The Federal Ministry of Finance’s report evaluating the current legal situation with regard to the taxation of persons subject to limited tax liability who derive German income from the assignment of rights entered in a German public record or register (so-called register cases) - in accordance with the statement by former parliamentary state secretary Ryglewski of 21 April 2021 -

I. Summary of the key findings

The evaluation of the current legal situation and the resulting taxation process shows that the way in which limited tax liability is tied to entering a right in a German record or register (taxation of register cases) needs to be reassessed. The evaluation needs to take into account (a) the insights of the Federal Central Tax Office (Bundeszentralamt für Steuern) and the Bavarian tax authorities (in the following referred to together as “competent tax authorities”) gained while processing the present cases and (b) the international tax environment and recent changes in the international tax environment. In particular, consideration must be given to the planned partial reallocation of taxing rights under Pillar 1 of the BEPS process and the decision to introduce a global minimum effective tax (Pillar 2).

Essentially, the evaluation comes to the following key conclusions:

- The legal situation with regard to the temporary assignment and disposal of rights entered in German public records or registers is complex in the case of taxpayers with limited tax liability. Very few of the fundamental legal issues that arise have been ruled on in a court of law, so legal risks remain with regard to cases that have been decided to date (by administrative authorities only) or are awaiting a decision (see II. 1.).
• Even if the courts confirm the legal interpretation of the revenue administration, considerable factual and legal uncertainties remain as a result of the complex circumstances of each individual case, particularly with regard to calculating the tax base for withholding tax (see II. 2.).

• The processing of the register cases has revealed that the existing legislation creates a very high administrative and compliance burden. This is the case despite the procedural simplifications granted by the Federal Ministry of Finance in various Finance Ministry circulars to take account of the provisions in double taxation agreements (DTAs), even if taxpayers with limited tax liability are covered by the agreement (see III.).

• With regard to third-party licenses, in particular, companies continue to face significant practical difficulties when it comes to obtaining information from the past (see III. 3.).

• The competent tax authorities are working intensively to process and reach decisions on register cases. Resources and structures have been put in place. It is expected that this work will speed up in future (see IV.).

• Based on the cases processed by the competent tax authorities so far, substantial back payments from multinational corporations are to be expected for past tax periods (see V.1.).

• However, in many cases changes were observed in the years 2019 and 2020 that are leading to rights being transferred to DTA countries (onshoring). As a result, it is very unlikely that the expected tax revenues for the past provide an indication of future tax revenues. Rather, it is likely that tax revenues from the transfer of intellectual property rights to countries with which Germany has concluded a DTA, or which receive relief from withholding tax under EU legal provisions, will fall to a very low level (see V. 2.).

• Germany’s rule is criticised internationally and is perceived as a unilateral extraterritorial measure. At the same time, the international consensus to introduce a global minimum effective tax (Pillar 2) and to partially reallocate taxing rights (Pillar 1) as part of the Inclusive Framework on BEPS has significantly changed the international environment in recent years. This new environment casts a new – critical – light on the justification underlying the current German legislation (see VI.). These changes in the international environment could be used to align the German tax system in this respect even more
strongly with global developments in a coordinated manner and thereby increase the efficiency of taxation procedures.

II. Legal situation and legal risks

The legal basis for the provision in question here has existed since 1925 but for a long time went largely unheeded, despite the fact that it set out a clear legal obligation for withholding tax to be levied on relevant remunerations and for tax declarations to be filed. Only in 2020, following a wider discussion in connection with the publication of the Federal Ministry of Finance circular (Finance Ministry circular of 6 November 2020, IV C 5 – S 2300/19/10016 :006; DOK 2020/1009219, Federal Tax Gazette I 2020, 2060) was there an in-depth debate both in literature and in practice (in Germany and internationally) on relevant legal issues. As yet there have been no court rulings on any of these legal issues, so that residual risks remain in the legal assessment (see 1. of this section). Even if the courts confirm the legal interpretation of the revenue administration, considerable factual and legal uncertainties still remain as a result of the complex circumstances of each individual case, particularly with regard to calculating the tax base for withholding tax (see 2. of this section).

1. General legal risks

In the past, companies did not observe the legislation regarding taxation of register cases, and tax authorities were unaware of the circumstances of the respective cases.

The legal provisions were discussed in depth in 2020 only after the revenue administration explicitly reaffirmed that a limited tax liability existed even if a right was merely entered in a German public record or register (see Finance Ministry circulars of 6 November 2020 and 11 February 2021). The revenue administration made the following key points:

- The wording of section 49 (1) no 2 (f) and no 6 of the Income Tax Act (Einkommensteuergesetz) includes income from the temporary assignment or disposal of rights that are entered in a German register or record. There are no convincing reasons for a restrictive interpretation. The assignment or disposal of a right entered in a German register or public record is sufficient for a limited tax liability to apply. It is not necessary for the right to be economically exploited in Germany or for there to be any other connection to Germany to establish tax liability.

