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Chaos trap voluntary disclosure

Veröffentlicht am 11.08.2014

How errors and tricks become a neck-breaker

There are definitely taxpayers who, even in the context of a voluntary disclosure, speculate that the tax office will not discover an estimate that is too low or other incompletenesses. After a precautionary overestimation of tax liabilities, precise calculations must be made on the basis of the documents, i.e. a new tax return must be submitted for each calendar year, as it were. This can also be done in the objection procedure in order to then reduce the tax to the concretely calculated amount actually owed.

Full disclosure

Sending masses of supporting documents without systematically compiling and evaluating the facts is not proper full disclosure, as required, and is worth no more than a self-disclosure filed in the form of a bag of punched out individual letters, for assiduous self-assembly. Such tax advisors are exempt from punishment

who subjectively merely believe or suspect that their professional activity is being misused for tortious purposes, because this is still socially adequate, typical of the profession, commonplace and thus “neutral”.

Offence incompleteness

The case is different when the client’s intent to abuse is positively known. Tax advisors who withhold supporting documents from the tax authorities, for example, in order to make a legally erroneous tax calculation by the advisor unrecognizable on the state side, risk at least their own punishment also because the facts were not fully disclosed. The maxim is: disclose the facts completely, and discuss the legal consequences later in the assessment and appeal proceedings “with an open mind”. Anything else would be a deception of the authorities, and a merely partial and therefore ineffective self-disclosure (BGH, decision of 20.05.2010, Az.1StR 577/09). Since 03.05.2011 at the latest, incomplete voluntary declarations have been ineffective as a whole. The StA at the LG Munich II has been particularly active in advancing the jurisdiction of the BGH, and is responsible for tax evaders “in the valley” (as locals call the area around Lake Tegernsee), § 371 of the German Tax Code (AO).

Subject blocking effect

The BGH (loc. cit.) clarified: “Incidentally, the Senate is of the opinion that the blocking effect cannot be circumvented with a ‘staged voluntary disclosure’. Insofar as it is not possible for the taxpayer to make a precisely quantified voluntary disclosure due to inadequate accounting or due to a lack of supporting documents, he is, in the opinion of the Senate, required to correct, supplement or make up for all the necessary information on the tax-relevant facts from the outset – i.e. already at the first stage of the voluntary disclosure, if necessary on the basis of an estimate using the information known to him.” And: “The Senate does not consider a partial self-disclosure to be sufficient to obtain exemption from punishment. For in this case the return to complete tax honesty is precisely missing (cf. also BGH [wistra 1993, 66](#), 68). Insofar as in the case law of the Federal Court of Justice such a partial self-reporting has so far been regarded as effective because the word ‘insofar’ in § 371.1 of the German Fiscal Code (AO) permits only a partial making up of missing correct information (cf. [BGHSt 35, 36](#); BGH [wistra 1988, 356](#); [1999, 27](#)), the Senate does not adhere to this. An inquiry with other senates is not necessary (cf. Hannich in KK-StPO 6th ed. [§ 132 GVG](#) marginal no.6 with further references).”

Gang tax fraud

A gang consists of at least three members (BGH, decision of 22.03.2001, Az. [GStt 1/00](#), [BGHSt 46, 321](#) ff.), which the jurisdiction considers to be abstractly and concretely more dangerous, consequently more worthy of punishment. It is already a case of a gang if a mediator or arbitrator reaches an agreement with the spouses living in divorce about a property acquired with illicit money in Italy, for example, in such a way that this property will be transferred to a charitable foundation in the future, naturally without prior tax legalisation. The case is similar when a taxpayer agrees with two advisors or co-partners or family members to disclose only a portion of the tax facts to the IRS. In this case, each participant can file a voluntary report on his own – but this would trigger investigations against the other members of the gang. In practice, such voluntary declarations must be filed simultaneously, even if several tax offices in different locations are responsible, if exemption from punishment is to be achieved for all parties involved.

Self-disclosure in the case of incomplete documents

Anyone who submits a voluntary declaration on the basis of incomplete documents (or e.g. their incomplete evaluation in the case of speculative transactions) must, as a precaution, estimate the taxes high enough and then amend them in the objection procedure. Taxpayers naturally tend to estimate too low, contrary to this good advice, “only for the sake of saving money for the time being”, so that the voluntary declaration as a whole is invalid (BGH, decision 20.05.2010, file no. [1 StR 577/09](#)).

The StB must never estimate anything himself. If the tax office or the tax investigation department proceeds to a tax estimate after a voluntary disclosure, this also affects the consultant in the case of a voluntary disclosure as a breach of duty leading to compensation (OLG Celle, judgement of 11.02.2009, Ref. [3 U 226/08](#)). The StB would then have to prove to his exoneration that the client would not have behaved in accordance with the advice anyway and had thwarted a complete self-disclosure.

The latter also occurs, of course, if, for example, only income tax on capital gains is disclosed – but the original source of wealth, such as beneficial donations or so-called consultancy fees, remains untaxed. Similarly, if it is an untaxed gift or inheritance and not just “tax neutral” capital gains.

Banks in Switzerland in particular – unlike in Austria – do not have an EDP system with tax analysis for German tax returns. Because as a rule there customers are often only evaders – it lacks the demand for tax directly usable evaluations for the declaration of taxable incomes from capital assets, until today. If you request secondary evidence there, it often takes months – sometimes longer. Fees for a second printout of an account statement at the end of the year can be up to more than CHF 500. It is not uncommon for the credit institution’s EDP system to fail to provide accurate evaluations. The financial supervisory authorities have been complaining about this in Germany for years. One practitioner then tells colleagues in training that everything is only half as bad: “Remember one thing: it’s always the client who goes to jail.”

by Dr. Johannes Fiala and Peter A. Schramm

by courtesy of

<https://www.network-karriere.com> (Issued August 2014)

Sie haben Fragen?

Scheuen Sie sich nicht, uns für ein Kennenlerngespräch anzurufen. Gerne nehme ich mir persönlich Zeit, um Ihren Fall zu prüfen und den ungefähren Aufwand für Ihr Anliegen abzuschätzen.

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Dr. Johannes Fiala

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Weiterempfehlung

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