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By PwC Deutschland | 13 August 2014

No tax deduction on confiscation of gains from corrupt dealing, unless tax effect had not been taken into account

The Supreme Tax Court has held that the prohibition on claiming a deduction for bribes also includes the legal costs of an unsuccessful defence as well as the court-ordered confiscation of the profits from the corrupt trading. A deduction for the confiscation would only be possible if the amount had not been calculated net of tax.

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A motor vehicle workshop consultant bribed an inspector of a motorcar factory to recommend his services to dealers and service points planning to reorganise or expand their workshops. In due course the arrangement came to light and the consultant, the inspector and, as an accessory, the wife of the inspector were convicted of corruption. The tax office refused to accept either the bribes, the costs of the criminal proceedings or the surrender of the illegitimate gains as deductible expenses of the consultant.

The Supreme Tax Court has upheld the position of the tax office, despite attempts by the consultant to argue that the “bribes” were, in fact, genuine commissions for business introductions. He, the consultant, was aware of no wrong-doing and had only pleaded guilty at his criminal trial in response to a “threat” by the judge of a longer custodial sentence if he did not do so. The tax court found, however, that the judge had not “threatened” anything, but had merely informed the accused of standard criminal court practice in such cases. As it was, he received a two-year suspended prison sentence with costs and surrender of his ill-gotten gains, two years being the longest period that can be suspended under German criminal law. Had he been truly convinced of his innocence, he could have pleaded not guilty in the hope of an acquittal. The Supreme Tax Court thus took the fact of the bribes as proven. Neither the bribes themselves not the court and other legal costs of the trial, nor the penalties inflicted could therefore be deducted. The only question remaining was the calculation of the amount of the illegitimate gains surrendered. The tax effect could not be taken into account twice to the disadvantage, or advantage, of the taxpayer. If the criminal court had taken the tax paid on the “gains” into account when setting the surrender amount, no further tax benefit could be granted by the tax courts. If the amount had been calculated gross, a tax deduction (reflecting the tax originally paid) could be indicated now. Whilst the actual basis of the calculation was not entirely clear (due to confusion following a misquoted reference) all the indications pointed to a net of tax approach by the criminal court. The tax court could therefore allow no further benefit.

Supreme Tax Court judgment X R 23/12 of May 14, 2014 published on August 13

Keywords

bribes, confiscation, corrupt trading, corruption