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By PwC Deutschland | 13. April 2011

No necessary economic ownership for “legal second”

The Supreme Tax Court has held that the purchase of a share followed by the immediate and pre-agreed transfer of a portion to a spouse led to neither partner holding the whole share at any one moment.

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A husband acquired a 15% share in a GmbH. The previous day, he had agreed “in view of the forthcoming acquisition” by contract to pass a 5.1% holding from this share to his wife with immediate effect. In his view, this meant that he at no time held more than 9.9% in the GmbH. The tax office took the contrary view: that he had, for a legal second, held 15% in the GmbH before passing 5.1% on to his wife. Thus, his capital gain on sale by both spouses of their respective shares two years later was taxable under the provision charging a gain on the sale of a share to income tax if the seller had held a significant holding at any time during the previous five years. At the time a significant holding was 10% or more of the share capital; later, the level was reduced to 1%, but the principle of the legal second here at issue remains unaltered and relevant in many other circumstances.

The Supreme Tax Court has held that holding a share as its legal owner for a “legal” or “logical” second does not necessarily imply economic ownership with tax effect at any time. The legal second is a construction of legal logic for the purpose of ordering interconnected events that occur simultaneously. It is not a measure of time, or, if it is, the time is nil. In the present circumstances, the husband had had at no time any possibility of exercising the rights of a 15% shareholder in the GmbH, since he had been unable to act as such throughout the transaction. Similarly, his dividend right was never higher than 9.9%. He could not therefore be taxed as though his economic ownership had ever been higher than 9.9%

Supreme Tax Court judgment IX R 7/09 of January 26, 2011 published on April 13

Schlagwörter

legal second