

Tax audit and criminal tax law - Recognizing risks and reacting in a targeted manner

Due to current events: Investigations by tax investigators into companies based in municipalities with a low trade tax rate

Presentation & structure

Speakers



Sandra Höfer-Grosjean
Regulatory & Compliance
Lawyer, Tax consultant

Phone: +49 211 8772 3496

E-mail: shoefer-grosjean@deloitte.de



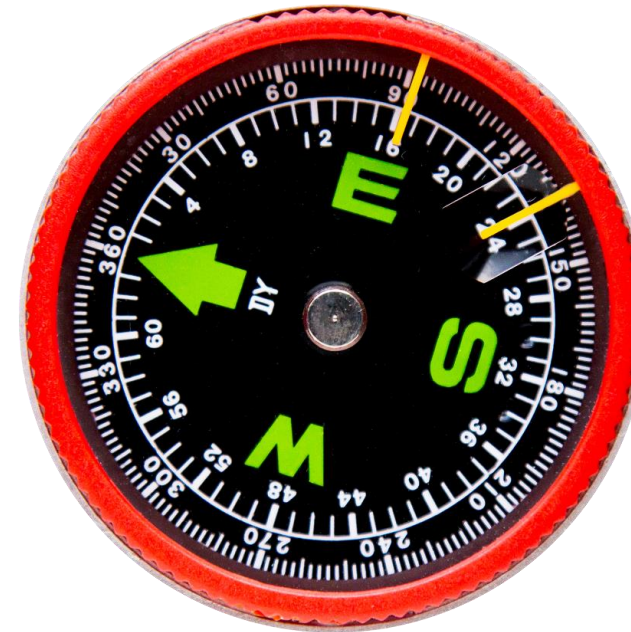
Volker Radermacher
Regulatory & Compliance
Tax consultant

Phone: +49 211 8772 3655

E-mail: vradermacher@deloitte.de

Structure

- I. From the audit order to the final meeting and beyond: reducing the risk of fines and criminal tax proceedings being initiated
- II. Investigations of the tax audit with regard to facts relevant to corporate fines
- III. New regulation of Section 153 (4) of the Fiscal Code of Germany (AO) - relevance under criminal law?
- IV. Due to recent events: Tax investigation into companies based in municipalities with a low trade tax rate
- V. Questions & Answers



**From the audit order to the final meeting and beyond:
Reducing the risk of fines and criminal tax proceedings
being initiated**

Reducing the risk of fines and criminal tax proceedings being initiated

Audit order - special features



Audit period is outside the "normal" assessment period (e.g. 1 year for electricity tax, "normal" taxes 4 years)

- Audit to determine the statute of limitations for assessment is permissible if there is a suspicion or possibility of a tax offence or a tax administrative offence - indications required!
- Since extension and / or deviation from the usual period: meaningful justification required in the audit order - request if necessary!
- If initial suspicion is "obvious" and no information was provided - later, if applicable, prohibition of exploitation under criminal law (no prohibition of exploitation under tax law - see BFH of 23 January 2002 - XI R 10, 11/01)



Recommendation:

Discussion of the audit procedure and further steps (e.g. "protective letter")

Reducing the risk of fines and criminal tax proceedings being initiated

Audit order - special features



Auditor would like to have unusual documents / information



Excursus: Tax CMS documents are increasingly being requested



- Currently no obligation to submit, but Application Decree („Anwendungserlass“) on Section 153 AO and case law must be observed
- Influencing subjective assessment of audit findings in the event of refusal or "poor Tax CMS"
- Inadequate organization of the tax department / accounting can "lead to Section 130 of the German Act on Regulatory Offences (OWiG)"
- Article 97 Section 38 of the Introductory law of the Fiscal Code (EStG), advantages and disadvantages of a Tax CMS verification by the audit

Reducing the risk of fines and criminal tax proceedings being initiated

Audit order - special features



Significant error becomes apparent when preparing a response to an audit request/ Obligation to correct during an audit?



