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By PwC Deutschland | 15. Dezember 2016

Insolvency: no right of protection for legitimate expectations following an enforcement of a VAT claim

VAT claims may also be asserted in insolvency proceedings against a GmbH, if the GmbH, which had previously been treated as a controlled company in a fiscal unity (Organschaft), which was subsequently not deemed to exist, actually received the VAT owed by it from the assumed controlling company (Organträger).

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According to the Federal Tax Court, no protection of legal expectations may be claimed in this situation despite a change in the application of the law on the Organschaft through a decision of the Supreme Tax Court in the interim.

Tax authorities register a VAT claim in the insolvency table

The shareholders of a GmbH, over whose assets insolvency proceedings had been opened in June 2009, comprised individuals and a GbR (a civil law association), who were also the sole members of a limited partnership (KG). The KG had leased assets from the GmbH for the purposes of its trade. Up until the end of 2008 the GmbH and the KG had assumed that the KG was the controlling enterprise of the GmbH. In May 2009 the KG informed the tax authorities that the organisational integration necessary for an Organschaft was missing. The tax authorities then registered the VAT claims for 2009 in the insolvency table.

The receiver, as plaintiff, raised an objection. The Tax Court refused the related appeal and held the GmbH liable as taxpayer for the supplies carried out by it, on the grounds that there was no financial integration for the recognition of an Organschaft.

The GmbH and the plaintiff attempted to rely on the right of protection for legitimate expectations, because the Supreme Tax Court had altered its case law vis-à-vis the existence of an Organschaft between sister companies in a decision (V R 9/09) made on 22 April 2010. The GmbH could not, they said, be held accountable for the fact that the KG had assumed at the beginning of 2009 that no Organschaft existed. The Supreme Tax Court, however, could not accept the plaintiff's argument.

No Organschaft possible between sister companies.

The Court confirmed its judgment in the above-mentioned case (i.e. no Organschaft possible between sister companies), noting that the decision was also in line with EU law and with case law of the European Court of Justice on the issue. However, the Court also considered itself obliged to refuse the appeal for the following reasons:

- Setting aside the question of financial integration and assuming for a moment that despite Supreme Tax Court case law the Organschaft had existed at an earlier point in time, the GmbH would in any event no longer have met with the conditions to (potentially) be a controlled company (Organgesellschaft) as soon as a temporary receiver with a right to reserve his approval was appointed.
- The Court stated that consideration should also be given to the fact that the tax authorities had already refunded the VAT, which the KG had paid over to the tax office at the time it had assumed that an Organschaft existed and that the Plaintiff had already successfully required the KG - on the basis of existing contracts between the KG and the GmbH – to pay the VAT refund received into the insolvency estate. (The Federal Supreme Court reached a decision on 15 October 2014 XII ZR 111/12).

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Supreme Tax Court decision of 24 August 2016 (V R 36/15) published on 14 December 2016

Schlagwörter

Protection of legitimate expectations, VAT Organschaft