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By PwC Deutschland | 13. September 2022

Liability of the Controlled Company arising after the termination of an Organschaft

In a recent case, the Supreme Tax Court decided that the liability of a controlled company (subsidiary) in a tax consolidation group (“Organschaft”) for the tax liability of its controlling company (parent in the Organschaft) is not necessarily limited to such taxes which arose during the existence of the Organschaft. The controlled company may be liable to the extent that the parent is required to pay tax on the controlled company’s turnover and may deduct input tax amounts from invoices for services obtained by the controlled company.

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Background

The dispute is whether a former controlled company can also be held liable for the VAT which had not arisen for tax purposes during the existence of the Organschaft,

The plaintiff had been appointed as a provisional liquidator over the assets of a GmbH by order of the competent local court.

The GmbH had previously been part of a VAT Organschaft of A-GmbH as a controlled company. Insolvency proceedings had also been instigated in relation to the assets of A-GmbH.

At the time of the opening of insolvency proceedings against A-GmbH, there were VAT arrears, inter alia, from the preliminary VAT return for March 2014. The tax office therefore filed a secondary liability claim in the same amount against the plaintiff for the VAT arrears of A-GmbH. Since the plaintiff contested the claim in full, the tax office issued the assessment notice for contested amounts.

Following an unsuccessful appeal to the tax office, the plaintiff appealed to the tax court, where the claim was successful.

Decision

The Supreme Tax Court allowed the appeal, reversed the decision of the lower court and referred it back.

According to Section 251 (3) of the General Tax Code (GTC), tax liabilities claimed during insolvency proceedings as an insolvency claim, must if necessary be established by means of a written administrative act. This applies, inter alia, to cases where a tax liability had already been established at the time the insolvency proceedings were opened but had not yet been assessed and the insolvency administrator objected to the claim filed in the schedule. If the assessment notice becomes non-appealable, the objection to the schedule is nullified.

The object of the assessment is the assertion of a tax liability as an insolvency claim for the purposes of taking it into account during the distribution of the insolvency estate. The administrative act pursuant to Section 251 (3) GTC thus contains two determinations, firstly that a claim from a tax liability under Section 37 (1) GTC exists and secondly that it is an insolvency claim pursuant to Section 38 Insolvency Code.

Tax liability claims under Section 37 (1) GTC also include secondary liability claims. Pursuant to Section 73 Sentence 1 GTC, a controlled company is liable for taxes of the controlling company for where the tax group between them is of significance for tax purposes.

Taxes of the controlling company "for which the Organschaft between them is significant for tax purposes" arise therefore - according to the wording and systematic of Section 73 GTC in conjunction with Section 2 (1) Sentence 1 and Section 2 No. 2 Sentences 1 and 3, Section 18 of the German VAT Act (VATA) - where the parent is required to pay tax on the controlled company’s turnover and may deduct input tax amounts from invoices for services obtained by the controlled company. Consequently, the controlled company is liable for these taxes in accordance with Section 73 GTC.

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This is also in line with the purpose of the provision. Section 73 GTC is intended to compensate for the tax risks associated with the transfer of legal tax responsibility to the parent (controlling company). The access under secondary liability rules to the assets of the controlled company is intended to avoid a tax fallout in the event of insolvency of the controlling company, which could arise as a result of asset shifting within the group of controlled companies.

Without providing further substantiation, the Supreme Tax Court did not follow the view expressed in the literature - - that the liability of the controlled company for the taxes of the controlling company only includes those taxes that arose during the duration of the controlling relationship.

Whether an insolvency claim exists depends on when the legal basis for the disputed claim was established. To establish a claim under insolvency law, neither the underlying tax liability nor the issuance of the secondary liability notice is relevant; rather the decisive question is whether the act or omission related to the liability occurred before the opening of the insolvency proceedings. The nexus for secondary liability under Section 73 Sentence 1 GTC is the existence of the Organschaft.

Applying the principles described above, the Supreme Tax Court was unable to conclusively decide the amount of liability of the GmbH as a former tax group company under Section 73 Sentence 1 GTC. The tax court did not make any findings on the extent to which the advance VAT payment for March 2014 comprise taxes of the Organschaft rather than the original taxes of the former tax group parent.

Source

Supreme Tax Court, ruling of April 5, 2022 (VII R 18/21), published on 8 September 2022.

Schlagwörter

VAT group, secondary liability, tax consolidation group