- **Principle:** legal obligation still exists
- **Exception:** AEAO on § 153, No. 3: *The notification and correction by the taxpayer are not required in cases of errors identified by the tax audit for the tax types and audit periods specified in the audit order.*
- **However,** there is still an obligation to correct other "non-audit" periods that are not time-barred.
- **Note:** Consider the risks of criminal tax penalties and fines: If necessary, precautionary "self-assessment security"; when submitting tax returns for subsequent periods during an audit, clarification letter if necessary in the event of a different legal opinion

Reducing the risk of fines and criminal tax proceedings being initiated

Audit order - special features



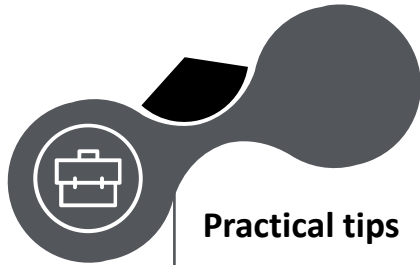
Auditor acts unusually



- Section 10 of the Audit regulations (BpO): Obligation of the audit to inform office for criminal and administrative offences: initial suspicion (Section 152 (2) of the German Criminal Procedure Code (StPO) or possibility of conducting criminal proceedings
- Auditor: possible accusation of obstruction of justice by omission (LG Stuttgart of 24 March 2020 - 61 NS 142 Js 114222/16)
- Obligation to interrupt audit: Not in case of mere possibility within the meaning of Section 10 (1) sentence 2 BpO, only in case of suspicion (partial interruption sufficient?)
- Continuation of audit: regularly only from the announcement of the initiation of criminal proceedings

Reducing the risk of fines and criminal tax proceedings being initiated

Central procedural regulation – Section 10 BpO



Practical tips

- Dealing with notification and interruption obligations is often associated with uncertainties
- Case examples: see state decree on Section 10 (1) BpO (of 31 August 2009, BStBl. I 2009, 829)
- There is a tendency to contact office for criminal and administrative offences "rather once more than once too little" (also due to LG Stuttgart 24 March 2020 - 61 NS 142 Js 114222/16 and internal guidelines)



Recommendations:

Ongoing analysis of the auditor's behavior

Contact office for criminal and administrative offences in good time (protective letter if necessary)

Only trained employees or external consultants should have contact with audit

Reducing the risk of fines and criminal tax proceedings being initiated

Criminal tax law reservation in final meeting according to Section 201 (2) AO / "red report"



A mere reference does not mean that criminal tax proceedings have been initiated!

- Possible criminal prohibition of exploitation in the event of breach of duty to instruct due to other aspects (see BGH of 16 June 2005 - 5 StR 118/05)



Recommendations:

If applicable, "protective letter", influencing the assessment office / appeal office before evaluating the audit report (relevance for objective facts; see also Section 12 (2) BpO)

Influence also on office for criminal and administrative offences and increase in the discharge threshold

Investigations of the tax audit with regard to facts relevant to corporate fines

Investigations of the tax audit with regard to facts relevant to corporate fines

Corporate fines according to Section 30 OWiG:
Punishment and absorption - fiscal interest

There are **other investigation options** in criminal /
fines proceedings ("What the audit doesn't get,
the tax investigation should get")



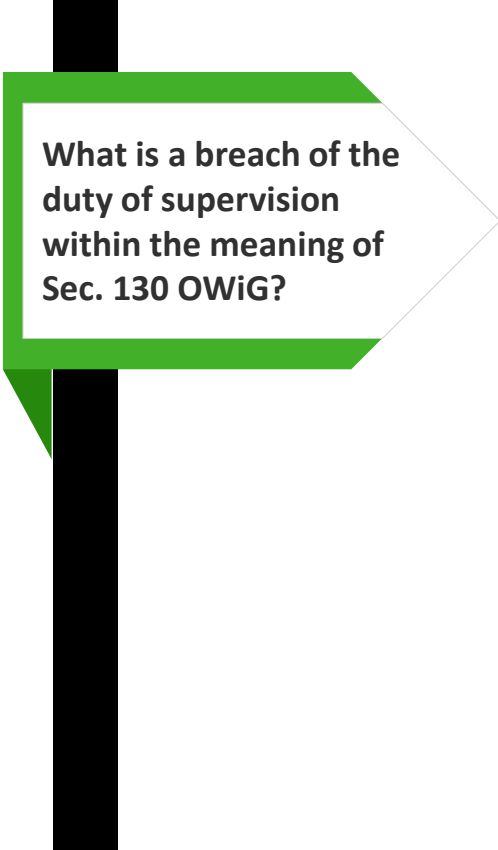
Extended statute of limitations: Prerequisite of
Section 30 OWiG: Criminal offence /
administrative offence by a manager
(e.g. Sections **370, 378, 379, 380 AO**) - often,
however, only Section 130 OWiG remains as a
linking offence in connection with an offence
committed by an "other employee"

