By PwC Deutschland | 19. Oktober 2011

Only partial foreign tax credit on repeated gifts

The Supreme Tax Court has held that credit for foreign gift tax is limited to the amount paid in the year of each gift. Lost credit in a prior year cannot be recovered against the higher tax now payable by reason of a higher progressive rate.

Gift tax in Germany is – as is inheritance tax – levied on progressive scales with generous personal allowances for close relatives. However repeated gifts from the same donor to the same beneficiary accumulate over a ten-year period in the manner that in each year of receipt, the cumulative total tax is calculated anew with a credit being given for the tax already paid. Thus the tax due on repeated gifts tends to rise in relative terms over the ten years, following the exhaustion of personal allowances and the progressive rate scale. However, the credit for foreign tax on the same gift is limited to that assessed on the gift made in the year in question. Thus, lost credit in one year cannot be recovered in another, even though the gross tax due is based on the accumulation of both.

A German resident receiving an annual cash gift from her mother in Holland has been unsuccessful in her attempts to obtain judicial redress for this imbalance. The gifts were taxable in both countries with credit in Germany for the Dutch tax paid, but limited to the corresponding German tax due. The different rate scales meant that the relative burden on lower amounts was higher in Holland that in Germany, whilst the position reversed as the gift rose. Thus the daughter received little or no benefit in Germany from the credit of the higher tax paid in Holland by her mother during the early years of the cycle, but could not recover this lost tax credit when the taxable gift began to accumulate. Had she received the entire gift in a single lump sum, the lost credit, if any, would have been limited to the excess of the Dutch tax payable on the whole over the corresponding German total.

The Supreme Tax Court has held to the letter of the statute. Gift tax is assessed annually, thus there is no provision for subsequent recognition of prior years' credits. The effect of prior years' assessments on the current year's calculation is a matter of calculation, not of law. On rather firmer ground, the court went on to hold that this imbalance was not excluded by European law. The ECJ had repeatedly held that the European systems of gift and inheritance taxes were not harmonised; thus, those crossing borders could not rely on fiscal neutrality. Imbalances of the type here under discussion had to be accepted as European law at present stands.

Supreme Tax Court judgment II R 58/09 of September 7, 2011, published on October 19

Schlagwörter

foreign tax credit, gift tax, lost credit