By PwC Deutschland | 07. November 2019

No trade tax add-back for letting of hotel rooms to tour operators

According to the Supreme Tax Court in its ruling of 25 July 2019 (III R 22/16), published on 7 November 2019, fees paid by a tour operator to hoteliers for the provision of hotel rooms are not subject to the trade tax add-back.

Under Section 8 No. 1 Letters d and e of the Trade Tax Act, rental and leasing payments made for the use of moveable and immoveable assets which have previously been deducted from the income tax/corporation tax base, are to be partially added back to trade tax base, where the asset would be treated as an asset in the balance sheet of the taxpayer, if he actually owned the asset.

The appellant, a GmbH, was a tour operator and organizer of package tours. For this purpose, it concluded contracts with other service providers in Germany and other European countries for typical advance travel/tourist services, in particular overnight stays, tourist transport, meals, support and the provision of activities at the tour destination. In its trade tax return for 2008, the appellant only added back the rent it paid in respect of its business premises. The fees paid to the hoteliers were not included in the add-backs. At the subsequent tax audit, however, the tax office took the view that hotel services were not "purchased" as a whole, but that part of the fee paid to the hoteliers was attributable to the "rental" of hotel rooms. Accordingly, it increased the trade tax base by the portion of these rents provided for by law. In the context of an interim judgment, the lower tax court ruled, inter alia, that the fees paid by the plaintiff to the hoteliers included rents and that the relevant portion had to be added back.

The Supreme Tax Court, however, took a different view and allowed the appeal. The add-back of the payments not only assumed the existence of a rental or leasehold agreement, but, through a fiction, presupposed the rented or leased asset would have to be included as a fixed asset in the taxpayer's balance sheet if he actually owned the asset. The Supreme Tax Court held that this was not the case on the basis of the facts before them which only involved the short-term provision of the hotel rooms, whereby the ownership position of the appellant could only be assumed for a correspondingly short-term. In order to allocate assets to the fixed or current assets in the balance sheet, the specific business object of the enterprise had to be taken into account and - where possible - attributed to the operating circumstances of the taxpayer.

In this respect, the Court held that a decisive point was the fact that the business model of a tour operator such as the appellant did not typically require long-term use of the assets provided by the hoteliers. On the contrary the temporary use of the assets better served the tour operator's need to be able to constantly adapt to market requirements that are subject to change (such as changes in the customer requirements or in factors at the tour destination).

The case was referred back to the tax court as it had only issued an interim decision on individual questions.

Source:

Supreme Tax Court decision of 25 July 2019 - III R 22/16 published on 7 November 2019

Schlagwörter

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