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By PwC Deutschland | 31 October 2016

Deadline for the filing of an application for recording at tax book values in the case of a contribution

The Supreme Tax Court held, in a decision published on 27 October 2016, that:

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- *In the case of a contribution and a share exchange, the transferee entity must file its application to be permitted to record the contributed asset at a value below its fair market value before it submits its "end-of-period tax balance sheet"(the term applied in Section 20 (2) 3rd Sentence of the Tax Reorganisations Act 2006). The term "end-of-period tax balance sheet" means the transferee's end-of-period tax balance sheet for the period in which the date of the contribution fell.*
- *It is immaterial when determining the deadline whether the submitted balance sheet was prepared on the basis of general accounting rules or the special rules applicable to tax balance sheets.*

The appellant, a limited partnership ("KG") held the entire stock in a German limited company (GmbH). The special business assets (Sonderbetriebsvermögen) of the KG's majority limited partner ("A") included shares in a US corporation ("A-Inc.") recorded with a tax book value of € 1. On 4 August 2008 A contributed the shares in A-Inc. into the GmbH and received new shares in the GmbH. In the statutory financial statements of the GmbH to 31 December 2008, the shares in A-Inc. were recorded at their fair market value (ca. € 2.6 million). The GmbH enclosed these statutory financial statements, when it submitted the tax returns to the tax authorities on 25 May 2009; also enclosed was a reconciliation to tax values (with higher depreciation from the supplementary balance sheets) and an attachment showing corrections according to Section 60 of the Income Tax Implementation Regulations. By a letter of 24 March 2010 the GmbH submitted to the tax office a separate tax balance sheet to 31 December 2008, according to which the value of the shares in A-Inc. was recorded at their original tax book value of € 1.

During tax audit the question was raised as to what extent the GmbH had properly applied its right to record book values. The tax office took the view that this subsequent election of the tax book values was not permissible. This view was shared by both the Tax Court at first instance and by the Supreme Tax Court.

The contribution constituted a qualifying share exchange, so that the GmbH had the option of recording the shares in A-Inc. at their tax book value or at a higher value not exceeding the fair market value. However, the GmbH had failed to exercise this option in time.

The relevant application must be submitted before the applicant files its "end-of-period tax balance sheet". The term "end-of-period tax balance sheet" refers to the transferee's end-of-period tax balance sheet for the period in which the date of the contribution fell; it does not refer to a balance sheet which is separate and independent from the end-of-period tax balance sheet.

Note: By submitting the 2008 statutory financial statements together with the reconciliation, the GmbH was treated as submitting a 2008 tax balance sheet and thus an "end-of-period tax balance sheet". Section 60 of the Income Tax Implementation Regulations requires that a taxpayer, who is obliged to keep accounting records, attaches to his tax returns at least a statutory balance sheet and profit and loss account, which should be applicable for tax purposes. Where the balance sheet contains entries or amounts, which do not correspond to tax regulations, these are to be adjusted through additions or annotations to correspond to the tax regulations. Alternatively, however, the taxpayer may also submit a tax balance sheet. Any one of these reporting alternatives (1. Statutory balance sheet with a statement that these are also the relevant

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basis for tax purposes; 2. Statutory balance sheet with additions or annotations relevant for tax purposes; 3. Tax balance sheet.), which the taxpayer submits to the tax office with his tax returns is- according to the Supreme Tax Court – to be regarded as an “end-of-period tax balance sheet” and thus constitutes the cut-off date for making the application.

Supreme Tax Court decision of 15 June 2016 (I R 69/15)

Keywords

Contribution of shares, Tax Book Values, Tax Reorganisations Act