

Employment Tax

Payment for employer's advertising on the license plate holder of the employee's private car as wages and salaries

In its decision of December 3, 2019 (Az: 1 K 3320/18 L) the Münster Fiscal Court dealt with the case of an employer who paid its employees remuneration for advertising on the private license plate holder of their private cars as tax-free "other" income. The Federal Fiscal Court rejected the appeal in its decision - VI R 20/20 – of June 21, 2022, published November 3, 2022.

It was disputed whether a payment made to parts of the employees for the attachment of a license plate holder with advertising to their private vehicles was subject to wage tax withholding. An employer had concluded "advertising rental agreements" with many of its employees. Under these agreements, employees placed advertising for the employer on the license plate holder or a sticker on the trunk lid of their private cars. In return, employees received a "maximum" payment of € 255 per year. The contracts did not contain any specifications to promote or ensure promotional use of the vehicle (no conditions regarding mileage or scope of travel). The employer assumed "other" income (not wages or salaries) according to sec. 22 number 3 GITA (German Income Tax Act) and therefore did not withhold wage tax. According to this regulation, other income is tax-exempt up to an amount of € 256 per year. The tax office, on the other hand, assumed that a wage payment had been made and held the employer liable for the wage tax that had not been withheld and paid.

According to sec. 42d para. 1 number 1 GITA, the employer is liable for the wage tax which he is required to withhold from the wages for the employee's account in accordance with sec. 38 para. 1, para. 3 sentence 1 GITA with each wage payment and to remit in accordance with sec. 41a para. 1 sentence 1 number 2 GITA. According

to sec. 19 para. 1 sentence 1 number 1 GITA, employment income is defined as salaries, wages, gratuities, bonuses and other emoluments and benefits granted "for" employment in the public or private sector, irrespective of whether there is a legal entitlement to them and whether they are current or one-off payments (sec. 19 para. 1 sentence 2 GITA). Such remuneration or benefits are considered to be "granted for an employment relationship" if they are caused by the individual employment relationship without necessarily being based on a consideration for a concrete (individual) performance by the employee. (cf. Federal Fiscal Court decisions from July 4, 2018 - VI R 16/17, BFHE 261, 543, BStBl II 2019, 373, Rz 11; from February 13, 2020 - VI R 20/17, BFHE 268, 227, BStBl II 2021, 311, Rz 13, and from February 16, 2022 - VI R 53/18, Rz 15).

Whether an exchange of services between employer and employee is to be attributed to employment income or based on a special legal relationship, to another type of income or to income exempt from tax is to be assessed according to the economic content of the facts to be assessed and not according to their external appearance (cf. Federal Fiscal Court decision from June 30, 2011 – VI R 80/10, BFHE 234, 195, BStBl II 2011, 948, Rz. 15). For this reason, the existence of a legal relationship between the employer and the employee in addition to the employment contract does not necessarily preclude the treatment of a benefit as wages (Federal Fiscal Court decision from June 23, 2005 - VI R 124/99, BFHE 209, 549, BStBl II 2005, 766, under II.1.b).

In the present case, the Fiscal Court confirmed the opinion of the tax office and the existence of employment income. The Fiscal Court considered it significant that the agreed "advertising leases" have no economic substance of their own. For the assessment of the "advertising lump sum" of € 255 per year, it is not – as is usual in business transactions – the achievable advertising effect that is relevant, but only the exemption limit according to sec. 22 number 3 GITA. Therefore, the focus was not primarily on the company's own interest in achieving the highest possible advertising impact. This is because it became clear that the value of the advertising effect was not the decisive factor in the drafting of the contract and in the pricing, as is usually the case with contracts in commercial life. In this context, the advertising contract does not have its own economic content. The triggering moment for the disputed payments to employees is their status as employees and accordingly, in the broadest sense, their work activity.

Furthermore, it was essential for the Fiscal Court that the questionable payments were also caused by the employment relationship because the contracts were concluded exclusively with employees and the term of the concluded contracts was linked to the existence of the employment relationship. Consequently, the amounts paid to the employees have to be qualified as employment income for income tax purposes.

The Federal Fiscal Court rejected the employer's appeal, stating that the fiscal court's assessment of the facts, which is generally binding on the Federal Fiscal Court, is not objectionable. Moreover, the questionable payments were not granted for reasons that were mainly in the employer's own business interests.

Recommendation for action

In the case of payments to employees based on separately concluded agreements outside the employment contract, for which no wage tax is deducted, it must be

ensured, among other things, that the agreement has its own economic content. For example, for advertising rental agreements concluded, as in the present case, the intended advertising effect should be ensured by suitable measures and considered when calculating the payment, for example, not be based on a lump-sum tax exemption limit. It also seems helpful to attract advertisers outside the permanent employment and, in case of employees, not to link the term of the advertising rental agreements to the length of the employment relationship.

If you have similar issues in your employer practice, please feel free to contact us at any time. The contacts in PwC's employment tax team look forward to speaking with you.

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Editorial

If you have any questions, comments or remarks about the newsletter, please do not hesitate to contact our editorial team. We look forward to your feedback.

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