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No requalification of share capital repayment to dividend if nature of transaction clear

The Supreme Tax Court has rejected a tax office attempt to requalify a repayment of share capital as a dividend merely because the repayment was not specified precisely in the capital reduction Resolution.

A GmbH resolved a share capital reduction of €16 m in preparation for a capital repayment with a view to avoiding an IFRS consolidation requirement for its sole shareholder, a public utility. It took the reduction to capital reserve, waited as required by the GmbH Act for one year after the public call on the creditors, reported the reduction to the trade registry and repaid an amount of €4 m to the shareholder. This repayment was sufficient to reduce the assets below the level for the consolidation requirement. The tax office saw the payment as a dividend distribution subject to withholding tax under a Corporation Tax Act provision to the effect that payments to shareholders are deemed to be made out of available retained earnings unless unambiguously specified as repayments of share capital.

The Supreme Tax Court has now held that the unambiguous specification need not be solely in the capital reduction/repayment resolution itself. The reduction resolution stated its purpose as being preparatory to a capital repayment to the shareholder, but did not state the, as then unknown, repayment amount. However, it was clear from all the circumstances that the repayment followed the reduction as soon as the GmbH Act permitted. There was every indication that a capital payment was intended and nothing to suggest that anything else had ever been contemplated. Accordingly, the court accepted the payment as a tax-free repayment of share capital, despite the interim booking to capital reserve.

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