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By PwC Deutschland | 25. März 2026

No retroactive taxation of contribution gain after change of legal form under EU Merger Directive?

The Hesse Tax Court has decided that the immediate taxation of a contribution gain pursuant to Section 22 (2) of the Reorganization Tax Act in conjunction with Section 17 of the German Income Tax Act violates the EU Merger Directive if it is applied on a general basis to cross-border contributions within a seven-year period. According to the court, this current provision wrongfully presumes an abusive sale of shares and leads to an impermissible retroactive taxation of hidden reserves.

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Background

Section 22 (2) Sentence 1 Reorganization Tax Act (RTA) provides that „insofar as shares acquired below market value by contribution in kind or share exchange are directly or indirectly sold by the acquiring company within a period of seven years from the date of the contribution, and insofar as the gain on the sale of these shares on the day of the contribution would not have been tax-free for the contributor under Section 8b (2) Corporation Tax Act, the gain on the contribution is to be taxed in retrospect as a gain of the contributor on sale of the shares in the business year of the contribution (**contribution gain II**).“

The plaintiff was the sole shareholder of a SLU; a limited corporation incorporated in Spain. Ms. E was the sole shareholder of the German company Y-GmbH. Both the plaintiff and Ms. E were managing directors of Y-GmbH and SLU. To consolidate their respective shareholdings in a joint holding company, the two established F-GmbH in Germany through a tax-advantaged share exchange pursuant to Section 21 (1), Sentence 2 RTA. Only one year later though, a change of legal form took place inasmuch as F-GmbH was transformed into a general partnership (F-OHG) in which the plaintiff and Ms. E continued to hold an interest. The tax office concluded that the change of legal form resulted in the realization of a contribution gain.

Decision

While Section 22 (2) RTA provides for retroactive taxation of the contribution gain II, the EU Merger Directive ensures a tax deferral in comparable cases until the gain is subsequently realized. In the case of a cross-border share exchange the Hesse Tax Court held that such immediate taxation as set out in the RTA is a violation of the provisions of the EU Merger Directive (MD).

The court further explains: If a shareholding in a foreign EU corporation was contributed to a German corporation at a value below fair market value and the German corporation was transformed into a partnership within seven years **the taxation of the so-called “contribution gain II”** resulting from the change of legal form violates the MD, provided that the personal and material scope of application of the Directive is otherwise applicable.

No tax evasion to be assumed from the outset:

The change of legal form (transformation of F-GmbH into a general partnership) which took place within seven years of the share exchange must not from the outset be deemed to constitute tax evasion or tax avoidance within the meaning of the relevant Article in the Merger Directive, thereby precluding its application.

Article 15 of the MD explains that

1. *A Member State may refuse to apply or withdraw the benefit of all or any part of the*

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*provisions where it appears that one of the operations **(a)** has as its principal objective or as one of its principal objectives tax evasion or tax avoidance (…)*

According to the case law of the European Court of Justice (ECJ), this must be interpreted restrictively (ECJ judgment of March 8, 2017, C-14/16, *Euro Park Service*). The German provision in Section 22 (1) Sentence 1, first half-sentence RTA presumes, as a general rule and without any possibility of proof to the contrary, that there has been abusive conduct.

In summary: If a company covered by the Merger Directive is resident in another EU member state (the state of incorporation) based on its registered office and is subject to unlimited corporate income tax liability there (in this case, the Spanish SLU), the (possible) domestic location of the management and the associated residency in Germany do not preclude the application of the MD to the contribution of shares in the non-German EU corporation.

The precedence of the EU Merger Directive excludes, within its scope of application, the immediate assessment of income tax for the shareholder on the “contribution gain II” which was taxed retroactively in the year of the share exchange pursuant to Sections 17 ITA and Section 22 (2) RTA.

Source:

Tax Court of Hesse, decision of 22 May 2025 (3 K 778/21) – Appeal currently pending before the Supreme Tax Court (case ref. X R 18/25).

Schlagwörter

Contribution of shares, merger