

Germany: Customs and voluntary declarations – Prepare your company for the next tax audit

An article by the CMS VAT Group

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This piece is about fundamental compliance and liability aspects which are highly relevant for each company. It intends to show the areas of risk concerning customs and how to handle mistakes with voluntary declarations.

Customs and import turnover taxes are highly formalized duties. But these are binding standards which have to be followed. Therefore the risk to be criminally liable for a minor negligence is a possibility not to be excluded for any company with transnational activity.

For example there is a risk to become part of a VAT-carousel as an importer. In a VAT-carousel one is used by another, foreign company as a tool to hide VAT-evasion inside their jurisdictions. In those cases German and other European criminal authorities quickly assume consciously negligent conduct. And in the case of criminal misconduct not only the company is liable for the duties and taxes but the competent executives may also be criminally liable. Especially in cases of organizational fault. But in any case of a minor negligence that is discovered before a tax audit is announced a voluntary declaration has to be advised. If the negligence is discovered during a tax audit it has to be defended during a long slugging process.

The rules for a voluntary declaration in Germany have recently been changed and tightened. Therefore early and smart legal advice should be used to safely receive the benefits of this legal procedure. The most important requirements for the voluntary declaration are:

- All relevant information – without any exception – that is necessary for the competent tax authorities to assess the correct amount of tax has to be declared.
- The documents which are delivered to the tax authorities have to be sufficient for them to determine the correct amount of evaded taxes.
- The evaded taxes have to be paid to the treasury within an appropriate respite.
- The voluntary declaration should be made in writing for reasons of provability.
- The voluntary declaration should be send to the local competent tax office for the offender.

But the law also has defined several reasons for disqualification. If one of these reasons occurs a voluntary declaration no longer causes a remission of penalty. Particular this rules have recently been changed by the German Bundestag and have been tightened. Reasons for disqualification of the benefits of a voluntary declaration are:

- An order for a tax audit has been announced to the offender or his agent. This point is new and particular problematic. There is no more room to find and voluntary declare errors within the timeline between the announcement and the beginning of the tax audit. Therefore every problematic issue has to be defended during the tax audit in order to avoid to be convicted for a criminal offence.
- The opening of a criminal investigation has been announced to the offender or his agent. (This point is not new.)
- An official of the tax authorities has arrived at the offender's branch for tax audit purposes or to investigate matters of tax fraud. (This point is not new.)
- If the felony of tax fraud has been discovered by the tax authorities at the time of the disclosure and the offender knew it or had to know it. (This point is not new.)

— If the evaded tax amounts to over 50.000 Euros for a single act. This clause is also new and a considerable tightening of the law.

But the law also includes a counter-exception: If the offender who evaded over 50.000 euro in a single act repays the tax within an appropriate respite and pays a penalty of 5% of the evaded tax sum he is not exempted from punishment but the district attorney will not pursue the charges against the offender and in the end he will also go unpunished.

The repayment which is necessary to go unpunished includes only the evaded taxes. In addition to the repayment of the taxes or duties the offender has to pay a penalty interest of 6% p.a. which is a modest rate in a global context. In China for example the rate is 18% p.a. In case of an evasion of over 50.000 euro the penalty of 5% of the evaded tax sum also has to be paid but only once.

The statute of limitation for taxes and customs is up to 10 years in the case of tax evasion and in cases of minor negligence 5 years for taxes. In cases of an administrative custom offence the statute of limitation is only 3 years. This statute of limitation begins with the end of the year in which the tax return has to be submitted.

Recapitulation

The voluntary declaration includes some tricky aspects but can be mastered with prudent legal advice. A voluntary declaration is the easiest and most cost efficient way to prepare a tax offender or a corporation and its executives for the inevitable tax audit and punishment.

For further information on this tax analysis and thought, please contact:

Dr. Björn Demuth
Partner – CMS Hasche Sigle
T +49 711 9764 488
E Bjoern.Demuth@cms-hs.com

Jakob Billau
Associate - CMS Hasche Sigle
T +49 711 9764 486
E jakob.billau@cms-hs.com

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