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By PwC Deutschland | 01 December 2020

Retroactive financial integration in case of change in shareholding during the year?

A continuous and retroactive financial integration is also possible where a change in shareholder takes place during the year. The Lower Tax Court of Duesseldorf held that a fiscal unity or tax consolidation group for corporation income tax may be established already for the whole year in which the exchange of shares took place. In its judgement the court disagrees with the tax authorities' official opinion on this issue. The Supreme Tax Court is now in charge and must finally decide the dispute.

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Background

A tax consolidation group (fiscal unity- Organschaft) exists if a corporation - the controlled company - is financially integrated into another company - the controlling company/parent company - and is also obliged under civil law to transfer its entire profit to the parent company under a profit transfer agreement. The controlling company must therefore have an uninterrupted participation in the controlled company from the beginning of its fiscal year to such an extent that it is entitled to the majority of the voting rights from the shares in the controlled company (**financial integration**).

The plaintiff was a GmbH, whose sole shareholder was a natural person (C). The fiscal / financial year of the GmbH was equivalent to the calendar year. There was no fiscal unity between C and the plaintiff. The plaintiff and C were shareholders in a limited partnership (GmbH & Co. KG) both as limited partner and as shareholder of the general partner GmbH. In both companies, the amount of participation was 70% (C) and 30% (plaintiff).

On 14 January 2010 and with retroactive effect as of 1 January 2010, 0:00 a.m., C contributed his limited partnership interest and his share in the general partner GmbH at book values to the plaintiff. In addition, he contributed his share in the plaintiff as a capital contribution to the newly founded B-GmbH. A profit transfer agreement (as necessary for a fiscal unity/Organschaft) was concluded between the B-GmbH and the plaintiff.

The tax office holds that a fiscal unity between the plaintiff and B-GmbH could only be established as of 2011. In the case of dispute, the relevant defective date for the fiscal unity was the beginning of the fiscal year following the contribution. B-GmbH had been established in early 2010; hence, no financial integration could have existed as of January 1, 2010.

Decision

The appeal was upheld before the Lower Tax Court of Duesseldorf. Financial integration of the plaintiff is valid for the entire year 2010. Since a fiscal unity already existed prior to the date of exchange of shares the transferee takes up the role of the transferor and financial integration passes to him as legal successor.

The court pointed out that - as was the case here - a tax consolidation group can also be established with effect of 1 January 2010 if the contribution (exchange of shares) is made at some time during that year. Although an exchange of shares is not generally possible with retroactive tax effect, here the transferee is the legal successor of the transferor (C) and the transferee follows in the latter's "footsteps". B-GmbH, as the successor of C, was therefore to be attributed the financial integration of C prior to the time of the exchange of shares.

Source:

Lower Tax Court of Duesseldorf, judgment of 29 September 2020 (ref. 6 K 2704/17 K); the appeal is pending before the Supreme Tax Court (ref. I R 40/20).

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Keywords

change of shareholders, exchange of shares, financial integration, retroactive change