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Tax exemption on gains from share disposals available to financial undertakings resident in third countries

Gains realised by financial undertakings resident in third countries on the disposal of shares are fully exempt from corporation tax. In these proceedings,the Hessian Tax Court considered whether the exclusion from the benefit of the participation exemption under Section 8b (7) of the Corporation Tax Act also applied to credit institutions and financial services institutions not resident in the EU/EEA.

Background:

The provision of Section 8b of the Corporation Tax Act (CTA) provides for a general tax exemption of domestic and foreign dividends and gains on disposals of shares. In the case of gains on disposals, 5% of the gain is deemed fictional non-deductible operating expenses (i.e. resulting in a 95% exemption of the gain).

The exemptions are, however, not available to certain credit institutions and financial services institutions under Section 8b (7) CTA. The version of this sub-section applicable for the years in question specifically extended the denial of the tax exemption to financial institutions resident in another EU Member State or an EEA State, which provided the inference that corresponding companies/institutions resident in third countries must be entitled to the tax exemption. The Hessian Finance Court also came to this conclusion.

Situation:

The plaintiff, a limited company incorporated under the laws of the Cayman Islands, had invested, inter alia, in shares in a number of German listed companies, whereby the 1% limit had been reached. In 2005, 2007 and 2009, the plaintiff realised capital gains from share transactions, which it treated as 95% tax exempt. The treatment was initially confirmed by the tax authorities in a tax audit, but at a later date, the tax office issued an amended tax assessment – this was possible as the assessments were still open – denying the plaintiff the 95% exemption on the basis that it was a financial undertaking.

The Hessian Tax Court rejected the treatment of the tax office:

Decision:

A consideration of the wording of the provision alone led to the conclusion that companies resident in third countries which fulfil the requirements of Section 1 (3) of the German Banking Act (i.e. per the provision then in force) were not covered by § 8b (7) CTA. That provision did not apply to third-country financial undertakings, which had no domestic establishment. Accordingly, the plaintiff's gains from the sale of its holdings in German corporations were tax-exempt.

Furthermore, following the principle of the Supreme Tax Court (I R 37/15), the fiction of the 5% non-deductible operating expenses could also not be applied to an entity, which had no domestic business establishment and no resident permanent representative.

Accordingly, the capital gains were completely tax exempt.

Source:

Hessian Tax Cout, judgment of 7 November 2018 (4 K 1549/16), published on 16 May 2019; the judgment is final.

Schlagwörter

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