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By PwC Deutschland | 30 January 2024

Update: “Tainting effect” of trading activity for trade tax purposes also for asset-management partnership

In a recent decision the Supreme Tax Court held that losses from a genuine business activity of an asset-management civil-law partnership (GbR) can lead to the reclassification of the otherwise asset-managing (non-business) activity as trading income if the so-called de minimis limit is exceeded.

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Background

The plaintiff is an asset-managing partnership (GbR). For 2009, it generated losses from renting and leasing. In 2010, the plaintiff had a photovoltaic system (PVS) installed on a plot of land which was leased to others and from which it generated losses. Losses were also incurred with respect to the asset management activity of renting and leasing. The tax office took the view that the (previous) income from letting and leasing had become commercial income as being “tainted” by the genuine business activity in connection with the PVS. The Munich Tax Court rejected the claim brought by the GbR.

Decision

The Supreme Tax Court confirmed the decision of Munich Tax Court, thereby abandoning its previous case law, the most recent one being from 2018. This change in the legal position of the court came because of previous legislative changes in Section 15 of the Trade Tax Act.

In the course of the Finance Act 2019 (Act on the Further Tax Promotion of Electric Mobility and the Amendment of Further Tax Regulations) Section 15 (3) No. 1 Income Tax Act (ITA) was revised with retroactive effect, namely that a “trade taint” (i.e., a deemed trade) will occur irrespective of whether a profit or loss is made from the commercial activity or whether the non-commercial income is positive or negative. Accordingly, an asset-managing partnership should also be regarded as a business enterprise even if it only realizes negative commercial (participation) income. In its judgment of 12 April 2018 (IV R 5/15), the Supreme Tax Court had still taken the contrary view.

At this point the Supreme Tax Court also states that it considers the erstwhile amendment of Section 15(3) No. 1 ITA and its retroactive application to be constitutional and for that reason has refrained from referring this matter to the Constitutional Court.

In addition, the BFH held that the **de minimis ruling** established by case law for freelance partnerships (i. e. where only negligible amounts of trading income from an entity’s own trading activities were received in addition to non-commercial income) must nevertheless be also observed when applying the new regulation: An original commercial activity of a partnership does not lead to a reclassification of its otherwise non-commercial activity if the original commercial net sales do not exceed 3% of the total net sales of the partnership and at the same time does not the maximum amount of € 24,500 in the year of assessment. The Supreme Tax Court went on to add that this also applies if the partnership - as in the case of dispute - carries out asset management activities in addition to its original commercial activities. Here however, the de minimis limit was exceeded.

Update (30 January 2024): Meanwhile, a constitutional complaint has been launched against the Supreme Tax Court decision; the matter is currently pending before the Federal Constitutional Court (case reference no. 2 BvR 2113/22).

Source

Supreme Tax Court decision of 30 June 2022 (IV R 42/19), published on 27 October 2022.

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Keywords

Asset & Wealth Management, tainted income, trading income