- The tax base is calculated as follows (see paragraph 10 ff of the Finance Ministry circular of 11 February 2021):
Pursuant to section 50a (1) no 3 of the Income Tax Act, the tax base for withholding tax is as a rule the respective gross remuneration for the assignment of the right registered in Germany.

The remuneration should be calculated on the basis of the respective contractual provisions.

If the remuneration cannot be calculated on the basis of the contract (e.g. in the case of license bundles), the remuneration must be appropriately apportioned.

The basis for an appropriate apportionment is the actual total remuneration (top-down approach). In this case, the tax base is calculated based on the overall income of the remuneration creditor from the assignment of rights registered in Germany.

If there is no actual apportionment formula, the tax base should be estimated. This is done by measuring German revenues against the revenues generated in the territories covered by the assignment of rights. Depending on the specific case, this can be worldwide revenues. The resulting ratio is applied to the total remuneration.

The companies affected and their tax advisors have a divergent interpretation, both with regard to the basic assumption that a tax liability exists and with regard to the relevant legal issues in connection with calculating the tax base. Their arguments are ultimately unconvincing. Under dispute are not just fundamental issues but also specific questions regarding the limitation period, particularly the possibility of suspending it, and the general possibility of holding someone liable for the tax, as well as questions in connection with applying DTAs.

When work started on the Finance Ministry circular there were no relevant court rulings on the key issues. There is therefore a certain amount of residual legal risk. At the end of 2021, the Federal Fiscal Court ruled in favour of the revenue administration with regard to various disputed legal issues in a different case (Federal Fiscal Court ruling of 13 October 2021 – I R 18/18, to be published in the Federal Tax Gazette). Examples include (a) the existence of a three-year suspension of the assessment period pursuant to section 170 (2) sentence 1 no 1 of the Fiscal Code (Abgabenordnung), even if the remuneration debtor (licensee) failed to withhold and declare the tax and (b) the fundamental possibility that the remuneration debtor (licensee) can be the liable party, even if the remuneration creditor was already liquidated prior to the issuance of
the notice of liability. However, decisions were not reached on other unresolved legal questions relating to tax liability and calculating the tax base.

2. Legal risks in specific cases

Besides the general legal risks described above, each individual case involves additional legal risks due to the complexity of the case.

First, identifying and assessing complex cross-border licensing structures gives rise to factual and legal uncertainties. A correct assessment depends to a large extent on companies making comprehensive disclosures and on a complex legal understanding and evaluation of the contractual relationships – in some cases taking into account applicable foreign legislation. Since there are variations from case to case, the legal issues cannot be uniformly clarified.

Second, calculating the tax base in each case is legally and factually very complex. In many cases the tax base has to be estimated due to the lack of a specific apportionment formula. The complex issues regarding allocation and apportionment involved in making an estimate vary from case to case and generate individual factual and legal risks that go far beyond a mere assessment of the fundamental legal issues.

III. Administrative and compliance burden

The current legislation results in a very high compliance burden for the revenue administration as well as for the affected companies (see 1. of this section). This applies not only to cases in which tax revenues are to be expected, but also to cases in which, due to an applicable DTA, Germany does not have the right to tax the income in question and no tax is incurred as a result (see 2. of this section). In addition, a very high administrative and compliance burden is to be expected with regard to non-intra-group licensing and disposals (third-party licenses). However, the extent of this burden cannot yet be conclusively assessed (see 3. of this section).

3. High administrative and compliance burden

The processing of register cases creates a high administrative burden both for the revenue administration and taxpayers. This is evident from the following:

The overwhelming majority of tax declarations that are filed still do not meet the requirements set out in the Finance Ministry circular of 11 February 2021, since in most cases the calculation of the tax base is at least partially incorrect. In some cases, taxpayers filed nil returns (i.e. tax declarations with a stated tax amount of €0), claiming that they did not believe any tax liability
applied. Consequently, no tax has been paid (to date). As a result, the revenue administration needs to conduct extensive follow-up investigations.

In almost all cases, the information initially provided by taxpayers has proven to be insufficient for the competent tax authorities to make quick tax assessments. This is why extensive follow-up investigations are carried out. During this process, the revenue administration depends on the cooperation of taxpayers in accordance section 90 of the Fiscal Code in order to review the licensing relationships and tax bases according to the submitted documentation. As the cases have an international dimension, enhanced cooperation obligations apply (section 90 (2) of the Fiscal Code). Most company groups make every effort to submit this documentation on time and in full. The focus of these investigations is to identify critical licensing structures and to calculate the tax base:

a. Critical licensing relationships

The first step is to identify the licensing structure based on the submitted documents and the comprehensive written disclosures from corporations and groups of companies. This comprises the assignment of relevant rights within multi-level contractual relationships by means of licenses and sub-licenses across several levels (license chains) with the involvement of at least one company that is resident for tax purposes in a country that has not concluded a DTA with Germany. Tax relief pursuant to section 50c of the Income Tax Act is not possible in this case; rather, the remunerations are subject to actual and final taxation.

