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# Untypical silent partner disqualifies company as Organschaft subsidiary

**The Supreme Tax Court has held that a company with an “untypical” silent partner cannot surrender its entire profit to its parent and thus cannot conclude the profit pooling agreement necessary for an Organschaft.**

A subsidiary took a silent partner with a profit share based on the results of a foreign branch. The silent partnership was "untypical" inasmuch as the silent partner took an active part in the management of the company. The profits from the foreign branch (permanent establishment) were exempt from German taxation under the relevant double tax treaty. The tax office refused to recognise an *Organschaft* between the subsidiary and its parent, as the payment of a profit share to a silent partner meant that the two companies could not pool their entire results. A legally valid profit pooling agreement is a necessary precondition for an *Organschaft*. The lower tax court upheld the position of the tax office and the Supreme Tax Court has now refused leave to appeal against that decision, as there is no question of law requiring clarification.

The Supreme Tax Court held that that the reference to the entire profit (of the subsidiary) in the company law provisions on *Organschaft* was clear and unambiguous. It could not be understood other than as an exclusion of all other profit appropriations (other than as specifically required or allowed under company law). It was therefore in conflict with the claim to a profit share of a silent partner. The fact that the share in question was based on only one of the company's fields of activity was irrelevant, as was the tax treaty exemption for that source of earnings. A treaty exemption did not change the fact of profit; it merely excluded the amount from the computation of taxable income.

Supreme Tax Court resolution I B 177/10 of March 31, 2011 published on June 22

**Schlagwörter**

Organschaft, silent partner