By PwC Deutschland | 29. Januar 2025

No trade tax addback of expenses for planning and booking of outdoor advertising media

The Supreme Tax Court has decided that the expenses incurred by a special outdoor advertising agency for the provision of advertising media by corresponding advertising media providers (out-of-home advertising) did not meet the requirements for trade tax add-back pursuant to Section 8 no. 1 letters f or d Trade Tax Act.

Background

According to Section 8 no. 1 Trade Tax Act (TTA), one quarter of the total of the expenses listed under letters a to f is added back to the trading profit if they were charged against income and insofar as the total exceeds €100,000. In the case before the tax courts the add-back provisions of letter d of one-fifth of the rent paid for movable assets in the ownership of others and letter f for one-quarter of the costs of the use limited by time of rights (in particular concessions and certain licenses) were in dispute. An addback for trade tax purposes further presupposes (under a fictitious approach) that the assetswere to be fixed assets had the company been the owner itself.

Out-of-home advertising, better known as outdoor advertising, is an advertising strategy that also includes ads in malls, subway stations, and any other public space.Further to its judgment III R 36/22 published in December 2024 (see **blog post of 24 December 2024**), the Supreme Tax Court has now published yet another decision regarding the trade tax add-back for companies in the advertising industry. At issue here was the trade tax add-back of expenses incurred by a special agency (as legal successor of the former plaintiff A-GmbH) for the use of advertising space in 2010 and 2011. It provided its clients with advice on the conception of outdoor advertising campaigns and assisted them in their implementation (media planning, campaign objective, advertising media space, premium locations, scope of duties of the advertising media providers, etc.). In individual cases, customers selected specific locations (**premium locations**) for the advertising campaigns. The advertising media providers installed and maintained the outdoor advertising. The plaintiff booked the advertising media in its own name and for its own account. The plaintiff charged its customers for the invoices issued by the respective providers.

The tax office was of the opinion that the booking of advertising media for a certain period of time was to be considered as rental and that the amount paid was subject to the add-back provision of Section 8 no. 1 letter d TTA. In addition, part of the expenses was added-back as costs for the temporary transfer of rights under Section 8 no.1 letter f TTA. The Tax Court of Hesse as court of first instance had granted the appeal brought by the plaintiff.

Decision

The Supreme Tax Court confirmed the view of the Hesse tax court and rejected the appeal of the tax office.

The requirements for an add-back pursuant to section 8 No. 1 TTA are not met with regard to either letter f or letter d, and also not with respect to letter e (i. e., add-back of one-half of the rent for the use of immovable assets in the ownership of another).

The trade tax add-back of expenses for the temporary transfer of rights in accordance with Section 8 no. 1 **letter f** TTA presupposes subjective rights to intangible assets with an independent asset value that include a right of use and a fundamental protected legal position. When dealing with digital advertising, the focus is generally not on the use of the digital space, but rather on an advertising service by the provider using the digital space. If the provider of conventional advertising media assumes significant obligations relating to the success of the advertising in addition to the obligation to install the advertising media the contract might be

classified as a contract for work and services.

Also, the fees paid by A GmbH to the advertising media providers for the digital advertising are not to be classified as rental or leasing fees within the meaning of Section 8 no. 1 **letter d** TTA. In the case of contracts under which the contracting party with a digital advertising space undertakes to display the advertising sequences made available to it by the other contracting party the core element of such agreement is not the use of the digital space but rather an advertising service to be provided. The advertising media providers had undertaken to display electronic content on the digital advertising spaces provided by them. Thus, the contracting parties in the case of dispute also agreed that the advertising media providers had to use the digital advertising media to produce a work product.

Finally, the Supreme Tac Court points out that the advertising space on advertising media at **premium locations** was not permanently intended for the operation of the special agency and therefore the advertising media at these locations were not to be fixed assets had the plaintiff been the owner himself. Therefore, the fees were not to be added back under the conditions set forth in Section 8 No.1 letter d TTA from the outset.

Source:

Supreme Tax Court judgment of 17 October 2024 (III R 33/22) – published on 23 January 2025.

Schlagwörter

agency, outdoor advertising, trade tax addback