Identifying and verifying critical licensing structures is a complex undertaking due to the elaborate and sometimes opaque group structures. This is compounded by the fact that taxpayers and tax advisors usually submit a multitude of documents and lengthy legal opinions that take a long time to process.

In some cases it is necessary to examine and verify a large number of third-party licenses (licensing relationships with companies that are not part of the group) in addition to purely intra-group licensing relationships.

b. Calculating and verifying the tax base

Remuneration for rights entered in a German register must be calculated on the basis of the specific underlying contractual relationships. In the context of register cases, remunerations for rights registered in Germany are usually not paid separately for each individual right but are consolidated in a license bundle. This means that an appropriate apportionment needs to be made.
in each case. In many cases this is very difficult, as it is not always possible, even for the companies themselves, to precisely determine which rights are included in the license bundle. Usually companies can only estimate the apportionments of a total remuneration for rights registered in Germany and other components of the license bundle. Whether or to what extent these estimations by the companies should be regarded as accurate, and (if they are regarded as inaccurate) how the revenue administration should best go about making an estimation needs to be discussed on a case by case basis.

Calculating the tax base using a top-down approach (see II. above), as set out in paragraph 10 seqq. of the Finance Ministry circular of 11 February 2021, is precisely what makes a detailed examination of the total revenue necessary. The total revenue then needs to be broken down and apportioned to the rights registered in Germany. This involves a great deal of information which takes a long time to process.

c. Conclusion

Extensive subsequent investigative work needs to be done in particular to identify the licensing structures and to calculate the tax base. This work is very complex and time-consuming, which is also the reason why, to date, there have been very few cases in which the assessment could be completed.

4. In particular: cases without tax revenue in Germany

The significant administrative and compliance burden needs to be considered in particular with regard to cases in which Germany does not have taxing rights due to an applicable DTA. Usually this means that the taxation procedure does not result in tax revenue. Based on past experience, this is to be expected in the overwhelming majority of licensing relationships.

On 11 February 2021, the Federal Ministry of Finance issued a circular making it possible to retroactively apply for an exemption under a DTA and simplifying withholding tax procedures (simplified procedure). This was extended with another circular on 14 July 2021. However, complying with the legal obligations still places a significant burden on revenue administrations and taxpayers, and there is no way of further reducing this burden by administrative means. This applies to the same extent to applications for exemption with effect for the future under a DTA.

a. Scope of the assessment

Applications for exemptions under the simplified procedure and applications for exemptions under a DTA with effect for the future need to be thoroughly assessed and take into account the
entire license chain. Here, too, the revenue administration is legally obliged to carry out a full assessment of the taxpayer’s eligibility for relief and to check there has been no abuse of tax arrangements pursuant to section 50c of the Income Tax Act, so that any critical licensing structures or arrangements can be identified. This also makes it necessary to request documents that are not always easy to procure by the taxpayers. Based on the information currently available, it is also not yet possible to dispense with these assessment steps by means of risk management, despite the fact that this is permissible in principle pursuant to the Fiscal Code.

b. **Difficulties for taxpayers in providing information**

Providing the relevant documents can be very difficult for taxpayers. This is particularly the case with regard to circumstances from the past that are subject to the simplified procedure. Since the documents to be submitted have to cover each year of the exemption applied for, taxpayers must submit certificates of residence and in some cases documentation verifying their factual entitlement to relief for every year since 2013. In addition, the relevant licensing and ownership structures have often changed during the period under review, making it necessary for both sides to carry out an additional review of the facts and circumstances. However, in every case so far it has been possible to procure the necessary documents. There also hasn’t been a case of an applicant refusing further cooperation.

c. **Lack of time as the simplified procedure comes to an end**

The option of using the simplified procedure ends on 30 June 2022. Tax advisors are therefore increasingly concerned that the Federal Central Tax Office will be unable to process the submitted regular exemption applications on time. This would mean that taxpayers would have to submit the legally required tax declaration to the Federal Central Tax Office by the next tax declaration deadline on 10 October 2022 and pay taxes accordingly. The Federal Central Tax Office will probably be unable to process the applications it has received at the time of writing this report by 30 June 2022. It is likely that a considerable number of new applications will be submitted before the deadline, and that as a result the Federal Central Tax Office will be unable to process them before the next tax declaration deadline on 10 October 2022. In addition, the statutory processing period for exemption applications only begins once all the required documents have been submitted. Often these are not submitted in full, and the necessary follow-up inquiries slow down the process even further.
d. Consequences

The simplified administrative procedures provided for in the Finance Ministry circulars of 11 February 2021 and 14 July 2021 have largely exhausted the simplification options under secondary legislation. It will not be possible to process the applications already received as well as those still to be expected by the cut-off date. The resulting tax declarations and subsequent refunds would create double the amount of work for both sides: taxpayers and the revenue administration. On the part of the revenue administration, this doubling of the amount of work would slow down the processing of existing applications even further and take the focus away from cases with potentially high tax revenues. A clear focus on relevant and high-tax-revenue cases is therefore necessary at this time. Processing less important cases could be deferred by extending the cut-off dates for the simplified procedure, thereby helping all parties involved.

