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Translation (not authorized) of the abatement of Tax (III C 4 – S 6400/21/10001:001 – (German Ministry of Finance, referring to Insurance Tax, dated March 4th, 2021

A. Community Implications

1 Insurance tax and fire tax are not harmonised in the European Union. However, with regard to the freedom of establishment and the freedom to provide services in the European internal market, since the Council Directive of the European Communities (EC) concerning the Second Council Directive of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC 1 certain European legal requirements exist which must be taken into account in the taxation of insurance premiums. The relevant directive law was revised and summarised in Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II)

2 According to recital No. 11, Directive 2009/138 EC is an important instrument for the completion of the internal market. It aims at allowing insurance and reinsurance undertakings authorised in their home Member State to carry on their business, in whole or in part, by establishing branches or by providing services throughout the Community.

3 Furthermore, the different taxes and charges levied by the Member States on insurance contracts must not lead to distortions of competition in the supply of insurance between Member States. In order to avoid such distortions of competition, the tax and other contribution systems applicable shall be those of the Member State in which the risks are situated or, in the case of life assurance, in which the commitments are entered into. It shall be for the Member States to lay down rules to ensure that such taxes and duties are levied.

4 The criterion of the location of the risk is an element of European directive law, on the basis of which the right of taxation is allocated to the Member State in which the insured risk is located. It therefore only applies in cases where the insured risk is located in a state of the European Economic Area (EEA state) (hereinafter: "member state"). If it is located outside the EEA, the Directive does not contain any provisions regarding the right of taxation, as it is not located in any Member State. Accordingly, the Member

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States decide autonomously whether and under which conditions insurance premiums for the insurance of risks located in a third country (outside the EEA) are taxed.

5 The provisions of the EEA Directive regarding the right of taxation are limited to insurance relationships with an insurance company established in the EEA which are

a) in the case of non-life insurance, risks located in the EEA (Member State of the location of the risk) or

b) in the case of life insurance, were established in the EEA (Member State of the commitment).

B. § 1 VersStG

I. Systematics

6 With regard to the requirements of Directive law to be observed in national tax law, § 1 VersStG distinguishes between insurance relationships with so-called EEA insurers (§ 1, para. 2 VersStG) and those with so-called third-country insurers (§ 1, para. 3 VersStG).

7 Section 1(2) of the VersStG serves - as before - to implement the requirements and objectives of the Directive, i.e. insofar as insurance relationships with EEA insurers are concerned and the risk is located in the EEA. The taxation of insurance premiums by the German tax authorities is withdrawn insofar as the taxation law is assigned by directive law to another Member State of the European Union or Contracting State to the Agreement on the European Economic Area because the insured risk is located there. Insofar as insured risks are located outside the EEA, § 1 para. 2 VersStG contains autonomous regulations on taxability in sentences 2 and 3.

8 The new regulatory system introduced by the Act to Modernise Insurance Tax Law of 3 December 2020 (Federal Law Gazette I p. 2659) clarifies in § 1 para. 2 sentence 2, 1st half-sentence VersStG, that in principle the insurance of risks located outside the scope of the Act is also taxable, unless the risk is located in another EEA state. The fact that Germany does not have a taxation right in cases where the risk is located in another EEA state was already sufficiently clear from § 1 para 2 of the old VersStG, but is now expressly emphasised by the regulation technique now used.

9 § 1 para 3 VersStG regulates the taxation of insurance premiums paid on the basis of an insurance relationship with a so-called third-country insurer. Here, too, EU Directive law does not apply.

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10 § 1 para 4 of the German Insurance Tax Act stipulates that the German exclusive economic zone is included in the scope of the Act. This means that insurance policies relating to risks located there, in particular to plants and corresponding facilities, are covered for tax purposes.

II. § 1 para 2 VersStG - Insurance relationship with EEA insurer

1. EEA insurer

11 "Insurer established in the territory of the Member States of the European Union or other Contracting States to the Agreement on the European Economic Area" within the meaning of § 1 para 2 of the VersStG (EEA insurer) is an insurer that has its registered office or place of residence in the said territory (§ 1 para 1 of the Ordinance on the Implementation of the Insurance Tax Act (Insurance Tax Implementation Ordinance - VersStDV).

