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By PwC Deutschland | 16 July 2020

Shareholding in corporation as a Special Business Asset II

The Supreme Tax Court has ruled that for the purposes of considering the allocation of a partner's share in a GmbH to the Special Business Assets II of his partnership interest, regard must be had not only to the business relationship of the GmbH with the partnership – but also to whether the GmbH has a substantial business operation of its own.

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Background

The appellant was the sole shareholder of a GmbH. In 2006, he established a GmbH & Co. KG (KG) with another person; each of them held a 50% stake in the KG as limited partners.

The KG operated in the production sector (wire and steel products). Through "his" GmbH, the appellant possessed both essential business contacts in the procurement market and financial resources. The KG procured the raw materials necessary for its production exclusively from the GmbH. In 2006, the GmbH granted the KG a loan. Insolvency proceedings were opened on the assets of the GmbH and the KG in 2010.

The appellant claimed special operating expenses for 2008 with regard to the default of a loan granted to the GmbH, a guarantee claim for the residual value under a leasing contract concluded by the KG and the assumption of a guarantee for consignment stock for the supplies to the KG.

However, the tax office rejected the claim and the appeal to the Münster Tax Court was unsuccessful.

The creation of provisions in the appellant's special balance sheet for the KG was not permissible. For as long as the KG was in existence, the creation of a provision for an impending claim under the guarantee was not possible as the provision could only be recognised upon cessation of the KG.

Furthermore, the creation of the provision was not permissible as there was no business motive for the default of the loan granted to the GmbH and the claim on collateral. The appellant’s shares in the GmbH were not held as special business assets for the KG, but rather in his private assets.

The shareholding in the GmbH did not bolster the appellant's interest in the KG or fulfil an essential economic function within the KG. Even though the business relations between the KG and the GmbH had been very close in the year under dispute, the GmbH had also maintained a considerable business operation of its own.

Decision of the Supreme Tax Court

The Supreme Tax Court followed the decision of the lower court and dismissed the appeal.

The expenses claimed by the appellant could only be considered special business expenses, if the appellant’s shareholding in the GmbH was considered as a Special Business Asset of the KG. This, however, was not the case.

According to the provisions of the Income Tax Act, necessary business assets of a commercially active partnership comprise – over and above the assets which are jointly owned by the partners - those assets which belong to a partner, where they are suited and intended to serve the business of the partnership (Special Business Assets I) or where they meet the requirements of Special Business Assets II (in line with settled case law, e.g. decision of the Supreme Tax Court on 23 February 2012 - IV R 13/08,).

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Necessary Special Business Assets II will be assumed where assets of the partner are utilised to establish or strengthen his interest in the partnership. A shareholding in a corporation may well be a Special Business Asset II. A shareholding in a corporation can strengthen the partner's interest in a partnership both through being economically advantageous for the business of the partnership and by serving the purpose of the partnership itself, because the partner's influence in the partnership increases or is strengthened by the participation in the corporation.

In order for the shareholding to be classified as a Special Business Asset II, the economic interrelationship between the businesses of the partnership and the corporation must be such that the primary reason that the shareholding in the corporation is held, is in the business interests of the partnership; thereby its feature as a private investment of the partner and shareholder should not play any significant role.

The criteria for the allocation of a shareholding to the necessary Special Business Assets II differ from those applicable to the allocation to the necessary business assets, which the appellant incorrectly relied upon.

Source:

Supreme Tax Court judgment of 19 December 2019 (IV R 53/16), published on 2 July 2020.

Keywords

limited partnership, special business assets, special business expenses