5. In particular: Third-party licenses

Specific problems also arise in cases in which rights are assigned or sold to third parties and not within a group of companies. These cases are also subject to taxation pursuant to section 49 of the Income Tax Act. For the affected companies this inevitably makes it even harder to procure information than in intra-group cases. Usually only the remuneration creditor has the information needed for the assessment – especially the eligibility for relief under a DTA. In the case of licensing out, the remuneration debtor who is liable for payment must obtain the information for past assessment periods from the remuneration creditor who is not part of the group. According to companies and tax advisors, this often results in considerable practical problems, for example, if the former remuneration creditor no longer exists or the business relationship has come to an end. In such cases, former remuneration creditors have no interest in the time-consuming administrative task of procuring the required information, especially as they derive no advantage from it.

Due to the difficulties described above, groups of companies have so far disclosed third-party licenses only to a very limited extent and in the vast majority of cases with little or insufficient information regarding the underlying structures.

Following an initial assessment and on the basis of the documents provided to date, it has however been possible to identify (in addition to regular register case structures) the following two sets of circumstances which deviate significantly from the circumstances in intra-group structures. These also have an impact on the potential tax revenue from these cases:
Within the framework of the concluded license agreements, the parent company reserves the right to assign third-party licenses and acts as the remuneration creditor vis-à-vis third parties. Based on the available data, the rights can be attributed to the parent company. Usually parent companies in register cases are resident in a jurisdiction covered by a DTA and fulfil the requirement set out in section 50d (3) sentence 2 of the Income Tax Act (usually a stock exchange listing). In this scenario, taking into account the provisions of the DTA, there should therefore be no remaining tax base in Germany in the vast majority of cases.

In licensing relationships between third parties it also seems unlikely that the royalty payments will be channelled through a company that is fiscally transparent and that the persons to whom the income is attributable are not covered by a DTA.

The assignment of third-party licenses is carried out by a company (third-party licensing). This company, in turn, gets the corresponding license rights via an intra-group assignment from a company (sublicensing to sublicensee) that is not eligible for tax relief, for example due to having its registered office in a tax haven (initial licensee). The remuneration for the intra-group assignment of a license is usually calculated in such a way that only a single-digit percentage of the sublicensee’s costs remains as profit. The remaining profit is paid as a license fee to the company located in a tax haven that is not entitled to tax relief, i.e. the initial licensee.

It follows that the remuneration from the third-party licensing is passed on by the sublicensee – with virtually no deductions in the intra-group payment – to the initial licensee, i.e. the tax haven company that is not entitled to tax relief. In the course of the transfer, which also represents the payment of a license for an assignment of rights, withholding tax is incurred in Germany. Due to the initial licensee not being entitled to tax relief, the withholding tax also remains in Germany. By taxing the intra-group transfer of the license, a large part of the remuneration received by the sublicensee in the context of the third-party licensing is taxed, since most of the amount is passed on. Additional tax income from the inclusion of third-party licenses is to be expected only in relation to the sublicensee mark-up, and only if the sub-licensee is not eligible for tax relief. Otherwise the remunerations have already been taken into account. The tax revenue from the taxation of third-party licenses is often insignificant compared to the remuneration.
The currently available data therefore indicates that, in the case of third-party licenses, there are ultimately far fewer cases that can actually be taxed in Germany. At the same time the compliance burden for companies is considerably higher than in cases within a corporation or group of companies, and in some cases can be fulfilled only to a limited extent in practice.

However, more experience and a further evaluation are needed in order to reach a definitive conclusion.

IV. Processing steps and status

1. Administrative simplifications by means of Federal Ministry of Finance measures

The legislation on the taxation of register cases was not adhered to by companies in the past. When this issue emerged in 2020 it resulted in a situation in which a highly detailed and complex legislation requiring intensive investigations had to be applied to assessment periods that in some cases lay far in the past. In order to take account of the practical difficulties arising from this situation, the Federal Ministry of Finance defined comprehensive administrative simplifications, within the scope of what was legally permissible, in consultation with the Länder.

The Finance Ministry circular of 11 February 2021 provided for a simplification whereby withholding tax for past years (inflow of license remunerations up to 31 December 2021 – cut-off period) can be waived if certain conditions are met pursuant to section 50a (5) sentence 2 of the Income Tax Act. For this purpose, the DTA that applies to the recipient of the remuneration with limited tax liability must state clearly that Germany has no right to tax the income and that an application for an exemption under the applicable DTA must be submitted to the Federal Central Tax Office in accordance with paragraph 4 of the above-mentioned Finance Ministry circular (simplified procedure).