12 For the determination of the insurer in the sense of insurance tax law, the contractual partner of the policyholder who is the creditor of the insurance premium under civil law is decisive in the case of insurance relationships concluded by contract. In the case of companies domiciled in a third country that have a branch office in Germany, this is usually the main branch office in the third country. The only exception is legally independent subsidiaries that have their own registered office in the EEA and are themselves entitled and obligated under civil law through the conclusion of insurance contracts.

2. Location of the risk in the European Economic Area

a) Location of the risk within the scope of the Act

aa) Three special cases (section 1(2), first sentence, nos. 1 to 3, VersStG)

13 (1) In three special circumstances, Directive law (Art. 13 No. 13 of Directive 2009/138/EC - Solvency II) defines the location of the risk irrespective of the domicile of the policyholder.

In such cases, the right of taxation shall lie with the Member State in which

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- (a) the immovable property is located,
- (b) the vehicle is registered,
- (c) the policyholder has concluded the contract for insurance of travel and holiday risks with a term of not more than four months.

Accordingly, § 1 para. 2 sentence 1 No. 1 to 3 VersStG provides that the respective fact must have been realised in the area of application of the VersStG.

14 (2) The special circumstance in sentence 1 no. 1 requires insurance of risks relating to buildings, installations and objects contained therein (with the exception of commercial goods in transit). The objects must be within the scope of the law.

15 It does not matter whether the risks relating to structures and the risks relating to property therein are covered by the same insurance. It is also irrelevant for the allocation of the risk whether the insured objects are located in the building for a longer period of time (e.g. household effects) or only temporarily (e.g. merchandise).

16 The term "commercial goods in transit" excluded from risk allocation is limited to goods in (customs) transit that have not yet been cleared for free circulation within the meaning of customs law. The general rules shall apply to such commercial goods in transit.

17 (3) The special offence in sentence 1 no. 2 requires insurance of risks relating to vehicles of all kinds which are entered or registered in an official or officially recognised register in the area of application of the VersStG and bear a distinguishing sign. The corresponding registers for the various types of vehicles are listed by way of example in § 1 para (3) and (4) VersStDV.

18 The special offence in sentence 1 no. 2 applies not only to (land) vehicles but also to aircraft and ships. In the case of (land) vehicles, the provision also covers mopeds, scooters, etc., since in these cases, too, the vehicle is registered in the Central Vehicle Register in addition to the issuing of the insurance number plate. The term "vehicles of all kinds" also includes vehicles that are not self-propelled (e.g. trailers, wagons).

19 This includes not only insurance of the vehicle itself (e.g. hull insurance) but, in the case of motor vehicles, also compulsory motor vehicle insurance and passenger accident insurance.

20 (4) In the case of the special circumstance standardised in sentence 1 no. 3, which concerns the conclusion of an insurance of travel and holiday risks with a term of not more than four months, the place of the submission of the declaration of intent of the

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insurance underwriter necessary for the creation of the insurance relationship is to be taken into account.

bb) General facts (§ 1 para 2 sentence 3 VersStG)

21 With regard to the insurance of other risks, Directive law defines the Member State in which the risk is situated as the Member State in which the policyholder, as a natural person, has his residence or habitual abode at the time of payment of the insurance premium.

In cases where the policyholder is not a natural person, the Member State is defined as the Member State in which, at the time of payment of the insurance premium, the head office of the undertaking, the permanent establishment or the corresponding establishment to which the insurance relationship relates is situated. These requirements are implemented accordingly in § 1 para. 2 sentence 3 VersStG.

22 The general offence with the characteristic "other risks" explicitly also covers vehicles not subject to registration, as the special offence of sentence 1 no. 2 only concerns vehicles that are subject to an obligation to register or are voluntarily registered without an existing obligation.

23 "Not a natural person" within the meaning of § 1 para 2 sentence 3 no. 2 VersStG are in particular: general partnerships, limited partnerships (KG and GmbH & Co. KG), partnerships under civil law, communities of heirs, special-purpose associations, corporations, associations of persons and estates as well as corporations and legal persons under public law.

