By PwC Deutschland | 26. Februar 2013

Criminal proceedings for evasion not excluded by previous administrative penalty

The ECJ has held that the principle of not trying a person for the second time does not exclude a criminal charge on a person who has already borne an administrative penalty for the same offence.

A Swedish taxpayer deliberately under reported income on his tax return. Consistently with this fraud, he also under reported VAT and social security dues. In due course, the manipulations came to light and the tax authorities reacted with a fine under the Tax Procedures Act in the form of a surcharge of up to 40% on the previous under-assessments. The public prosecutor followed with a charge under the Tax Offences Act which faced the taxpayer with a penalty of up to six years in prison. He attempted to claim that this second charge was contrary to community law in that it was in breach of the principle set forth in the Charter of Fundamental Rights of the European Union that no one may be tried a second time for a criminal offence of which he or she has already been acquitted or convicted in a binding verdict. The authorities replied that the taxpayer's evasion was entirely a matter for Swedish law and that community law was not relevant.

The ECJ has now held that community law is not, as such, directly relevant within a purely national context of unharmonised taxes, in this case income tax and social security charges. VAT, however, was levied on the direct transposition of the VAT Directive and thus fell within the jurisdiction of the ECJ. Since the present case involved VAT as well as other taxes, the ECJ was not barred from giving a ruling on questions put to it. Turning to the substance of the matter at hand, it held that the principle of no second trial applied to criminal charges only. If, therefore, the administrative penalty (surcharge on the tax due) were to be seen as such, there would be no bar to opening criminal proceedings against the taxpayer for the same offence. Whether the surcharge levied was administrative or criminal was a matter for the national court. The determination would be on one or three separate bases. A penalty was criminal if it was described as such in national law, if the nature of the offence warranted the designation as criminal, or where the nature and severity of the penalty inflicted were appropriate to crimes rather than to infringements.

The ECJ case reference is C-617/10 °*Akerberg Fransson*, judgment of February 26, 2013.

Schlagwörter

fine, prison, second charge, surcharge