

# WTS Tax Newsletter

## Payroll tax

### Differentiation between cash benefits and benefits in kind

Dear reader,

Since 01.01.2020, the scope of tax-privileged benefits in kind has been restricted by a legal definition of the term "benefit in kind". This affects in particular the use of the 44 €-wage tax exemption limit for non-cash benefits, the lump sum taxation in accordance with section 37b of the German Income Tax Act (EStG) as well as the wage tax exemption limit for non-cash benefits (gifts) up to an amount of 60 € gross for personal events of employees (e.g. birthdays, marriage, service anniversary) and the 110 € wage tax exemption limit for celebrations on personal occasions of employees (e.g. service anniversary). However, vouchers and prepaid cards continue to be eligible as non-cash benefits under certain conditions.

In the letter of the Federal Ministry of Finance (following BMF) dated 13<sup>th</sup> April 2021, the tax authorities published rules for applying the amended statutory provisions, which most of them are already valid retroactively since 1<sup>st</sup> January 2020.

Only the requirements of section 2, paragraph 1, No. 10 of the Payment Services Supervision Act (Zahlungsdienstaufsichtsgesetz - ZAG) for vouchers and prepaid cards has to be met as of 1<sup>st</sup> January 2022 to apply for the tax allowances for non-cash benefits. Provider as well as employer, who distribute vouchers and prepaid cards have now to adapt their offerings to the new tax requirements. In this newsletter, we present the regulations of the BMF dated 13<sup>th</sup> April 2021.

If you have any questions, please do not hesitate to contact the WTS HR-Taxes team.

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## 1. Tax allowance for non-cash benefits

Benefits in kind are also part of wages and salaries, if they are paid to the employees in return for making their work available.

Benefits in kind are subject to various tax benefits. For example, they can be tax-exempt or taxed at a flat rate using special tax rates.

## 2. Previous differentiation between cash wages and benefits in kind

Until 31<sup>st</sup> December 2019, the question of whether the employee was entitled to receive a cash payment or a benefit in kind was based on what the employee was entitled to receive by the employer on the basis of the employment or service agreement.

- » If the employee was only entitled to receive goods or services, this has to be considered as benefit in kind, regardless of how the employer fulfilled the entitlement (handover of an item, service, invitation, voucher, prepaid card, earmarked cash payment, subsequent reimbursement of costs). It also did not matter whether the employee himself became a contractual partner of the third party or whether the employer obtained the benefit in kind from the third party.
- » However, in case the employee was also entitled to a cash payment from his employer in the amount of the value of the benefit in kind instead of receiving the goods or services, then the payment has to be considered as wage salary, even if the employer turned over the goods.

According to these principles non-cash benefits to employees, e.g. vouchers and (rechargeable) prepaid cards, could also be considered tax-exempt

- › up to an amount of 44 € per month
- › for personal occasions (e.g. birthdays, marriages) up to an amount of 60 € for each occasion

or taxed at a flat-rate

- › up to an amount of 10.000 € per calendar year in accordance with section 37b of the German Income Tax Act.

It was also harmless if the employee paid the costs for the non-cash benefit in advance and these were subsequently reimbursed by the employer, or if the employee received an earmarked cash benefit from the employer which he was only allowed to use for the previously determined fringe benefit.

## 3. New definition of benefits in kind

Now, the question of whether the benefit qualify as cash salary or benefit in kind does not depend on the employee's entitlement but on the fulfillment of this entitlement.

Since 1<sup>st</sup> January 2020, the following applies

- » earmarked cash benefits, subsequent reimbursements of costs, cash surrogates and other benefits that are denominated in a monetary amount are in principle not benefits in kind but cash salary

(section 8, paragraph 1, sentence 2 German Income Tax Act)

- » Vouchers and prepaid cards that entitle the holder exclusively to receive goods or services and that meet the criteria of section 2, paragraph 1, No. 10 of the Payment Services Supervision Act (in German: Zahlungsdiensteaufsichtsgesetz - in the following ZAG) continue to be considered as benefits in kind.

(section 8, paragraph 1, sentence 3 German Income Tax Act, but to be applied only as of 1<sup>st</sup> January 2022)

However, the 44 € - wage tax exemption limit for such vouchers only applies if they are granted in addition to the salary that is owed anyway.

(section 8, paragraph 1, sentence 3, second half-sentence and paragraph 4 German Income Tax Act)

## 4. Transitional arrangement for vouchers

### 4.1 Wage tax

Vouchers and prepaid cards can still be treated as non-cash benefits in 2020 and 2021, even if they do not meet the requirements of section 2, paragraph 1, No. 10 ZAG.