Punishment / fining of natural persons, if
applicable additionally - fiscal/"educational"
interest



ATTENTION: Audit is increasingly being trained in this regard / nowadays close contact with office for criminal and administrative offences

Investigations of the tax audit with regard to facts relevant to corporate fines



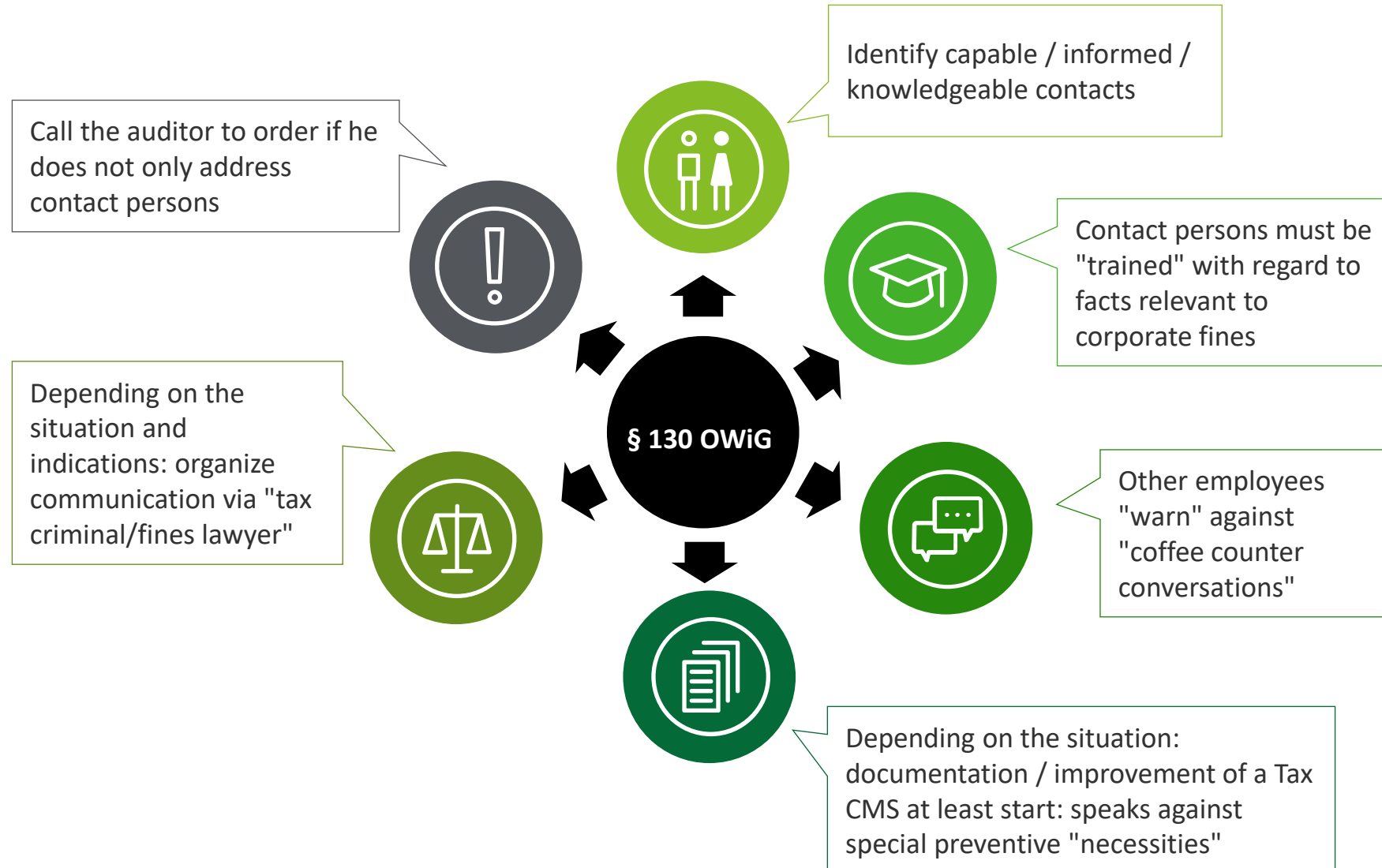
What is a breach of the duty of supervision within the meaning of Sec. 130 OWiG?

