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The “Ne Bis in Idem” Principle in Tax Disputes:

Nowadays there is great interest in the application of this principle in tax disputes. [1, page 47]. Illegal activities of taxpayers - when they breach tax law - should be and is sanctioned by tax law instruments. When such an act constitutes a serious tax fraud or other serious illegal activity, it will be sanctioned by criminal law. Thus, regularly we face concurring administrative tax proceedings and criminal proceedings dealing with the same facts, the same illegal activity. Here the application of ne bis in idem rights come into play.

For a long time ne bis in idem has not been recognized at the international level, but was only acknowledged for the national criminal justice. Progressively it has become a topic because of international conventions and international criminal law tribunals. In the common law system, you refer to this principle as “protection against double jeopardy”.

The legal fundament and origin of this principle lies in the rule of law, namely in res judicata and thus legal certainty. [2, page 28].

The European Convention of Human Rights itself does not contain such a provision of “ne bis in idem”, it is not recognized as right under Article 6 ECHR. The provision

has meanwhile been included in Article 4 of the 7th Additional Protocol to the ECHR. [3].

The judgement in case of *Lucky Dev. vs Sweden*, the European Court of Human has elaborated on the nature of tax surcharges for the breach of tax law duties by a taxpayer and it regarded this tax surcharge as a sanction under Art. 6 of the European Convention on Human Rights. The inclusion into Art. 6 ECHR had and has effects how to classify the *ne bis in idem* principle in tax matters. [4].

Conditions for the applicability of the *ne bis in idem* principle under the Convention system are the question if these are two criminal proceedings (according to the so called Engel criteria), if we have two proceedings (“bis”), if one of these two proceedings are final [5] and if we have the same offence. [6, 7].

Thus it is clarified that the same factual basis is relevant to determine the “same offence” and that a State should be able to choose complementary legal responses to socially offensive conduct (such as in a traffic or tax context) under certain conditions.

Under the EU law regime, *ne bis in idem* is regarded to be a general principle of EU law.[1, P.52]. Art 50 of the Fundamental Rights Charter of the European Union also protects the right of *ne bis in idem*. [8]. The Court of Justice of the European Union has acknowledged the applicability of this provision in a case of value added-tax.[9]. It has also expressed that criminal tax proceedings against the managing directors and tax law proceedings against the legal entity (company) based on the same offences is legitimate.[10]. Finally, it followed the recent jurisprudence of the European Court of Human Rights and allowed also parallel administrative penal tax proceedings as well as criminal tax proceedings for the same facts under certain conditions.[11].

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