(cf. No. 30 of the letter of the BMF dated 13<sup>th</sup> April 2021)

However, the previous requirements have still to be met, i.e. the employee's entitlement only relate to the item and the employee could not be alternatively claim a cash payment instead.

The transitional regulation only applies to the question of whether cash wages or benefits in kind has to be supposed in accordance with section 8, paragraph 1, sentence 3 German Income Tax Act, but this does not relate to cash wages defined in section 8, paragraph 1, sentence 2 German Income Tax Act and to the application of section 8, paragraph 2, sentence 11, 2nd half-sentence German Income Tax Act. Therefore, the 44 € - wage tax exemption limit for vouchers and prepaid cards is only applicable as of 1<sup>st</sup> January 2020, if these are granted in addition to the remuneration owed anyway (see point 7). It no longer applies to cases of salary conversion.

### 4.2 Social security insurance

The transitional tax regulation also applies to the treatment of vouchers and prepaid cards within the meaning of section 8, paragraph 1, sentence 3 of the German Income Tax Act for social security purposes. As far as these will be considered as tax-exempt benefits in kind by the German tax authorities until 31<sup>st</sup> December 2021, they are also exempt from social security contributions.

However, if the employer has already taxes and paid social security contributions on the tax-exempt benefits in kind under the transitional arrangement, an adjustment is only feasible, if the employer could reclaim the already paid taxes retroactively for the respective accounting period. If this is not possible, the social security contributions or social security contribution shares already paid were paid lawfully, so that a refund or set-off against future social security contributions is not possible according to the German association of social security insurances.

- For tax purposes, a correction is possible insofar as the taxation took place within the individual payroll 2021 according to the employee's tax deduction characteristics and for lump-sum taxations in 2020 (e.g. according to section 40, paragraph 1 German Income Tax Act), as far as the preliminary assessment of the respective wage tax returns are still subject to review.

(cf. top 5 of the discussion result of the "GKV-Spitzenverbandes", the "Deutsche Rentenversicherung Bund" and the "Bundesagentur für Arbeit" on questions of joint collection of contributions of 24<sup>th</sup> March 2021)

## 5. Vouchers / prepaid cards as non-cash benefits

According to the above-mentioned transitional regulation, the previous principles for the classification of vouchers and (rechargeable) prepaid cards can be applied until 31<sup>st</sup> December 2021. This means it is crucial that the employee is only entitled to claim the item from the employer, but not a comparable amount in cash. The fulfillment can be made with vouchers and (rechargeable) prepaid cards previously recognized as non-cash benefits.

As of 1<sup>st</sup> January 2022, vouchers and prepaid cards have to meet the following requirements in order to qualify as non-cash benefits:

- » they may only entitle the holder to purchase goods or services directly from the employer or a third party

and

- » they have to meet the criteria of section 2, paragraph 1, No. 10 ZAG.

- section 2, paragraph 1, No. 10 ZAG regulates which services are not payment services, and therefore have not be supervised by the German Federal Financial Supervisory Authority (following BaFin).

The BaFin has published a fact sheet for the interpretation of the provisions of the ZAG:

[https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Merkblatt/mb\\_111222\\_zag.html#Start](https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Merkblatt/mb_111222_zag.html#Start)

However, the tax authorities argue that the ZAG should be interpreted for tax purposes. Even if the regulations of the BMF dated 13th April 2021 mostly correspond to those of the BaFin fact sheet as mentioned above, the tax authorities do not treat it as binding document. The same also applies to a specific regulatory classification of a

prepaid card as a payment service or a certificate of the regulatory compliance with the criteria mentioned in section 2, paragraph 1, No. 10 ZAG by the BaFin.

→ Therefore, if an employer would like to avoid a wage tax liability risk, he has to check whether the vouchers / prepaid cards used meet the requirements settled in the letter of the BMF dated 13<sup>th</sup> April 2021.

The ZAG mentions 4 use cases, which have been adopted in the letter of the BMF dated 13<sup>th</sup> April 2021:

### 5.1 Payment systems in limited networks (house card, shop-in-shop solution)

This includes vouchers or prepaid cards (with or without an stated amount) that entitles the holder to purchase goods or services exclusively by the **issuer of the voucher** from its own range of products. The registered office of the issuer and its range of products are not limited to Germany.

