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Bank officer not liable for probable evasion by customers

The Supreme Tax Court has upheld a lower court ruling absolving a bank officer from liability for his complicity in supporting the probable evasion of tax on interest income by customers.

The head of the customer securities administration of a major bank set up a system allowing customers to transfer their investments to the bank's subsidiaries in Switzerland and Luxembourg. The transfers were identified by code number or password, thus the owner of the investment could not be identified in Switzerland and Luxembourg. Identification after the event was not always possible in Germany either, as the tax investigators found out, following a raid on the bank's premises after their suspicions had been aroused. Ultimately, they were able to identify about 75% of all transferors. Of these, almost none had declared income from the investments transferred, although in about 6% of those cases, the failure to declare had not led to a loss of tax revenue. The tax investigators estimated the total probable evasion by the remaining unidentified 25% of the transferors on the basis of (conservative) extrapolations from the retrospective assessments on the persons indentified, and claimed the amount – together with evasion interest – from the officer as an accessory to the evasion. The local court dismissed this claim on the grounds that evasion had not been proven and the Supreme Tax Court has now upheld this judgment.

The court took the view that tax evasion was a crime that had to be proven in a specific case. Liability as an accessory was secondary to the liability of the perpetrator and thus depended upon the continued existence of that liability. The court did not absolutely refuse to accept extrapolations as a basis for estimating a total liability for mass evasion, but did say that strict standards of evidence were essential. Whilst almost all of the persons identified had not declared their income, 6% had not evaded their tax burden. The liability of those remaining might have become statute-barred or even been paid in the meantime (note: the court did not mention this, but there has been a generous tax amnesty for evaders of tax on investment income in the interim, which presumably encouraged at least some persons to come forward, if only to be able to repatriate their funds to Germany without fears of further investigation). All told, there was no certainty that a global calculation based on probabilities was sufficient proof of an actual liability. To this the court added the, for some, astonishing, rider that the actions of the plaintiff in making discovery more difficult and in some cases impossible, did not add to his legal liability.

[Note: This case goes back for over 20 years. In the meantime developments in the law on banking, particularly in countering money-laundering, have rendered an exact repetition of this form of aiding and abetting tax evaders impossible. However, the essential point of the case remains: the tax authorities must prove evasion – and not merely its probability – by an unknown party if they wish to make a known accessory financially liable.]

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Schlagwörter

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