24 The terms "enterprise", "permanent establishment" and "corresponding institution" in § 1 para 2 sentence 3 no. 2 VersStG are derived from the term "branch office" (of the insurance nephew) used in Art. 13 no. 13 d of the Solvency II Directive. However, this term is not to be understood in the content definition given by §§ 13 ff., 29 German Commercial Code (HGB). The terms "enterprise" and "permanent establishment" used in tax law apply to the area of insurance tax (cf. § 12 of the German Fiscal Code, AO).

25 "Unternehmen" ("entity") refers to the non-natural person as policyholder.

26 "Permanent establishment" is any fixed place of business or enterprise serving the activity of a company.

27 The term "relevant establishment" refers to non-entrepreneurial sectors. This includes, in particular, establishments of public corporations or establishments of associations or societies serving non-profit-making purposes.

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28 In the context of Community law, the legal characteristics "registered office of the enterprise" and "permanent establishment or the corresponding facility to which the insurance relationship relates" embody the location of the risk and consequently the right of taxation. If the registered office of an enterprise or a permanent establishment or corresponding facility is located in the same place as the insurance relationship, the right to taxation is conferred. If the registered office of an enterprise and a permanent establishment or corresponding facility of the same enterprise are located in different Member States, the Directive assigns the right of taxation to the Member State in which the insured part of the non-individual is located. If, for example, only a permanent establishment is insured, taxation is due in the Member State in which the permanent establishment is located. If an overall policy exists for several parts of a company in different Member States, the insurance premium paid must be divided accordingly between the insured risks.

29 Example:

A company with its registered office in Austria, which has several permanent establishments, including one in Germany, concludes a permanent establishment liability insurance policy with an EEA insurer for all its permanent establishments.

Result: The insurance premium is subject to taxation in Germany pursuant to § 1 para. 2 sentence 3 no. 2 VersStG (general facts) insofar as it is paid to cover the risks of the permanent establishment located in Germany. If this amount is not specified separately in the insurance contract, the insurance premium portions attributable to the risks located in the individual Member States shall be determined for the purpose of taxation according to reasonable commercial principles (if necessary by estimation).

30 For the taxation of a company affiliated with the policyholder (not a natural person) see cc) below.

cc) Insurance for the account of a third party - policyholder and insured person in different Member States

31 The wording of Directive law (Art. 13 No. 13 letter d) double letter ii) of the Solvency II Directive) as well as of § 1 para. 2 sentence 3 of the German Insurance Tax Act (VersStG) clearly assumes the insurance of own risks with regard to the determination of the location of the risk. Thus, the law of the Directive formulates even more clearly than the - transposing - German legal text that in cases where the policyholder is a legal person, the risk is located in the Member State in which the branch of this policyholder to which the insurance contract relates is located.

32 In its judgment of 14 June 2001, C-191/99 (Kvaerner) [2002] ECR I-4447, HFR 2001, 919, the European Court of Justice (ECJ) ruled that another company (insured company) is

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to be regarded as an establishment of the policyholder within the meaning of the relevant directive law if there is a group relationship between the two companies (Company A as policyholder - Company B as insured company with its registered office in another member state). However, this required an extensive interpretation of the characteristic "establishment" (of the policyholder) in order to justify that the law of the Directive contains a determination of the Member State which is entitled to the right of taxation for such an insurance, namely the Member State in which the insured company is located. As a result, the ECJ's decision is correct, even though, from an objective point of view, it is the insurance of another company and thus the insurance of a third-party risk and not a risk of the policyholder.

33 In the *VersStG*, the Directive characteristic "establishment of this policyholder to which the contract relates" is reflected by the statutory characteristics "permanent establishment or the corresponding facility to which the insurance relationship relates" in § 1 para. 2 sentence 3 no. 2 *VersStG*, which are not amenable to an interpretation to the effect that an independent company (as part of the policyholder) can also be understood.

34 Insurance tax law nevertheless arrives at the same result as the ECJ in its ruling of 14 June 2001, in that the material policyholder (person whose risks are covered by the insurance) is to be taken into account with regard to the location of the risk in the case of insurance for the account of another.

