By PwC Deutschland | 13. September 2022

No retroactive change of legal form effective for tax purposes if the contribution requirements are not met when the resolution is adopted

In its ruling of 21 February 2022 (I R 13/19), the Supreme Tax Court rejected the tax office's appeal against the ruling of the Lower Saxony Tax and ruled that the (retroactive) change of legal form of a partnership into a corporation under Section 25 Sentence 1 in conjunction with Section§ Section 20 (1) Reorganisations Tax Act is prohibited for tax purposes if, at the time of the resolution to convert, the partnership changing its legal form no longer engages in a commercial activity

Background

An interest was held in a GmbH & Co. KG, which calculated its profits on the basis of tonnage (i.e. profit determination of commercial shipping operating in international traffic) in accordance with § 5a Income Taxes Act (“ITA”); a civil law partnership (“GbR”) was one of the partners. The interest in the GmbH & Co. KG was the only significant operating asset of the GbR. On 17 December 2012, the GbR was entered in the commercial register as a general partnership (“OHG”). With effect from 2 January 2013, the interest in the GmbH & Co. KG was sold. On 25 January 2013, it was decided to convert the OHG into a GmbH for tax purposes at book values retroactively to 18 December 2012. The release and attribution of the difference between the book value and the going concern value within the meaning of Section 5a (4) Sentence 1 ITA (year of dispute: 2012) was disputed by the parties. While the tax office assumed a release of the difference pursuant to Section 5a (4) Sentence 3 No. 3 ITA as of 18 December 2012 due to the change of legal form, the plaintiffs were of the opinion that there was no profit-increasing release of the difference due to the neutral nature of the change of legal form at book value.

Decision

The Supreme Tax Court did not have to rule on the previously disputed question of whether a change of legal form of a partnership into a corporation also triggers Section 5a (4) Sentence 3 No. 3 ITA, since in the case under review no tax-effective (retroactive) change of legal form was executed.

According to the Supreme Tax Court, this results from the fact that at the time of the resolution on the retroactive change of legal form on 25 January 2013, the requirements of Section 25 Sentence 1 in conjunction with Section 20 (1) Reorganisations Tax Act were not met. According to the Supreme Tax Court, Section 25 Sentence 1 in conjunction with Section 20 (1) Reorganisations Tax Act , requires that shares in a co-entrepreneurship must be contributed. At the time of the resolution to change the legal form on 25 January 2013, such shares no longer existed. This follows from the fact that the interest in the GmbH & Co. KG - as the only material operating asset - had previously been sold with effect from 2 January 2013; this transfer constituted a sale of business within the meaning of Section 16 (1) Sentence 1 No. 1 ITA. As a result, the OHG was no longer a co-entrepreneurship at the time the resolution was adopted, but only an asset-managing partnership. However, the transfer of an asset-managing partnership cannot constitute a sufficient contribution within the meaning of Section 20 (1) Reorganisations Tax Act .

The question raised by the lower court and disputed in the literature as to whether the prerequisites of Sections 20 and 21 Reorganisations Tax Act must already be met at the time of the retroactive taxation (in this case, 18 December 2012) was not relevant in the case in dispute, so that the Supreme Tax Court did not have to comment on this.

Source

Supreme Tax Court decision of 21 February 2022 (I R 13/19), published on 8 September 2022.

Schlagwörter

Reorganisation Tax Act, change of legal form, entrepreneur, partnership income