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Issue of shares as part of corporate action (spin-off)

The Lower Tax Court of Lower Saxony ruled that the allocation of shares in the course of a restructuring of Hewlett-Packard Company meets the requirements of a spin-off within the meaning of Sec. 20 (4a) Sentence 7 of the German Income Tax Act. Thus, there is no taxable distribution in kind at the time of the share allotment.

Background

The plaintiff held shares in Hewlett-Packard Company (HPC) in his portfolio account, which he had already acquired before December 31, 2007. In 2015, HPC changed its name to HP Inc. (HPI). HPI then transferred its corporate customer business to its previously formed subsidiary, Hewlett-Packard Enterprise Company (HPE), by way of a so-called “spin-off”. For one old share in HPC, the shareholders received one share in the renamed company HPI and one additional share in HPE. The custodian bank recorded the allocation of the additional shares in HPE as a taxable distribution in kind and withheld capital gains tax. With reference to the circulars issued by the federal Finance Ministry dated January 18, 2016 and March 20, 2017, the tax office treated the transaction as a taxable distribution in kind within the meaning of Sec. 20 (1) Sentence 1 No. 1 Income Tax Act.

Judgement

The Lower Tax Court took a different view. The allotment of HPE shares is not a taxable event. The special income tax provisions for corporate action had to be applied: Sec. 20 (4a) sent. 7 Income Tax Act assumes a continuation of acquisition costs in the case of spin-offs. The provision of Sec. 20 (4a) Sentence 7 Income Tax Act, which relates exclusively to spin-offs, supersedes the more general provision of Sec. 20 (4a) Sentence 5 Income Tax Act as a more specific statutory provision. No tax liability arises because the HPE shares acquired have replaced the previous shares for tax purposes.

With this decision, the Tax Court of Lower Saxony follows the case law of other lower tax courts but has granted appeal in view of other proceedings already pending before the Supreme Tax Court on this issue.

Source:

Tax Court of Lower Saxony, decision of 29 September 2020 (Case No. 13 K 223/17)

Schlagwörter

Hewlett Packard, Spin-off, corporate action, distribution-in-kind