

By PwC Deutschland | 10 June 2024

Withdrawal of tax credit in the wake of alleged cum-ex scheme

If it has been revealed during an external tax audit that a large portion of dividend payments from shares were part of so-called short sales and thus the withholding of capital gains tax appears doubtful (here: as being in connection with cum-ex trading), the tax office is entitled to revoke the tax credit granted earlier and reclaim the tax refund from the taxpayer. This was decided by the Tax Court of Hesse following a complaint regarding the suspension of payment.

Background

The applicant is a company that conducted transactions on its own account on the XETRA and EUREX stock exchanges around the dividend record date. In the corporate income tax return for 2011 it claimed the credit of capital gains tax and for that reason presented the relevant tax certificates. The tax office had initially concurred with the request but withdrew the tax credit based on the findings of an external tax audit and subsequently issued an amended notice of assessment to that effect.

Decision

The plea for suspension of payment brought by the applicant was dismissed by the Tax Court of Hesse. The court saw no proof that capital gains tax had been deducted and paid to the tax authorities.

Capital gains tax on so-called “cum-ex transactions” can only be credited if it has been withheld and paid. The person who claims the tax credit has a corresponding obligation to cooperate and provide evidence of the tax withholding. If this cannot be demonstrated or verified, the tax office is generally entitled to reverse and amend the underlying tax assessment and reclaim any excess tax amounts refunded to the taxpayer.

The burden of proof is with the applicant, whereby the mere tax certificate in these circumstances is no probative evidence that the tax was withheld and paid. This is especially true considering the anonymity of stock exchange transactions, as there is no possibility to verify the economic owner of the shares, to determine when and how long the shares were held, and whether a capital gains tax was withheld at all.

The applicant does also not have any legitimate interest in this respect, as it had joined the anonymity of the stock exchange market and thus was aware of the obligation to provide conclusive evidence, especially as its sole concern was to obtain a tax advantage arising from the credit of capital gains tax. The business model only made economic sense by including the additional spread achieved from obtaining the tax refund.

Reference:

Tax Court of Hesse, decision of 26 July 2023 (4 V 1042/22); an appeal is currently pending before the Supreme Tax Court (case no. VIII B 121/23).

Keywords

Capital gains taxation, cum-ex