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By PwC Deutschland | 26 May 2025

Waiver of late payment penalties on grounds of the statutory concessionary rule

In a most recent decision, the Supreme Tax Court commented on the conditions for a waiver of late payment fees on grounds of the concessionary rule mentioned in Section 227 Fiscal Code following the rejection of the request for suspension of payment/stay of execution by the tax office.

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Background

Section 240 (1) Sentence 1 Fiscal Code states that “a late-payment penalty of 1 percent of the rounded tax amount in arrears shall be payable for each month of default where a tax is not paid by the end of the due date”.

Section 227 Fiscal Code: The revenue authorities may waive in full or in part claims arising from the tax debtor-creditor relationship where their collection would be unreasonable given the circumstances; under the same conditions, amounts already paid may be refunded or credited.

The plaintiffs (married couple) applied for a waiver of the late payment penalty for income tax and the solidarity surcharge for the year in dispute in the amount of some € 144,000 for reasons of equity (waiver by way of concessionary rule). The tax assessment in question had subsequently been reversed. The recognized hidden profit distribution was based on an incorrect entry in the balance sheet of A Ltd. in which the plaintiff held an interest. This incorrect entry was cancelled and then made available to the responsible tax office.

The tax office rejected the application for a waiver. The lower tax court dismissed the action by the plaintiffs as unfounded as they had not done everything in their power to obtain a suspension of payment for the year in dispute. In any case, this would also have required a court application for stay of execution.

Decision

In the opinion of the Supreme Tax Court, it depends on the circumstances of the individual case whether the taxpayer should have also applied for a stay of execution before the lower tax court after his application was rejected by the tax office to be able to claim the waiver of the late payment penalties. This - as the Supreme Tax Court said – is also a question whether the taxpayer „has done everything“ in his power to claim the waiver of late payment penalties.

This could be the case if - for example - the refusal to grant the suspension of payment by the tax office is bound by guidelines or other administrative instructions. In such a scenario, it may be a promising option to apply to the lower tax court for stay of execution. However, there must be special

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circumstances which would warrant such a move.

In the case of dispute, the waiver of late payment penalties cannot be refused solely on the grounds that the taxpayer has failed to contact a court. A strict obligation to this effect cannot be inferred from case law. If the taxpayer has submitted a sufficiently substantiated application to the tax office, he has generally done everything necessary for approval of the request for suspension of payment.

The lower tax court, on the other hand, has assumed that a taxpayer - irrespective of the circumstances of the individual case - has done everything necessary only if, following the rejection of his application for a suspension of payment by the tax office, he has also filed an application for a suspension of payment with the competent tax court. It has thus by way of typification unduly generalized the requirements for the right to a waiver.

The Supreme Tax Court went on to specifically point out that whether the plaintiffs had “done everything” within the meaning of the case law prior to the successful reduction of the tax assessments to obtain the stay of execution depends above all on the content of the two applications submitted by the plaintiffs. This correspondence is missing from the files reviewed by the lower tax court. As far as the plaintiffs' appeals regarding the hidden distribution were successful it must be considered to what extent the plaintiffs were aware of the internal treatment of the loan from A Ltd. and if therefore it was possible and reasonable for them to make a substantiated statement in this respect. If necessary, the lower tax court will also have to determine whether there were special circumstances that would have made an application to the lower tax court for a stay of execution promising at the time of the tax office's rejection of the application.

It is for these reasons that the case is referred back to the lower tax court for further hearing and final decision.

Supreme Tax Court judgment VIII R 2/23 of 25 February 2025 - published on 22 May 2025.

Keywords

penalty, waiver