For income tax payers

Qualification of income from the letting and sale of containers as part of an investment

In the case in dispute, the tax authorities wrongly did not classify the leasing and intended sale of the containers by the plaintiff as commercial. The activities intended by the plaintiff in the form of the purchase, sale and rental of containers exceeded the scope of private asset management and fulfilled the requirements of a commercial enterprise.

The Düsseldorf Fiscal Court pointed out that the Federal Fiscal Court assumes such special circumstances, which lead to private asset management being exceeded, if the rental activity is combined with the purchase and sale of the movable assets on the basis of a uniform business concept to form a uniform activity. This in turn requires that the (short-term) letting of the movable assets and their sale are so interdependent that the sale is necessary in order to realise a profit at all. The business concept must be such that the intended total profit can only be realised by generating proceeds from the sale of the leased assets. Whether this requirement is met depends on an assessment of the circumstances of the individual case.

Hidden profit distribution for sole shareholder managing director despite ban on private use of company car

In the case of a sole shareholder managing director, there may be prima facie evidence of the private use of a car provided by the GmbH leading to a hidden profit distribution (vGA) even if a ban on private use was agreed in the employment contract. However, the hidden profit distribution is not to be assessed at company level according to the 1% rule, but according to arm's length principles. This was decided by the Münster Fiscal Court.

According to the case law of the Federal Fiscal Court, general life experience suggests that a company vehicle provided to a managing director by the company for private use will also be used privately. This also applies in the case of a ban on private use if no organisational measures are taken to exclude private use. The prima facie evidence is supported by the fact that a ban on private use has no consequences under company law or labour law due to the lack of a conflict of interests. It can therefore not be assumed without further ado that the managing director actually complies with the ban. The plaintiff has not rebutted the prima facie evidence. It has failed to provide evidence, for example by keeping a logbook or other records. The plaintiff has not submitted any evidence regarding the actual implementation of the agreement, according to which the company vehicle is to be parked on the company premises after business hours. As the private use to be assumed on the basis of prima facie evidence was not based on a transfer agreement, this does not lead to wages but to a concealed profit distribution.

However, contrary to the opinion of the tax office, this is not to be valued using the 1% rule, as this value under wage tax law does not apply to the valuation of a hidden profit distribution. Instead, the value is to be estimated according to arm's length standards. In the calculation, the court applied a profit mark-up of 5% to the vehicle costs and recognised private use at 50%. The court also denied the special depreciation allowance for the newly acquired vehicle as it was not used at least 90% for business purposes. The plaintiff did not provide the vehicle to its managing director for business use as part of the employment contract, but rather as part of a concealed profit distribution. This does not constitute business use within the meaning of § 7g EStG.

Repaid refund interest as negative income from capital assets

If interest on income tax refunds is assessed in favour of the taxpayer and paid out to them and the taxpayer repays this interest to the tax office due to a new interest assessment, the repayment can lead to negative income from capital assets. This was decided by the Federal Fiscal Court.

For negative income to arise, the interest to be paid by the taxpayer on the basis of the new interest assessment must relate to the same difference and the same interest period as the refund interest received on the basis of the previous interest assessment.

For VAT payers

Christmas party as a VAT tax trap

Company events, such as upcoming Christmas parties, are largely codified for income tax purposes. Unfortunately, this does not apply to VAT, as there is no specific legal standard. The free provision of another other service by an employer for the private needs of his staff is, in accordance with § 3 para. 9a no. 2 UStG, with the exception of attentions, a service equivalent to other services for consideration, which is taxable in Germany.

On the other hand, benefits that are predominantly caused by the employer's business interests are not taxable. The tax authorities are of the opinion that benefits in the "usual" scope up to an amount of EUR 110 including VAT per employee and company event can be assumed for up to two company events per year.

In its ruling of 10 May 2023, the Federal Fiscal Court treats the amount of EUR 110 as an exemption limit from a VAT perspective. The consequence is: If the entrepreneur already intends to use the purchased service exclusively and directly for free transfers of value within the meaning of § 3 para. 9a UStG when purchasing the service, he is not entitled to deduct input tax.

Furthermore, this means that the entrepreneur must pay VAT on an equivalent other service within the meaning of § 3 (9a) UStG, even though there is no input tax deduction.

Note

The German government is planning to increase the tax-free allowance from EUR 110 to EUR 150.

Deduction of import VAT as input tax

Importation requires the imported goods to be used by the company for the purposes of the taxed transactions of the entrepreneur. This presupposes that he uses the goods themselves and thus their value for these transactions. If the trader merely provides a customs clearance or transport service in relation to the imported goods, he is therefore not entitled to deduct import VAT.

The Federal Fiscal Court thus confirmed the decision of the Hamburg Fiscal Court. A taxable person who submits a customs declaration as an indirect representative and whose activity in connection with the importation of goods is limited to the completion of customs formalities can only deduct the import VAT paid by him as input VAT if a direct and immediate connection with certain output transactions or with the overall economic activity of the taxable person is proven. Any connection with the overall economic activity is in any case superseded by the connection of the import VAT with the specific output turnover of the foreign supplier.

