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By PwC Deutschland | 25. Januar 2018

Gift Tax : Benefit provided to person related to a shareholder

The Supreme Tax Court decided in three separate cases that the payment of excessive consideration under the terms of a contract between a GmbH and a party related to the shareholder is not a partial gift by the GmbH, if the shareholder was involved in the conclusion of the contract between the GmbH and the related party. In such a case the benefit granted arises from corporate relationship between the GmbH and the shareholder. With these decisions the Supreme Tax Court has changedn its earlier jurisprudence on this question.

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Background

In two of the cases (II R 54/15 and II R 32/16) the appellants had each rented out real estate to a company. In each case the appellant was the spouse of the shareholder of the company. The shareholders were either co-signatories of the contracts or had concluded the contract as owner-manager. In the second case (II R 42/16) the appellant sold shares in a company. He was the brother of the shareholder, who had set the purchase price. It was established at the tax audits that the rents paid were too high and the purchase price excessive, thus, for income tax purposes, giving rise in each case to a hidden profit distribution by the GmbHs to their shareholders. In addition the tax authorities took the view that excessive payments constituted partial gifts by the GmbHs to related parties which were subject to gift tax. The Supreme Tax Court did not share this view.

No Gift Tax: excessive payment to a related party arises from the corporate relationship

The Supreme Tax Court held that the payment of an excessive consideration by a GmbH to a party related to the shareholder is not a partial gift by the GmbH to the related party, if the shareholder is involved in the conclusion of the contract between the GmbH and the related party. Such involvement by the shareholder can arise in various situations, for instance where the shareholder concludes the contract between the GmbH and the related party in his capacity as owner-manager, or where he is co-signatory or where he gives the managing director instructions with regard to the conclusion of the contract, or where he works towards or agrees to the conclusion of the contract in any other manner.

Motivation for the excessive payment of rent or purchase price by the GmbH to spouse/brother was the existing corporate relationship between the GmbH and its shareholder. This also applies where a number of shareholders have interests in the GmbH and at least one of them was involved in the agreement between the GmbH and the party related to him. Where the shareholder holds his interest in the GmbH through a parent company, the same principles apply, if he is involved in the conclusion of the contract between the GmbH and the related party.

Comment

These judgments contrast to the Supreme Court's decision on 7 November 2007 (II R 28/06) in which the Court held that such a transaction between the GmbH and a party related to a shareholder could be viewed as a partial gift and the Court now appraised the question differently.

The Court also noted that in such cases the shareholder may himself be the donor. Whether in fact there was a gift between the shareholder and the related party would depend upon the specific features of the relationship, so for example whether there had been an agreement to gift or rather a loan or a purchase agreement. This question was not ruled upon.

Source:

Supreme Tax Court – decisions of the II Senate on 13 September 2017 published on 24 January 2018:

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II R 54/15

II R 32/16

II R 42/16

Schlagwörter

Private Wealth, donations, excessive consideration, inheritance and gift tax, related party