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By PwC Deutschland | 19 February 2014

No deduction for EC fine for cartel offence

The Supreme Tax Court has held that no portion of a European Commission fine for a cartel offence can be deducted, unless the fine was set specifically to absorb the economic benefit obtained.

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A company was fined by the European Commission for its membership of an illegal cartel. The fine was based on the nature and gravity of the offence and on the Commission's estimate of the effects on the market. The company's market share was also taken into account. The fine was uplifted by 10% for each year of the offence. The uplifted amount was then reduced to 10% of the worldwide turnover of the company in the previous year. All measures of size or importance were based on turnover. The Commission followed its own (published) guidelines throughout. These emphasise the deterrent purpose of cartel fines. The company lost its appeal against the fine before the ECJ, but then claimed a tax deduction for its legal costs and for the fine itself. The basis for the latter was an Income Tax Act provision that allows a deduction for penalties if these are levied to absorb the illicit benefits (before tax) from an offence, rather than to penalise it. The tax office allowed a deduction for the legal costs, but refused one for the fine, saying that the fine was a non-deductible penalty. The lower tax court, and now the Supreme Tax Court, confirmed this stance.

The Supreme Tax Court based its position on the fact that none of the documents relevant to the Commission's fine referred at any stage to an intention of confiscating illicit benefits. Turnover-based measures of size were intended as a test of the gravity of the offence. The Commission had also confirmed to the tax office in reply to a query that it had not taken the illicit benefit for the company into account when setting the fine and was unable to measure what that benefit might have been. The court drew the conclusion that the primary purpose of the fine was penal and deterrent, rather than confiscatory. It accepted the taxpayer's statement that the deterrent would fail if the benefit were less than fully absorbed, but found the thought to be too general as a measure of a specific element of a fine. It could only be relevant to an increase in the base fine to take account of exacerbating circumstances. Even then it would have to be looked at carefully. In the event, there had been no particular exacerbating or extenuating circumstances; the reduction of the fine to 10% of annual turnover followed from a different provision, to keep fines to a level that did not endanger the offending company's existence.

Supreme Tax Court judgment IV R 4/12 of November 7, 2013 published on February 19, 2014

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