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# Maintenance fees borne by lessor also added back for trade tax purposes

**The Supreme Tax Court decided that maintenance fees incurred under leasing agreements must also be added back to the income subject to trade income tax.**

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## Background

Under Section 8 No. 1 letter d of the Trade Tax Act (TTA), one-quarter of the total of one-fifth of the rent paid for the use of movable fixed assets in the ownership of another (including lease instalments) must be added back to the profit from trading operations.

In the years 2011 and 2012, the plaintiff (a GmbH) had leased utility vehicles to third parties, some of which it had leased itself. According to the lease agreements, the plaintiff had to bear the "maintenance fees" for the vehicles leased by him. Following a tax audit, the tax office added back part of the cost for maintenance to the trading profit subject to trade income tax and pursuant to Section 8 No. 1 letter d TTA. The Tax Court of Lower Saxony decided against the plaintiff and confirmed the add-back of the maintenance fees to the trading profit.

## Decision

The Supreme Tax Court dismissed the appeal of the plaintiff as unfounded and agreed with the judgment of the lower tax court. Maintenance costs that are under mutual agreement passed on to the lessee are part of the "leasing rate" and must be added back for trade tax purposes.

The financing service provided by the lessor alone is no sufficient reason to treat the leasing agreement different from the rental agreement for the purposes of trade tax addback. Rather, the temporary transfer of use in return for payment is the overriding aspect to look at. At least to the extent that the leased asset - as in the case in dispute - continues to be economically attributed to the lessor.

In case of a rental contract and according to civil law Section 535 (1) sentence 2 German Civil Code (BGB) the landlord/owner is the one to bear the maintenance costs for the rented property. According to Section 581 (2) Civil Code, this provision applies analogous (“mutatis mutandis”) to leases, so that the lessor must bear the maintenance costs. In the case such cost is passed on to the tenant or lessee, this represents an ancillary service of the tenant or lessee in addition to the basic rental payment.

It follows from this, that - in principle - the lessor is free to pass the maintenance costs on to the lessee. This is prompted by the fact that the lessor finances an investment decision of the lessee and makes the leased asset acquired by him available for the lessee to use. Therefore, the interest in the use of the asset lies predominantly with the lessee and not with the lessor. In economic terms, the special payments for the maintenance work do not represent anything other than part of the consideration payable by the lessee for the transfer of use, including the wear and tear associated with it.

## Source:

Supreme Tax Court, decision of 20 October 2022 (III R 33/21), published on 26 January 2023.

## Keywords

maintenance expenses, trade tax addback