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By PwC Deutschland | 14. Oktober 2022

# ECJ confirms German penalty charges for failure to submit sufficient cross border documentation

**The European Court of Justice (ECJ) decided that the German penalty surcharge for failure to present proper documentation in cross border business relations is in line with the EU principle of freedom of establishment. Although there is a restriction because the documentation requirements and the associated penalty only apply to taxpayers engaged in business relationships with related parties abroad, the measures are proportionate, don’t go beyond what is necessary to attain the objective pursued and are necessary to ensure a balanced taxation powers between Member States.**

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## Background

The case referred to the ECJ from the Bremen Tax Court relates to the questions whether the penalty surcharge under Section 162 (4) Fiscal Code due on failure to present proper documentation in cross border business relations is in line with the freedom of establishment in Art. 49 TFEU and the freedom to provide services (Art. 56 TFEU). Violation of the cross-border documentation requirements in Sec. 90(3) Fiscal Code was punished by imposing penalty surcharges (Sec. 162 (4) Fiscal Code). Those could not be furnished in a sufficient manner by the plaintiff and thus the tax office imposed the surcharge in the amount of 5% of the amount to be adjusted.

According to Sec. 162(4) Fiscal Code a surcharge is to be imposed which is at least 5 per cent and at most 10 per cent of the excess income determined, but not less than EUR 5 000, and which, in the event that usable records are submitted late, is up to EUR 1 000 000, but not less than EUR 100 for each full day of delay, whereby the imposition of a surcharge is to be waived only if the non-compliance with the record-keeping obligations appears to be excusable or if any fault involved is only minor. One question comes to mind here: Are there not more lenient or other means available (e. g. estimate to the disadvantage of the taxpayer)?

More on the ECJ referral and on the case of dispute to be found in our **blog post** of 6. August 2021.

## ECJ decision

*The ECJ ruled that the provision of Article 49 TFEU on the freedom of establishment does not preclude the German regulations, specifically the documentation obligation and the irrefutable presumption by the tax authorities in case of default that the taxable income of the taxpayer is higher than the declared income (here: estimation of tax base to the disadvantage of the taxpayer) and the imposition of a penalty surcharge of at least 5% up to 10% of the determined excess amount of income, with a minimum amount of €5,000.*

***In detail the ECJ had the following comments, as to the***

***… obligation to provide fiscal documentation***

Although such a difference in treatment constitutes a restriction on freedom of establishment this measure is nevertheless an appropriate means for ensuring the attainment of the objective in question and does not go beyond what is necessary to attain that objective.

***… penalty surcharge***

Imposing a surcharge of a sufficiently high amount appears to the ECJ appropriate to deter taxpayers subject to the obligation to provide fiscal documentation from disregarding that obligation and, thus, of preventing the Member State of taxation being deprived of the possibility of monitoring cross-border transactions effectively between affiliated companies to ensure a balanced allocation of the power of taxation between the Member States. To the ECJ this is supported by the fact that the tax surcharge is not applicable if the infringement of the obligation to provide fiscal documentation is excusable or if the fault is

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only minor.

The fact that the German legislation - in case of non-compliance - also provides for an adjustment of the taxable income to the disadvantage of the taxpayer cannot justify a different interpretation. Those rules are different in nature from that of the penalty surcharge since they are not intended to penalize failure to comply with the obligation to provide proper documentation but rather to correct the amount of the taxpayer's taxable income.

**Source**

The ECJ case reference is **C-431/21**, *Finanzamt Bremen* judgment of 13 October 2022.

**Schlagwörter**

cross border transactions, documentation