

Voluntary Disclosure: Risks for the former managing director of a German GmbH (limited liability company)

The identification of tax irregularities within a company brings about an obligation for the managing directors as the GmbH's legal representatives to immediately correct the mistakes. In case of individuals who no longer act as managing directors this can lead to liability issues with respect to irregularities that occurred during their time in office.

The identification of tax issues in a company induces the legal representatives of the company, e.g. the managing directors of a GmbH, to take a decision on appropriate measures aimed at correcting these issues vis-a-vis the tax office.

If there are tax issues, which might be qualified as an intentional tax evasion by the tax office, the appropriate approach would most likely consist in filing a voluntary disclosure according to Art. 371 Fiscal Code (AO).

Cases involving a filing of incorrect or incomplete tax returns or a failure to file tax returns seem to occur in companies on a rather regular basis. A voluntary disclosure provides the best possible protection from criminal punishment for the legal representative; at the same time, it comes with a set of special and strict requirements that must be fulfilled in order to achieve its desired effects.

The voluntary disclosure is typically made by a company's then current legal representatives, on behalf of the company and - if there is a personal involvement - also in their own name. In many cases, the need for companies to correct tax issues is related to issues that took place in the past and under the responsibility of a managing director who already left the company.

In such cases, companies and their current managing directors should consider informing the former managing director(s) about the intended voluntary disclosure in order to also protect the former managing directors as individuals from criminal punishment. As the voluntary disclosure is a personal criminal exemption reason a former managing director will either have to file the voluntary disclosure himself or it must be filed also in his name, through a representative who has been authorized accordingly by the former managing director. If the managing director intends to be included in the voluntary disclosure, i.e. have the disclosure made also in his name, he has to grant a power of attorney prior to the submission of the disclosure. For reasons of proof, a written power of attorney is advisable. An approval that is granted only after the submission of the disclosure is not sufficient to have the former managing director benefit from the exemption from criminal punishment. In case a former managing director was not informed and/or did not grant his approval to be included in the disclosure and have it also made in his name, he cannot invoke that he was included in the disclosure, which was submitted by the new managing director, for example if the new managing director files the tax returns, which the former managing director failed to file (See lately KG, resolution dated 24.11.2016 - (4) 121 Ss 169/16 (195/16)).

A protection by taking advantage of article 371 para 4 AO is also not possible. This provision of law protects a third party from criminal prosecution in case someone else filed the necessary correction according to article 153 AO, which was not filed or filed in an incomplete or incorrect way. This article shall not apply in cases where the filing obligation was not fulfilled at all (e.g. failure to file a tax return).

Specific attention is required in case of correction of tax issues, which arose in the past, at least where there is a desire of having former managing directors benefit from available exemptions from criminal punishment for the periods for which he was responsible.

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