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By PwC Deutschland | 29. Januar 2019

Payments-on-account received by a insolvency practitioner do not lead to an immediate profit realisation

Where an insolvency practitioner prepares an annual balance sheet, his claim to a payment-on- account is to be treated as a part of the final fee and does not lead to a realisation of profits upon receipt.

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The Supreme Tax Court had to consider two questions. Firstly, whether a claim for remuneration according to Section 9 of the Insolvency Practitioners' Fee Regulations (IPFR) should be capitalised as a payment-on-account when it is received by an insolvency practitioner, who prepares a balance sheet, or whether the profit is to be realised in the profit and loss account. Secondly, the question arose as to the recognition for tax purposes of a sub-holding in a silent partnership and whether the profit share of the sub-partners should be considered a special business expense of the main partnership.

The appellant is a partnership ("Gesellschaft bürgerlichen Rechts" – "GbR") providing business advisory and insolvency services. The partners A and B each held a 50% interest in the partnership. B and his wife set up an internal special silent partnership. The tax office deemed the income from the payment-on-account as realized when received. The holding in the internal special silent partnership was not recognised by the tax office as it could not pass the arms' length test.

Insolvency practitioner's claims

The claim of the insolvency practitioner under Section 9 IPFR constituted a simple payment-on-account for the final fee, which did not give rise to a profit realisation in the year under review.

Profits are realised if the service provider performs the services agreed in accordance with the contract. This will be the case where the contractual services – excluding for minor ancillary services – have been performed in full. Profits will also be realised where a partial performance of the agreed service is provided and such performance relates to partial services which may be charged separately and which can be separately invoiced. Furthermore partial performance must relate to an independent claim for remuneration according to the fee regulations or according to a special agreement. This may not be assumed where the claim for the services (partially) performed actually constitutes a payment-on-account or an advance. Payments-on-accounts are in this sense only preparatory inputs as part of a pending contract.

An insolvency practitioner can also perform services for which he receives a remuneration. This remuneration is part of a total consideration for the complete service during the whole of insolvency procedure and completed at the end of the activity. This will be the case where the insolvency court rules on the completion of the insolvency proceedings. The wording of Section 9 IPFR has no impact on this as it does not provide for a partial performance, which can be separately invoiced.

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Silent sub-partnership

On the question whether a silent sun-partnership can be recognised for tax purposes, the Court rejected the application. For the recognition of profit shares of a sub-partner as special business expenses of the main partners, it was necessary for the sub-partners to make a contribution, which had not been the case here.

Source: Supreme Tax Court decision of 7 November 2018 (IV R 20/16) published on 23 January 2019.

Schlagwörter

Income Tax Act, partnership, payments on account