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By PwC Deutschland | 20. Juli 2023

Trade tax addback of costs for grant of cable retransmission rights

In a most recent decision, the Supreme Tax Court held that payments for granting cable retransmission rights may be added back for trade tax purposes pursuant to Section 8 No. 1 (f) of the German Trade Tax Act.

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Background

The parties are in dispute as to whether payments to GEMA (the German umbrella organization for musical performances and musical reproduction) and VG Media (which is another company for the transfer of cable retransmission rights with focus on the exploitation and protection of copyrights and ancillary copyrights) are to be added back to taxable trading income according to Section 8 No. 1 (f) Trade Tax Act (TTA). Section 8 No. 1 (f) provides *for the add-back of part (i. e. 6,25 percent) of the costs of the use limited by time of rights (in particular concessions and licenses…**except** for licenses that solely permit the grant of the rights to third parties)*.

In the trade tax returns of the plaintiff for assessment periods 2008 and 2010, payments to GEMA as well as VG Media were not added back to the trading profit subject to trade income tax, but rather held as wayleave pass-through rights in the context of the identical decrees issued by the highest tax authorities of the German Federal States. Following a tax audit, the local tax office took a different view and held that the payments must in part (6,25 percent) be added back to the trading income subject to trade income tax.

The lower tax court upheld the action brought by the plaintiff. It was of the opinion that cable retransmission rights are indeed rights within the meaning of § 8 No. 1 f TTA. However, these rights are nevertheless used and thus exhausted with each retransmission. They are therefore not transferred for a specific and limited period of time.

Decision

The Supreme Tax Court allowed the appeal brought by the tax office and held that the preconditions for the trade tax addback pursuant to Section 8 No. 1 (f) TTA are met. The add-back of fees for granting the cable retransmission rights is not in conflict with the general purpose of the TTA, namely to subject to trade tax the German business enterprise and its objective earning capacity.

Contrary to the opinion of the court of first instance, these rights were granted for a limited period of time. Also, the expenses were incurred for the transfer of rights. The trade addback of those costs, i. e. those for the transfer of cable retransmission rights, is thus not in conflict with the meaning and the legislative intention of Sec. 8 No. 1 f TTA.

The court elaborates further by stating that the cable retransmission right is a copyright-protected entitlement to the publication of a work. It is not an unprotected (legal) position. Under the German Copyright Act (CA) the author's exclusive right of communication to the public of his work (Section 15 (2) sentence 1 CA) includes the broadcasting right (Section 15 (2) sentence 2 no. 3 CA), i.e. the right to make the work available to the public by radio, such as sound and television broadcasting, satellite broadcasting, cable broadcasting or similar technical means (Section 20 CA).

The broadcasting right includes the right to cable retransmission pursuant to Section 20b (1) sentence 1 CA, i.e., the right to retransmit a broadcast work as part of a program retransmitted simultaneously, unchanged and in its entirety by cable systems or microwave systems. The same applies to the ancillary copyright of

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broadcasting companies. Under Section 87 (1) No. 1 CA, they have, among other, the exclusive right to retransmit their radio broadcasts and make them available to the public.

The communication to the public which is required for cable retransmission already exists if the transmission takes place by means of a new technical process. If this is the case, no further examination is required to determine whether the work is reproduced for a new audience.

The cable retransmission right is another transferable right within the meaning of Section 8 No. 1 letter f TTA. This is evident, as far as the author's cable retransmission right is concerned, from Section 20b (2) sentence 1 CA and for the corresponding right of the broadcasting organizations from Section 87 (1) no. 1, (2) sentence 1 CA.

The cable retransmission rights at issue were also not intended exclusively for transfer to third parties. The right to use the cable retransmission right related solely to the plaintiff as a cable operator; the broadcasts transmitted and their content in detail are not decisive, and the question whether the plaintiff transferred rights to third parties (the cable customers) is thus not relevant here.

Lastly and according to the contractual agreements with GEMA and VG Media, the right of use was only granted for a limited period.

Source:

Supreme Tax Court, decision of 23 February 2023 (IV R 37/18), published on 13 July 2023.

Schlagwörter

Licensing rights, trade tax addback