



Focus on recent decisions on German procedural and litigation law

1 Referral to the Constitutional Court: Is the amount of interest charged on suspensions unconstitutional?

Is the interest on tax amounts for which suspension of execution is granted, at a rate of 6% per year, in line with the constitution? This is what the German Federal Fiscal Court (BFH) now wants to know from the German Federal Constitutional Court (BVerfG). The legislator previously reduced the interest rate pursuant to secs. 233a, 238 of the German Fiscal Code to 1.8% p.a. for periods as from 1 January 2019. This was in response to the decision of the BVerfG in 2021, in which it declared the interest rate of 6% p.a. on tax arrears and tax refunds to be unconstitutional (see KMLZ VAT Newsletter 29 | 2021). However, an interest rate of 6% p.a. continues to apply to interest on suspensions (and other types of interest). In its decision of 24 June 2024 (ref. 7 V 11/24), the Munich Fiscal Court expressed serious constitutional doubts in this regard and granted a suspension of enforcement. In its decision of 8 May 2024, the BFH referred the question to the BVerfG as to whether the amount of the interest on the suspension of enforcement at 6% p.a. accruing as from 1 January 2019 until 15 April 2021, is compatible with the German Basic Law (ref VIII R 9/23). In its 2021 decision, the BVerfG did not explicitly rule on other types of interest (interest on deferrals, evasion and suspensions). Taxable persons and their advisors should file an appeal against the assessment of interest on the suspension of enforcement in order to keep the assessment open and to benefit from a potentially positive decision by the BVerfG. At the same time, they can apply for a suspension of enforcement of the respective assessment of interest on the suspension of enforcement (for which no further interest amount will arise).

2 Video hearings and other procedural innovations before the ECJ and the EGC

We previously reported on the partial change of jurisdiction from the ECJ to the EGC (see KMLZ VAT Newsletter 33/2024). Alongside this, the ECJ and the EGC have decided to amend their rules of procedure. In future, the parties to an action may



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

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

participate in a hearing before the ECJ/ECJ by videoconference. To do so, they must state the reason for their inability to attend before the court in person eg health, security or other serious reasons (e.g. flight cancellation). Another innovation is that the ECJ and the EGC can now decide to broadcast hearings live. Previously, it was already possible to follow the delivery of judgments, the reading of opinions and hearings of cases assigned to the Grand Chamber of the ECJ live. This has now been codified in the Rules of Procedure and extended to other hearings before the ECJ/EGC, in particular those before smaller chambers in important cases. In addition, the video recordings of hearings will, in future, be available on the CJEU's website for up to one month after the hearing. This should give EU citizens and referring courts the opportunity to participate remotely in hearings of the ECJ/EGC. However, parties to proceedings are entitled to object to the broadcasting and publication of video recordings, provided that they have acceptable reasons for doing so.

3 A search or seizure order issued by a tax investigator does not interrupt the statute of limitations.

Search and seizure can be ordered by various people. In principle, this power lies with the judge. In the event of imminent danger, orders for search and seizure can also be issued by the public prosecutor's office or the fines and criminal cases department (*BuStra/StraBu*) and their investigators, ie police officers and tax or customs investigators. However, not all of these orders can interrupt the limitation period for prosecution and assessment. In the case of administrative offences, in addition to an order by a judge, there is a special provision to the effect that an order issued by a prosecuting authority (public prosecutor or BuStra) also has the effect of interrupting the statute of limitations (sec. 33 para. 1 no. 4 of the Administrative Offence Act (OWiG)). Now, for the first time, the BFH has commented on whether search and seizure orders issued by investigators, such as tax investigators, can also serve to interrupt the statute of limitations (judgment of 31 January 2024 – X R 7/22). The BFH denied this possibility and stated that tax investigators do not work for the prosecuting authority in that sense. Furthermore, the BFH emphasised that a search order must meet minimum substantive requirements in order to interrupt the statute of limitations. Taxable persons should check carefully to see whether prosecution or a change to the tax assessment is not already excluded due to the statute of limitations. The present case clearly shows that not every investigative measure is capable of interrupting the statute of limitations.

4 Continued effect of a waiver of an oral hearing

With the consent of the parties involved, the court can make its decision without an oral hearing (sec. 90 para. 2 FGO). The BFH was recently required to clarify how long a consent, once declared, continues to apply (case no. IX S 16/24). The plaintiff had asserted, by way of a complaint, that the BFH had violated his right to a fair hearing, as it had decided on the appeal in the absence of an oral hearing. At an earlier stage of the proceedings, the plaintiff had declared his consent to this. In the meantime, the proceedings were suspended due to other proceedings before the BVerfG. According to the BFH, once a waiver of the oral hearing has been declared, it continues, in principle, to have effect. It does not become ineffective due to the expiry of a significant period of time, e.g. the three-month period applicable in civil proceedings. It is merely "used up" if the court issues an order to take evidence or clarification orders, for example. In this way, the court signals that it no longer considers a decision based on the current stage of the proceedings, in light of which the waiver was originally declared, to be sufficiently legitimate. In this case only, must there be another opportunity for an oral hearing. Taxpayers should carefully consider and weigh up whether to waive the oral hearing. By doing so, they also forgo the opportunity to explain their arguments orally in court or to introduce further evidence before the Fiscal Court.