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Trade tax addback of expenses for the provision of holiday homes even if sublet to travelers

The Supreme Tax Court decided that payments made by a provider of holiday lettings to the respective owners of the holiday homes in order to sublet them himself to travelers may qualify as rental within the meaning of Section 8 No. 1 letter a Trade Tax Act and must in part be added back to the trading profit subject to trade income tax.

Background

According to Sec. 8 no. 1 letter e Trade Tax Act (TTA) one quarter of the total of (currently) one half of the rent paid for the use of immovable fixed assets in the ownership of another must be added back to the trading profit subject to trade income tax. In a case before the Supreme Tax Court the question arose if this would also apply for payments made by a provider of holiday homes to the owner of the respective holiday homes in order to offer the facilities for rent to travelers.

Facts of the case

In 2010, the plaintiff held a 100% interest in a company (X) which offered holiday homes to travelers via catalogs, an internet platform and via intermediaries such as travel agencies. The plaintiff was the parent company of X, which is why the income of the latter was surrendered to and consolidated with the plaintiff under the German concept of a tax group („*Organschaft*“).

X concluded agreements with its travel customers for the letting of holiday homes (houses and apartments) in its own name and for its own account at a total price which included the price payable to the respective owner of the holiday home including a mark-up (margin) for X. The tax office concluded that the payments made by X to the owners of the holiday homes were rents which must be added to the trading profit pursuant to Sec. 8 No. 1 letter e TTA. The Tax Court of Baden-Württemberg had dismissed the action brought by the plaintiff as unfounded.

Decision

The Supreme Tax Court also rejected the claim of the plaintiff. First, the court held that the payments made by X to the owners of the tourist homes were rentals and lease payments for the use of immovable fixed assets according to Sec. 8 No. 1 letter e TTA and, second, that it corresponds as such with the intention of the legislator and overall purpose of the provision insofar as the assets were to be fixed assets of the lessee had he been the owner himself (fictitious approach).

Attribution of the holiday homes (here: to the plaintiff) under the fictitious ownership approach must especially be considered if the facilities were rented long-term and if, under the business model of the provider of the holiday homes (here: the plaintiff), it was meant to maintain a largely unchanged pool of holiday lettings which could be offered to travel customers.

In essence, the contract for use (rental or lease agreement) must be in accordance with civil law. This was the case here, as the main obligation of the owners was the transfer of use of the holiday homes and the main obligation of X was for payment of a rent.

The Supreme Tax Court conceded that it was indeed possible for a holiday home provider to act merely as an intermediary between the owners of the holiday properties and the travelers. However, X was not an intermediary, as it offered a large number of accommodation facilities in its own name without referring to the respective owner of the property. In addition, X did not have any claims for commission against the owners of the holiday accommodations, but instead had to pay the owners a compensation for the use of

their holiday home facilities.

Source:

Supreme Tax Court, decision of 17 August 2023 (III R 59/20), published on 26 October 2023.

Keywords

Holiday accomodation, rental expense, trade tax addback