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Pension promise to owner/manager hidden distribution

The Supreme Tax Court has held the annual cost of a pension promise to a former owner/manager who retired before the pension date to be a hidden distribution.

A 58 year old managing director and majority shareholder of a GmbH was promised a fixed monthly pension to be drawn from age 68 onwards (ten years being the minimum period of service for a related party pension entitlement which the tax authorities are prepared to accept). However, his contract of employment allowed termination by either party at age 65 without notice. In the event, he stood down at age 63, although the pension promise was allowed to continue unaltered. The tax office insisted that the provision should then be released back to income and the pension expense of future years be disallowed.

The Supreme Tax Court has now held that the provision as such must be accepted. The promise was given under a legally binding agreement and the GmbH remained liable for fulfilment. However, the managing director's retirement at 63 meant that at that point at the latest each party had accepted that he would not earn his pension over at least ten years of service. Accordingly, the annual pension charge was to be disallowed as a hidden distribution of profit. To the extent that assessments of earlier years were now final and could no longer be altered, the corresponding pension payments were to be treated as hidden distributions when made.

Supreme Tax Court judgment I R 76/13 of June 25, 2014 published on September 3

Schlagwörter

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