35 The case where a legal person does not insure its own risks but those of a third party is not regulated in Directive law; the same applies to natural persons. The ECJ's extensive interpretation of the concept of establishment of the policyholder (see above, para. 32) reaches its limits where the insured third-party company is one that has no group affiliation with the policyholder. This regulatory gap in the insurance of third-party risks is to be closed by interpreting the Directive in such a way that the location of the insured risk is to be based on the insured person or the location of the insured institution. The aim of the Directive is to avoid distortions of competition. Such distortions could occur, however, if the insurance of third-party risks were not based on the actual location of the risk with the insured person (as the material policyholder), but rather on the location of the risk with the (formal) policyholder. Accordingly, Article 1 para 5 *VersStDV* stipulates that in the case of insurance for the account of a third party, the policyholder within the meaning of § 1 para 2 sentence 3 *VersStG* - which does not refer to the policyholder in his function as contractual partner of the insurer and debtor of the insurance premium (formal policyholder), but as the person with whom the risk is located - is to be understood as the material policyholder, i.e. the person whose risks are covered by the insurance.

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36 Example 2:

A-AG (corporation) with its registered office in Austria takes out a liability insurance policy with an Austrian insurance company for a G-GmbH resident in Germany.

Result: The risk is located in Germany - irrespective of whether there is a group relationship between A-AG and G-GmbH. Germany has the right of taxation.

37 Example 2:

The parents living in Paris take out accident insurance with a French insurance company for their daughter studying in Berlin.

Result: As long as the daughter (as the insured person) has her domicile or habitual residence in Germany, the insured risk is located there. Germany has the right of taxation.

b) Location of the risk in another EEA state

38 If the insured risk is located in another EEA State, Germany has no right of taxation. Accordingly, in § 1 para 2 sentence 2 of the VersStG, the risks listed in numbers 1 to 4, which are located outside the scope of the VersStG (see 3 below, marginal no. 40 ff.), are explicitly excluded from taxability in Germany by the second half of the sentence ("unless ...") if they are located in another EEA state.

39 For "other risks", this follows from the general facts of § 1 para. 2 sentence 3 VersStG, which in this respect is based on the fact that the characteristics that embody the existence of a risk in the context of the Directive (see above 2 a) bb), para. 21 ff) must be realised in the area of application of the VersStG.

3. Location of the risk in the third country

a) Realisation of the special facts outside the EEA

40 European Directive law does not contain any provisions regarding the right of taxation in cases in which the circumstances regulated in the three special situations are realised outside the EEA and thus outside the regulatory power of Community law. The realisation of the three special situations in the third country is governed by § 1 para 2 sentence 2 Nm. 1 to 3 of the German Insurance Tax Act (VersStG) based on the insurance company's domicile in Germany, which in this respect represents an independent point of reference for taxation in Germany.

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European directive law does not contain any requirements with regard to the right of taxation in cases in which the situations regulated in the three special situations are realised outside the EEA and thus outside the regulatory power of Community law. The realisation of the three special situations in the third country is governed by § 1 para 2) sentence 2 Nm. 1 to 3 of the German Insurance Tax Act (VersStG) based on the insurance company's domicile in Germany, which in this respect represents an independent point of reference for taxation in Germany without embodying the location of the risk, which is recognisably to be located abroad. The exception in § 1 para 2, second sentence, second half-sentence VersStG, according to which Germany's right of taxation does not apply in certain cases - if the risk is located in another EEA state - is not relevant here.

b) Insurance of permanent establishments or other entities of a non-natural person located outside the EEA

41 The taxability of these insurances is regulated in § 1, para. 2, sentence 2, no. 4 of the German Insurance Tax Act (VersStG) based on the policyholder's residence in Germany. The characteristics of "insurance of a permanent establishment or other facility" reflect the general facts of § 1 para. 2 sentence 3 no. 2 VersStG, which refer to a permanent establishment or a corresponding facility. The term "other establishment" is to be understood in the same way as the term "corresponding establishment" used in § 1 para 2 sentence 3 of the VersStG and refers to non-subsidiary areas of a non-natural person (see II. 2. a) bb), para. 27 above). The difference to the regulation of the general facts is that the reference object of the insurance is in a third country and the policyholder is resident in Germany, whereby the policyholder can also be a natural person, since the regulation also covers the insurance of third-party risks.

c) Insurance taken out by natural persons for the coverage of risks located in the third country.