Not defined in the law - criteria are discussed in literature, e.g.

- Careful selection of managers and employees
- Proper organization and distribution of tasks and, if necessary, establishment of an auditing department
- Instructing and informing employees about their tasks and duties
- Monitoring and control of employees
- Intervening against violations within the company
- Maintaining a functional condition through appropriate equipment and resources
- An increased duty of supervision in the event of irregularities in the past or current grievances
- Documentation of all measures that are carried out in order to fulfill the due supervisory duty

Investigations of the tax audit with regard to facts relevant to corporate fines

Section 130 OWiG - practical tips



New regulation of Section 153 (4) AO - relevance under criminal law?

New regulation of Section 153 (4) AO - relevance under criminal law?

Application from "2025": expressly standardized additional notification and correction obligation according to audit



Standardized notification and correction obligation according to audit (Section 153 (4) AO)

- *The obligation to notify and correct **also** exists if the audit findings of an external audit have been incontestably implemented in a tax assessment notice, an assessment notice pursuant to section 180 (1) sentence 1 no. 2 or a partial final assessment notice pursuant to section 180 (1a) and the facts underlying the audit findings also lead to a change in the tax bases in another declaration submitted by or for the taxpayer that was not the subject of the external audit.*
- Explanatory memorandum: "Extension of the obligation to correct"
- Reference to legal grounds or legal consequences? Duty to investigate?



Criminal tax law risks? Recommendation:

Statement in this regard to the tax authorities after non-appealability

Due to current events:
Investigations by tax investigators into company
headquarters in municipalities with a low trade tax rate

Tax investigation of company headquarters in municipalities with a low trade tax rate

Press releases

manager magazin Abmelden

Startseite > Politik > Meinung > Gewerbesteuerflucht kann Steuerfahndung aktivieren

Gewerbesteuerflucht in Deutschland

Die Briefkasten-Falle in der Provinz

Von Christian Pfeiffer

03.03.2016, 11:46 Uhr



Zentrale der Deutschen Börse: Hinterwelt sind zahlreiche Firmen in Exilorten zugewandert. Foto: Getty Images/ dpa

tagesschau Sendung verpasst?

Startseite > Investigativ > Gewerbesteueroasen: Wie Großunternehmer Steuern sparen



EKSLUSIV Gewerbesteueroasen
Wie Großunternehmer Steuern sparen
Stand: 02.11.2022 17:01 Uhr

RHEINISCHE POST

Gewerbesteueroasen im Fokus

Ermittlungen wegen mutmaßlichen Scheinsitzen von Firmen in Monheim

Monheim/Köln · Firmen sollen in Gewerbesteueroasen wie Monheim zum Schein ihren Sitz angemeldet haben. Es gab bereits Razzien. Der Finanzminister will Briefkastenfirmen stärker ins Visier nehmen.

17.06.2024 , 07:18 Uhr - 2 Minuten Lesezeit

Süddeutsche Zeitung Ich bin angemeldet Logout

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Gewerbesteueroasen

Grünwald, bitte zahlen

14. Februar 2023, 9:56 Uhr · Lesedauer: 3 Min.



Der Weg über die Grünwälder Brücke ist für Fußgänger und Radfahrer beschränkt. Foto: Martin Seppenschmidt/imagoeconomica

Die Vorortgemeinde gerät wegen ihres extrem niedrigen Steuersatzes für Firmen unter Druck. Staatsanwaltschaftliche Ermittlungen in den Fällen Andres Tandler und eines Essener Immobilienunternehmens könnten die Steueroase teuer zu stehen kommen.

