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By PwC Deutschland | 20. September 2023

Portfolio dividends: Determining the shareholding threshold of 10%

While calculating the participation threshold in Sec. 8b (4) Sentence 1 Corporate Tax Act for portfolio dividends (shareholdings of less than 10%) the general principles of the attribution of assets for tax purposes laid down in Sec. 39 Fiscal Code must be observed. According to a most recent judgment of the Supreme Tax Court the decisive factor is the economic ownership of the shares.

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Background

Dividends received on significant holdings are exempt from corporation and trade taxes. A minimum shareholding of at least 10% is required for corporate tax and must be met at the beginning of the calendar year in which the dividend was received, whereas for trade tax a minimum shareholding of at least 15% at the beginning of the relevant tax year is required. Portfolio dividends (shareholdings of less than 10%) are taxable.

The plaintiff, a GmbH, and X were shareholders of Y-AG, whereby the plaintiff held 9.898% and the majority shareholder was X with 85.1%. On 16 December 2013, the plaintiff concluded a purchase and transfer agreement with the main shareholder for purchase of 50 shares, which brought him slightly above the 10% ownership threshold. However, the contract was subject to the condition precedent of payment of the purchase price. This was delayed until 2014 due to an incorrect money transfer and thus the transfer of ownership under civil law definitively took place only at the beginning of 2014.

In 2014 (the year in dispute), the plaintiff received dividends from Y-AG for years 2012 and 2013. In the corporate income tax return for 2014, the plaintiff treated the dividends as tax-exempt income within the meaning of Sec. 8b (1) CTA plus non-deductible operating expenses pursuant to Sec. 8b (5) CTA. The tax office refused to apply Sec. 8b (1) CTA and took the dividends into account in full when determining the income subject to corporate tax because at the beginning of 2014 the plaintiff had not yet met the participation threshold of 10% as required under Sec. 8b (4) CTA.

The Munich Tax Court upheld the appeal brought by the plaintiff. The participation threshold of Sec. 8b (4) CTA had already been reached at the beginning of the year in dispute. Although the plaintiff had not yet become the owner under civil law of the shares acquired on 16 December 2013, he had nevertheless gained beneficial ownership at the time.

Decision of the Supreme Tax Court

The Supreme Tax Court agreed with the lower tax court and rejected the tax office's appeal as unfounded. Contrary to the opinion of the tax office, the amount of the participation is not solely determined by ownership under civil law. From a tax perspective, the ownership of the shares must take into account the principle of economic ownership described in Section 39 of the German Fiscal Code. Accordingly, economic ownership presupposes that the owner exercises effective control over the asset whereby excluding others (i. e. the legal owner) from affecting the economic good during the normal period of its useful life (beneficial ownership, Section 39 sub-section 2 No. 1 sentence 1 Fiscal Code).

The shares were already attributable to the plaintiff in 2013 from an economic point of view because he had already received an enforceable claim and entitlement to the shares which could no longer be unilaterally revoked by the seller and furthermore, he had, from an economic point of view, already acquired the underlying dividend rights. The fact that the plaintiff was not yet entitled to the voting rights from the 50 shares acquired on 16 December 2013 was of no relevance here, since - with a shareholding of just over or just under 10% - the plaintiff was on equal footing with a majority shareholder with investments of 85% or

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85.1%. Therefore, the increase in the voting rights of the plaintiff had practically no effect in the specific case of dispute.

The beneficial owner of a share is the one who can at the same time exclude the stockholder from his essential rights (e.g., dividend receipts and voting rights). This position vis-à-vis the stockholder cannot be conveyed solely by a legally secured purchase expectation and (from an economic point of view) a receipt of dividends. Beneficial ownership could likewise not be considered where there was a participation in an "overall contractual concept" which virtually prevented that person from exerting his essential rights of ownership in the shares and precluded him from bearing the financial risk of the transactions.

Finally, the BFH points out that not individual structural aspects are decisive, but rather the holder of the managerial powers of disposal plays a key role based on the overall conditions and circumstances of the case.

Source:

Supreme Tax Court, decision of 7 June 2023 (I R 50/19) - published on 14 September 2023.

Schlagwörter

portfolio dividend, tax exemption