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Cum-ex: No legal doubts on assessment of interest for tax evasion

In a recent judgment again dealing with cum-ex schemes, the Hamburg Tax Court dismissed the appeal against the assessment of interest on tax evasion in a so-called “cum-ex case” as unfounded.

Background

Between 2007 and 2009, a bank - a subsidiary of the plaintiff and a controlled company in a tax consolidation group - carried out over-the-counter stock transactions around the dividend record date. In doing so, the bank purchased and sold several millions of shares in domestic companies. The investment income generated from these transactions was attributed for tax purposes to the plaintiff.

The tax office initially credited dividend withholding tax and the solidarity surcharge amounting to tens of millions of euros when assessing corporate income tax for the years in question. In April 2020, however, the tax office revoked the tax credits.

The plaintiff's objection was rejected by the tax office. Subsequently, the Hamburg Tax Court dismissed the appeal in its judgment of 9 November 2023 (case No. 6 K 228/20). The complaint relating to non-admission before the Supreme Tax Court was also rejected, thus rendering the judgment final.

The tax office also assessed interest on the tax evaded amounting to tens of millions. The plaintiff criticized this measure and denied any tax evasion, but to no avail. The plaintiff claimed that the information provided by the affiliated company to the tax office had been correct and that the judgment 6 K 228/20 was not binding on the current proceedings. Criminal convictions in connection with cum/ex transactions were not applicable here.

Decision

The Hamburg Tax Court did not accept these arguments.

It confirmed the validity of the assessment of interest on tax evasion and found that tax evasion had occurred. The judgment 6 K 228/20 is final and binding with regard to issues of the statute of limitations pursuant to Section 110 of the Procedural Code of Fiscal Courts (Finanzgerichtsordnung - FGO). A final judgment may not be called into question again.

Furthermore, the judgment contained additional evidence of tax evasion. In particular, incorrect or incomplete information had been provided to the tax authorities in tax returns, certificates, and a professional certification from 2009 (Section 370 of the Procedural Code of Fiscal Courts). This resulted in illicit tax benefits.

The statements indicate that dividend withholding tax was withheld, which is incorrect. The subsidiary merely received dividend compensation payments on which no dividend withholding tax was due. These false statements were made knowingly and with intent.

Furthermore, as the parent company, the plaintiff was liable for the interest. The tax evasion resulted in a tax benefit for the plaintiff.

The appeal against this judgment was not granted. However, it is possible to file an appeal against the refusal of the leave to appeal with the Supreme Tax Court.

Keywords

Cum/cum transactions, Tax evasion, cum div