For inheritance tax payers

Scope of the inheritance tax exemption for a family home

Under the conditions of § 13 para. 1 no. 4c of the Inheritance Tax Act (ErbStG), the transfer of an owner-occupied property (so-called family home) is exempt from inheritance tax. The Lower Saxony Tax Court ruled on the scope of the tax exemption that only the floor area of the parcel of land built on with the family home (or, in the case of larger parcels of land, an appropriate accessory area) is exempt from inheritance tax in accordance with § 13 para. 1 no. 4c ErbStG.

The plaintiff acquired six parcels of land by inheritance. Five of these parcels were combined as one property in the land register (§ 890 BGB). In the case in dispute, there was the particularity that the tax office responsible for the valuation had summarised three of the five parcels of land combined in the land register in a single assessment and determined a total value for them. In the explanatory memorandum to the assessment notice, the assessment tax office stated that the tax exemption for the family home should only be granted for the one parcel of land on which the house is located.

This was also the view of the tax office responsible for inheritance tax. It did not include the total value determined for the three parcels of land in the inheritance tax assessment and granted the tax exemption for this, but instead deducted the value of the parcel of land with the detached house from the total value and only granted the tax exemption in this amount. The plaintiff, on the other hand, applied for tax exemption for all three parcels.

The Lower Saxony Tax Court was of the opinion that the inheritance tax office had rightly only exempted the parcel of land actually built on with the family home from tax. It remains to be seen what position the Federal Fiscal Court will take on this issue.

Note

For inheritance tax purposes, property is valued by the tax office in whose district the property in question is located. The tax office responsible for inheritance tax then adopts the values determined in this way as "basic assessments" in the inheritance tax assessment. In turn, the tax office responsible for inheritance tax decides on the tax exemption for a family home.

Procedural law

No change in accordance with § 173a AO in the event of incorrect data import into the ELSTER portal

If you make a mistake when importing tax data into the ELSTER portal, this is not a correctable clerical error due to new facts within the meaning of § 173a of the German Fiscal Code (AO).

The taxpayers prepared their income tax returns themselves by submitting them to the tax authorities via the "ELSTER Form" portal. They declared income from employment, capital assets and letting and leasing. After

receiving the data, the tax office (TO) informed the taxpayers that the paper copy with signature still had to be submitted for this selected data transfer (so-called compressed procedure) for the transferred data set. This was subsequently done, whereupon the TO carried out an assessment in accordance with the application and assessed the income tax for the year in dispute in a notice dated 23 October 2019. On 25 October 2019, the taxpayers submitted another income tax return for the same year in dispute, now using the so-called authenticated procedure ("MY ELSTER"). The taxpayers made an error in the data transfer. Instead of the relevant declaration data for the assessment year, the data from the previous year was mistakenly entered into the form. The TO did not notice the claimants' error. It interpreted the new data transmission as a corrected income tax return for the year in dispute and issued an amended assessment notice on 13 November 2019 in accordance with § 172 para. 1 sentence 1 no. 2 AO with corresponding amendment instructions. The dispute was inevitable, as the "newly" assessed income tax was higher. In May 2020, the taxpayers - now plaintiffs - applied to have the amended income tax assessment cancelled.

The TO rejected the application and referred to the fact that it had become final in the meantime. The appeal was unsuccessful. The tax court dismissed the action. The amended income tax assessment could not be cancelled due to a lack of relevant correction provisions.

The Federal Fiscal Court found that the source of the error - exporting the incorrect tax return data to the "MY ELSTER" portal - was the responsibility of the plaintiffs. This oversight was not to be assessed in accordance with § 129 AO due to its lack of obviousness.

Note

When preparing your own tax return with data transfer via ELSTER, the utmost caution and care is required.

Miscellaneous

Possibilities for objections against tax office notices

Taxpayers can raise objections to (almost) all tax office notices if they believe that they have been treated unfairly, i.e. not in accordance with the law. At the beginning of the pyramid of pleas is the objection, the formal requirements for which are regulated in the German Fiscal Code (AO).

The objection is admissible against tax assessment notices, assessment notices, measurement notices and also enforcement measures of a tax office and must be sent to the tax office that issued the notice or measure. The objection can be made in writing or electronically. In special cases, this can also be declared in person at the tax office "for the record" in front of an official. However, a text message is not sufficient. There is no prescribed form for the objection, but the letter or email must state which decision or assessment the person concerned is objecting to. An incorrect designation, such as objection or complaint, is not detrimental. However, care must be taken to ensure that findings in a special assessment notice, e.g. the income of several persons in one notice, can still be challenged at the tax office that issued the subsequent income tax assessment notice, but only within the deadline that applies to the assessment notice. This period is generally one month, calculated from the date of receipt of the assessment notice. This day is notionally assumed to be the 3rd day after the date of the assessment notice.

