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By PwC Deutschland | 26. Januar 2026

Trade tax liability of a foundation with legal capacity

In a recently published decision, the Supreme Tax Court clarified that foundations with legal capacity are not subject to trade tax per se. The decisive factor is whether economic business operations within the meaning of the Trade Tax Act are carried out.

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Background

The case only went before the Supreme Tax Court because the tax court of first instance had failed to examine whether the plaintiff, in the years of dispute, was liable for trade tax at all.

The proceedings involved a foundation under civil law (plaintiff) with legal capacity that sought recognition as a non-profit organization and did not wish to pay trade tax for the years 2014 to 2017. The tax office rejected the request for recognition as non-profit organization (charitable foundation) on the grounds of alleged lack of altruism and devotion to serving the public interest and assessed trade tax. The tax court of first instance confirmed the view of the tax office.

Decision

According to the Supreme Tax Court, a foundation with legal capacity does not fall under Section 2 (2) of the Trade Tax Act (TTA) and it is thus only liable for trade tax if it either fulfills the requirements of Section 2 (3) TTA where it is fictionally assumed that a commercial enterprise exists or if it operates a commercial enterprise within the meaning of Section 2 (1) sentence 2 TTA.

Section 14 of the Fiscal Code states that an “Economic activity” shall mean an independent sustainable activity from which revenue or other economic benefits are derived, and which comprises more than mere asset management. The intention to realize a profit shall not be required. As a rule, an activity shall be deemed to constitute asset management where assets are utilized, e.g., by investing capital assets to earn interest or by renting or leasing immovable property.

The Supreme Tax Court emphasized that the investments (holding of cooperative shares), interest income from fixed-term deposits, and donations received by the foundation are not automatically considered as economic business operations. A tainting effect, i. e. the automatic reclassification as trading income, is only assumed under certain conditions such as in the case of investments in partnerships that are primarily engaged in commercial activities or in the case of a structured investment policy. Even stock transactions can only constitute economic business operations if they are sustainable and recurring.

The lower tax court did not establish whether the plaintiff's activities exceeded the limits of private asset management. It must therefore yet be determined for each individual activity of the plaintiff whether it constituted a commercial business operation.

Specifically, the Supreme Tax Court called out **the following activities** of the foundation**:**

According to the findings of the lower tax court, **the donations received** in 2016 did not constitute economic business operations. However, it has not been established beyond doubt that the donations were not voluntary contributions without consideration.

The **holding of cooperative shares** in a bank does not constitute economic business activity because it did not go beyond asset management.

Although investing in **interest bearing fixed-term deposits** is a self-employed activity, it is doubtful

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whether this investment was sustainable or a one-time transaction. It is also doubtful whether this activity went beyond asset management.

It has not been established whether the **stock transactions** carried out in 2015 were sustainable and exceeded the scope of asset management. This does not necessarily follow from the credit financing and the involvement of an external consultant.

According to the findings of the lower tax court to date, it is also not possible to conclusively determine whether **the plaintiff's 100% interest in an asset management company** (GmbH) gives rise to economic business operation.

The same applies to the plaintiff's **additional holdings in three partnerships**. It cannot necessarily be concluded from the number and scope of the holdings that the activity went beyond asset management because the (high) value of a holding does not inevitably lead to economic business operations regardless of economic influence.

For these reasons, **the Supreme Tax Court referred the matter back to the tax court** for further hearings and decision.

Source:

Supreme Tax Court, decision of 25 September 2025 (III R 16/25), published on 22 January 2026.

Schlagwörter

economic activity, foundation