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By PwC Deutschland | 12 October 2017

Referral to Federal Constitutional Court: trade tax on the profits arising on the disposal of an interest in a partnership by persons other than individuals.

The First Senate of the Federal Constitutional Court heard arguments on the constitutionality of a provision in the Trade Tax Act, according to which trade tax was levied on the sale of business interests. The case has opened up a question of principle with regard to trade tax.

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Since 2002 trade tax has been payable on profits arising from certain disposals of partnership interests. The intention of the legislature at the time was to close a loophole. Prior to the new rule companies had to pay trade tax on profits arising from the sale of business interests but this could be avoided by inserting a partnership. The background to this is that where the seller is an individual no trade tax arises. In the instant case of a brewery effected by the new rule, interests in a GmbH & Co. KG (a limited partnership with a company as its unlimited partner) had been sold by various companies, partnerships and a foundation. In addition the business from Bremen filed a complaint on the basis of an abuse of the constitutional prohibition of retroactivity, as its members sold their interests before the provision came into force but were charged to tax. As a matter of fact the relevant disposal of the business interests occurred in the middle of legislative process. The sales contract was signed before the law came into force, but after the government introduced a draft bill to the Bundesrat (Federal Council/upper house). The question is therefore how long one can rely on the continuity of applicable tax laws. We will have to wait and see, as the Constitutional Court will probably take a couple of months to issue its decision.

Reference:

BverfG: 1 BvR 1236/11

Keywords

Income Tax Act, trade tax