The core element of this simplified procedure is that an exemption application can be submitted retroactively for already paid remunerations. This reduces the administrative burden considerably, because in contrast to the usual procedure, the tax does not need to be first declared and paid before the remuneration creditor covered by the DTA can apply for a tax refund (insofar as there is no taxing right under the DTA), and the Federal Central Tax Office can and must refund the tax, as is it is obliged to do, on the basis of the application.

This procedure completely exhausts all legal possibilities for simplification and is only justified due to the current exceptional circumstances. This simplified procedure can be used only in cases in which eligibility for relief under a DTA or pursuant to section 50c of the Income Tax Act is
beyond doubt. The simplified procedure is justified because (a) in these cases no tax would ultimately be due in Germany on the basis of the relevant DTA and (b) it spares taxpayers from having to carry out intensive follow-up investigations due to the failure to identify register cases in the past. In this procedure, too, certain documents have to be submitted to enable the competent tax authorities to verify the information provided by taxpayers.

In early summer 2021 it became apparent that the simplifications provided for in the circular of 11 February 2021 did not allow companies to fully process cases in the time available. The application deadline for the simplified procedure was therefore extended to 30 June 2022 in a Finance Ministry circular of 14 July 2021, together with the extension of the cut-off period.

This simplified procedure is recognised by the companies affected and their tax advisors as a significant simplification, but it is not deemed to be sufficient. However, further simplifications are increasingly coming up against the legal limits, as the competent tax authorities must have a minimum level of ability to verify the information provided by taxpayers. Although risk management with reduced controls is legally permissible in principle, there are limits in this regard, and under certain circumstances the constitutional principle of equitable taxation could be violated if the controls are not sufficiently enforced.

2. Building up expertise and staff numbers at the Federal Central Tax Office

Up to the middle of 2020, the underlying circumstances of the register cases were not known to the revenue administration. This meant that the Federal Central Tax Office, which is responsible for taxing remunerations for the assignment of rights from 2014 onwards, also had no experience with processing such cases. In order to deal with the expected high number of subsequent declarations, the Federal Central Tax Office had to improve its structures and build up expertise and staff numbers. The first step was the establishment of a working group at the start of October 2020. Due to the already high workload in this area, it was necessary to set up an independent pillar for processing register cases. The relevant budgetary requests were submitted as part of the 2022 personnel budget. The Federal Central Tax Office provided internal interim financing for the most urgently needed staff and in the first half of 2021 was able to establish a separate pillar comprising 12 employees (some working on a pro rata basis) in the division responsible for processing cases: a head of division and eleven members of staff at different levels of seniority. Individual employees worked 50% of the time on register cases and the other 50% on regular tax relief cases, which also still needed to be processed.
During the second half of 2021 it was possible to increase the number of employees assigned to this task at the Federal Central Tax Office, so that there is now one head of division and 16 members of staff at different levels of seniority dealing with register cases. A further ten posts have been earmarked for this task.

The first 26 high-priority cases are being processed (calculating and verifying the tax base) on a pro-rata basis by a head of division with approx. 0.5 of his working hours as well as 22 auditors from the Federal Audit Directorate with roughly 0.2 full-time equivalents per processed case.

Structures have been created at the Federal Central Tax Office to ensure that the cases are processed. The necessary personnel was made available, along with the required budgetary funds. Nevertheless, it took some time to build up these human resources. At the same time, due to divergent interpretations of the law, the companies did not initially provide sufficient comprehensive documentation to calculate the right amount of tax. This situation has improved. Companies are for the most part cooperating comprehensively and constructively, even if the legal interpretations still diverge widely. This overall situation explains why assessment notices could only be issued in a few cases. Decisions on pending cases are expected to be reached more swiftly and existing cases processed in a timely manner.

3. Cooperation among different tax authorities

Different federal and Land tax authorities are responsible for processing register cases. Since 2013, the Federal Central Tax Office has been in charge of processing all cases in which remuneration for the assignment of rights was paid after 1 January 2014. All other cases – i.e. assignments of rights prior to 2014 and disposals of rights – fall under the remit of Land tax authorities. Because register cases have no domestic nexus other than the register entry, responsibility lies with the tax authorities in the place where the register is located. Since the German patent and trade mark register is maintained in Munich, the Bavarian tax authorities are responsible in most cases. This applies to assignments of rights prior to 2014 and, in many cases, to disposals of rights after 2014.

