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By PwC Deutschland | 13 February 2013

Theft from employer is not employment income

The Supreme Tax Court has allowed an employer a refund of the income tax paid on a fraudulent salary overpayment despite notification of the tax deduction to the employee, on the grounds that the tax had not been deducted from employment income.

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A payroll clerk took advantage of an internal control weakness to consistently overpay his salary by exaggerating the gross amount due. Eventually, the fraud was discovered and the company requested the tax office to return the income tax deducted from the excess. The tax office refused on the basis of a prohibition in the Income Tax Act intended to ensure that employees claim credit in their income tax returns only for those amounts of tax actually deducted from their remuneration. However, the Supreme Tax Court has now held that the prohibition did not apply in this case, as the amount in question had not been deducted from “remuneration for an employment”, but from the proceeds of a theft. Accordingly, the salary withholding tax return could be altered as long as it had not become final and binding under the more general rules of the Tax Management Act. In practice, this usually means that alteration is possible for as long as the payroll records remain open to tax office audit.

The Supreme Tax Court reached this conclusion on the basis of the legal definition of employment income as being all benefits “granted” to an employee for his services in public or private employment. This applied to benefits granted voluntarily as well as those the employer was bound to provide and included overpayments of salary made in error. However, amounts stolen had not been “granted” by the employer, but taken by the employee without authorisation to do so. They were thus not employment income, so the tax deducted from them in order to conceal their true nature was not covered by the prohibition on reducing the amount of salary withholding tax due, once it had been certified to the employee.

Supreme Tax Court judgment VI R 38/11 of November 13, 2012 published on February 13, 2013.

Keywords

Fraud, salary withholding tax, wage tax