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So-called block acquisitions may meet the terms of Section 8b (4) Sentence 6 Corporation Tax Act

In a recent judgement, the Supreme Tax Court decided that the participation threshold specified in Section 8b (4) Sentence 6 of the German Corporation Tax Act (“CTA”) (10 % of the share capital) can also be attained through an acquisition transaction which is economically uniform from the acquirer's perspective in a situation where several sellers are involved in the transaction.

Background

The plaintiff acquired shares in a corporation of more than 10% of the (cumulative) total from three different sellers during the course of the year. The holding of shares acquired from the individual sellers was less than 10% in each case.

The tax office did not recognise the application of Section 8b (4) Sentence 6 CTA (retroactive application of an acquisition during the current calendar year to the beginning of the calendar year) due to the multiple acquisitions of shares during the year thereby referring to the circular issued by the Upper Finance Directorate Frankfurt am Main on 2 December 2013, according to which Section 8b (4) Sentence 6 CTA does not apply unless at least 10% is acquired in one acquisition transaction.

Decision of the Supreme Tax Court

The Supreme Tax Court agreed with the decision of the lower court and dismissed the appeal as unfounded.

The tax court had been correct at law to accept the plaintiff's argument, as the participation threshold specified in Section 8b (4) Sentence 6 CTA (10 % of the share capital) can also be achieved through an acquisition transaction which is uniform economically from the acquirer's perspective in a situation where several separate sellers are involved.

The lower tax court correctly pointed out that vis-à-vis the phrase in Section 8b (4) Sentence 6 CTA "*acquisition(s) of a shareholding of at least 10% during the year*", the Supreme Tax Court had not yet considered whether and under what conditions the acquisition of several packages of shares from separate sellers - each of which is below the aforementioned shareholding threshold – should be covered by the (favourable) treatment in Section 8b (4) Sentence 6 CTA, in circumstances where the total of the acquisitions exceeds the aforementioned shareholding threshold.

In the event - due to the facts of the case - the Senate did not need to address the question of whether Section 8b (4) Sentence 6 CTA should be generally applied where there are a number of (partial) acquisitions. This is because - even where several sellers are involved - the participation threshold referred to in the provision will be reached insofar as an acquisition transaction can be considered economically uniform from the acquirer's perspective.

Both the legislative history and the purpose of the provision give rise to the conclusion that an "economically uniform" acquisition of a shareholding of at least 10% must be sufficient to meet the condition in Section 8b (4) Sentence 6 CTA.

The lower tax court expressly stated in its decision that the (indirect) participation relevant in the case under review had been acquired by the plaintiff from several sellers "on the basis of a uniform decision ... through a uniform legal transaction under the law of obligations". This conclusion was based on the fact that - underlying the acquisition as a whole (as set out in a uniform notarised deed) - was a uniform acquisition decision with a uniform time of acquisition. This formal finding was made independent of the fact that the

lower tax court took the view that for the purposes of Section 8b (4) Sentence 6 CTA it was irrelevant when and from whom the shareholding of at least 10 % had been acquired.

The Senate is bound by these findings in accordance with Section 118 (2) of the Tax Court Code. It must therefore be assumed that, from the acquirer's point of view, there was a uniform acquisition transaction in the case in question, which meets the requirement of Section 8b (4) sentence 6 CTA.

Reference

Supreme Tax Court, judgement of 6 September 2023 (I R 16/21), published on 11 January 2024.

Keywords

Intercompany dividends, tax exemption