Tax investigation of company headquarters in municipalities with a low trade tax rate

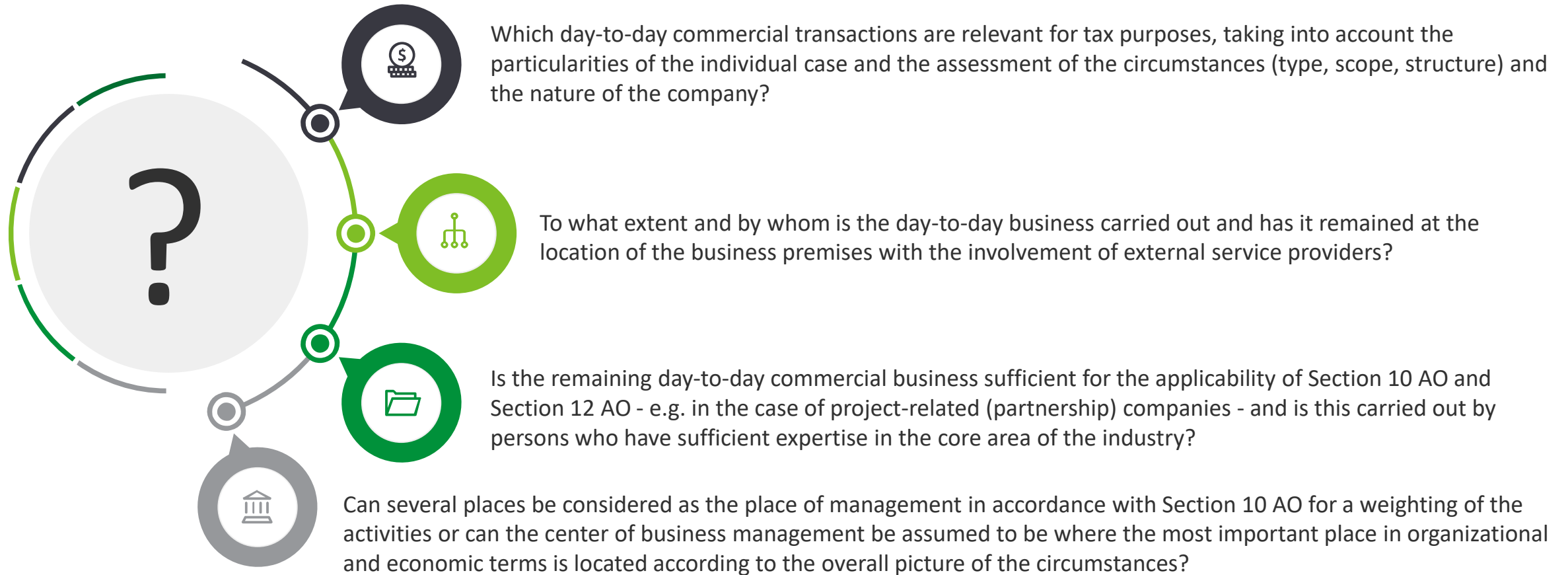
Examples of municipalities/cities with low trade tax rates



- **Brandenburg:** Marienwerder (250 %); Schönefeld (240 %); Zossen (270 %)
- **Bavaria:** Bad Wörishofen (240 %); Bad Wiessee (240 %); Grünwald (240 %); Kemnath (230 %); Rettenbach am Auerberg (230 %); Röttenbach (230 %); Stammham am Inn (209 %); Wolfertschwenden (230 %)
- **Mecklenburg-Western Pomerania:** Rögnitz (240 %); Schönbeck (220 %)
- **North Rhine-Westphalia:** Monheim (250 %); Leverkusen (250 %)
- **Saxony-Anhalt:** Lützen (240 %)
- **Schleswig-Holstein:** Hamfelde (250 %); Thumbby (250 %)
- **Thuringia:** Langenwolschendorf (200 %); Oppershausen (250 %)

