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By PwC Deutschland | 09. Dezember 2024

No disallowance of partial write-down in Section 8b (6) sentence 2 Corporation Tax Act to savings bank governed by private law

In a recent judgment, the Supreme Tax Court held that Section 8b (6) sentence 2 of the German Corporation Tax Act as part of the tax exemption rules for dividends from participations in corporations and associations does not apply to savings banks that are organized as legal entity governed by private law.

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Background

The provision of Section 8b Corporation Tax Act (CTA) defines in more detail thetax exemption of investment income (dividends from participations in other companies or associations) and states in para. 3 sentence 3 that partial write-downs for corporations are not tax-deductible. Section 8b (6) sentence 2 CTA extends the personal scope of application to business operations of corporations **governed by public law**.

In the present case before the tax courts, it had to be clarified whether this extension also applies to savings banks that are run in the legal form of a stock corporation (AG) or another legal entity **under private law**. In the case of dispute, the plaintiff had made a partial write-down of its investment in the regional Schleswig-Holstein Savings Banks and Giro Association (single share) which the tax office disallowed.

The tax court of first instance confirmed the view of the tax office. The partial write-down made by the plaintiff pursuant to Section 8b (6) sentence 2 CTA analogous and in conjunction with Section 8b (3) sentence 3 CTA is to be added back off-balance sheet as its application was not blocked by Section 8b (7) CTA (which specifically excludes shares held by banks and financial services for short term trading…).

Decision

The provision of Section 8b (6) sentence 2 CTA on the exemption of dividends from corporations and associations also applies to business operations of public bodies. Therefore, it is also valid for partial write-downs in connection with the respective share losses or in connection of a loan or a surety for a loan granted by a shareholder and which are to be ignored in computing the taxable income. However, the Supreme Tax Court found that these rules are **not to be applied** to a savings bank in the legal form of a **private company** (stock corporation - AG) either by way of interpretation or by analogy.

In the case of companies as shareholder in other corporations or associations the dividends received will - under certain circumstances as specified in Section 8b Corporation Tax Act - be 95% tax-free. Section 8b (6) sentence 2 CTA provides that subsections 1 to 5 apply to earnings and gains falling to a business held by a corporation of public law from other corporations of public law through which the business is an indirect member of the company. Section 8b (3) sentence 3 CTA provides that non-deductible losses include losses in connection with a loanor a surety for a loan, where loan or surety were granted by a (qualified) shareholder who holds or held directly or indirectly more than 25% of the ordinary share capital of the borrowing corporation.

As evidenced from the wording in Section 1 (1) CTA and the definition in Section 4 (1) sentence 1 CTA of business operations of public bodies, the legislator was well aware of the difference between corporations, associations of persons or private law estates on the one hand and business operations of legal persons under public law (businesses held by a corporation of public law) on the other. The fact that the legislator has provided in Section 8b (6) sentence 2 CTA a regulation specifically addressed to businesses held by a corporation of public law clearly suggests that only this group of persons should be affected by the provision.

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Even if only very few savings banks under private law may participate in regional savings banks associations (of which the German Savings Banks Association is the umbrella organization), the Supreme Tax Court sees no indication that the legislator could have simply “ overlooked” such savings banks when setting up Section 8b (6) sentence 2 CTA.

The Supreme Tax Court could also not agree with the opinion of the court of first instance who held that a failure to include savings banks under private law would lead to a violation of the general principle of equality under Art. 3 (1) of the German Basic Law (*Grundgesetz*). Legal entities under private law are not completely identical to those under public law. The Supreme Tax Court concedes that the unequal tax treatment may be legally questionable in a political sense. However, this does in no way impact the fact that - in each case due to a deliberate decision by the legislator - profits of business operations of public bodies are in part taxed differently to those of corporations.

Source:

Supreme Tax Court, decision of 4 September 2024 (I R 12/22) – published on 5 December 2024.

Schlagwörter

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