The name of the person lodging the objection must appear in the letter; a signature is not mandatory. The objection does not have to be drafted by a tax consultant, lawyer or other member of this profession; anyone concerned can do this themselves. The objection is free of charge at the tax office. If there is an effective objection, the responsible tax office must review the entire assessment and in particular the objections raised. This means that any other errors in the assessment that the taxpayer has not yet noticed or objected to can also be rectified. If this results in a higher tax, the tax office must point this out to the taxpayer so that they have the opportunity to withdraw their objection. Then everything remains as before. After examining the objection, the authority must either amend the assessment if it recognises the objections or issue a reasoned decision rejecting the objection.

Filing an objection does not mean that an assessed tax does not have to be paid. An application for suspension of enforcement is required for this. The authority should comply with this request if there are serious doubts about the correctness of the assessment or if payment would result in undue hardship. If the taxpayer does not agree with the objection decision, they can appeal against it to the tax court. The same applies if a decision on the objection has not been made within six months without a compelling reason, in which case an "action for failure to act" can be filed.

Tax secrecy: Personal data disclosed in criminal tax proceedings may not be disclosed to third parties

The Regional Court of Nuremberg-Fürth considered it lawful that, in view of tax secrecy, search warrants must be justified more briefly or not at all by stating the allegation of the offence. From the point of view of the third party's legal protection options, this also appears to be

feasible because the third party not involved in the criminal tax proceedings is generally not in a position to oppose the grounds for suspicion of the offence against the accused anyway. According to tax secrecy, personal data of another person that has become known in tax or criminal tax proceedings may not be disclosed to third parties without authorisation.

Legislation

Reduced VAT in the catering industry ends on 31 December 2023

The reduced tax rate of 7% on restaurant meals in the catering sector until the end of the year will not be extended. The tax rate will return to 19% after the turn of the year. According to the Deutsche Presse-Agentur, this has been agreed by the coalition government.

Modernisation of partnership law (MoPeG) comes into force on 1 January 2024

The Act on the Modernisation of Partnership Law (MoPeG) comes into force on 1 January 2024. It is intended to modernise partnership law and adapt it to the current requirements of the economy. The law brings significant changes for partnerships, in particular for civil law partnerships (GbR). The main changes are the legal capacity of the GbR, the introduction of a company register and the possibility of reorganisation in accordance with the Reorganisation Act. The Act also includes changes to tax law, such as the option for partnerships to opt for corporation tax and tax relief for smaller partnerships. Entrepreneurs and companies should therefore familiarise themselves with the changes and take appropriate measures.

Growth Opportunities Act passed

The so-called Growth Opportunities Act was passed by the German Bundestag on 17 November 2023. The Federal Government wants to use it to strengthen Germany's competitiveness as a business location.

Dates Taxes/Social Security

December/January 2024

Tax type		Due date	
Wage tax, church tax, solidarity surcharge		11.12.2023[1]	10.01.2024[2]
Income tax, church tax, solidarity surcharge		11.12.2023	not applicable
Corporation tax, solidarity surcharge		11.12.2023	not applicable
Value added tax		11.12.2023[3]	10.01.2024[4]
End of the grace period for the above tax types in the event of payment by:	Bank transfer[5]	14.12.2023	15.01.2024
	Cheque[6]	11.12.2023	10.01.2024
Social security[7]		27.12.2023	29.01.2024
Capital gains tax, solidarity surcharge		The capital gains tax and the solidarity surcharge payable on it must be paid to the relevant tax office at the same time as the profit distribution to the shareholder.	

1 For the past month.

2 For the previous month, for quarterly payers for the previous calendar quarter, for annual payers for the previous calendar year.

3 For the previous month, in the case of a permanent extension for the month before last.

4 For the past month, for the penultimate month in the case of a permanent extension, and for the past calendar quarter in the case of quarterly payers without a permanent extension.

5 Advance VAT returns and income tax returns must generally be submitted (electronically) by the 10th of the month following the filing period. If the 10th falls on a Saturday, Sunday or public holiday, the next working day is the deadline. No late payment surcharges will be levied if payment is up to three days late. A bank transfer must be made in good time so that the value date on the tax office's account is on the due date.

6 When paying by cheque, please note that payment is only deemed to have been made three days after receipt of the cheque by the tax office. A direct debit authorisation should be issued instead.

7 Social security contributions are due on the third-last bank working day of the current month. To avoid late payment penalties, it is advisable to use the direct debit procedure. All health insurance funds have a standardised deadline for submitting contribution statements. These must be received by the respective collection agency no later than two working days before the due date (i.e. on 21/12/2023/25/01/2024, 0.00 a.m. in each case). Regional peculiarities regarding due dates may need to be taken into account. If payroll accounting is carried out by external contractors, the wage and salary data should be sent to the contractor around ten days before the due date. This applies in particular if the due date falls on a Monday or on a day after public holidays.

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