By PwC Deutschland | 13. April 2026

Sale of limited partnership share in special project company not subject to trade tax

In a recently published judgment, the Supreme Tax Court held that the profit from the sale of the share in a project company in the legal form of a partnership (GmbH & Co. KG) is not included in the trading income of the plaintiff, a limited liability company (GmbH), because the conditions for trade tax liability - namely, the operation of a business as defined in Section 2 (1) Sentence 1 of the Trade Tax Act - were not (yet) met.

I. Background

The case before the Supreme Tax Court dealt with the question whether the profit of the plaintiff (a GmbH) from the sale of its limited partnership interest in a GmbH & Co. KG (subsidiary) is subject to trade tax on the part of the plaintiff (as the parent company and co-partner).

1. Legal provisions:

The provisions in the Trade Tax Act (TTA) relevant to the case of dispute are Section 2, (1) Sentence 1 and (2) Sentence 1 TTA, Section 7 Sentence 2 No. 2 TTA, and Section 9 No. 2 Sentence 1 TTA.

Section 2 (1) Sentence 1 and (2) Sentence 1 TTA: Every business is subject to trade tax insofar as it carries on domestic operations. The activities of companies, in particular (…) and companies with limited liability (GmbH) always rank as business activities in their entirety.

Section 7 Sentence 2 No. 2 TTA: The trading profit includes a gain on sale or closure of the share of a member to be seen as the business proprietor or partner in the partnership business.

Section 9 No. 2 Sentence 1 TTA: The total of the profit and the amounts added back shall be reduced by….the profit share from a domestic or foreign general or limited partnership, or from another entity in which the members are to be seen as business proprietors, if included in the trading profit.

2. Case of dispute:

The plaintiff's business model was to set up project companies in the legal form of a GmbH & Co. KG partnership. In each case, the plaintiff held a 100% stake in the project companies' capital as the sole limited partner. Each of these companies, acting as the buyer, entered into a purchase agreement subject to a condition precedent for a property in the nursing care or social housing sector. Before the purchase agreement became effective and prior to the acquisition of ownership by the respective project company the plaintiff sold its limited partnership interests to investment funds.

The conditions precedent had not yet been fulfilled at the time of the plaintiff's sale of the limited partnership interests and thus neither the purchase agreement nor the lease agreement had taken effect under civil

law at that point in time. Moreover, the respective project company had not (yet) acquired ownership of the social housing property at the date of sale. Rather, it was engaged in preparatory activities and had not (yet) commenced commercial operations. It therefore did not genuinely operate a business.

The tax office imposed trade tax on the capital gain realized by the plaintiff during the 2012 tax assessment period. It took the view that the capital gain must be included in the plaintiff's trading income because its activities were to be classified in entirety as a business activity under Section 2 (2) Sentence 1 TTA. However, a different allocation to the project company's business income pursuant to Section 7 Sentence 2 No. 2 TTA was not an option, since the project company had not itself engaged in any promotional activities during hat tax year.

The lower tax court granted the appeal of the plaintiff.

II. Decision

The Supreme Tax Court concurred with the decision of the lower tax court and dismissed the tax office's appeal. The gain from the sale of the partnership share is not part of the current earnings of the plaintiff from its own (commercial real estate) trading activities but rather a capital gain. The attribution to the plaintiff's current profit, as asserted by the tax office, would presuppose trading in real estate or with other economic assets which is not the case in the dispute at hand.

From a tax perspective, the plaintiff could not trade with "shares in partnerships" since a partnership interest - unlike a share in a limited liability company - does not count as an asset.

Corporations such as the plaintiff are subject to trade tax by virtue of their legal form; their activities are always and in its entirety considered a business operation. However, this only applies if the partnership operates an established business in Germany (Section 2 (1) Sentence 1 TTA), i.e., if it has already taken up commercial operations. However, the applicability of Section 7 Sentence 2 TTA (see above) regarding the standard trade tax assessment at the level of the partnership was not at issue here because the partnership's substantive trade tax liability had not yet commenced.

The plaintiff was also prevented from trading with the KG's assets: At the

time of the sale, the KG did not own real property in the manner of a full right in rem to a property that would have been attributable to the plaintiff pursuant to Section 39 (2) No. 2 of the General Tax Code (GTC.

Furthermore, at the time of the sale, the KG also had no right of expectation, i.e., a legal position that, while not yet constituting a full right for ownership which cannot be unilaterally prevented by the transferor from maturing into a full real right and is also protected with effect against third parties under Section 161 of the German Civil Code, which reads as follows: „If a person has disposed over a thing, and the disposition is subject to a condition precedent, then any further disposition which the person makes as regards the thing during the period pending fulfilment of the condition is ineffective on the satisfaction of the condition to the extent that it would frustrate or impair the effect subject to the condition.“

The Supreme Tax Court left open the question whether the capital gain must be excluded from the business income of the co-partner already by virtue of interpretation of Section 7 Sentences 1 and 2TTA (i.e., “from the outset”) as determined by the tax court of first instance or whether, if included in the corporation’s trading income, it must be reduced again pursuant to Section 9 No. 2 Sentence 1 TTA.

Source:

Supreme Tax Court, judgment of 11 December 2025 (III R 38/22) published on 9 April 2026.

Schlagwörter

Sale of shares, commercial partnerships, gain on sale