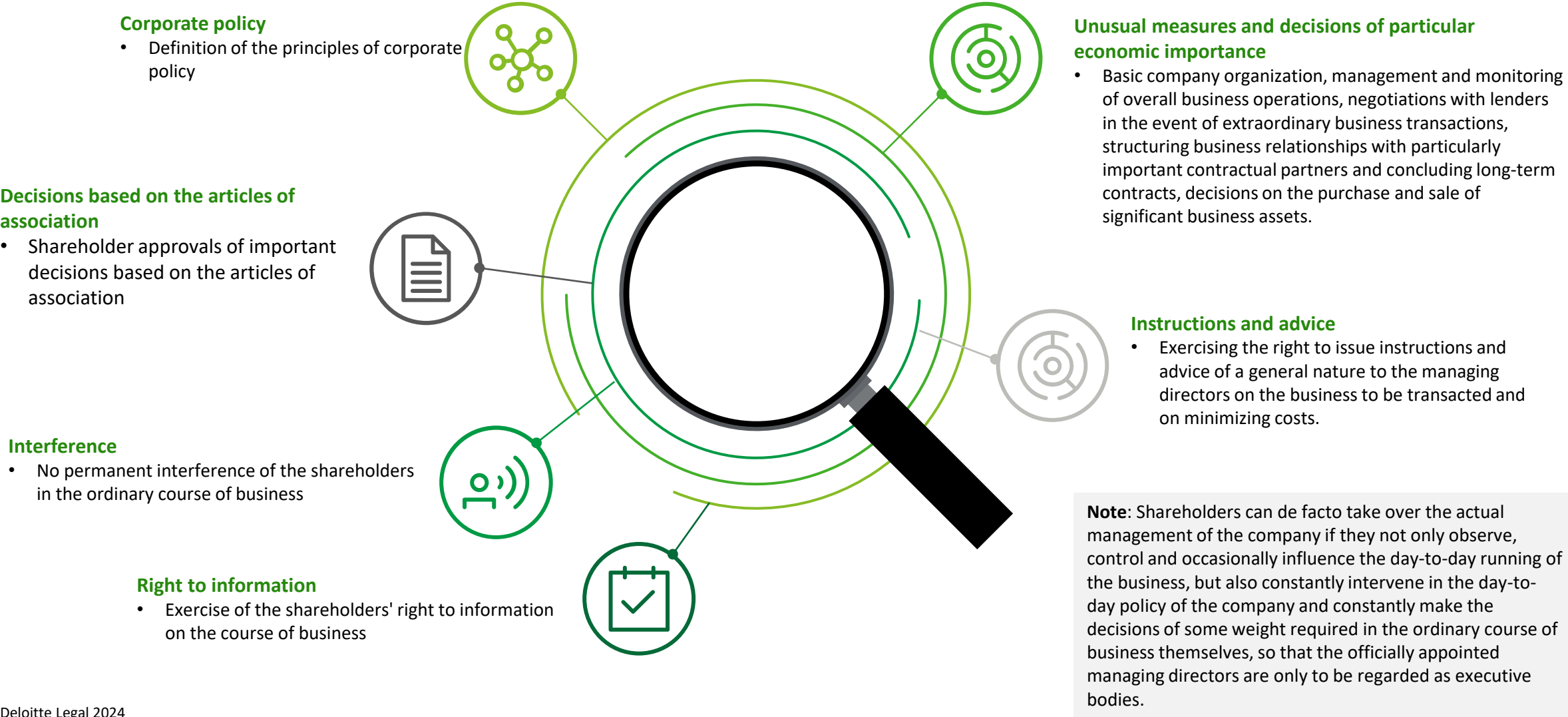
Investigation strategies of tax investigators in connection with trade tax oasis cases

Key questions regarding the place of management - also in the context of an appropriate Tax CMS



Investigation strategies of tax investigators in connection with trade tax oasis cases

Differentiation between taking over day-to-day business and shareholder decisions