(section 2, paragraph 1, No. 10a ZAG)

#### **Example 1:**

The employee receives a gift card for a specific furniture store from the employer, which can only be redeemed in the retailer's store or online shop.

#### **Solution:**

The gift card qualifies as benefit in kind.

#### **Example 2:**

The employee receives a gift card from his employer for the online store of a sporting goods retailer, which can only be redeemed there.

#### **Solution:**

The gift card qualifies as benefit in kind.

#### **Example 3:**

Within a mall parts of the sales area are used by independent companies (e.g. booksellers, certain fashion manufacturers). The mall's gift cards can also be used for purchases in these stores.

#### **Solution:**

Even if a shopping card from the mall can also be redeemed at the retailers with their own stores, the shopping card qualifies as benefit in kind.

### 5.2 Payment systems in "limited networks"

These include vouchers and prepaid cards (with or without an stated amount) that are not redeemable directly with the issuing merchant but entitle the holder to purchase goods or services exclusively on the basis of acceptance agreements between the issuer of the voucher and the points of acceptance at a limited number of points of acceptance in Germany.

(section 2, paragraph 1, No. 10a ZAG)

A limited group of acceptance points exists for

- » urban purchasing and service associations in Germany,
- » purchasing and service associations covering a specific region in Germany (e.g. several neighboring towns and municipalities in rural areas), or
- » customer cards issued by a specific chain of stores (a specific issuer) for the purchase of goods or services in the individual stores in Germany or in the online shop of this chain of stores with a uniform market appearance (e.g. a symbol, brand, logo); the type of operation (e.g. own stores, in a cooperative or group association via agencies or franchises) is irrelevant.

(cf. No. 10 of the BMF letter dated 13<sup>th</sup> April 2021)

The requirement for a limited group of acceptance points is also met in the case of center vouchers or customer cards from shopping centers, malls and outlet villages, "city cards" and city vouchers.

(cf. No. 11 of the BMF letter dated 13<sup>th</sup> April 2021)

**Example 4:**

The employer provides its employees a so-called City Card with an amount of 20 € per month, which they can use in restaurants, for shopping or for cultural events.

**Solution:**

This is a benefit in kind.

**Example 5:**

In a municipality a voucher card can be purchased, which can be redeemed in all participating stores like gas stations, supermarkets, coiffeur and restaurants in the locality. The employer provides his employees with such cards worth of 30 €.

**Solution:**

This is a benefit in kind.

**Example 6:**

A gas station operator issues fuel cards that can be used for fuel and other goods at his gas station. The employer purchases a fuel card worth of 50 € as birthday gift of an employee.

**Solution:**

This fuel card qualifies as benefit in kind.

**Example 7:**

A gas station chain issues fuel vouchers or -cards that can be used for fuel and other goods at all gas stations of the brand. The employer gives each employee a fuel voucher worth of 20 € as Christmas gift, which the employer has purchased in advance.

**Solution:**

As the gas station chain has a uniform market presence, the fuel vouchers also qualify as benefit in kind. It is irrelevant how the individual gas stations are linked to each other (own business, cooperative or group association, agencies or franchising).

- However, if the employer issues the fuel voucher itself, a benefit in kind can only be adopted, if the gas station balance accounts directly with the employer.

**Example 8:**

The 20 employees of a company receive a monthly voucher issued directly by the employer entitling them to purchase 30 liters of fuel from the gas station X. The gas station X sends a collective invoice to the employer.

**Solution:**

The employees receive monthly a benefit in kind.

**Example 9:**

The 20 employees of a company receive a monthly fuel voucher issued directly by the employer entitling them to purchase 30 liters of fuel from gas station X. The employees pay the bills upfront and submit the invoice to the employer for reimbursement afterwards.

**Solution:**

There is a subsequent reimbursement of costs, which has to be taxed as cash salary. If the fuel should qualify as benefits in kind, the gas station should either send the invoice directly to the employer for payment or the employer has to purchase fuel vouchers in advance - as described in example 6.

### 5.3 Very “limited range” of goods and services

These include vouchers or prepaid cards (with or without an stated amount) that entitle the holder to purchase only goods or services from a very limited range of goods or services. Neither the number of points of acceptance nor the domestic purchase is relevant.

The vouchers / prepaid cards are limited in terms of content ("functional"), there is no regional limitation (as stated in point 5.2.), i.e. redemption abroad is also conceivable. (section 2, paragraph 1, No. 1b ZAG)

In the case of fuel cards, for example, this can affect cards that are only valid for fuel and car accessories (add blue, oil, screen wash, wiper blades, car wash), but not for other goods that can be purchased at gas stations (travel supplies, magazines).

