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No gifts between company and its shareholders

The Supreme Tax Court has rejected an assessment to gift tax on a supposed hidden distribution to a shareholder on the grounds that a shareholder’s receipt of a hidden benefit is his investment income.

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The taxpayer, a natural person, ultimately held the controlling interest in a group of companies. One of the subsidiaries supported another in financial difficulties with a loan. Later, the creditor was forced to subordinate the debt in order to save the debtor from bankruptcy. The taxpayer then acquired both the shares in the debtor and the subordinated loan for a nominal price of 1 euro. Four years on, the fortunes of the debtor improved and the loan repayment obligation revived under a clause in the subordination agreement. The tax office saw the repayments as gifts by the original loan creditor to its ultimate shareholder and raised an assessment to gift tax. The shareholder contested this assessment before the courts.

The Supreme Tax Court has rejected the assessment, unusually, for two entirely different reasons. The first was a matter of fact: the gift tax value of a transfer was the market value of the object when transferred and nothing had been raised during the case to suggest that the subordinated loan had been anything other than worthless when the taxpayer took it over. Subsequent developments had occurred after the taxpayer had become the sole immediate shareholder of the debtor and were thus for his account. On this basis there had been no gift.

The Supreme Tax Court then went on to rule against the tax office on the point of law that there can never be gifts between a company and its shareholders. Rather, the possible relationships can only be commercial governed by contract or on the basis of the shareholdings governed by company law. A company can benefit its shareholders with an openly declared or hidden distribution, or with a capital repayment, but never with a gift. Distributions are chargeable to income tax as investment income, but not to gift tax. This applies, too, when the distribution is not evenly spread between the shareholders, such as in the present case where any hidden benefit from the transaction would have fallen entirely to the shareholder acquiring the loan. The court also made the point that it would be illogical to subject a hidden distribution to gift tax whilst taxing an openly declared dividend as investment income.

Supreme Tax Court judgment II R 6/12 of January 30, 2013 published on March 26

Schlagwörter

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