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No trade tax “Organschaft” privilege for interest paid to foreign subsidiary

The Supreme Tax Court has held that restricting a trade tax privilege to domestic units of a tax group does not infringe a group’s freedom of Establishment.

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At the time in question one-half of long term interest paid (now one quarter of all interest paid over €100,000 p.a.) was disallowed for trade tax. However, there was, and is, an exception for interest paid within an *Organschaft*, as disallowance within a tax group would effectively mean a double charge on the income. This exception is, though, confined to domestic units within the group. A taxpaying parent faced with a disallowance of half the interest paid to its Belgian subsidiary protested that excluding it from the exemption in respect of an EU subsidiary placed it at an unfair disadvantage compared with a purely German group. This was a restriction on its freedom of establishment.

The Supreme Tax Court has now pointed out that the aim of the exemption is to prevent taxing internally generated profits within a tax group. It is therefore right to fully allow an expense deduction if the income is fully chargeable by the same taxpayer. In this case, however, the income was earned by the Belgian subsidiary and thus not charged to German trade tax. Since expense and income were separated, there was no reason not to follow the general rule of disallowing one-half of the interest on long term loans. There was no question of double taxation within Germany and thus no restriction on the taxpayer's fundamental freedom of establishment.

Supreme Tax Court judgment I R 30/13 of September 17, 2014 published on December 18

Schlagwörter

Organschaft, long-term interest, trade tax