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By PwC Deutschland | 24 December 2024

Trade tax add-back of advertising expenses

In a most recent decision, the Supreme Tax Court held that the rental of advertising mediums paid by a service company might be added back for trade tax purposes provided the assets were to be fixed assets had the company itself been the owner.

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Background

Under **Section 8 no.1 Trade Tax Act** (TTA) certain items are to be added back to the trading profit insofar as they were charged against income. In the case before the Supreme Tax Court, the add-back provision in Section 8 no. 1 letters d and e were the subject of dispute according to which (one quarter of one-fifth of) the rent paid for the use of immovable fixed assets in the ownership of another (letter d), and (one-quarter of one-half of) the rent paid for the use of movable fixed assets in the ownership of another (letter e) are to be added back.

The plaintiff advertised its service company as part of sponsoring measures for clubs as well as through mobile and poster advertising. The companies providing the services were predominantly advertising agencies which generally did not own the advertising mediums (walls, pillars, stairs and means of transport). The tax office concluded that the expenses recorded in the accounts were to be regarded as rent for movable fixed assets and to be added to the trading profit. The lower tax court decided that the advertising expenses were not subject to the trade tax addback of Section 8 no. 1 letter d TTA because the advertising vehicles were not deemed to be fixed assets.

Decision

The Supreme Tax Court granted the tax office's appeal and noted, first, that an add-back of rental expenses in connection with the implementation of advertising measures in accordance with Section 8 no. 1 letters d and e TTA presupposes that the contracts underlying the advertising mediums are classified as rental or lease agreements with respect to its legal content or at least contain separable main performance obligations under rental or lease law. For this purpose, the individual contracts must be examined in type to determine whether they are rental contracts, contracts for work and services, agency agreements or mixed contracts with separable and distinguishing services.

Second, an addback under the trade tax regime presupposes that the assets were to be fixed assets had the plaintiff been the owner himself (fictitious approach). To allocate assets to the fixed or current assets in the balance sheet, the specific business of the enterprise must be taken into account and - where possible - compared with the operating circumstances of the taxpayer.

Hence, in the case of dispute one of the key questions to be answered is whether - given the specific nature of the business - the advertising and promotional activities warrant to permanently maintain advertising mediums in the business. In the case of dispute, the Supreme Tax Court held that the plaintiff would typically not be required to always provide such capacity permanently.

On the other hand, the Supreme Tax Court did not completely rule out the possibility that fixed assets may also be assumed in the case of a service company of the type pursued by the plaintiff if certain advertising mediums are rented for a longer period or if similar advertising mediums are repeatedly rented for a short period of time. As the findings of the lower tax court regarding (a) the legal status of the contracts, and (b)

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the classification of the advertising mediums as fixed assets were not sufficient the case had to be referred back to the tax court of first instance.

Regarding the principles and requirements to determine whether an asset is to be allocated to fixed assets, the Supreme Tax Court refers to its case law, specifically the judgments of 25 July 2019 (see **blog post of 7 November 2019**) and 23 March 2022 (**blog post of 24 June 2022**).

Source:

Supreme Tax Court, decision of 16 September 2024 (III R 36/22) – published on 19 December 2024.

Keywords

trade tax addback