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By PwC Deutschland | 03. Mai 2019

Refinancing by leasing companies: treatment of notional interest portion of leasing instalments

According to a decision of the Supreme Tax Court, the leasing instalments paid in cases of refinancing by a leasing company were also to be included in the calculation of the trade tax base.

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The bank privilege in the Trade Tax Implementation Ordinance did not apply to the notional interest portion of the leasing instalment.

The appellant, ("GmbH"), operated a business leasing assets to end users. It was not in dispute that the GmbH was a financial services entity within the meaning of Section 1 (1a) of the Banking Act. For the purposes of refinancing, the GmbH sold the assets to another leasing company and leased them back for onward letting to the end user (referred to in the judgment as the "two level model"). Following a tax audit, the tax office had added the full leasing instalments back to the trade income in accordance with § 8 no. 1 (d) of the Trade Tax Act. The appellants appeal to the tax court was unsuccessful as was the appeal to the Supreme Tax Court.

Under Section 8 No. 1 (d) of the Trade Tax Act, a portion of "rental and leasing payments (including lease instalments) for the use of movable fixed assets owned by another" is to be added back to the profit from trading operations. According to the Court, the term "use of moveable fixed assets" must also be considered to include assets, which are leased or rented out to another person for the purposes of generating income. The legislation did not provide any points of reference for assuming that this did not apply to the "two level model". According to the Court the meaning of Section 8 No. 1 **(d)** of the Trade Tax Act was unambiguous. If the legislators had wished to make an exception to the add-back under this provision in respect of 'passed through' leased assets, they could have expressly included the exception in the wording of the law, as they did for licences under Section 8 No. 1 **(f)** which provision expressly excludes the add-back of payments for licensing rights, which are specifically intended to be licensed on to third parties.

Furthermore, in the opinion of the Court, the exception for financial services entities provided for in Section 19 (4) of the Trade Tax Implementation Ordinance relating to interest payments did not apply. Whilst it was true that the appellant was a financial services company within the meaning of the Banking Act, the add-back of the leasing instalments pursuant to § 8 No. 1 **(d)** Trade Tax Act did not constitute interest payments pursuant to § 8 No. 1 **(a)**. The provision of Section 19 (4) of the Trade Tax Implementation Ordinance was not to be interpreted as extending the trade tax privilege for financial services entities to **all** financing components of the other add-backs under Section 8 No. 1.

Section 19 (4) of the Trade Tax Implementation Ordinance was intended to ensure that, in the context of Section 8 No. 1 **(a)** Trade Tax Act (add-back of interest payments), leasing businesses should not be placed in a worse position than credit institutions vis-à-vis their refinancing. Section 19 (4) of the Trade Tax Implementation Ordinance expressly eliminated the add-back for interest payments under Section 8 No. 1 **(a)** Trade Tax Act; however, an elimination of the add-back of leasing instalments was not included.

Finally the Court noted that, if, in arrangements using the two level model, the trade tax privilege (Section 19 (4) of the Trade Tax Implementation Ordinance) proved ultimately only to be advantageous for the leasing company owning the assets and did not also apply to the leasing instalments paid by the leasing company operating as a sub-lessor, this was entirely due to the structure chosen by the company itself.

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