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By PwC Deutschland | 02 December 2024

No tax privileges for fundamentalist and extremist corporations

In two recent decisions published on 28 November 2024, the Supreme Tax Court commented on the tax privileged non-profit status (public-benefit purpose) of extremist corporations and the presumption of conformity resulting from a Federation's or a Land's report on the protection of the constitution according to Sections 51 (3) sentence 2 of the German Fiscal Code.

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Legal background

Under **Section 51 et seq Fiscal Code** tax privileges are granted to a corporation on account of serving directly and exclusively public-benefit, charitable or religious purposes (tax-privileged purposes). A corporation shall be understood to mean a corporation, an association or a pool of assets as defined in the Corporation Tax Act.

Section 51 (3) sentence 2 Fiscal Code states that a tax privilege shall furthermore require that the corporation does not, pursuant to its statutes and in its actual management, advance efforts within the meaning of section 4 of the Federal Constitution Protection Act and does not contravene the concept of international understanding. In the case of corporations who are listed in the Federation's or a Land's report as an extremist organization, it shall be refutably assumed that the conditions for tax privileges of the corporation (…) are not fulfilled.

Judgment of 5 September 2024 – case V R 15/22: No tax privileges as charitable non-profit organization for fundamentalist and extremist corporations

A " public-benefit purpose" to obtain the tax-privileged non-profit status in accordance with Section 52 para. 1 sentence 1 of the German Fiscal Code (AO) is to be denied already at the time a corporation pursues efforts that are directed against the free democratic basic order of the Federal Republic of Germany. The loss of non-profit status is then inevitable and irrespective of the fact that the corporation at the same time provides other services for public-benefit purpose. Both of those activities cannot be weighed against each other. With this most recent decision the Supreme Tax Court confirms its established case law.

The plaintiff, a registered non-profit association, was mentioned in various reports on the Protection of the Constitution. Since 2009 it was also named in the appendix of a constitution protection report that listed extremist organizations. The tax office denied the plaintiff tax privileges for corporation tax and VAT due to its inclusion in the constitution protection reports. The tax court of first instance upheld the claim.

The Supreme Tax Court overturned the decision of the tax court and referred the case back for further hearings and final decision. When examining whether a corporation promotes efforts against the free democratic basic order other activities carried out by the corporation that serve the common good must not be taken into account. To assess and weigh both different activities against each other in the context of an overall assessment of the particular circumstances of the case is not possible as the promotion of unconstitutional activities is not a furtherance for the general public-benefit. Or, to put it another way, an extremist organization cannot offset or compensate its anti-constitutional aspirations with "charitable" activities.

However, the tax court had carried out such an assessment and will now have to make a fresh decision. In this respect, it must assess the evidence that supports the promotion of anti-constitutional efforts by taking into account the objectives and methods of a corporation as well as any organizational, personnel, strategic and ideological links to other similar groups. The decision must also reflect on the fact that the plaintiff is

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listed as extremist in reports on the protection of the constitution in the years in dispute from 2009 onwards and that it is therefore up to the plaintiff to provide evidence, in accordance with the general assumption (presumption) laid down in Section 51 (3) sentence 2 Fiscal Code, that it does not promote any anti-constitutional activities.

Judgment of 5 September 2024 – case V R 36/21: In this case of a similar nature the Supreme Tax Court held that the presumption rule in Section 51 (3) Fiscal Code requires to ascertain that the corporation whose non-profit status (with regard to the tax privilege) is to be denied must be expressly identified as an independent taxable entity in a constitutional protection report (judgment V R 36/21 of 5 September 2024).

The plaintiff, an association, was an independent state organization whose name and designation were almost identical in wording to the independent federal organization. The name of the federal organization also contained an abbreviation. The constitution protection reports of one state contained statements on both organizations. The respective appendix of some of these constitution protection reports, which named extremist organizations, only listed the identical part of the name and the abbreviation. The tax office denied the plaintiff the tax privilege for non-profit corporations. The lower tax court confirmed the opinion of the tax office. This is what the Supreme Tax Court had to say:

The rebuttable presumption of Section 51 (3) sentence 2 Fiscal Code already applies if a corporation is expressly listed as extremist in a report on protection of the constitution. A reference to this effect in an annex to the constitution protection report is sufficient. However, the respective corporate body must be clearly identifiable. It is not sufficient if it is not clear from the constitution protection reports which corporation is being referred to as an independent taxable entity. An assessment for the group as a whole (group view) is not intended in the context of Section 51 (3) sentence 2 Fiscal Code.

As in the above-mentioned judgment V R 15/22, the Supreme Tax Court also referred the matter back to the tax court of first instance, as this court must itself examine and assess the facts as to whether a particular corporation is listed as an independent taxable entity in the constitutional protection reports under Section 51 (3) sentence 2 Fiscal Code.

Source:

Supreme Tax Court, judgments V R 15/22 and V R 36/21 of 5 September 2024 – published on 28 November 2024.

Keywords

extremist corporations, non-profit associations, tax privilege