

Insurance premium tax: Federal Ministry of Finance issues guidelines on determination of policyholders

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On 27 May 2020 the Federal Ministry of Finance (BMF) issued guidelines on the determination of policyholders who are persons of relevance for insurance premium tax (IPT) as their registered office in Germany might trigger IPT. These guidelines are especially relevant for vessel and aircraft insurance and English-language policies.

Background

Under special provision Section 1(2) (first sentence, second bullet) of the Insurance Tax Act (VersStG), IPT is triggered in Germany for:

- insurance contracts with an EU or EEA insurer; and
- vessel and aircraft insurance if the vessel or aircraft is registered in Germany.

As regards to the latter point, if the vessel or aircraft is not registered in Germany, whether Section 1(2) (first sentence, second bullet) of the VersStG applies conclusively and whether in consequence the omnibus provision Section 1(2) (second sentence) of the VersStG applies is debatable.

The main prerequisite for IPT to be triggered under Section 1(2) (second sentence) of the VersStG is the location of the policyholder's registered office. However, not all insurance contracts, especially those written in English, refer to 'policyholders' – rather, different terms are used.

On 5 October 2017 the Cologne Fiscal Court (2 K 792/16) considered an English-language Protection and Indemnity insurance contract where there was no registration of vessels in Germany and ruled that the omnibus provision applied. As the policy did not refer specifically to a 'policyholder' but rather to 'members' and 'co-assureds', the court had to determine which person of relevance triggered IPT in Germany. The court ruled that the registered offices of all members, even if they are not the registered owner, are important when it comes to IPT. In this case, the registered office of one member triggered IPT in Germany as all members were – according to the contract – liable for the obligations towards the insurer (particularly for premium payments) and therefore maintained a position comparable to a policyholder.

This decision raised questions, including with regard to the questionable (in light of EU regulations) statement that double taxation would be allowed in the European Union.

In particular, this ruling led to uncertainties regarding the person of relevance for IPT, especially with respect to English-language contracts, since the Cologne Fiscal Court determined the policyholder's status with few generally applicable criteria.

Guidelines

On 27 May 2020 the BMF issued guidelines on determining policyholders (*Versicherungsnehmer*), particularly where a contract is written in English. The BMF stated that in some contracts, it is unclear which of the listed parties is the policyholder, particularly where terms that are uncommon or not precise enough for the German legal context are used.

The BMF stated that the following criteria indicate that a party should be considered a policyholder:

- The insurance contract is concluded in the party's own name.
- The party is named as a policyholder, member or similar.
- The party has an existing obligation to pay the insurer the insurance premium.

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- The party has a contractual duty to declare and pay the insurance premium tax in their own name, has sole entitlement to the insurance claim.
- The declaration and payment of the insurance premium tax falls under the party's own insurance tax number.

However, the simple inclusion of a party in an insurance contract as a co-insured does not allow for any conclusions as to their role.

According to the BMF, the following criteria indicate that a party should not be considered a policyholder:

- The insurance contract is concluded in a third party's name (with the relevant party acting solely as a representative).
- The party is named as a co-assured.
- The party has no original obligation to pay the insurer the insurance premium, but rather has mere liability for the amount of compensation.
- The party has no or only a partial entitlement to an insurance claim in case of an insured event.

The BMF further found that the following do not constitute 'relevant criteria':

- the motive for concluding the insurance contract;
- whose interest is insured (eg, insurance for a third-party account); and
- treating the party as a factual contact person of the insurer.

The criteria's relevance varies according to the BMF. Only the conclusion of a contract in a party's own name or a third party's name allow for an unequivocal conclusion regarding the policyholder. The other criteria should be considered holistically, meaning that the fulfilment of one criterion does not allow for the assumption or rejection of the position of the policyholder. Where the fulfilled criteria are balanced (*non-liquet*), the relevant party should not be considered a policyholder.

Comment

Many legal questions remain with regard to IPT in Germany. As German IPT rates are high compared with other countries, this is an issue. Consequently, the Insurance Premium Tax Act is being modernised and will be finalised by the end of 2020. An addition will be made to Section 1(2) of the VersStG, implying that the omnibus provision with its prerequisite regarding the location of the policyholder's registered office will apply in cases of an EU or EEA insurer and where a vessel or aircraft is not registered in Germany. However, at present, no definition of 'policyholder' is intended to be added. Therefore, the BMF's guidelines are welcome, even though they are not binding on the courts. There are only a few criteria leading to unequivocal conclusions, which is both positive, as it gives room for the interpretation required in this contract-dominated field, and negative, as uncertainty remains. However, the regulation of *non-liquet* situations should avoid overly unclear situations.

Even with the guidelines, insurers, policyholders and co-assureds should choose their policy wordings carefully as this might prove to be of even greater importance when trying to avoid tax liability.

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