The BMF letter dated 13<sup>th</sup> April 2021 mentions in its nr. 13 as examples vouchers or prepaid cards which are limited to

- » local and long-distance passenger transport (e.g. for travel authorizations, train restaurant, Park&Ride - parking facilities) including certain mobility services (e.g. the use of (electric) bicycles, car-sharing, e-scooters),
- » fuel, charging power, etc. ("everything that moves the car"),
- » fitness services (e.g. for visiting training facilities and obtaining the goods or services offered there),
- » streaming services for film and music,
- » newspapers and magazines, including downloads,
- » books, also as audio books or files, including downloads, wellness treatments in form of skin care, makeup, hairstyling and similar (so-called beauty cards),

clothing including shoes together with accessories such as bags, jewelry, cosmetics, fragrances (“goods that serve the appearance of a person”)

**Example 10:**

The employer gives the employee a credit card for Netflix, Spotify, etc. worth of 15 €

**Solution:**

Since it does not matter whether the provider of vouchers / prepaid cards with a limited range of goods / services is domiciled in Germany or abroad, the vouchers / prepaid cards qualify as benefit in kind.

## 5.4 Instruments for social or tax purposes

Non-cash benefits are also vouchers or prepaid cards (with or without an stated amount) which only entitle, on the basis of acceptance contracts between issuer and acceptance points, to purchase goods or services exclusively for certain social or tax purposes in Germany (special purpose card). The number of acceptance points is not relevant, but the redemption has to take place in Germany.

(section 2, paragraph 1. No. 10c ZAG)

As examples, the letter of the BMF dated 13<sup>th</sup> April 2021 mentions in no. 16:

- » food vouchers of social institutions
- » food vouchers/restaurant checks in paper form as well as in digital form (see point 12.2.)
- » treatment cards for medical services or rehabilitation measures,
- » cards for company health measures (including company health benefits provided by the employer within the meaning of section 3, No. 34 German Income Tax Act)

- For food vouchers of a social institution, we assume there should not be any scope of application for vouchers granted by the employer. It is our understanding, that the company cafeteria is probably not meant here.
- The regulations for food vouchers, however, remain unchanged, even though the employee has to bear the costs for so-called digital food vouchers upfront and these are subsequently reimbursed by the employer.

In order to use the tax-free allowance currently amounting to 600 € p.a. under section 3 No. 34 of the German Income Tax Act, it is not required that the benefit qualifies as benefit in kind; cash benefits are also eligible. However, any amounts exceeding the tax-free allowance can be taxed at a flat rate in accordance with section 37b of the German Income Tax Act if the benefit qualifies as benefit in kind.

According to the above mentioned fact sheet on the ZAG provided by the BaFin, gifts to employees on the occasion of a special personal event within the meaning of R 19.6 paragraph 1 of the German Wage Tax Guidelines (e.g. flowers, wine, chocolates, books or CDs up to an limit of 60 € per occasion) would be counted among the favored tax purposes, but not the use of the of the 44 € tax exemption limit for non-

cash benefits and the lump-sum payment pursuant to section 37b German Income Tax Act. However, the tax authorities exclude such gifts within the meaning of R 19.6 paragraph 1 Wage Tax Guidelines as taxable benefit for certain social or tax purposes as benefits in kind.

(cf. No. 15 of the BMF letter dated 13<sup>th</sup> April 2021)

## 6. Vouchers / prepaid cards that will no longer be benefits in kind from 2022

After expiration of the transitional regulation, vouchers or prepaid cards that do not meet the requirements of paragraph 5 of this newsletter have to be taxed as cash salary as of 1<sup>st</sup> January 2022. This applies to the following cases:

### 6.1 Vouchers / prepaid cards that do not exclusively entitle the holder to purchase goods or services

Vouchers or prepaid cards that do not exclusively entitle the holder to purchase goods or services have always to be treated as cash salary. These are in particular vouchers or prepaid cards that

- » have a cash withdrawal function. However, it is harmless if remaining balances of up to an amount of one Euro can be paid out,
- » have their own IBAN,
- » can be used for bank transfers (e.g. PayPal),
- » can be used for the purchase of foreign currencies (e.g. pounds, U.S. dollars, Swiss francs), or
- » can be deposited as a general payment instrument

(cf. No. 24 of the BMF letter dated 13<sup>th</sup> April 2021)

### 6.2. Vouchers / prepaid cards that can be redeemed at many points of acceptance and for a variety of goods or services

Vouchers or prepaid cards that can be redeemed at a large number of acceptance points (online and locally) and without being limited to a specific product range will also qualify as cash salary in the future.

