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Trade tax banking privilege also for group financing company

According to a ruling of the Supreme Tax Court the sole criterion for claiming the banking privilege for trade tax purposes is that the assets from banking transactions and the purchase of monetary receivables outweigh the assets from other business activities. With its decision the court thus keeps to the strict wording of the relevant statute.

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Background

To avoid or at least mitigate additional tax costs and thereby ensuring competitiveness for the financial industry, the so-called banking privilege in Section 19 of the Trade Tax Implementing Regulation (*Gewerbesteuer-Durchführungsverordnung*) basically exempts credit institutions as defined in more detail in Section 1 (1) GermanBanking Act (*Kreditwesengesetz - KWG*) from the interest addback and provided certain requirements are met.

Section 1 (1)of the Banking Act defines credit institutions as undertakings which conduct banking business commercially or on a scale which requires commercially organized business operations. Section 2 (1) deals with the exceptions and addresses those institutions which are not considered as credit institutions and the activities which are not genuine banking transactions within the meaning of Section 1. Included in these exceptions are, i. a., "undertakings which conduct banking business solely with their parent undertaking or with their subsidiaries or affiliated undertakings “.

Case of dispute

The case before the Supreme Tax Court dealt with the question as to whether the "banking privilege" can also be claimed by intra-group financing companies in the years 2009 through 2017.

The plaintiff provided various services predominantly towards other members of the group. In addition, it effectively acted as a financing company within the group and as such fulfilled the requirements of a credit institution pursuant to § 1 of the Banking Act. In a comparison of the company’s assets, the banking business outweighed the non-banking business. In contrast, the plaintiff's sales revenues and income from its activities as service provider were higher than those from its financing business.

The tax office and the Hessian Tax Court hence concluded that the plaintiff was not a company essentially engaged in monetary and credit transactions and therefore could not claim the banking privilege. However, the Supreme Tax Court took a different view.

Decision of the Supreme Tax Court

The Supreme Tax Court held the plaintiff's appeal to be justified. In summary, the court had the following to say on the matter.

Pursuant to Section 8 no. 1 letter a Trade Tax Act (TTA), one fourth of the remuneration for debt is added back to the trading profit subject to trade tax. However, this add-back applies only to a very limited extent to banks in view of their extensive deployment of borrowed funds (the „banking privilege“).

One of the prerequisites for claiming the banking privilege is that the company must be a credit institution within the meaning of Section 1 of the German Banking Act and essentially carry out genuine banking transactions. Whether the company mainly conducts banking business must be determined solely based on a comparison of assets as set out in Section 19 (2) of the Trade Tax Implementation Ordinance and not on the basis of turnover or earnings figures. Taking this into account, the plaintiff fulfilled the prerequisites of

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the banking privilege.

The add-back in accordance with Section 8 No. 1 TTA primarily affects companies who by their very nature have a considerable demand for debt financing – even though borrowing is the core part of their business activity. The banking privilege of Section 19 (1) Trade Tax Implementation Ordinance therefore exempts banks from adding back interest under certain conditions and in accordance with Section 1 (1) of the Banking Act.

Note: In the years in dispute, a group financing company which was not subject to banking supervision could therefore also claim the banking privilege. This was for the following reason: According to Section 2 (1) No. 7 Banking Act, a company is deemed **not** to be considered as credit institution within the meaning of Section 1 GBA if it conducts its banking business solely with parent undertaking or with their subsidiaries or affiliated undertakings ("intragroup exemption"). The Supreme Tax Court, in an earlier decision of 6 December 2016 (I R 79/15) has held that it nevertheless did not prevent the financing company from claiming the "banking privilege", because the "banking privilege" provided in **Section 19 Trade Tax Implementation Ordinance applicable at the time** only referred to Section 1 (1) GBA and not specifically to Section 2 (1) GBA. These principles were therefore still valid in in the years of dispute. Only from 30 June 2020 has the legislator amended Section 19 (1) sentence 1 Trade Tax Implementing Regulation to the effect that the banking privilege was specifically to be denied for group financing companies.

Reference:

Supreme Tax Court, judgment of 30 November 2023 (III R 55/20), published on 7 March 2024.

Schlagwörter

Banking Act, intra-group financing, trade tax addback