In autumn 2020, the Bavarian revenue administration set up the Section 50a Task Force to process register cases. It includes employees of the Munich tax office and of the Bavarian tax office. Because the responsibilities of the Section 50a Task Force and the Federal Central Tax Office are highly interconnected, close cooperation is required between the authorities involved. First, the structures needed for this cooperation must be created in the authorities. The distribution of responsibilities also requires intensive coordination, as there are usually ongoing
cases that need to be dealt with uniformly. In some cases, the same taxpayer is involved in both disposals and assignments of rights in the same year. In these cases, too, determining the right amount of tax requires extensive coordination among authorities. This is time-consuming, but unavoidable due to the circumstances of the cases in question. Cooperation between the tax authorities involved is now well-established and runs smoothly, so it should be possible to reduce systemic inefficiencies in future interactions between tax authorities and taxpayers. This will accelerate case processing.

4. Cooperation with taxpayers and their advisors
Cooperation with taxpayers, and especially their advisors, is characterised by highly divergent interpretations of the legal situation, which inevitably leads to conflict.

Initially, the overwhelming majority of tax declarations filed did not fully meet the requirements set out in the Finance Ministry circular of 11 February 2021, since the calculation of the tax base was at least partly incorrect in most cases. In some cases, taxpayers filed nil returns (i.e. tax declarations with a stated tax amount of €0), claiming that they did not believe any tax liability applied. Consequently, no tax was paid.

After the authorities involved pointed out the revenue administration’s interpretation of the statutory requirements and the need to comply with them, the companies usually submitted a multitude of documents and lengthy legal opinions that are taking a long time to process. It is apparent that advisors are endeavouring to provide complete documentation and conclude cases in a timely manner. As a result, cooperation is now satisfactory in the majority of cases, despite being inherently conflict-ridden. Nevertheless, the divergent interpretations, the ensuing investigative work on both sides and the necessary consultations are one of the reasons for the long processing times.

5. Declarations and applications received to date

a. Tax declarations
In 2020, 41 remuneration debtors filed a total of 553 (quarterly) tax declarations with a stated tax volume of approximately €75,620,000. These figures increased further over the course of 2021, with a particularly sharp increase in the second quarter. Accordingly, by the end of 2021, 3,065 tax declarations had been filed by 219 different remuneration debtors, with a total tax volume of approximately €133,610,000.
As of 19 May 2022, a total of 3,294 quarterly tax declarations with a tax volume of about €138,860,000 have been filed by 238 remuneration debtors. The tax declarations are generally filed with written disclosures. So far, only a very small number of companies have filed a declaration without a corresponding written disclosure.

In the case of 1,227 of the tax declarations received, the party obliged to pay the tax immediately lodged an objection.

The number of remuneration debtors filing tax declarations has risen steadily since 2020. The surge in the number of tax declarations at the beginning, followed by a more moderate increase, can be attributed primarily to the fact that several companies initially filed retroactive declarations for previous quarters (going back to 2014). The volume of declared tax increased accordingly.

b. Applications for exemptions

The Federal Central Tax Office has received a total of 4,094 applications for regular exemptions, refunds, or exemptions under the simplified procedure for past periods set out in no 4 of the Finance Ministry circular of 11 February 2021. These can be broken down into 1,493 applications for certificates of exemption pursuant to section 50c (2) sentence 1 no 1 of the Income Tax Act with effect for the future and 102 applications for notices of exemptions (refunds) pursuant to section 50c (3) of the Income Tax Act from 21 remuneration debtors associated with ten groups of companies. The number of applications for exemptions under the simplified procedure totalled 2,499.

c. Future volume expected

Companies and tax advisors have indicated to the Federal Central Tax Office that, due to the extensive efforts required in order to determine the relevant facts, numerous tax declarations and applications for exemptions have yet to be submitted. A very large number of applications is therefore expected in June, especially since the simplified procedure will come to an end on the scheduled cut-off date of 30 June 2022. This can already be observed, with the number of applications received by the Federal Central Tax Office clearly on the rise. Due to the large number of applications, it is currently not possible to register all applications in a timely manner. However, the Federal Central Tax Office estimates that more than 1,000 applications for participation in the simplified procedure have been submitted since the beginning of December 2021 alone.
6. Processing status

a. Tax declarations

Cases have been ranked in order of priority so that they can be processed in a structured way. A group of 56 priority cases is being processed first. Within each priority case, all licensing relationships of a group of companies are reviewed. In particular, this involves processing all tax declarations of the associated remuneration debtors.

So far, a number of tax assessment notices have been issued. These include a case encompassing a comprehensive sale transaction and the ongoing assignment of rights in the year in question.

The 56 priority cases that are currently being processed account for 771 (quarterly) tax declarations with a tax volume of approximately €31,700,000. Of the groups of companies to which these cases relate, 18 did not file any tax declarations and four filed nil returns.

It is already apparent that, in many of the 56 priority cases currently being processed, the amount of tax declared will in all likelihood have to be corrected upwards significantly. The amount will have to be estimated in many cases. Only in two cases (with a total of 14 tax declarations) will it be possible to accept the taxpayers’ calculation of the tax base and the tax declarations filed.