**Example 11:**

A voucher provider offers a voucher with which employees can order vouchers from various retailers (redeemable online or locally) in a portal. The invoice is sent to and paid by the employer.

**Solution:**

According to our opinion, since the voucher in the portal is neither regionally nor functionally limited, the voucher has to be considered as cash salary as of 1<sup>st</sup> January 2022.

**Example 12:**

A voucher provider offers a voucher that can be redeemed for the purchase of fuel at over 1,000 gas stations throughout Germany and many other retailers in the mobility sector (e.g., also rental cars, car sharing).

**Solution:**

Although the product range is limited, so that a benefit in kind could be assumed (see paragraph 5.3), the product range might not be sufficiently limited. Thus, the voucher has to be considered as cash salary. However, to qualify as benefit in kind the provider could functionally restrict the scope of the card in that way, that it is only valid for rental cars and car sharing at many providers or only for fuel at many gas stations.

→ The functional limitation of the vouchers and prepaid cards shall be ensured and documented in a suitable manner by technical precautions and in the contractual agreements used.

(cf. No. 26 the BMF letter dated 13<sup>th</sup> April 2021)

### 6.3 "Marketplaces"

Vouchers or prepaid cards that can be redeemed in a so-called marketplace (where various merchants offer their goods) has to be taxed as cash salary if the marketplace offers a variety of products.

**Example 13:**

The employee receives a voucher from his employer that can be redeemed on an online platform for a variety of items at a variety of retailers.

**Solution:**

The voucher qualifies as cash salary.

→ If only a limited range of products is offered in the Marketplace (e.g. clothing and cosmetics, mobility), this continues to be a benefit in kind (see the following example 14 and No. 13 of the BMF letter dated 13<sup>th</sup> April 2021).

**Example 14:**

The employee receives a voucher from his employer for an online shop, where exclusively clothing, shoes, accessories and cosmetics can be purchased.

**Solution:**

Even if the consigner is a so-called marketplace, in which the goods are sold by various retailers, the voucher results in a benefit in kind because it is only valid for a very limited range of goods or services.

## 7. Scope of application of the 44 € - tax exemption limit for vouchers and prepaid cards

Under section 8 paragraph 4 of the German Income Tax Act, the monthly 44 € - tax exemption limit for non-cash benefits is only applicable for vouchers and prepaid cards, if they are granted in addition to the salary that is owed anyway.

The tax advantage of the above-mentioned 44 € - tax exemption limit is thereby excluded in particular in the context of salary waiver or salary conversion compensation. This already applies as of 1<sup>st</sup> January 2020 and is not covered by the above-mentioned transitional regulation.

(cf. No. 4 of the BMF letter dated 13<sup>th</sup> April 2021)

→ The 44 € - tax exemption limit will be raised to 50 € per month as of 1<sup>st</sup> January 2022.

Since 1<sup>st</sup> January 2020 it is regulated by law when benefits are granted in addition to the salary that is owed anyway. Accordingly, the condition of additionality is only met if

- » the benefit shall not be credited against the entitlement to wages,
- » the entitlement to wages is not reduced in favor of the benefit,
- » the benefit is not granted in lieu of a future increase of wages that has already been agreed upon, and
- » the salary is not increased if the benefit is discontinued

In view of the principle of uniformity of taxation, this applies irrespective of whether the wages are bound by a collective agreement.

(cf. section 8, paragraph 4 German Income Tax Act)

## 8. Timing for the taxation of vouchers and prepaid cards

For the determination of the relevant date of inflow and so far also for the correct time of taxation, it has to be differentiated if the voucher can be redeemed with the employer or with a third party:

### 8.1 To be redeemed at a third party

If the voucher or prepaid card can be redeemed with a third party, the benefit in kind accrues at the time of presentation and, in the case of prepaid cards, at the earliest at the time the credit is topped up. The employee already has a legal claim against the third party at this time.

### 8.2 To be redeemed with the employer

If the voucher or prepaid card is to be redeemed with the employer, the benefit in kind accrues at the time of redemption.

