

By PwC Deutschland | 05. Oktober 2011

Immediately diluted share purchase is purchase of reduced holding

The Supreme Tax Court has held that a share purchase for the purpose of resolving a capital increase to be taken up by another shareholder gives the acquirer diluted rights.

A future director acquired a 12.6% holding in a GmbH. A shareholders' meeting was held immediately afterwards to resolve a capital increase to be taken up in full by other shareholders. His relative holding thus fell to 0.02%. Rather more than a year later, he sold his share, realising a not inconsiderable capital gain. Under the then law, capital gains on the sale of shares held privately for more than one year were tax-free unless the recipient had held at least 10% of the issued share capital of the company at any time during the previous five years. The tax office saw this exception as fulfilled with the purchase of the 12.6% share and assessed income tax on the gain in the year of sale. The shareholder argued that he had acquired his investment for the specific and agreed purpose of voting in favour of the capital increase. Since this increase necessarily led to the immediate dilution of his shareholding, he had, effectively, never held more than the diluted proportion of 0.2%. This, though, was well below the 10% limit for taxing the capital gain.

The Supreme Tax Court has now sided with the taxpayer. The share purchase and capital increase resolutions were passed in one sitting in the lawyer's offices and were parts of the same transaction. That the one resolution necessarily preceded the other in law, did not mean that the two could not be regarded as a single act for tax purposes. Taxation was based on the substance of transactions rather than on their legal form, and the substance here was that the taxpayer at no time effectively disposed over a shareholding of more than 0.2%.

In the meantime, capital gains taxation has been revised and gains on the sale of any shares acquired in 2009 or later are always taxable, regardless of the circumstances of the investment. The case therefore has no meaning as a planning guide for the future, although it is of importance in drawing tax conclusions from interlinked transactions, establishing, as it does, yet again that interlinked transactions should be taken as a single event, if such is the substance of the occurrence.

Supreme Tax Court judgment IX R 32/10 of May 25, 2011 published on October 5

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