42 Such insurance policies are taxable under § 1 para 2) sentence 3 no. 1 of the VersStG (general facts) if the policyholder has his domicile or habitual residence within the area of application of the VersStG at the time of payment of the insurance premium. The domicile of the policyholder in Germany as described in this way does not embody the location of the risk within the meaning of European Directive law, but represents the connecting factor for taxation determined autonomously by the German legislator.

43 Example:

The art lover K, who lives in Germany, lends a world-famous painting to a museum in New York for five years and insures it with an EEA insurer against theft and damage for this period.

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Result: The insured risk is located in a third country (USA). The insurance premium is taxable due to the policyholder's residence in Germany.

III. Insurance relationship with third country insurer (§ 1 para 3 VersStG)

1. Third-country insurer

44 "Insurer established outside the territory of the Member States of the European Union and the European Economic Area" within the meaning of section 1(3) of the VersStG (so-called third-country insurer) is an insurer established outside the European Economic Area. This also includes insurers that are subject to Chapter IX of Directive 2009/138/EC - Solvency II ("Branches of insurance or reinsurance undertakings with head offices outside the Community") and that have an official permit in accordance with the provisions of the Insurance Supervision Act (VAG) for their activities within the scope of the VersStG. (See also the comments under B. II. 1. on "EEA insurers", margin no. 11 f.).

2 The individual elements of § 1(3) of the VersStG

a) Residence of the policyholder in Germany

45 The main case of application is regulated in No. 1, which is based on the fact that the policyholder has his domicile or habitual residence in the area of application of the Act at the time of payment of the insurance premium.

b) Residence of the policyholder outside Germany

46 In the cases of § 1 par. 3 Nm. 2 and 3 VersStG, insurance premium payments are taxable even if the policyholder is not resident in Germany.

47 aa)

In the case of the insurance of objects, it is sufficient under No. 2 that the object was located in the area of application of the Act at the time of the establishment of the insurance relationship.

48 bb)

According to No. 3, it is sufficient for taxability that the insurance relates directly or indirectly to an enterprise, a permanent establishment or another entity within the scope of the Act.

49 The facts regulated in Nm. 2 and 3 are only relevant if the policyholder does not have a registered office, domicile or habitual residence in the area of application of the Act, otherwise r. 1 is already relevant.

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c) Examples

50 Example 1:

A company with its registered office in Germany insures the environmental risks associated with its production facility with an insurance company in the USA.

Result: Taxability in Germany results from § 1 para. 3 no. 1 VersStG, whereby it is irrelevant under insurance tax law where the production facility is located, i.e. in Germany in the EEA or in a third country.

51 Example 2:

A policyholder resident in Italy insures with an insurer domiciled in the United Kingdom a painting which, at the time of conclusion of the insurance contract, is on loan in the museum of a major German city for exhibition purposes.

Result: The taxability in Germany results from § 1 para. 3 no. 2 VersStG.

52 Example 3:

A globally operating group based in the USA, which also has a subsidiary in Germany, insures all companies belonging to the group worldwide with a US insurer.

Result: Taxability in Germany results from § 1 para. 3 no. 3 VersStG (pro rata, insofar as the insurance premium is paid for covering the risks of the subsidiary resident in Germany).

IV. Scope of the Act

53 The scope of application of the VersStG is not limited to Germany, but also extends to the German exclusive economic zone (EEZ) pursuant to § 1 para 4 VersStG. The EEZ is an area beyond and adjacent to the territorial sea up to an extension of 200 nautical miles from the baseline (§§ 55 and 57 of the UN Convention on the Law of the Sea of 10 December 1982 - BGB! I 1994, 3770).

54 The regulation has particular significance for the taxability of insurance premiums paid for the insurance of objects and installations located in the EEZ, such as wind farm installations.

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C. BMF Letter of 26 September 1990

The BMF letter of 26 September 1990 - IV A 4-S 6356-16/90 (BStBl I 1990, 645 is repealed.