

By PwC Deutschland | 30. Oktober 2026

Attribution of a contribution gain following gratuitous succession

When a foundation inherits shares from a contributor and sells them within the seven-year lock-up period, the resulting contribution gain I (“Einbringungsgewinn I”) is attributed retrospectively to the contributor. The foundation must pay the tax as the contributor’s universal successor. Section 22(6) of the Reorganisations Taxes Act 2006 (RTA) does not govern the personal attribution of that gain: its scope must be narrowed to reflect the provision’s purpose (so-called teleological reduction)

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The facts

The case concerned E, who held a limited partner's interest in a KG. In 2008, the KG and its general partner GmbH were merged into a stock corporation (AG), with a tax transfer date of 31 December 2007. For tax purposes, the transaction constituted a contribution of E's partnership interest at book value under Section 20 RTA 2006. E received new AG shares in return, and the hidden reserves were not taxed at that stage.

This tax treatment was conditional. Under Section 22 RTA 2006, a sale of the shares within seven years of the tax transfer date triggers retrospective taxation of the original contribution gain ("Einbringungsgewinn I") in the year of contribution. The gain is reduced by one-seventh for each full year that has elapsed.

E died in 2011. Her sole heir, a foundation and the appellant in this case, sold the inherited AG shares later that year. It was undisputed that the sale triggered a contribution gain of €2,155,359 for 2007.

The dispute concerned whom the gain should be attributed to. The tax office assessed the foundation as E's universal successor, applying E's personal income tax rate. The foundation relied on Section 22(6) RTA 2006, which treats the successor as the contributor in cases of gratuitous succession. It argued that the gain was therefore its own income and should be subject to corporate tax rather than E's personal income tax rate.

The lower court rejected the claim, and the foundation appealed to the Supreme Tax Court (BFH).

The court's reasoning

The Supreme Tax Court dismissed the appeal, although it agreed that the wording of the first half-sentence of Section 22(6) RTA supported the foundation's interpretation. Indeed, it went further than the lower court and described the wording as unambiguous. Nevertheless, it held that the provision's wording extended beyond its intended purpose and therefore required a narrower interpretation (so-called teleological reduction).

The legislative history does not resolve the issue

Under the government's original draft, the gain would have been taxed only when the shares were sold, so the question of retrospective attribution did not arise. Parliament subsequently amended the rule to provide for retrospective taxation. As such the explanatory memorandum to the original draft did not speak to this final version.

The statutory framework points to the contributor

Whilst the first half-sentence of Section 22(6) RTA deems the contributor's legal successor to be the contributor in cases of succession without consideration, the Court noted that this rule applied only to Section 22(1) to (5) RTA itself.

Other provisions of income tax law allow a recipient's early sale to trigger retrospective taxation of the original transferor. Examples include Sections 6(3), 6(5) and 16(3) ITA. These provisions show that the person who triggers the taxable event need not be the person to whom the income is attributed.

The principle that income is taxed in the hands of the person who earned it also supports attribution to E, as she generated the hidden reserves.

The Court noted that E was aware of the lock-up period and could have addressed the associated risk in her will or by agreement.

The Court also rejected the foundation's attempt to derive a general principle from Section 6(3) ITA. It regarded that provision as an exception that could not support the foundation's interpretation.

The annual obligation to provide proof under Section 22(3) ITA passes to the successor only from the date of death; it does not apply retrospectively.

The provision's purpose supports the same conclusion

Section 22 RTA 2006 seeks to preserve the taxation of hidden reserves and prevent a change in the applicable tax regime. Under the foundation's interpretation, a gain attributable to E for income tax purposes would become subject to corporate tax solely because the shares passed to a foundation. The Supreme Tax Court considered this precisely the change in tax status that the provision was intended to prevent.

The foundation pointed out that Section 22(1), sentence 6, no. 1 RTA 2006 covered gratuitous transfers to companies and cooperatives, but not to foundations. Drawing on the legislative history, the court regarded this omission as an oversight.

The court emphasised that the rule operates neutrally. If the shares had instead passed from a foundation to an individual, the gain would likewise have remained subject to the lower corporate tax rate. The aim is not to maximise tax, but to ensure that succession does not alter the applicable tax regime. The court also saw no meaningful purpose in the foundation's interpretation, which would attribute the gain retrospectively to the successor for a period when the contributor was still alive and clearly subject to tax.

A narrower interpretation to reflect the provision's purpose

Departing from a provision's wording is permissible only in narrowly defined circumstances. Where a literal interpretation would produce a result contrary to the provision's intended purpose because its wording is unduly broad, its scope must be narrowed to reflect that purpose. The Supreme Tax Court held that those conditions were met here: the arguments drawn from the statutory framework and the provision's purpose were sufficiently compelling to require a narrower interpretation despite the unambiguous wording.

Source:

Supreme Tax Court judgement (**X R 8/24**)

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Schlagwörter

Reorganisation Tax Act, contributions, contributor, deferred business income