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Actual activities carried out by partnership relevant to determine trade tax liability

In a decision published in April 2025 the Supreme Tax Court held that the effective day on which the actual activities are carried out by a partnership is relevant to determine the begin of its trade tax liability.

Background

At the center of the dispute was whether losses incurred in 2009 and 2010 by a limited partnership (KG) founded in 2008 could be taken into account for trade tax purposes. The purpose of the KG was the acquisition, ownership, development and planning, construction, redesign, operation, management, leasing, and sale of real estate projects. With this in mind, the KG acquired a plot of land in 2008 on which it had a hotel built by its limited partner (F GmbH). The plot was then to be sold; the KG itself did not intend to operate the hotel. Also in 2008, F GmbH undertook to transfer its shares in the KG; the transfer tookplace in 2011. In the end, the property was not sold.

Here is what the Supreme Tax Court had to say:

What is to be regarded as advertising activity of a partnership and is therefore relevant for the beginning of its material trade tax liability is determined on the basis of the activity carried out by the partnership. In this regard, the partnership and the partners involved must not be mingled.

The Supreme Tax Court distinguishes between companies whose activities are focused on the construction and sale of a specific property (in the case in question: a hotel) where trade tax liability begins at the earliest upon conclusion of the contract for the purchase of the land to be developed, and service providers with trade tax liability arising upon commencement of actual activities (in the case in question: the opening of the hotel).

According to the Supreme Tax Court, the intention of the persons participating in the company may not be taken into account when determining the objective trade tax liability. The levels of the partnership and the partners involved in it must not combined (see above). The Supreme Tax Court confirms its opinion expressed in an earlier judgment of 15 June 2023 (IV R 30/19). On this basis, the lower court (court of first instance) could not infer - as it did -from the shareholder's possible intention to sell her shareholding that the company owning the property intended to sell the property in question. This applies even if, from an economic point of view, the transfer of the shareholding should have been equivalent to the sale of the property.

The Supreme Tax Court also saw no violation of the general principle of equality (Art. 3 (1) Basic Law). In particular,it was not convinced of an unequal treatmentof the sale of the property (asset deal) and the sale of the shareholding in the company that owns the property (share deal), given the nature of trade tax.

As a result, the tax office's appeal was successful and led to the reversal of the lower court's decision who had upheld the plaintiff's claim. Since this latter decision by the lower tax court did not contain sufficient findings as to whether the partnership in question was already subject to trade tax in 2009 and 2010 the case was referred back for further review. For the Supreme Tax Court, the question to be answered is if the company

operated the hotel itself after completion and, if so, when it started operating the hotel.

Supreme Tax Court, judgment of 20 February 2025 (IV R 23/22) published on 24 April 2025.

Keywords

partnership, trade tax