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When internal group exchanges of services become a criminal risk

Introduction

In a recent decision (3 February 2025; 6B_90/2024), the Federal Supreme Court (FSC) upheld the conviction of a financial manager (controller) of a Swiss group company to a fine for conditional intent to evade withholding taxes.

What has happened?

Specifically, it concerned a loan that a Swiss company, let us call it X AG, had received from a foreign group company. During an audit of the tax years 2010–2012 by the cantonal tax administration, the interest rate of 3.15% for the loan was deemed excessive. In December 2014, the cantonal tax administration declared an interest rate of 2.5% to be appropriate, which X AG accepted in January 2015 for the tax years 2011–2016. The difference of 0.65% was added to the profit as excessive interest expense. In 2015, the FTA conducted an audit at X AG and found that in some cases the interest paid was not in line with market rates. The FTA then charged withholding taxes in 2016, which X AG paid. Subsequently, the FTA initiated proceedings for tax evasion. This ended in the aforementioned decision by the FSC.

Why was the conviction made?

The criminal liability resulted purely from formal reasons, i.e. the failure to report and declare the withholding tax on the excessive interest to the FTA. The Swiss withholding tax is a self-assessment tax. Failure to report or late reporting of a monetary benefit constitutes tax evasion. The controller was accused of having known, at the latest by December 2014, through the notice from the cantonal tax administration regarding the excessive interest expenses, that payments subject to withholding tax existed which should have been reported to the FTA. The controller's personal liability was justified on the grounds that his duties included preparing the tax return for X AG, co-signing it after approval by the country manager, and acting as the contact person for the tax authorities. The fact that the controller had always informed his superiors did not exonerate him.

What lessons can be learned?

Firstly: intra-group transactions, whether they involve financing, services or the supply of goods, must correspond to a third-party price (known as an arm's length price). Secondly: documentation plays a crucial role. The Swiss Tax Conference (SSK) and the FTA closely follow the OECD-Transfer-Pricing-Guidelines and expect companies to be able to demonstrate arm's length pricing. Thirdly: the personal liability of decision-makers should not be underestimated. Financial officers, CFOs and even members of the board of directors can face criminal prosecution if they breach

their duties in connection with the declaration of monetary benefits.

What needs to be done?

When exchanging services between group companies, consideration must be assessed not only from a tax perspective, but also in terms of governance and compliance. This includes, for example, regularly comparing intra-group loans with the interest rates published by the FTA. If the agreed terms deviate from these rates, sound economic justification is required that will, if necessary, also withstand review by the tax authorities. Similarly, internal cost allocations – for example, for management services, IT support or licence fees – should be reviewed annually and documented in a comprehensible manner. Any deviations must be reported to the FTA in a timely manner. Companies would do well to define clear internal processes and responsibilities. Legal certainty can be achieved in some circumstances with tax rulings. The people responsible should be made aware of this issue through training courses and internal guidelines. As the decision shows: Even if the company ultimately settles the tax liability, this does not exempt it—or individuals acting on its behalf—from criminal prosecution for failing to report the tax in a timely manner.

Conclusion

The decision illustrates that formal omissions can lead to serious consequences. For companies, this means that they must consistently apply transfer pricing guidelines and align their internal control systems accordingly. This is the only way to effectively minimize tax and criminal law risks.

Please do not hesitate to contact us if you have any questions.

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