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By PwC Deutschland | 27 February 2024

Flat-rate tax for the use of VIP hospitality lounge for customers and employees

The Supreme Tax Court ruled that the provision of seats in a VIP hospitality lounge (VIP box) free of charge to business partners and employees constitutes a benefit in kind that may be taxed at a flat rate in accordance with Section 37b of the German Income Tax Act. The benefit in kind was by way of the use of the individual VIP box seat. Expenses relating to empty seats are not to be considered.

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Background

According to Section 37b (1) income Tax Act (ITA) „*taxpayers may apply a flat-rate tax of 30 percent on business-related benefits in kind that are provided in addition to the agreed services given or received (….)* “.

In the case of dispute, the plaintiff used a VIP box at an all-inclusive price which enabled it to invite twelve people to the arena for each event. The opportunity to attend a concert constitutes a benefit. Every benefit to customers also has an intrinsic advertising value. In the case of VIP boxes, the Ministry of Finance (MoF) in a decree from 2005 has allowed a breakdown of the total expenses for matters of simplification to reasonably estimate the non-deductible portion of entertainment expenses or gifts.

Business partners of the plaintiff were invited to the VIP box for the event in question. In addition, employees, and members of the management board of the plaintiff took part in the respective events. The plaintiff had paid a lump sum price for the VIP box, but this amount did not include any catering expenses. The plaintiff therefore requested an apportionment based on the MoF „VIP box decree“ (including the allocation of the non-existent catering portion) to advertising and benefits. However, the tax office assumed an allocation of 25% for advertising and 75% for gifts with reference, among others, to the MoF circular from 2005.

The Berlin-Brandenburg Tax Court upheld the appeal of the plaintiff for the following reasons. Contrary to the opinion of the tax office, the benefits were not to be estimated at 75% of the plaintiff's total expenses for the VIP box. Instead, the expenses attributable to the benefits must be determined by comparing the total expenses for the box in relation to the actual use, the parts of the expenses that were not attributable to the provision of benefits must be deducted.

Decision of the Supreme Tax Court

The Supreme Tax Court rejected the tax office's appeal as unfounded and confirmed the view held by the tax court of first instance. The provision of seats in a VIP box free of charge to business partners constitutes a benefit in kind that may be taxed at a flat tax rate in accordance with Section 37b ITA. The same applies if the benefit is granted to employees insofar as they did not attend the events in the predominantly own operational business interests of the plaintiff. The taxpayer's expenses for the seats provided can be determined by an appropriate estimate. The same applies to the share of advertising attributable to the benefit.

The Supreme Tax Court held that the expenses relating to the events covered by the agreement for use of the VIP box but not attended, as well as the expenses relating to the empty seats, did not fall within the scope of Section 37b ITA. After all, the plaintiff, in principle, had in no case granted a benefit to someone.

The purpose of the benefit in-kind granted to the beneficiaries in the present case is not the event-related visit to the VIP box as such – as for example is the case in the event of a Christmas get-together for staff (staff outing) - but rather the free use of the individual seat to attend the respective event. A small but

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significant difference here, but which bears relevance to the decision.

Reference:

Supreme Tax Court, judgment of 23 November 2023 (VI R 15/21), published on 22 February 2024.

Keywords

benefit in kind, employee benefit