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Salary fraud free of payroll withholding tax

The finance ministry has issued a decree on the application to similar cases of a Supreme Tax Court judgment holding that a fraudulent salary increase was not a salary and that the tax office should return the withholding tax paid over without cause.

A long-serving, trusted payroll clerk took advantage of a weak system of internal control to award himself a series of unauthorised salary increases. The fraud was discovered after some four-and-a-half years and the company requested the tax office to return the payroll withholding tax deducted from the fraudulent amounts. The tax office refused in respect of all past years on the grounds that the salary as actually paid and the withholding tax as actually deducted had already been certified to the employee and that this certificate could not now be altered. The company went to law and was ultimately successful when the Supreme Tax Court held (in November 2012) that an employer was not required to withhold tax from an amount paid as salary against his will. Accordingly, the company was entitled to return of all amounts paid over to the tax office on the fraudulent “wage” in respect of all years for which the payroll tax audit had not yet been finalised. The finance ministry has now issued a decree on the application of this judgment to similar cases.

An employer can correct payroll errors at any time up to year-end, or until the employee’s earlier leaving date. The payroll records of all but very small employers are subject to regular audit at three to five yearly intervals. Once an audit has been closed out, the assessments are final and binding and cannot generally be reopened. The Supreme Tax Court judgment at issue therefore covered the calendar years for which annual salary tax certificates had been issued but the payroll records had not yet been audited.

The decree distinguishes between fraudulent payments disguised as salary or other benefits and unintended payments made in error. Errors cannot be corrected, once the final figures for the year have been certified (now notified to the tax authorities). Fraudulent payments against the will of the employer are not elements of employee remuneration and are not subject to withholding tax. Taxes withheld and accounted for to the tax office are to be refunded on application, provided the employer amends the annual remuneration notification. The decree closes with a reference to employer liability for tax revenue lost as a result of incorrect salary tax certification or notification; this reference, though, will often prove to be an empty threat, given that the fraudulent salary is not itself taxable as employment income.

Keywords

payroll withholding tax, salary fraud