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By PwC Deutschland | 12 February 2018

Write-up of shares in GmbH not part of tax-neutral profit transfer

The Supreme Tax Court has decided that a gain arising from a share disposal can be rolled-over on a tax-neutral basis under Section 6b Income Tax Act where the privileged asset has been sold to a related entity. However, the Court also ruled that the part of the gain attributable to the write-up of the privileged asset – where the earlier write-down of the shares had reduced the taxable profits -could not be rolled over as a tax-neutral transfer under section 6b of the Income Tax Act.

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Facts

The appellant, a limited partnership (“KG 1”) was a shareholder in a D-GmbH. In 1996, KG 1 wrote down the value of its share in the loss-making D-GmbH and treated it as tax-deductible. In 2006 the limited partner of KG 1 (an individual – “R”- with a 99% interest in KG 2) formed a second limited partnership (KG 2), in which he held a 100% interest. In the same year KG 1 sold its interest in D-GmbH to KG 2. In the 2006 tax returns the portion of the capital gain attributable to R was rolled-over under Section 6b German Income Tax Act on a tax neutral basis and set-off against KG 2’s acquisition cost for D-GmbH.

At a subsequent tax audit, the tax authorities took the view that the 1996 write-down had to be reinstated. As a result the book value of the share was increased, reducing the amount of the capital gain available for roll-over on a tax neutral basis under Section 6b German Income Tax Act. The Supreme Tax Court confirmed this view.

Principle of reversal of impairment

As a matter of principle, a shareholding held as a business asset is to be valued at its acquisition cost, unless the taxpayer proves that there is an impairment in value and a lower going-concern value is applicable. Accordingly write-downs from previous years must be reversed up to the upper limit of the acquisition cost, unless the taxpayer can also prove in the respective subsequent year that a lower going concern value applies on the relevant balance sheet date.

Reversal reduces amount of privileged capital gain

If a partnership sells a joint asset to another partnership and a partner has an interest in both partnerships, the part of the capital gain allocated to the “double-partner” can be proportionately rolled over on a tax neutral basis against the sister-partnership’s own acquisition costs for the said asset. The relevant proportion in this case is based upon the level of the “double-partner’s” interest in the second partnership.

The gain available for roll over under Section 6b Income Tax Act is the amount by which the sales price - after the deduction of the costs of sale - exceeds the book value properly applicable at the time of the sale. When subsequently determining the notional book value at the time of the sale, the valuation rules under the Income Tax Act must be observed, as well as the rules for the reversal of impairment.

In the opinion of the Court, a reversal of impairment could not be avoided because the specific share written off in 1996 may have been considered to have been completely or partially destroyed in the meantime. The shares in the D-GmbH are to be regarded as a single share held in the business assets of the appellant. Neither the consolidation of shares, nor increases and reductions of the capital led to a destruction of the appellant’s share in D-GmbH or of the acquisition costs attributable to that share.

No partial exemption on the reversal of impairment

It is correct that the Income Tax Act provides for a (50%) partial exemption on the appreciation of business

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assets after a write-up in value. However, according to the Supreme Tax Court, this does not apply to the extent that the impairment led to a full tax deduction in profits and the tax deduction was not fully reversed later through a write-up to the higher going-concern value. In the view of the Court, this principle also applies where the share in question are later sold.

Source:

Supreme Tax Court judgment 9 November 2017 (IV R 19/14), published on 7 February 2018.

Keywords

Income Tax Act, limited partnership, reversal of impairment, roll-over relief