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Tax administration issues guidelines on use of group name

The German Finance Ministry has commented on possible profit adjustments under Sec. 1 Foreign Tax Act with respect to the use of group name and logo between the taxpayer and a related party.

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Sec. 1 Foreign Tax Act (FTA) provides for an adjustment to correct a profit shift by a German taxpayer from his dealings with a foreign related party on other than arm's length terms, particularly as regards pricing. Dealings refers to all mutual obligations (business relationships) affecting income other than those entered into as shareholder.

In its judgment I R 22/14 of January 21, 2016 the Supreme Tax Court held that a parent company cannot be deemed to have earned income from allowing its Polish subsidiary to register locally in the group name. The German business was active in a field of patented technology associated with its own firm name. It allowed its Polish subsidiaries to register in that name, but made an appropriate charge for the use of the technology. It also did not authorise the Polish companies to use its logo, but left it up to them to design their own. The tax office maintained that the group name was a valuable intangible and demanded an income adjustment to reflect its use by foreign subsidiaries. However, the Supreme Tax Court confirmed its previous case law in holding that the mere use of the group name in the company registration of a subsidiary – including the right to trade under that name – does not give rise to a royalty entitlement of the parent. Such entitlement only arises in connection with other associated rights, such as the use of a logo or technology, in which case, the benefit from the use of intangibles should be seen as a package. However, this did not arise in the case at issue, as the rights to the logo had not been assigned and the rights to the technology had been charged for separately.

The German Finance Ministry – in a current decree – refers to that judgment by setting forth the administrative and other regulations to be followed when applying German CFC-legislation, namely business relationships as defined Sec. 1 sub-sec. 4 FTA. The tax administration accepts the Supreme Tax Court decision if there are no economic benefits to be derived from the use of the name which would otherwise have to be remunerated following the arm's length principle. This latter would be the case if there is an exclusive right to use the name and if such use by an independent third party may be denied, or – in other words – if the owner may exclude third parties from using the name or the logo. The obligation for an arm's length remuneration requires that the name has a separate independent market value. Under normal circumstances, the registration of a logo gives its owner the sole right to use it and – in case German trademark law is violated –a claim for damages.

Additionally, the use of the name, logo or trademark should be remunerated if the beneficiary could reasonably expect an economic advantage from the use of the intangible already from the outset (expected benefit). Generally, if the intangible is only used within the sales activities of the group and only products of the multinational group are sold no independent benefit is achieved. This would be different, however, if the group company produced goods and provided services on the market.

Finally and with respect to the issue of arm's length terms, the Finance Ministry points out the following:

- The amount of royalties should be calculated based on the so called hypothetical third party comparison (i. e. the price that is most likely to accord with the arm's length principle based on a

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true estimation).

- The amount of the claim for damage would not be in accordance with dealing at arm's length.
- Royalties may be unreasonable inasmuch as this results in a lasting or permanent loss situation of the licensee.

The administrative guidelines shall apply to all comparable cross-border cases, whether licensee or licensor are domestic or foreign companies.

Ministry of Finance circular of 7 April 2017 (IV B 5 - S 1341/16/10003)

Keywords

firm name, group name, income adjustment, logo, profit adjustment