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By PwC Deutschland | 25. November 2024

Requirements for combining business operations of public bodies

On 21 November 2024, the Supreme Tax Court has published its decision on the requirements for the combination of business operations of public bodies in accordance with Section 4 (6) sentence 1 Corporation Tax Act which restricts the scope of application for grouping several commercial institutions. The judgment expressly contradicts the more generous view of the tax authorities on this subject as set out in the circular of the Federal Ministry of Finance (MoF) of 12 November 2009.

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Statutory regulation

Section 4 of the Corporation Tax Act (CTA) deals with the tax situation of business operations of public bodies. These are defined in Section 4 (1) as „bodies of legal entities under public law that serve a sustainable economic activity to generate income or other economic benefits outside agriculture and forestry“.

Furthermore, Section 4 (6) sentence 1 numbers 1 to 3 states that „a business of a commercial nature (business operation) may be combined with one or more other business operations if

1) they are similar,

2) according to the overall picture of the actual circumstances, there is objectively a close mutual technical and economic interdependence of some importance between them, or

3) there are businesses of a commercial nature that serve to supply the population with water, gas, electricity or heat, public transport, or port operations.

Background

The plaintiff, an institution under public law, operated a building yard and wastewater disposal as well as water supply and an outdoor swimming pool. In 2007 it built a combined heat and power plant (CHP) on the premises of the outdoor swimming pool which was operated with biogas. The electricity generated was sold and the heat was mainly utilized by the swimming pool during the outdoor pool season and by third-party customers in the development area.

The plaintiff sought to offset the negative income from the outdoor pool against the income from the water supply and the CHP plant. The tax office refused, as it considered the operation of the outdoor pool to be an independent business of a commercial nature that could not be combined with the other business operations.

The Tax Court of Schleswig-Holstein had granted the appeal.

Decision

The Supreme Tax Court annulled the judgment of the court of first instance and ruled in favor of the tax office.

The economic activities of a legal entity must generally be assessed separately for tax purposes in order to avoid any distortions of competition. It follows from this that a combination in accordance with Section 4 (6) sentence 1 CTA and a potential offsetting of profits and losses is only possible if the requirements for combination are met between allbusiness operations of the public body whose income is to be determined and assessed jointly.

A successive combination (chain combination), in which several business operations of the public body are combined, is not permitted when the requirements would not be met if a simultaneous view and approach

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was taken. Therefore, even if more than two business operations are combined, the requirements of Section 4 (6) sentence 1 nos. 1 to 3 CTA must be met between all business operations which are to be combined.

The Supreme Tax Court further clarified that the more generous view set out in the MoF circular of 12 November 2009 for the combination of several business operations is not in line with applicable law.

Source:

Supreme Tax Court, decision of 29 August 2024 (V R 43/21) – published on 21 November 2024.

Schlagwörter

Public Sector Entity (PSE), business facility