



The relevance of the planned Association Sanctions Act for tax compliance

1 Threat of heavy fines for companies

The planned Association Sanctions Act has been in political debate for some time. Already in August 2019, the Federal Ministry of Justice and Consumer Protection presented a draft bill, which provided for considerable sanction options, including the dissolution of companies concerned. The Federal Government's present draft has been watered down to the extent that dissolution of associations is no longer envisaged. Nevertheless, the threat of considerable association fines, which could threaten an association's existence, remains in place. For companies with an average annual turnover of more than EUR 100 million, a fine of up to 10% of the average annual turnover could be imposed. However, high revenue does not necessarily mean profits. Industries with high turnover but low profit margins will be unable to afford this. Compared to fines imposed on natural persons, which are based on economic capacity, there is still room for improvement. In the case of companies with an average annual turnover of less than EUR 100 million, the fine can amount to EUR 10 million for intentional offences and up to EUR 5 million for acts of negligence. It should be noted that, in addition to corporate forms under private law, legal entities under public law also fall within the scope of the application of the Association Sanctions Act.

2 Intended principle of legality necessarily leads to sanction proceedings against the company

Unfortunately, errors cannot be ruled out in the area of VAT. The obligation to submit twelve monthly VAT returns within a very short period of time during the year bears a risk that should not be underestimated. In addition, VAT is linked to a large number of transactions. Digitalisation, electronic recording and software-based accounting are both a curse and a blessing. A wrong setting in the ERP software can result in serious errors in the VAT return. An alleged VAT exemption



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applied to mass cases can quickly lead to corrections amounting to millions. Experience in recent years has shown that tax authorities react more sensitively to corrections. In the case of high correction amounts, the probability that investigative proceedings will be initiated against those responsible for VAT has significantly increased. According to the draft of the planned Association Sanctions Act, the fines and criminal cases department of the tax office must necessarily initiate sanction proceedings against companies (principle of legality). This also applies to customs investigations in the areas of customs duties, import VAT and excise duties. Under the current legal situation, it is at the discretion of the respective administrative authority whether, in the case of tax evasion, an association fine in accordance with sec. 30 of the Act on Regulatory Offences (*OWiG*) is also imposed on the company concerned (opportunity principle).

3 Tax compliance as approach to defence

A functioning tax compliance management system is a key factor when it becomes necessary to prove which measures the company has taken to ensure that its tax obligations are being met. On the one hand, this involves internal guidelines for the processing of tax-relevant tasks. On the other hand, however, internal company controls, as well as preventive measures to avoid infringements of the rules, will also play a key role in terms of defence in the event of any sanction proceedings. The classical criminal defence methods, such as remaining silent and hoping that the accusation is not ultimately sufficient for a conviction, are not promising in this context. In the case of classic rectification cases, the incorrect tax law treatment is usually undisputed. Thus, the defence options concentrate on explaining what the company has done to prevent violations of VAT law.

4 Defence based on tax law in tax law disputes

Insofar as the accusation is based on a dispute under tax law (for example, as to whether the circumstances in dispute are subject to VAT in Germany or whether the conditions for a tax exemption are met), the preparation of a defence must begin as early as the initial tax proceedings themselves. Transactions which ultimately turn out to be outside the scope of VAT in Germany cannot be the subject of tax evasion. In this case, an early approach to defence in tax proceedings is decisive for success in criminal and sanction proceedings. If any objection to a tax that has already been finally assessed is only raised before the criminal courts, the company will face difficulty in convincing the judges that the tax office or customs authorities have incorrectly assessed the subject taxes.