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By PwC Deutschland | 12 March 2021

Tax loss of value of shares following the opening of insolvency proceedings

If the shareholder's right of membership in a domestic stock corporation (AG) lapses because the AG is dissolved, wound up and deleted from the register as a result of insolvency, the shareholder incurs a taxable loss if he does not receive his contribution back in full or in part.

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If such shares are deleted from the shareholder's securities account by the custodian bank before the AG is removed from the register, the loss will be considered to arise at the time of the deletion by the custodian bank. However, a loss cannot already be assumed to have arisen at the point when a distribution of assets can no longer be objectively expected as part of the final distribution of the assets of the AG or when the listing of the shares on the stock exchange is discontinued or their listing is revoked. This was the judgment (VIII R 20/18) of the Supreme Tax Court on November 17 2020 and published on 11 March 2021.

Facts

In 2009, the appellant acquired shares in a listed domestic stock corporation, which were held in a securities account with the bank. The relevant holding amounted to less than 1% of the shares in the AG. The shares were part of his private assets for tax purposes.

Insolvency proceedings were opened against the assets of the AG in 2012. The shares were still shown with a unit price in the appellant's securities account as of December 31, 2013. The appellant wanted to set off a total loss from the investment against gains on the sale of other shares which he had realised in 2013 (the year in dispute). The tax office and the Munich Tax Court rejected the requested offset.

Decision

The Supreme Tax Court agreed with the findings of the lower court and refuses the appellant's appeal.

It ruled that Sec. 20 (2) Sentence 1 No. 1 of the German Income Tax Act (“ITA”) and Sec. 20 (2) Sentence 2 ITA in the version applicable in the year in dispute contained an unintentional loophole, since the statute did not provide for a realization event either in the case of the legal extinction of domestic shares due to an insolvency-related deletion or in the case of their deletion from the securities account by the custodian bank. The facts of disposal pursuant to Sec. 20 (2) Sentence 1 No. 1 ITA apply accordingly to these transactions. However, a taxable loss only arises for the shareholder when he suffers a definitive loss of rights due to the legal expiry of his membership right or the derecognition of the shares from the securities account. In the year in dispute 2013, the appellant did suffer a loss in value. However, this did not affect the existence of his membership rights, nor were the shares deleted from the appellant's securities account.

The decision is relevant for shares acquired after December 31, 2008, for which the loss of membership rights or the deletion from the securities account takes place in assessment periods between 2009 and 2019 inclusive. For assessment periods from 2020 onwards, the legislator has provided in Section 20 (6) sentence 6 ITA that losses due to a write-off of worthless shares and other loss of shares are assessable and subject to an independent loss offset restriction. As the previous legal loophole has been closed, for 2020 assessment periods onwards, there is no longer any need for a corresponding application of a “disposal” event due to the legal lapse of the membership right or the deletion from a securities account.

Source

Supreme Tax Court ruling of November 17, 2020 (VIII R 20/18), published on March 11, 2021, cf. Press Release 006/20.

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Keywords

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