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By PwC Deutschland | 17. März 2025

Hidden profit distributions in the case of stock corporations

The Supreme Tax Court decided that remuneration agreements (for profit related bonuses and sales bonuses) between a stock corporation (AG) and a member of the management board who is also a minority shareholder are generally to be recognized for tax purposes. Only in exceptional cases are they treated as a hidden profit distribution, specifically if there are clear indications in individual cases that the supervisory board of the AG has unilaterally focused on the interests of the management board member in the remuneration agreement.

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Background

In the case of dispute, a stock corporation (AG) had concluded a remuneration agreement through its supervisory board with the management board member X who had sole power of representation. The agreement provided for sales and profit-related bonus payments. Two members of the three-member supervisory board were minority shareholders together with X. The third member was not a shareholder of the AG. There were no family relationships between the Management Board and the members of the Supervisory Board. The tax office and subsequently also the tax court of first instance treated the sales- and profit-related remuneration payments to X as hidden distributions of profits. This resulted in higher corporation tax for the AG.

Decision

The Supreme Tax Court disagreed. Sales-based bonuses in particular should only be recognized under tax law in exceptional cases due to the risk of profit absorption. However, the tax court of first instance had not considered the fact that the case law cited concerned the remuneration of the managing director of a GmbH. In the situation of an AG, however, the circumstances are different. Here, a supervisory board acts on behalf of the AG which is legally obliged to protect the interests of the AG when agreeing the remuneration of the management board.

In the case of dispute, X was not in a position to control the supervisory board because he did not hold the majority of shares required for the election of the supervisory board members and he was not related in any way to the members. In such a situation, a hidden distribution in connection with sales- or profit-related bonuses is only possible in exceptional cases if special circumstances clearly showed that the supervisory board had unilaterally focused on the interests of the management board member.

Source:

Supreme Tax Court judgment of 24 October 2024 (I R 36/22) – published on 13 March 2025.

Schlagwörter

hidden distributions