By PwC Deutschland | 18. September 2026

Transfer of roll-over provision to a partnership limited by shares (KGaA)

In a recently published judgment, the Supreme Tax Court decided that hidden reserves from a reserve established in a partnership may, pursuant to Section 6b (3) of the Income Tax Act, also be transferred to the acquisition costs of assets of a partnership limited by shares in which the partners hold an interest as general partners.

Background

The roll-over relief provisions pursuant Section 6b Income Tax Act (ITA) allows deferral of the tax charge on a capital gain from the sale of business property (mostly land and buildings). This reduces the amortization basis of the replacement or, alternatively, its base cost for computing any future gain on sale. The replacement must be acquired within a set time limit (basically four years for the purchase or commencement of construction) and must be held as a fixed asset of a domestic permanent establishment.

Case of Dispute

In connection with the sale of their limited partner interests in a GmbH & Co. KG, the plaintiffs set aside reinvestment reserves that reduced the capital gain pursuant to Section 6b (3) ITA. The reserves were transferred to reinvestment assets of a KGaA in which they (also) held an interest as general partners with a liability contribution. The amount of their limited liability contributions exceeded the amount of the transferred reinvestment reserves.

The tax office maintained that a transfer of unrealized gains from a tax-free rollover reserve pursuant to Section 6b (3) ITA to the acquisition cost of assets of a KGaA, as a legal entity, could not be made. It further stated that the KGaA - and not the plaintiffs - was the owner of the reinvestment assets which hence precluded the transfer of the reserve.

Both tax courts with identical conclusions

The appeal before the Cologne Tax Court was successful. The court decided that the general partners of a KGaA should be treated as co-partners based on their liability contribution. This includes the option of transferring a reinvestment reserve (roll-over relief provision) without affecting income, in accordance with Section 6b ITA.

The Supreme Tax Court concurred with the lower tax court because the requirements for establishing reserves under Section 6b (3) ITA had been met and held that the reserves had been validly established. However, it referred the matter back to the lower tax court. It has yet to be determined whether, and if so, to what extent, hidden reserves from assets acquired by the reinvesting business were in fact deducted.

First: To the Supreme Tax Court, it follows from Section 34 (1) Sentence 4 ITA (governing the preferential tax treatment for extraordinary income) that a reserve under Section 6b - as in the case at hand - may also be set up as regards the gain from the sale of a co-partner's share. Notwithstanding the fact that, in such a case, the decision to set up the reserve is relevant only for the taxation of the departing shareholder, the final decision must be made in the course of the procedure for the separate and uniform determination of taxable income of the partnership from which the partner has withdrawn.

Second: Because of the shareholder-focused approach applied for this tax benefit, Section 6b ITA permits the transfer of hidden reserves from a roll-over provision based on Section 6b (3) ITA not only for business-related purposes but also toward the acquisition or production costs of assets belonging to a shareholder's individual or special business assets.

Third: These principles therefore also apply to the transfer of hidden reserves to the acquisition cost of assets of a KGaA in which the co-entrepreneurs (in this case, a KG) hold an interest as general partners. Although the KGaA is not a partnership within the meaning of Section 15 (1) Sentence 1 No. 2 ITA, it can nevertheless be reasonably argued - given the KGaA's hybrid corporate structure - that the general partners of a KGaA should be treated "as if" they were partners for tax purposes.

Source: Supreme Tax Court, judgment of 21 May 2026 (IV R 21/23) published on 17 September 2026.

Schlagwörter

hidden reserves, roll-over relief provision