

## **BFH denies trade tax addback for intermediary companies**

Intermediary company only acted on behalf of other parties

In a decision dated October 25, 2016 (1 R 57/15), Germany's Federal Tax Court (BFH) denied a trade tax addback for rent paid by a German intermediary company that organized participation in foreign trade fairs on behalf of others.

The amended Trade Tax Act that applies as from 2008 requires an imputation of expenses, i.e. interest expense, rent and lease payments for the use of movable and immovable fixed assets, owned by another party. The payment must be partly added back to the trade tax base, on which trade tax will be due. The BFH held that this addback does not apply to intermediary companies.

In the case, the plaintiff was a German GmbH that arranged participation in foreign trade fairs in its own name but on behalf of the Federal Republic of Germany and the State of Bavaria. The German tax authorities assessed a trade tax addback on rent payments for the use of space in exhibition halls made by the GmbH.

The BFH stated that an addback under the trade tax provision for rent paid for immovable assets required that the assets qualify as fixed assets of the lessee had the plaintiff been the owner of the assets. In determining whether assets qualify as fixed assets, the business model and the actual circumstances of the lessee's business must be taken into account. Since the GmbH had the role of an intermediary company and acted only on the direction of the principal, the space rented in the exhibition halls could not be considered the GmbH's (fictional) fixed assets. The choice of exhibition halls depended on the principal's instruction and only incidentally as a result of the GmbH. Fixed assets, however, would have to be presumed to be kept ready and for permanent use, which was not the case for the space in the exhibition halls rented by the GmbH.

The BFH's decision underscore the fact that the business model and the actual circumstances of the lessee will be taken into account when deciding whether a trade tax addback on payments for the use of (im-)movable fixed assets that are owned by another party should be assessed.

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