

artax

NEWSLETTER

Author:

Circulation: 20'000
(distributed electronically)

Dr. iur. Bernhard Madörin

Tax and trust expert
Licensed audit expert RAB
Licensed insurance intermediary FINMA

Criminal mismanagement: Now the financial owner may also be affected even if not the legal owner!

Dear Sir or Madam,

The criminal court of Basel-Stadt has in practice introduced a new and punishable concept of property. Next to ownership, co-ownership, and joint ownership, two new forms of ownership of an object have been introduced recently: the financial owner and also the legal owner – the latter being discretely different to the former. Offences against property can now also be committed against the financial owner. For the purpose of this present article let us call this new legal institution “dual ownership”.

Criminal mismanagement as an offence

The term 'disloyal management' for a criminal offence is wrought with problems. Let us have a close look at it.

Art 158 paragraph 1 SCC: criminal mismanagement

Who by order of the law, by order of the authorities or by legal transaction has been entrusted to manage another person's assets or to supervise such an asset management and, by neglecting his duties, either causes or tolerates any action that lead to the other person's assets being harmed shall be punished with imprisonment up to three years or with a fine.

Let us assume that your neighbour asks to water his plants and flowers during his two weeks of absence while on holiday, and occasionally, two or three times a week, have a wander around the house. He hands over his keys on Friday. On Sunday you receive a phone call from a member of your family asking you to come to Ticino. The whole family would be there and the weather is just fantastic. On the spot, you decide to pack your suitcase and you spend two pleasant weeks in the sunniest part of Switzerland. On your return, however, you meet a rather irritated neighbour. All of his plants have withered, on a day with a thunderstorm the strong wind caused a window to open, and unfortunately the rainy weather on the northern side of the Alps caused massive water damage. The promised, albeit not undertaken, rounds have led to damage, and your neighbour is disappointed. You have neglected your duty to supervise the house, thus allowing damage your neighbour's assets.

What may look trivial is a rather complex issue from a point of view of criminal law, and can also constitute the offence of criminal mismanagement. As a result, through this criminal offence a civil liability may be penalised and referred to penal law. Whether such actions will then be prosecuted depends on both the specific situation and on common sense.

Extension attempts by the criminal court of Basel-Stadt

In a recent judgement, the criminal court of Basel-Stadt has extended the rather blurred framework conditions for criminal mismanagement. In this particular case it was about the management by a single shareholder. He was the owner of the company and the sole legal owner. The shareholder now has, under various legal titles like personal salary, salary for his wife, expenses, business cars, licence fees etc. drawn an overall salary of CHF 500'000 per year. A former employee – made redundant due to various incidents – then claimed to be a shareholder as well, based on a payment to the single shareholder. This person was neither registered as a shareholder nor in possession of a share certificate. The person in question never made civil law claims to shareholder entitlement and never paid tax for his alleged possession of shares.

He then asked for compensation from the manager and finally brought a charge. The public prosecutor's office took it up, and the criminal court has now sentenced the manager with the argument that the sole shareholder may well legally be the sole shareholder but that the other person would be the economic owner of a part of the shares, that his assets had been damaged and thus the criteria for criminal mismanagement has been met.

The second qualification by the judges proves that the criminal court proceeds systematically with the introduction of double ownership. The shareholder was owner of a brand that had been listed in the brand register and paid himself licence fees within the normal range. Here the court also decided that the brand might be the legal property of the sole shareholder (with entry in the brand register), but that the brand from an economic point of view was property of the stock company and that a licence fee would lead to an unlawful loss for the company, and thus constitute criminal mismanagement. Completely disregarded remains the legal fact that a brand, by virtue of the brand law, can only be transferred via written contract.

Concerning the licence fee payments, the defendant had agreed with the tax administration then in charge to come to a ruling (agreement with the tax administration about an issue). The licence fees for the brand were admitted as operating expenses, with the licence fee revenues thus becoming personal income. In the end, the ruling was worthless, despite the sole shareholder having paid taxes on this income. Based on the principle of economic shareholder and economic owner of the brand, the licence fee payments were not accepted as operating expenses, and the sole shareholder in the end was convicted of tax fraud.

Conclusion

With this judgement of the criminal court of Basel-Stadt, "criminal mismanagement" (already a problematic term) is drastically enlarged by the term of dual ownership. In the future, everybody needs to ask who the legal owner and who the economic owner is. They need not be identical.

Tax law knows the economic approach. As a consequence, issues are being taxed regardless of the legal form. Now punishability based on economic interpretation has been introduced, regardless of the legal form. The appeal case is pending at the cantonal court, and it is to be hoped that the original verdict will be amended.

artax is looking for two new employees, more information's [here](#).

Kind regards

artax Fide Consult AG

Member of Morison KSi

Gartenstrasse 95, Postfach, 4002 Basel
Tel: +41 61 225 66 66, Fax: +41 61 225 66 67
info@artax.ch, www.artax.ch