(cf. section 38, paragraph 2, sentence 2 German Income Tax Act, R 38.2 paragraph 3 sentence 2 German Wage Tax Guidelines, No. 26 of the BMF letter dated 13<sup>th</sup> April 2021)

## 9. Valuation

As a general rule, benefits in kind has to be measured at the usual final prices at the place and time of transfer less the usual price discounts. For reasons of simplification, the usual price discounts could be applied with 4%, so that benefits in kind could be recognized at 96% of the final price at which they are offered by the donor or the donor's customer to third party end consumers in general business transactions.

(cf. section 8, paragraph 2, sentence 1 German Income Tax Act, R 8.1 paragraph 2 sentence 3 German Wage Tax Guideline)

If the specific good or service is not offered to end consumers on the market at comparable conditions, the benefits in kind could also be assessed in the amount of the employer's expenses (incl. VAT and all ancillary costs). The 4% price discount as mentioned above does not apply in this case.

(cf. BMF letter dated 11<sup>th</sup> February 2021, BStBl. 2021 I, 311)

### 9.1 Valuation of vouchers and prepaid cards

According to R 8.1 paragraph 2 sentence 4 German Wage Tax Guideline, the 4% - deduction also does not apply if a voucher or prepaid card is handed over with a maximum amount denominated in €.

(cf. no. 17 of the BMF letter dated 13<sup>th</sup> April 2021)

### 9.2. Costs for prepaid cards

If the employer incurs costs for providing and loading prepaid cards, this does not constitute an additional benefit in kind. These costs are regarded as a necessary concomitant of the employer's business objectives and do not form part of the remuneration.

(cf. No. 3 of the BMF letter dated 13<sup>th</sup> April 2021)

## 10. Money substitutes

In particular prepaid cards or prepaid credit cards that can be used nationwide and without restriction in terms of the product range within the framework of non-cash payment transactions are defined as money substitutes. A limitation solely to the domestic territory is not sufficient.

The tax authorities also do not permit such a prepaid card to be treated as benefit in kind, which is handed over with the condition that it is only to be used for a specific purpose.

(cf. No. 23 of the BMF letter dated 13<sup>th</sup> April 2021)

### **Example 15**

The employee receives a reloadable prepaid credit card, which they can use for purchases at a very large number of acceptance points worldwide. However, they may only use the card to purchase fuel for their private car.

**Solution:**

The voucher qualifies as cash salary. An employment contract restriction regarding the redemption of the voucher does not have an impact.

→ Usually, the reloadable cards, which have been used for employee incentive purposes yet, only entitle the holder to purchase goods or services, so that the above-mentioned transitional rule also applies here, i.e. they do not have to be taxed as cash salary until 31 December 2021.

## 11. Earmarked cash payment and subsequent reimbursement of costs as cash salary - differentiation to reimbursement of out-of-pocket expenses

If the employer has promised the employee a good or service and fulfills this promise by making a cash payment to the employee, this is basically a cash salary (earmarked cash payment or subsequent reimbursement of costs).

However, section 3 No. 50 of the German Income Tax Act is still applicable, i.e. the cash salary may be tax-exempt if it is

- » cash in transit, i.e., amounts received by the employee from the employer to be spent on the employer's behalf

or

- » reimbursement of out-of-pocket expenses, i.e. amounts by which expenses incurred by the employee on behalf of the employer are subsequently reimbursed by the employer.

(cf. No. 21 of the BMF letter dated 13<sup>th</sup> April 2021)

**Variant for example 15:**

The employee receives the card on condition that it is only used to refuel the company car.

**Solution:**

Although this is a cash benefit, it is tax-exempt as a reimbursement of out-of-pocket expenses or a cash in transit within the meaning of section 3 No. 50 of the German Income Tax Act.

In order to differentiate between subsequent reimbursement of costs and tax-free reimbursement of out-of-pocket expenses, the tax authorities assume that a subsequent reimbursement of costs can be assumed, if the employee has a personal interest in the goods or services purchased. A personal interest exists, if the goods or services are intended for the employee's private use.

(cf. No. 21 of the BMF letter dated 13<sup>th</sup> April 2021)

**Example 16:**

The employee has a claim against their employer for the transfer of ownership of a bicycle worth of 800 € in addition to the wages he or she is entitled to anyway.

**Variante A:**

He or she receives an amount of 800 € from the employer to buy the bicycle themselves.

**Variante B:**

He or she buys the bicycle and get a reimbursement amounting to 800 € after presenting the purchase receipt.

