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By PwC Deutschland | 21 February 2025

Bribes confiscated under criminal law reduce VAT basis

In a most recent judgment, the Supreme Tax Court held that bribes confiscated under criminal law reduce the VAT basis of the respective turnover affected under criminal law. A tax that has already been assessed must be corrected at the time of collection in accordance with Section 17 (1) sentence 1 VAT Act.

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Background

The plaintiff was a Graduate Engineer in Supply Technology and worked for various companies in the real estate industry as a project and technical manager. Until the end of 2014 he worked as an employed project manager at X-AG and its subsidiary Y-GmbH, where he supervised major repair measures in the real estate sector. He had received free services, predominantly for private residential construction, on a continuous basis without being instructed to that effect by his supervisor or employer. The district court convicted him of bribery in business dealings and tax evasion and he was sentenced to a prison term.

In addition, the bribes were confiscated under criminal law by court order. The tax office treated the “bribe payments” and the benefits provided by the commissioned companies as remuneration for services subject to VAT. But the payments made by the plaintiff to the state justice treasury regarding the bribes collected did not reduce the assessment basis for VAT.

Decision

The Supreme Tax Court took a different view. Although the bribes are illegal payments, they are subject to VAT in addition to the other payments made to the plaintiff for his services. However, the amounts collected reduce the assessment basis for VAT. According to the case law of the Federal Constitutional Court and the European Court of Justice, a reduction is required in these cases as otherwise the principle of equal treatment (Art. 3 Para. 1 of the German Basic Law, Art. 20 of the Charter of Fundamental Rights of the European Union) would be violated because this would result in an inadmissible double burden for the perpetrator: First, the economic advantage gained through the criminal offense would be absorbed by the criminal confiscation of the bribes, and second, the bribes would be subject to VAT to the same extent. It is irrelevant that the amount collected under criminal law remains with the state treasury and that it is not repaid to the supplier. There is also no need to rely on the concessionary procedure whose admissibility in VAT law is in any case questionable under EU law.

Source:

Supreme Tax Court judgment of 25 September 2024 (XI R 6/23) – published on 20 February 2025.

Keywords

assessment basis, bribes