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By PwC Deutschland | 03 April 2019

Extended trade tax deduction also possible for shareholdings in real estate management companies

Under the extended trade tax deduction, rental income derived by entities whose activities are limited to the administration of their own real property is deductible from the trading income subject to trade tax. The Grand Senate of the Supreme Tax Court held that this trade tax deduction is also available for a commercial GmbH & Co. KG with respect to its interest in a pure asset-management civil law partnership.

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Legal background: According to Section 9 no. 1 2nd Sentence of the Trade Tax Act (TTA) enterprises, which exclusively manage and use their "**own real estate**", may - upon application - make a deduction of that part of the trading income which relates to the management and use of their own real estate. This alternative (i. e. the extended) deduction takes the place of the deduction under Section 9 No. 1 1st Sentence TTA (lump sum deduction of 1.2% of the assessed value of the real estate).

Case in dispute: The plaintiff was a commercial partnership in the legal form of a GmbH & Co. KG, which held a 2/3 stake in a purely asset-managing civil law partnership (GbR). In view of the fact that a limited company was the plaintiff's sole general partner with management competence, the income of the GmbH & Co. KG ranked as trading income per se, even if the partnership itself did not operate a trading facility (due to the so called "trading hallmark"-principle). The GbR in turn was the owner of a real estate. The plaintiff claimed the extended trade tax deduction for its pro-rated rental income from the participation in the GbR. The tax office rejected this because the interest in the real-estate-owning partnership did not constitute "own real estate"; it was rather the GbR which owned the property. The Fourth Senate of the Supreme Tax Court did not share the view of the tax office but considered itself prevented from reaching such a decision due to an earlier judgement of the First Senate; accordingly, the Grand Senate was called to resolve the dispute.

Each partner owns a pro rata share of the asset of the civil law partnership

The Grand Senate of the Supreme Tax Court held that the extended deduction (Section 9 no. 1 2nd Sentence TTA) is also available in these circumstances. "Own real estate" within the meaning of Sec. 9 no. 1 2nd Sentence TTA is meant to comprise real estate belonging to business assets of the entrepreneur. Property owned by a GbR-civil law partnership is property of the shareholders of the GbR. In the case in dispute and on a straight "look-through-basis" as partner of a pure asset-management partnership, the plaintiff held a pro-rata 2/3 share in that entity as his own (business) assets, thus owning a proportionate amount in the real property .

Source:

Supreme Tax Court – Grand Senate – judgment GrS 2/16 of September 25, 2018 published on March 27, 2019

Keywords

extended trade tax deduction, real estate management company, real property