**Solution:**

In both cases the tax authorities assume that the purpose of the employment contract does not lead to the assumption of benefits in kind. Rather, it is an earmarked cash benefit or subsequent reimbursement of costs, so that section 37b of the German Income Tax Act does not apply.

(cf. No. 22 of the BMF letter dated 13<sup>th</sup> April 2021)

**Variante C:**

The employer orders the bicycle and pays the invoice. The delivery is made from the dealer to the employee's home.

**Solution:**

This qualifies as benefit in kind.

Up to now, the case law has only had to deal with the question of whether the amount in question represents tax-free reimbursement of out-of-pocket expenses or taxable salary (e.g. reimbursement of income-related expenses):

- » Tax-exempt reimbursements of out-of-pocket expenses has been assumed, if the employee incurs expenses in the completely predominant interest of the employer, which conduce to the performance of work and which do not lead to an enrichment of the employee (cf. decision made by federal fiscal court dated 21<sup>st</sup> August 1995, BStBl. 1995 II page 906 on consumables for the instruments of orchestra musicians (string money)).
- » Taxable cash salary is available, if the employee receives income that is granted "for" their employment, i.e. that has the character of remuneration (cf. decision made by federal fiscal court dated 5<sup>th</sup> April 2006, BStBl. 2006 II page 541 on security devices at an employee's home).

However, from our point of view it is doubtful whether it can be concluded that paid expenses in advance by the employee, which qualify as taxable salary, also has to be considered as cash salary instead of non-cash salary. We assume, that this also does not result from section 3 No. 50 of the German Income Tax Act.

In practice, we assume that there will still be cases in which an employee pays in advance for salary, that could be considered as non-cash benefit.

**Example 17:**

A bowling event in the evening will be held as social event within a two-day workshop for 12 employees. One of the participants pays the costs for the bowling as well as the food and beverages consumed and is reimbursed via the expense reimbursement process provided by the company.

**Solution:**

The evening event qualifies as non-cash benefit, as there is no predominant company interest. In our opinion, however, there is a benefit in kind for all

participants. The employee who paid the costs in advance had disbursed the expenses on behalf of the employer. It is our understanding, the fact, that they lead to a non-cash benefit does not change the classification of the event as benefit in kind.

**Example 18:**

According to a company agreement, an individual celebration will be held for each employee for their 25<sup>th</sup> service anniversary. The employer provides a budget of 600 € per celebration. On the occasion of his or her service anniversary, the employee reserves a table in a restaurant for the service anniversary dinner with the colleagues and pays the costs incurred of 700 €. The invoice is made out to the employer. The portion of the invoice up to an amount of 600 € will be reimbursed to the employee by the employer as an out-of-pocket expense.

**Solution:**

It is our understanding that the employee's own interest is not present, since the party is not for the employee's private use. Rather a company event can be assumed for which the 110 tax exemption limit due to R 19.3 paragraph 2 sentence 3 German Wage Tax Guideline can be applied.

→ In these cases, it is recommended to request for a written disclosure at the companies tax office.

In the following constellation, we assume that benefits in kind can no longer be assumed:

**Example 19:**

The employee receives a voucher for a "dinner for two" worth of 90 € from the employer. The employee visits a restaurant of his/her choice with his/her partner and submits the bill to the employer for reimbursement.

**Solution:**

The redemption of the voucher at the employer leads to cash salary as a subsequent reimbursement of expenses according to section 8 paragraph 1 sentence 2 German Income Tax Act. Should the dinner qualify as benefit in kind, the invoice of the restaurant has either to be send to the employer directly for payment or the employer has to purchase and pay a food voucher of the restaurant in advance.

## 12. Cases, in which subsequent reimbursement of costs are harmless

In only a few cases, the tax authorities continue to recognize benefits in kind despite of subsequent reimbursement of costs.

### 12.1 Meal allowance for business trips

Employees usually pay their hotel bills for business trips in advance, which also include breakfast costs, and are reimbursed for these costs via the travel expense report. Breakfast costs are not part of the accomodation expenses but are covered by the per diem meal allowance. However, if the employer has determined the day and place of the meal, the hotel breakfast is provision for meals arranged by the employer and therefore a fringe benefit that leads to a reduction of the per diem meal allowance.

In the update of the BMF letter of the tax travel expense law published in November 2020, the Financial Administration has retained this rule:

Initiation by the employer is assumed by the tax authorities in particular in case

- » the employer reimburses the costs of meals with regard to the employee's business trips according to internal business trip guidelines
- » the invoice is made out to the employer or it is a small-value invoice according to section 14 of the German Value Added Tax Act in conjunction with section 33 of the German Value Added Tax Ordinance, which is available or has been made available and saved as a document for the employer's accounting.

