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German Tax and Legal News

Preclusion of the corporate regulatory fine after a voluntary disclosure

Voluntary disclosure protecting corporate bodies against criminal prosecution and enterprises against regulatory fines - The relationship between sec. 30 (4) sent. 3 OWiG and secs. 371, 378 (3) AO

If executives of an enterprise commit tax evasion or recklessly understate tax in their official capacity, this can result both in the personal conviction of the particular executive and in a regulatory fine on the enterprise. These risks can be minimized by a coordinated voluntary disclosure.

Duty of late registration of tax if errors are found

If it is discovered in an enterprise that tax returns have not been submitted in the past, or have not been submitted accurately, and this has meant that tax may have been understated, the executives of the enterprise, i.e. normally the managing directors or management board members, have a duty to inform the revenue authority without undue delay. An intentional breach of this duty constitutes a tax crime.

Risk of investigations under tax law

In this situation, however, it is often a concern that the managing directors or management board members may be at risk of being subject to investigation for tax crimes on account of the error since discovered. This is particularly the case if, for instance, comparable errors have already occurred in the past, but did not at the time cause problems under criminal tax law. Also conceivable, though, are situations in which the revenue authority, unlike the enterprise, assumes intent.

Late registration that meets the requirements for voluntary disclosure if need be

In such a situation the executives of the enterprise may be able to protect themselves by submitting the necessary late registration in a form that, if need be, e.g. if the revenue authority is not persuaded otherwise, meets the requirements set out by the German Fiscal Code (AO) for a voluntary disclosure giving exemption from punishment after tax evasion (sec. 371 AO) or reckless understatement of tax (sec. 378 (3) AO). The late registration need not contain the words "voluntary disclosure". The (stricter) requirements of sec. 371 AO provide in particular for:

- Full late registration of all tax crimes for one type of tax that have not become time-barred, but at least of the last ten calendar years (there may be exceptions for provisional wage tax and VAT returns).
- No reasons for "blocking", e.g. the announcement or conduct of an external tax audit or the awareness of the revenue authority.
- No tax amounts exceeding EUR 25,000.00; should this be the case, however, exemption from punishment can be achieved by the payment of conscience money pursuant to sec. 398a AO.
- Payment of taxes and interest upon the request of the revenue authority.

Risk of corporate regulatory fines

Should the revenue authority consider the above late registration of bases of assessment to be a voluntary disclosure, this would mean not only that the executives of the enterprise were protected, but also, under certain circumstances, the enterprise itself. In the case of crimes or regulatory offences by executives of an enterprise, the enterprise may be subject to regulatory fines under sec. 30 of the German Regulatory Offences Act (OWiG) that could amount to several million euros.

Preclusion clause for successful voluntary disclosures

However, the preclusion clause of sec. 30 (4) sentence 3 OWiG states that the independent assessment of a regulatory fine is precluded if the crime or regulatory offence of the executive cannot be prosecuted. Such a bar to prosecution is given in the case of a successful voluntary disclosure. This requires, however, that all executives concerned submit successful voluntary disclosures.

Simultaneous protection of the natural person and the enterprise

Successful voluntary disclosures under criminal tax law thus offer not only protection against prosecution for managing directors and management board members, but also protection of the enterprise against the assessment of regulatory fines under the Regulatory Offences Act.

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