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Tax Update Germany

Importance of a Tax Compliance Management System (Tax CMS) in Germany

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In the last years, one could observe an increasing tendency of the German tax authorities to review every correction of a tax return from a criminal tax law perspective. Both in case of a correction of a tax return (Sec. 153 AO) as well as in case of a voluntary disclosure (Sec. 371, 378 AO), the tax return has been objectively incorrect at the time of its filing. However, the norms differ from each other in its subjective elements since a criminally relevant voluntary disclosure requires that the tax payer has acted intentionally or negligent when filing the incorrect tax return. Therefore, the assessment of the subjective element is highly significant and has often caused difficulties in practice.

1. Letter of the German Federal Ministry of Finance dated 23 May 2016

On 23 May 2016, the German Federal Ministry of Finance (BMF) has published a letter with regard to the differentiation of a mere correction (Sec. 153 AO) from a voluntary disclosure (Sec. 371, 378 AO). According to the German Federal Ministry of Finance, the implementation of an internal Tax Compliance Management System might be an indication against intent or negligence, but does not exempt the tax authorities from examining the individual case. Against this background, the verifiable implementation of a Tax CMS is of great importance for the differentiation of a mere correction from a voluntary disclosure and can help to avoid criminal tax law consequences for the company respectively the persons acting for the company (legal representatives / tax department).

2. Advantages of a Tax CMS

Besides the criminal tax law aspects, there are further advantages from the implementation and documentation of a Tax CMS. The implementation of a Tax CMS can also help to reduce civil law liability risks for the management (board) who is responsible to set up a risk early warning system and to organize and supervise the company and who is personally liable for damages in case of legal offences due to improper organization and supervision (Sec. 91, 93 AktG, Sec. 43 GmbHG). Furthermore, the implementation of a Tax CMS can help to reduce the fine in terms of administrative offences law as the German Federal Court of Justice (BGH) pointed out in a recent decision (judgement 1 StR 265/16 dated 9 May 2017 about the determination of fines according to Sec. 30 OWiG). Finally, the implementation and improvement of a Tax CMS provides the opportunity to make internal processes and structures more efficient, to clearly define

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roles and responsibilities and to reduce reputational and financial risks for the company.

3. Elements of a Tax CMS according to IDW PS 980

The Letter of the German Federal Ministry of Finance does not contain any comments on the requirements for an effective Tax CMS. Therefore, the German Institute of Auditors (IDW) has established a working group which has developed the requirements for the design and review of a Tax CMS based on the existing IDW auditing standard 980 (IDW PS 980). The respective IDW auditing practice statement has been published on 31 May 2017.

4. Practical significance

Many companies in Germany are currently concerned with the implementation and documentation of a Tax CMS based on IDW PS 980.

Warth & Klein Grant Thornton has extensive experience and deep know-how in Tax CMS projects. Our experts are happy to support you in this regard, e.g.

- Status quo analysis;
- Development of proposals for improvement;
- Preparation of the elements of a Tax CMS (e.g. Tax Directive, Risk-Control-Matrix, Process Documentation);
- Preparation of a description of the Tax CMS;
- Auditing and certification of the Tax CMS according to IDW PS 980 in the form of an appropriateness and/or performance test.

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