(cf. No. 64 and 118 of the BMF letter dated 25<sup>th</sup> November 2020 on the tax treatment of employee travel expenses, BStBl. 2020 I p. 1228)

## 12.2 Digital food vouchers

The existing regulations on the provision of meals on workdays in the form of paper vouchers (food vouchers, restaurant checks) and meal allowances on workdays (so-called digital food vouchers) continue to apply unchanged.

Benefits in kind can be assumed if the requirements of R 8.1 paragraph 7 No. 4 of the German Wage Tax Guidelines and the BMF letter dated 18<sup>th</sup> January 2019 (BStBl. I page 66) are met. This also applies in the case of so-called digital food vouchers, where the employee pays the costs for the daily meal in advance and the costs will be subsequently reimbursed on his/her merits.

(cf. No. 16 of the BMF letter dated 13<sup>th</sup> April 2021)

## 12.3 Subsequent credit notes in using the discount allowance

For the application of the so-called discount allowance pursuant to section 8 paragraph 3 German Income Tax Act it is also required that a non-cash benefit exists. According to R 8.2. paragraph 1 sentence 4 German Wage Tax Guideline rebates in the form of subsequent credit notes are favored by the rebate allowance, if their conditions are already met at the time the employee receives the non-cash benefits. This provision is also retained.

(cf. No. 20 of the BMF letter dated 13<sup>th</sup> April 2021)

## 13. Instruments of payment

Valid legal instruments of payment in Germany or payments in a common, freely convertible foreign currency that can be traded in Germany do not qualify as benefits in kind. If the usual end price of instruments of payment differs from the nominal value (e.g. coins with collector's value), the tax authorities assume benefits in kind, which has to be valued at the (higher) usual end price at the place of delivery.

(cf. No. 19 of the BMF letter dated 13<sup>th</sup> April 2021)

- Whether virtual currencies (e.g. Bitcoins), which are not considered as legal instrument of payment, will be handled as cash or non-cash compensation remains an open question.

## 14. Future insurance benefits as benefits in kind

Future insurance benefits are expenses paid by the employer to guard the employee and his/her family against illness, accident, invalidity, old age or death (cf. section 2, paragraph 2, No. 3 of the German Wage Tax Ordinance). The benefits are treated differently for the question of whether they are cash salary or benefits in kind:

- » The provision of health-, daily sickness allowance- or nursing care insurance protection qualify as a benefit in kind in case the employer is the insurance holder and pays the insurance contributions.

(cf. No. 6 of the BMF letter dated 13<sup>th</sup> April 2021)

- » In case the employee is the insurance holder of the health-, daily sickness allowance or nursing care insurance and pays the insurance contributions by himself, any grants paid by the employer has to be considered as cash salary. This also applies in case the grant will only be paid by the employer provided that the employee conclude the insurance contract with an insurance company specified by the employer.

(cf. No. 18 of the BMF letter dated 13<sup>th</sup> April 2021)

- » If the employer grants accident insurance protection by concluding a voluntary accident insurance, a benefit in kind can be assumed. However it is required that, in case the employer is the insurance holder, the employee is able to immediately assert the insurance claim directly against the insurance company and that the insurance contributions were not taxed at a flat rate in accordance with section 40b paragraph 3 German Income Tax Act. The lump-sum taxation in accordance with section 37b paragraph 2 German Income Tax Act is permitted in this case.

(cf. No. 7 of the BMF letter dated 13<sup>th</sup> April 2021)

- » Insofar as contributions for group accident insurance for employees could be taxed at a flat rate in accordance with section 40b paragraph 3 of the German Income Tax Act, the 44 € - tax exemption limit is not applicable according to the BMF letter 13<sup>th</sup> April 2021.
- » The same applies to ongoing contributions and benefits, which will be paid by the employer within the framework of the company pension scheme from an existing employment to pension funds or for direct insurances. According to the German tax authorities, the special statutory regulation of section 19 paragraph 1 sentence 1 No. 3 German Income Tax Act, which allocate such benefits to wages and salaries, exclude a valuation of the above mentioned contributions and benefits in accordance with section 8 paragraph 2 sentence 1 German Income Tax Act.

(cf. No. 29 of the BMF letter dated 13<sup>th</sup> April 2021)

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