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By PwC Deutschland | 29 June 2023

No extended trade tax deduction for general partner without share in partnership assets

The participation of a limited liability company (GmbH) as general partner in a limited (non-trading) real estate managing partnership (KG) does not entitle the GmbH to an extended deduction of the part of income from the administration and use of own real estate within the meaning of Sec. 9 No. 1 2nd Sentence Trade Tax Act if the GmbH does not have a share in the assets of the KG. The Supreme Tax Court held that the general partner GmbH uses and manages third-party property rather than managing own real estate as presupposed by the statutes.

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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). "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.

Zebra companies – as defined and addressed by the Supreme Tax Court in the following - are asset or property managing partnerships with minimum one commercial investor including corporations (corporate investors) as partners.

The **matter of dispute** was whether the plaintiff, a GmbH (limited liability company), is entitled to the extended reduction of trade income pursuant to Sec. 9 No. 1 2nd Sentence TTA (in the version applicable in the years 2012 through 2015), although it held an interest as general partner in a real estate managing KG (zebra company) but without a share in the assets of the KG. The GmbH received a fee for assuming full liability.

The **appeal before the Baden-Wuerttemberg Tax Court** was not successful. The plaintiff did not have a share in the assets of the KG and, by assuming liability for the KG in return for payment, rendered a service for consideration. The plaintiff had thus performed a secondary activity that was contrary to the extended deduction. By assuming personal liability, it rather provided a service to the KG.

Decision

The **Supreme Tax Court** agreed with the decision of the lower tax court and rejected the appeal as unfounded. The plaintiff is not entitled to the extended deduction as provided in Sec. 9 No. 1 2nd Sentence TTA. This applies irrespective of whether the acceptance of full liability against payment was based solely on the partnership agreement or on a separate contractual relationship under the law of obligations between the plaintiff and the KG.

The participation of a GmbH as general partner in a limited non-trading real estate managing partnership (*zebra company*) does not meet the requirement as „management and use of own real property "attributable under Sec. 39 (2) No. 2 German Fiscal Code. Under this provision "assets to which several persons are jointly entitled shall be attributable proportionally to the participants insofar as taxation requires separate attribution". Hence, in the case of dispute the GmbH is not entitled to the extended deduction under Sec. 9 No. 1 2nd Sentence TTA as it does not have a share in the assets of the KG. The general partner GmbH uses third-party property instead.

A company that holds a share in a non-trading KG (limited partnership), OHG (general partnership) or GbR (partnership under civil law) uses own real estate only to the extent that the real estate owned by the non-trading partnership is attributable to it as its own business assets for tax purposes (i. e. in accordance with Sec. 39 (2) No. 2 of the Fiscal Code; see above). In this respect, the use to safeguard its investment assets

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is a harmful secondary activity.

Purely real estate-managing partnerships not only own real estate and capital assets but also have other assets that are part of the recoverable assets for creditors, e.g., a company vehicle or office equipment. For liability purposes, the general partner uses not only its own real estate, since liability is not limited under civil law to specific assets of the GmbH, but its entire business assets, including the shareholding in the KG.

Source:

Supreme Tax Court, decision of 20 April 2023 case III R 53/20 – published on 22 June 2023.

Keywords

Extended deduction for trade tax