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By PwC Deutschland | 24. Oktober 2022

Trade tax liability of real estate trading partnership not before acquisition of first property

The Supreme Tax Court decided that the actual trade tax liability of a real estate trader arises at the earliest with the conclusion of the purchase agreement for a first property. It is only after the completion of the purchase that he is in a position to offer his services on the market.

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Background

The plaintiff is a limited partnership (KG) which was founded early in 2011 and operates as a commercial real estate trader. According to the Articles of Association, its business purpose is the acquisition, management and sale of real estate, land, and buildings. The financial year (fiscal year) deviates from the calendar year and runs from 1 June to 31 May of the following year. In fiscal 2011/2012 (1 June 2011 to 31 May 2012), it had prepared the acquisition of a first plot of land, but the corresponding purchase agreement was not concluded before June 2012, thus in the 2012/2013 fiscal year. The tax office did not recognize the loss of around one million euros declared by the plaintiff for the 2011/2012 fiscal year. It was of the opinion that the acquisition activities undertaken by the plaintiff in the 2011/2012 fiscal year did not yet give rise to a trade tax liability. The assessment of the declared trade loss (to be carried forward) was therefore denied. The Tax Court of Saxony-Anhalt upheld the appeal by saying that, in the 2011/2012 fiscal year, the plaintiff had undertaken activities that were objectively directed at preparing the envisaged business transactions, namely by hiring the real estate agency in March 2012, viewing the property in April 2012, negotiating the purchase agreement, and ask the notary to draft the purchase agreement for the land in May 2012.

Decision

The Supreme Tax Court confirmed the view of the tax office and overturned the decision of the tax court which led to the dismissal of the claim brought by the plaintiff.

The factual trade tax liability of a business does not commence before all the requirements of a business enterprise have been met. It follows that losses to be carried back, and hence also loss carry forwards, can only be effectively assessed from the time the material trade tax arises. This is the case as soon as a business carries on domestic operations. A commercial real estate trader commences his advertising activity at the earliest with the acquisition of the first property. It is therefore not the beginning of the acquisition process that is important, but rather its completion, which is marked by the conclusion of the purchase agreement. The completion of a valid purchase agreement is the only decisive aspect because this puts the entrepreneur in a position to offer his services on the market. In contrast, preparatory activities that eventually lead to the conclusion of the relevant purchase agreement are not sufficient. The Supreme Tax Court went on to say that these principles apply to both sole traders and partnerships and irrespective of the legal form of their partners.

The business activities of the plaintiff in 2011/2012 were limited to the issue of profit participation rights to finance its business purpose (i. e. the commercial real estate trading) and to initiate a real estate purchase. However, the interest-bearing investment of the profit participation capital does not qualify as an independent promotional activity to be regarded as a true asset management activity which already had commenced in fiscal 2011/2012.

Source

Supreme Tax Court decision of 1 September 2022 (IV R 13/20), published on 20 October 2022.

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Schlagwörter

Real estate enterprises, Trade Tax Loss Carry-Forward