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By PwC Deutschland | 21. März 2023

Findings during cash inspection may warrant subsequent tax audit

Similar to a VAT inspection pursuant to Section 27b of the German VAT Act, the review of the cash-system (here: at a restaurant business) does not require prior notice or the specification of reasons. This was decided by the Hamburg Tax Court. In addition, the court held that the cash inspection allows an automatic follow-up tax audit if warranted by the facts determined during the cash inspection.

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Background

On September 15, 2021, the staff from the tax authorities conducted a cash inspection at the premises of the plaintiff, a limited liability company (GmbH), pursuant to Section 146b of the German Fiscal Code (Fiscal Code). The wording of Sec. 146b is clear and plain as it states that "*to verify whether cash receipts and cash payments are being properly recorded and accounted for, public officials so assigned by the revenue authorities may – during regular business and working hours, without advance notice and outside the framework of an external audit – enter the business properties and business premises of taxpayers for the purpose of determining facts that may be relevant for taxation (cash inspection)*". Sec. 146b (3) for that matter provides further that "*if the findings of a cash inspection provide grounds to do so, the cash inspection may be turned into an external audit in accordance with section 193 without the need for a prior audit order. Notification that a cash inspection is being turned into an external audit shall be provided in writing*."

The review at the plaintiff's premises included the compliance of the cash accounting. The employees did not provide the auditors with the records requested. They stated that these documents were locked in the office of the managing director and that only the managing director had a key to the office. The auditors handed over a list of the documents to be provided. The plaintiff subsequently handed over the documents for the cash inspection.

By notice dated 11 October 2021, the tax office informed the plaintiff of its intention to continue and expand their review by way of an ordinary tax audit pursuant to Sec. 146b (3) Fiscal Code which prescribes that, if there is considerable evidence found during the cash inspection, the official review may be continued as a regular tax audit without prior notification. The transition to an external audit shall be indicated in writing.

Decision

The Hamburg Tax Court dismissed the action as unfounded on the grounds that the requirements for a change to an ordinary tax audit pursuant to Section 146b (3) Fiscal Code had been met. The findings during the cash audit had given sufficient reason to proceed with a regular tax audit because the requested documents had not been handed over to the auditors at the due time. The court further pointed out that the order for the transition to the tax audit is at the discretion of the tax authorities and that this can be verified by the court only to a limited extent.

Moreover, the taxpayer is not in a worse position as if he had received a "normal" tax audit notice pursuant to Sec. 196 Fiscal Code. In addition, the court indicated that Sec. 146b (3) Fiscal Code is not a provision with punitive effect.

It is not necessary that the findings during the cash audit are clear and indisputable facts, as it is not the responsibility of the internal service or the auditor who performs the cash inspection to completely check documents which are presented later and separately and apart from an external audit. This is part of the tasks of a tax audit.

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In conclusion the Hamburg Tax Court notes that a valid reason to continue the cash inspection by way of a regular tax audit can be justified if reservations or inconsistencies to the cash records and entries arise, if deficiencies in cash management are found, documents are not submitted or in the case of the taxpayer's lack of cooperation during the cash audit.

During the cash inspection in the case of dispute, the auditors were not provided with the requested documents. This alone would have been reason enough to order a follow-up tax audit. In the opinion of the court, the effect of not handing over the requested documents is tantamount to denying the auditor access to the taxpayer's offices.

Case finally closed?

No. From the outset it seems an ostensibly clear-cut case when looking at the relevant legal provisions which are explicitly laid down in the German Fiscal Code. It was, among other things, the unambiguous wording of the law that caused the judges to deny the plaintiff an appeal to the Supreme Tax Court. Nevertheless, the plaintiff has submitted a complaint relating to non-admission before the Supreme Tax Court (pending case reference: XI B 93/22).

Source

Hamburg Tax Court, judgement of 30 August 2022 (6 K 47/22), published on 2 March 2023.

Schlagwörter

tax audit