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By PwC Deutschland | 03. Dezember 2024

No right to estimate the withdrawal of non-food items by retailers if recorded on a flat rate basis

An additional estimate by the tax office because of a breach of record-keeping obligations is not possible if the taxpayer (a sole trader in the food and non-food sector) was relying on the simplified record-keeping procedure granted to him by the Federal Ministry of Finance. The main issue in the case of dispute was whether the ministerial circular to that effect covers not only food but also non-food items.

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Background

Entrepreneurs who sell food or prepared meals occasionally withdraw products for private use. Such withdrawals must be taxed. The current lump sums for free transfers of value (withdrawals in kind or so-called own use) are published separately each year by the Federal Ministry of Finance (MoF) in the Federal Tax Gazette. The relevant lump sums can be used by the taxpayers as basis for taxation. The lump sums are based on empirical values and offer the taxpayer the option of recording the withdrawal of goods on a monthly basis. They are thus a relief for the taxpayer as a recording a large number of single withdrawals is avoided.

According to Section 162 of the German Fiscal Code the tax authority shall estimate the tax base if it cannot in any other way be determined or calculated by it. All circumstances which have an impact on such estimate shall be taken into account. It was that latter sentence which was the subject-matter before the tax courts.

Just only “food” or also “non-food items”? - Years in dispute: 2015 to 2017

The plaintiff, a sole trader, operated several supermarkets and withdrew goods for his own use in the years in dispute without recording these withdrawals individually. Instead, he used the lump sums published by the MoF for gratuitous transfers of value (withdrawals in kind). The tax office was of the opinion that the MoF circular only applied to food and beverages but not to non-food items. It therefore increased the income from business operations and VAT accordingly.

The Münster Tax Court upheld the action of the plaintiff. It stated that the tax office was entitled to estimate the amount of the plaintiff's withdrawals from his business in accordance with Section 162 Fiscal Code because he had not recorded them. However, the additional estimates for the withdrawal of so-called non-food items were not admissible. The Supreme Tax Court agreed with the latter but rejected a general power of the tax office to estimate.

Decision

Key statement of the Supreme Tax Court: Legitimate expectation for taxpayers exists if guidelines in the MoF circular are applied

For the years in dispute, the MoF had provided a simplification of the recording obligation, which could be invoked by the plaintiff. This gives taxpayers the option to record the withdrawal of goods on a monthly basis as a lump sum provided that they adhere to the values published annually by the MoF which are determined on the basis of experience. Therefore, the MoF regulation protects the legitimate expectations of the groups of taxable persons specified therein.

Taxpayers who invoke a decree for simplification of recording granted by the tax administration and thus rely on its validity cannot be subject to an additional assessment due to breaches of recording obligations. Such tax simplification rule protects taxpayers from unjustified burdens on subsequent changes to the

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interpretation by the tax authorities.

The official MoF announcement in question not only applied to the withdrawal of food and luxury foodstuffs but also to the withdrawal of non-food products (excluding tobacco products) insofar as these were goods from the generally customary range of goods in the respective branch of trade specified in the MoF regulation - in this case the retail trade in food and luxury foodstuffs.

Note: According to the latest MoF regulation regarding non-food items free withdrawals of good that are neither food nor beverages must be recorded separately and item by item.

Source:

Supreme Tax Court, decision of 16 September 2024 (III R 28/22) – published on 28 November 2024.

Schlagwörter

bookkeeping, records