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By PwC Deutschland | 22 April 2024

# Recovery of withholding tax credited in the course of „cum/ex“ tradings

**The Hamburg Tax Court decided that the withdrawal of the refund or the credit of withholding tax in the wake of cum-ex schemes due to fraudulent misrepresentation is also possible if a third party committed the fraud.**

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## Background

Cum-Ex or also known as so called dividend stripping refers to a huge volume of transactions prior to 2012 that involved exploiting an ostensible loophole on dividend payments that enabled a number of parties to claim the same tax refund. In its decision of 28 July 2021, the Federal Court of Justice held that claiming a refund or credit of withholding tax in the wake of cum-ex schemes is a criminal act of tax evasion (see **blog post of 31 May 2022**).

## Case of dispute

A bank, which was a subsidiary (controlled company) of the plaintiff, entered into over-the-counter share transactions in the years 2007 through 2009 involving the acquisition of shares with (cum) dividends due on or just before the dividend record date and delivery of these shares after the dividend record date without (ex) dividends. The relevant schemes were brought to the bank's attention by two lawyers. The corresponding share packages were put together by outside investment advisors. In the years of dispute, the bank acquired and sold several million shares in domestic companies as part of these share transactions leading to investment income in the multi-digit million range. The tax office had originally allowed the credit of withholding tax (capital gains tax) plus solidarity surcharge in the double-digit million range as a result of the alleged share transactions.

In April 2020, the tax office amended the corporation tax assessments and withdrew the tax credits for the following reasons. In March 2020, two of the investment advisors had been convicted of tax evasion and aiding and abetting tax evasion for the benefit of the bank in connection with the share transactions in question. A senior employee of the bank and one of the lawyers who had brought the transactions to the bank's attention were also finally convicted of tax evasion. The plaintiff essentially claimed that those responsible at the bank had not acted with intent for tax evasion.

## Decision

The Hamburg Tax Court dismissed the appeal.

The 2007 tax assessment was still open for amendment based on Section 173 para. 1 no. 1 Fiscal Code (as a result of new facts or evidence) and according to Section 164 para. 2 sentence 1 Fiscal Code for 2008 and 2009 (amendment of tax assessments with a review proviso in effect).

The statute of limitation had not expired for any of the years in dispute. Tax assessments generally become statute-barred at the end of the fourth year following the end of the year in which the return was filed. If, however, tax is evaded, the statutory limitation period extends to 10 years (Section 169 para.. 2 sentence 2 Fiscal Code whereby „the limitation period for assessments shall be ten years where taxes have been evaded and five years where they have been recklessly understated“). In this respect, the tax court adopted the findings in the legally binding judgments against the lawyer and the two investment advisors.

**Withdrawal of the tax credit due to fraudulent misrepresentation** (Section 130 para. 2 no. 2 Fiscal Code) is also possible **if a third party has committed the fraud**. The tax credits were obtained, among

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others, through fraudulent misrepresentation on part of the legally convicted lawyer and the convicted investment advisors (Section 130 (2) no. 2 Fiscal Code). However, these circumstances should be taken into consideration **when exercising discretion** in reaching a decision. The submission of a tax certificate that is formally correct but incorrect in terms of content constitutes an act of deception with regard to the levy of capital gains (withholding) tax.

If the beneficiary of the tax credit was aware of the incorrectness of his declarations and/or the illegality of the assessment or if he was unaware of this due to gross negligence, the discretion to withdraw the assessment (Section 130 para. 2 no. 3 and 4 Fiscal Code) is virtually inevitable. If there are several reasons for the withdrawal, the state's interest in the withdrawal and thus the establishment of material justice is reinforced.

After all, the tax court summarizes that the withdrawal of the assessments for tax credit was in any case justified. Section 130 para. 2 no. 2, no. 3 and no. 4 Fiscal Code offers at least three grounds for withdrawal (see below). The deceptions committed by the lawyer and the investment advisors were rightfully attributed to the plaintiff in the context of the tax office's discretionary power. The tax office had been correct in assuming that those responsible at the bank had acted with gross negligence and should have recognized the incorrectness of the tax certificates which they themselves had issued.

**Section 130 (2) Fiscal Code:** An administrative act which gives rise to a right or a substantial advantage in legal terms or confirms such a right or advantage (beneficial administrative act) may only be withdrawn where (…) **2.** *it has been effected by improper means such as fraudulent misrepresentation, threat or bribery*, **3.** *the beneficiary obtained the administrative act by providing information which was essentially incorrect or incomplete,* **4.** *the beneficiary was aware of its illegality, or was unaware of this due to gross negligence.*

**Reference:**

Hamburg Tax Court, decision of 9 November 2023 (6 K 228/20).

**Note:** The court did not allow the appeal, but the plaintiff has meanwhile filed a complaint against the non-admission which is currently pending before the Supreme Tax Court (case no. VIII B 17/24).

**Keywords**

cum-ex