date as of 31 December 2019 until 31 December 2020. Thus, deviating from the previous legal situation, no interim balance sheet needs to be prepared for mergers after 31 August 2020.

The information described above shall also apply to split-ups and spin-offs pursuant to §§ 15, 16 UmwStG as also here, retroaction pursuant to § 2 UmwStG is applicable.

2.2. Procedures pursuant to § 20 possibly in connection with § 24 UmwStG (particularly contributions)

In case of contributions pursuant to § 20 UmwStG or § 24 UmwStG by way of (partial) universal succession (§ 123 (3) UmwG) this is not applicable according to the strict wording.

§ 20 (5) and (6) UmwStG (in connection with § 24 UmwStG) does not include its own regulation on the retroactive tax effect. According to it, the effective day may only be eight months before the registration of the merger for entry in the commercial register or before the day of the conclusion of the contribution agreement – notwithstanding the fact that, § 17 (2) sent. 4 UmwG is applicable with some of the procedures included by these regulations.

If the explanatory memorandum assumes that restructuring resolutions by the respective company organs can no longer be passed by conventional means, which could possibly complicate - possibly essential - restructuring measures, this shall also apply to measures pursuant to §§ 20, 24 UmwStG.

Nevertheless, we cannot simply assume that the 12-month term is also applicable here. An adaption to the UmwStG has not been provided for and the wording of the law does not suggest that the legislator has planned the extension to all procedures pursuant to §§ 20, 24 UmwStG as § 17 UmwG is applicable to mergers and splits.

However, this is not appropriate. The meaning and purpose of this law also includes restructuring measures in the meaning of §§ 20, 24 UmwStG. Insofar, the explanatory memorandum even contradicts to the wording of the regulation of the 8-month term in § 20 (6) UmwStG. It is also not understandable why mergers as well as split-ups and spin-offs are to be treated in deviation of the overall system of the UmwStG differently than contributions.

Rather, the impression is being created that the fiscal implication of the measures by the legislator have not - yet - been reflected in the laws. The passing of respective tax laws cannot be excluded at the moment. However, there are no announcements by the Federal Ministry of Finance (*Bundesfinanzministerium, BMF*) on scheduled changes in legislation regarding this matter at the moment.

2.3 Legal form transformation pursuant to § 9 UmwStG (in connection with § 25 UmwStG)

The situation in case of a legal form transformation is even more complex.

From a fiscal point of view, in case of a "crossing" legal form transformation - corporate entity to partnership entity (§ 9 UmwStG) or vice versa (§ 25 UmwStG) - a transfer of assets is fabricated due to the change of the taxation systems. At the time when the transformation becomes effective, the transferring entity is obligated to prepare a transfer balance sheet and the acquiring entity is obligated to prepare an opening balance sheet for tax purposes pursuant to § 9 sent. 2 UmwStG. In accordance with the remaining regulations of the UmStG regarding the preparation of balance sheets, pursuant to § 9 sent. 3 UmwStG balance sheets

may now be prepared for an effective date which lies no more than 8 months before the application of the legal form transformation for registration with the commercial register.

From a commercial law point of view, the legal form transformation is carried out under preservation of identity, i.e. there is no transfer of assets. For this reason there is no duty under commercial law to prepare a closing balance sheet, there is no regulation regarding any retroactive effect. This means that the regulation regarding the extension of the retroactive effect under commercial law does generally not lead to an extension of the fiscal possibility of the retroactive effect.

In the meaning of a uniform retroactive effect under transformation tax law a regulation or announcement regarding this is desirable.

3. Summary and Conclusion

According to our opinion, the 12-month period passed should be applicable for mergers pursuant to §§ 3 et seq. and §§ 11 et seq. UmwStG as well as split-ups and spin-offs pursuant to §§ 15, 16 from a fiscal point of view. With respect to spin-offs pursuant to §§ 20, 24 UmwStG and legal form transformations pursuant to §§ 9, 25 UmwStG, the situation is not clear. Initially, we recommend considering the continued applicability of the 8-month term in any planning as well as coordinating with the competent tax office.

The certainty whether the 12-month term from the new law is applicable according to tax law will only become effective in the future as soon as the legislator passes (interim) adaptations to the UmwStG following the law for the Mitigation of the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Proceedings Law or the BMF makes respective announcements in writing. A complete synchronization is particularly desirable under the aspect that some restructuring measures do not become excluded from the entrepreneurial option just because of lapse of time.

BEITEN BURKHARDT is happy to support you with the planning and execution of the legal transformation as well as the coordination with the fiscal authorities.

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