Q & A



**Thank you very
much**
for your attention

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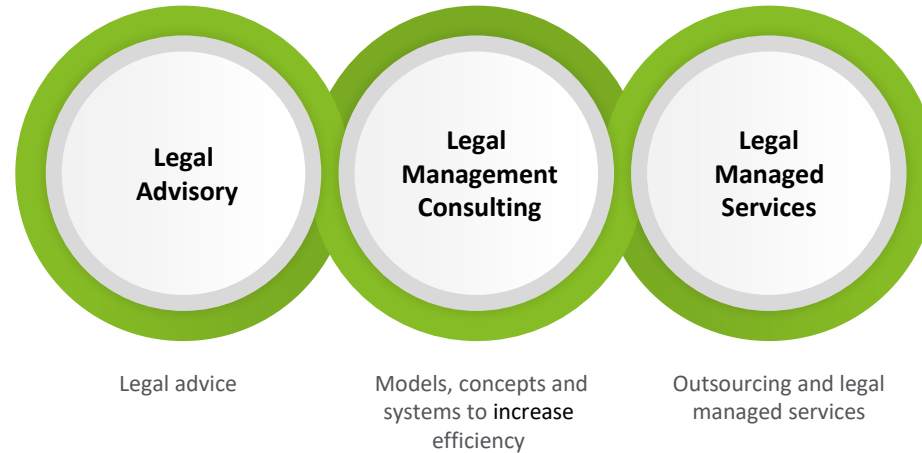
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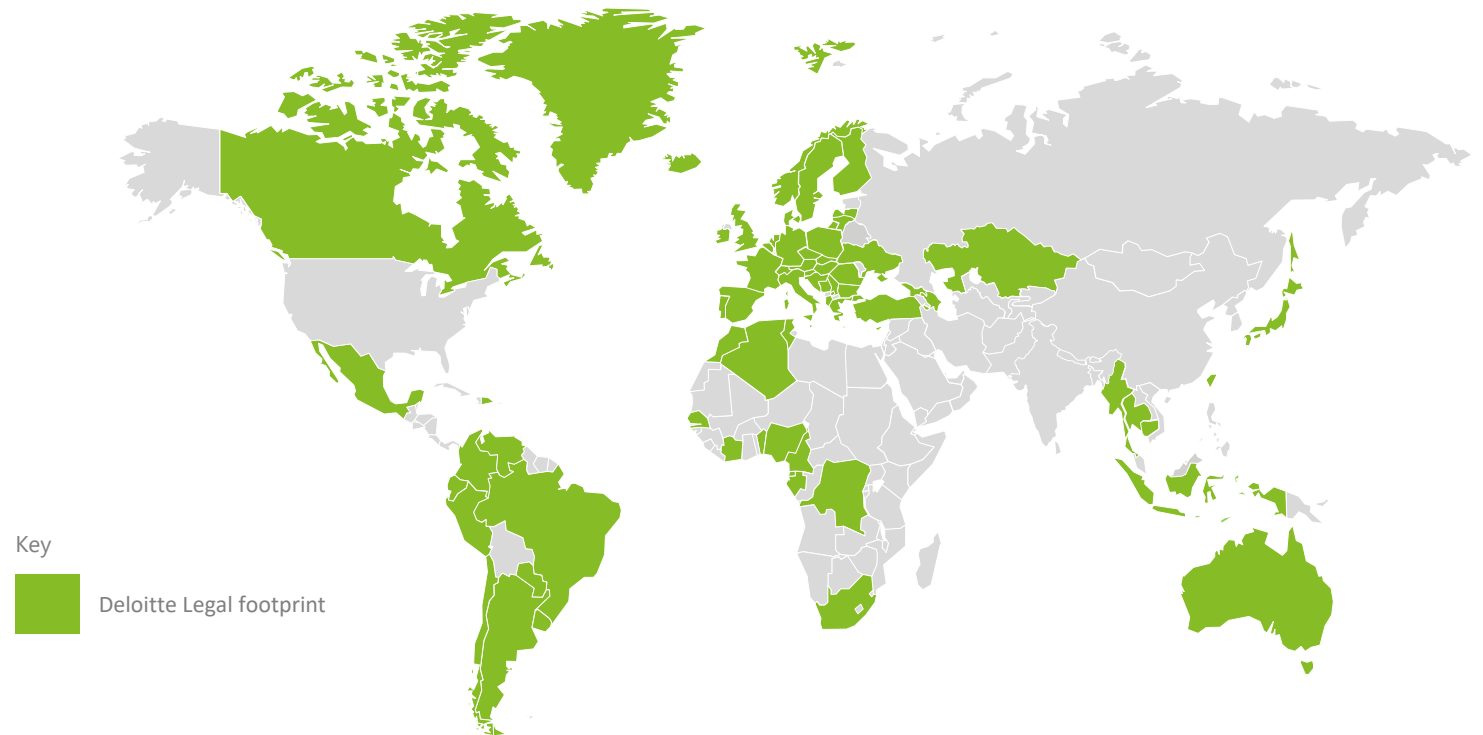


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