In five other cases, the authorities involved are in the final stages of liaising with each other, meaning that assessment notices will most likely be issued soon.

b. Applications for exemptions

To date, 105 applications for exemptions have been granted, in the form of 60 certificates of exemption with effect for the future, 32 certificates of exemption under the simplified procedure for past tax periods, and 13 notices of exemption (refunds). So far, one application for an exemption with effect for the future has been turned down due to a lack of cooperation.

It should be noted that, before an application is turned down, companies must normally be consulted and, if necessary, additional documents reviewed, meaning that this process tends to take longer. If an application for an exemption under the simplified procedure is turned down, this does not mean that no exemption is granted; rather, the regular exemption procedure applies. So far, no applications for exemptions under the simplified procedure have been turned down.

To date, 20 remuneration creditors have had their existing eligibility for relief confirmed (in relation to a specific licensing relationship) and, on account of being covered by a DTA, do not
have to pay tax in Germany on their income from the assignment of rights entered in German registers. However, this does not necessarily allow any conclusions to be drawn about the total number of remuneration creditors who meet the register requirement set out in section 49 of the Income Tax Act and are covered by a DTA, due to (a) the large number of other applications and (b) the fact that any such consideration can only take into account the companies that have contacted the Federal Central Tax Office.

V. Additional tax revenue and expectations for future tax periods

An evaluation of the cases processed to date by the competent authorities shows that significant additional tax revenue can be expected for past tax periods (see 1. of this section).

At the same time, however, it is clear that this will not continue in future tax periods. On the contrary: tax payments are likely to be far lower in the future. In theory, companies can structure their operations in such a way as to completely avoid paying taxes (see 2. of this section).

1. Additional tax revenue

Additional tax revenue for past tax periods is limited to cases in which the relevant rights were transferred to tax jurisdictions with which Germany has not concluded a DTA. The following information about additional tax revenue applies only to such cases.

a. Taxes assessed to date

So far, the competent tax authorities have assessed taxes totalling approximately €900 million.

All assessment notices are currently undergoing out-of-court legal remedy proceedings. It is possible that the amount of tax assessed will change in the legal remedy proceedings if new facts emerge.

b. Future assessments for past tax periods

The competent tax authority plans to issue assessment notices relating to further cases soon. In these cases, and in the cases that are still in the early stages of processing, it is clear that substantial back taxes will have to be paid. Due to the specifics of the cases in questions, no DTAs are applicable, meaning that there are no restrictions on Germany’s taxing rights.
In these cases, there are prototypical questions relating to estimating tax bases as well as questions relating to the interpretation of certain DTA provisions. The aim is to clarify these matters in court with the help of a test case.

The overall conclusion in relation to these cases is that, in cases where no DTA is applicable, very high back payments are to be expected in some cases. However, the total amount cannot be quantified reliably at this stage.

c. Cases covered by DTAs

For clarification purposes, it is worth pointing out that the overwhelming majority of cases that would potentially be subject to tax based on Germany’s legislation on the tax treatment of register cases are, in fact, covered by DTAs, meaning that Germany can levy no taxes or expect any additional tax revenue.

2. No additional tax revenue in future tax periods

In recent years, groups of companies have been continually revising and adapting the licensing and ownership structures that are relevant in connection with the taxation of register cases. Since 2018, an increasing number of restructurings of intra-group licensing relationships can be observed. The transfer of rights and associated license chains to countries with which Germany has concluded a DTA can preclude Germany from taxing register cases based on section 49 of the Income Tax Act.

To validate this observation, the Federal Central Tax Office has reviewed the disclosures of 40 corporations and groups of companies, with a special focus on possible restructurings and any ensuing reduction of the tax base in Germany.

Of the groups reviewed, 35 have restructured their intra-group assignments of licenses in such a way that, according to the documents available to the Federal Central Tax Office, taxation pursuant to section 49 of the Income Tax Act will most likely no longer be an option following the restructuring. Most of these restructurings took place in 2019 and 2020. In many cases, they were achieved by transferring the rights in question from a company located in a tax haven to a company that can invoke a DTA (known as onshoring). In other cases, the company relocated its tax residency from a tax haven to a country with which Germany has concluded a DTA, or was merged with a company whose tax residence is in such a country.
Four of the groups reviewed do not appear to have restructured their intra-group licensing structures so far, based on the documents available. However, they may well do so in the future. This would be a straightforward process at any time, and the high back payments of taxes that can be expected make it likely.

In one of the cases reviewed, remunerations were, from the outset, limited to assignments of rights that could not be taxed in Germany because of an applicable DTA, meaning that no tax was due for past tax periods, either.

