

## Abstract

### **Criminal investigations and civil tax audits:**

In Germany, there are two completely different ways in which the state deals with taxes and with tax evasion. On the one hand, there are the criminal proceedings to punish the person who has tried to evade taxes (tax evasion / tax fraud). These criminal proceedings are proceedings before the ordinary courts with a public prosecutor acting in the interest of the state to find the truth. Ultimately, it is a normal criminal procedure. This means that the state has the burden of proof and the presumption of innocence and the need for intent on the part of the accused apply.

On the other hand, there are the "normal" tax proceedings, in which the tax authorities examine the tax return and - in the end - assess the taxes. In Germany, this procedure is not an audit under civil law, it is a procedure under public law with a special fiscal jurisdiction with specialised fiscal courts. I think this is necessary because German tax law is so complicated that you need a specialised administration and a specialised jurisdiction to master this special (tax) law.

This leads to a number of problems, which I will try to point out a little bit here.

The first problem is that the prosecutor is usually not a tax specialist and the courts in criminal proceedings are not courts of tax specialists either. The second problem is that the timing of investigations varies. There have been cases where the criminal proceedings have ended (resulting in tax evasion) in which the tax proceedings were still pending and the last instance of the tax courts had not yet decided that there was a tax debt. From a specific point of view, this looks a bit like the case of someone being convicted of murder, but it is not yet certain that the victim is really dead. Ultimately, this leads to the key question: Who can judge whether a tax is owed that has been intentionally evaded? Is it possible - in terms of taxpayers' rights - that the result of the criminal investigation can be that a tax was owed, while the financial procedure (tax audit) leads to the result that no tax was owed?

A similar (third) problem is raised by the case law of the ECJ regarding the VAT fraud. Here the ECJ is very strict if the undertaking knew or should have known that it was involved in a VAT fraud. In this case, the taxpayer has no right to deduct input VAT or no right of exemption for the output transactions. Maybe one day the ECJ will rule that such an undertaking has no right of deduction and at the same time no right of exemption. We will see. Beyond that, the jurisprudence of the ECJ leads to the fact that a person, which only knew that another person is or was a fraudster, becomes a fraudster himself. This is a little bit strange as the criminal law (at least in Germany) strictly separates always between the perpetrator and the participant.

The last question concerns the point that many member states have introduced administrative sanctions if a company does not pay the tax on time. Here the key question is whether subsequent criminal proceedings conflict with the *ne bis in idem* principle. This principle is contained in the EU Charter and the Convention on Human Rights, and the approach of the ECJ and the ECtHR is - in my view - slightly different.