In summary, a first evaluation of the documents available to the Federal Central Tax Office shows that no future tax revenue can be expected except in a very small number of the cases reviewed. In nearly 90% of cases, there is unlikely to be any future tax revenue. Even in the cases where no restructuring appears to have taken place so far, it would be relatively easy to avoid paying German tax in this way. It is therefore not unlikely that restructurings will be carried out in the future, resulting in a reduction or complete absence of tax revenue. A positive change is that groups of companies will no longer hold rights, and therefore IP, in countries with which Germany has not concluded a DTA. This makes potential tax havens – with which Germany does not conclude DTAs – less attractive as locations for IP entered in German registers.

However, the timing of the observed restructurings in 2019 and 2020 – before the publication of the first Finance Ministry circular – suggests that the restructurings were not primarily a response to Germany’s decision to tax register cases, but rather to the introduction of a global minimum effective tax, which was being widely publicly discussed in those years. After all, it is also in companies’ interest to hold IP in countries that comply with the global minimum effective tax, which is usually true of countries with which Germany has concluded DTAs. The positive effect would thus occur regardless of Germany’s treatment of register cases.

VI. International environment

Internationally, the taxation of register cases must be viewed in the context of two relevant topoi. First, the legislation is perceived as unilateral and extraterritorial and has therefore drawn sharp criticism since it came into the focus of attention (see 1. of this section). Second, international tax law is experiencing a period of profound change due to the agreement reached within the Inclusive Framework on BEPS on a global minimum effective tax (Pillar 2) and the partial reallocation of taxing rights (Pillar 1). This fundamental reorganisation of the international tax
system casts a different light on the need for a nexus in German tax law that is tied to nothing but a register entry (see 2. of this section).

1. **International criticism of the current legal situation**

Many of our international partners have expressed criticism of Germany’s taxation of register cases, often addressed directly to the Federal Ministry of Finance. Essentially, other countries consider the legislation to be a unilateral measure with extraterritorial effect. Against the background of an international tax law system that has evolved on the basis of an international consensus, these countries believe that Germany’s taxation of register cases is outdated and should be abolished. The main reason given is the agreement on the partial reallocation of taxing rights (Pillar 1) as part of the Inclusive Framework on BEPS. In exchange for the partial reallocation, they argue, it was agreed that digital taxes and other taxes that are similar in nature would be abolished. According to these critics, tying the taxation of rights exclusively to their entry in a register effectively results in IP being taxed without any link to the place in which it is actually held. They believe that the German tax has a similar effect to a digital tax in many cases, because the tax base is calculated according to the share of sales attributable to Germany. Ultimately, this criticism is inaccurate from a technical tax perspective, because taxation under Pillar 1 results in a reallocation of taxing rights regardless of the existence of a nexus with the registration of rights. Nevertheless, the countries’ objections must be taken seriously from a political point of view.

In particular, countries that were sceptical of the introduction of Pillar 1 for a long time are likely to have placed further expectations on the agreement. This includes the expectation that IP-related taxing rights resulting in extensive national taxation will be withdrawn in exchange for these countries ceding some of their tax base under Pillar 1. It is therefore fair to assume that abolishing the tax could facilitate the domestic implementation of Pillar 1 in these countries, thus contributing to the important goal of introducing the two-pillar plan on a global basis.

2. **Implications of Pillars 1 and 2**

The introduction of a global minimum effective tax and the partial reallocation of taxing rights also have implications for the justification of Germany’s taxation of register cases under tax law. The tax already applies only in cases where there is no DTA preventing Germany from levying taxes, which normally excludes cases where the taxpayer with limited tax liability is resident in a jurisdiction covered by a DTA. Against this background, the German legislation can be understood to imply that, in the case of assets that are particularly easy to shift, such as rights,
the need for a sufficient connection to Germany is already satisfied if the rights are entered in a German register, which establishes a minimum connection to Germany.

The introduction of a global minimum effective tax sets out to ensure a minimum level of effective tax at the international level. This makes it unattractive to transfer moveable assets, especially IP, to tax havens. The restructurings carried out by the companies reviewed show that the private sector’s response is to transfer IP to jurisdictions covered by a DTA, thus ensuring a minimum level of tax. This reduces the practical need to tax IP based on their entry in a register, since it ensures that tax is levied in those countries while also massively reducing the tax revenue that can be expected from this legislation. Against this background, it is fair to question whether the taxation of register cases in the remaining cases is worth maintaining, given the high administrative and compliance burden involved.

At the same time, the agreement on the partial reallocation of taxing rights, which is primarily aimed at tech companies with significant economic activity in market jurisdictions in which they have no physical presence, shows that the international community has addressed the problem by creating new tax rules. Against this background, additional taxing rights based on nothing other than the entry of IP would require additional justification. This, too, should be borne in mind when considering the future of the taxation of register cases.

3. Conclusion

The arguments set out in VI. 1 and VI. 2 illustrate that the taxation of register cases needs to be critically examined, particularly against the backdrop of global developments relating to the two-pillar plan. In this context, it is worth bearing in mind that Germany has an interest in the internationally coordinated tax system that was achieved with the multilateral agreements on the global minimum effective tax and the partial reallocation of taxing rights.