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By PwC Deutschland | 09 September 2024

Ministry of Finance: Tax treatment of incongruent distributions

Following a judgment of the Supreme Tax Court, the tax authorities confirm that incongruent profit distributions - i.e. profit distributions that deviate from the share in the share capital or nominal capital - are in principle to be recognized for tax purposes. This requires that the corresponding dividend resolution is effective under civil law. In its current circular the Federal Ministry of Finance (MoF) explains in more detail the principles and special features of various constellations.

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Background

In its decision of 28 September 2022 (case ref. VIII R 20/20) the Supreme Tax Court held that a civil law resolution for a selective incongruent advance distribution to only one of two shareholders contravening the articles of association but passed unanimously by the shareholders' meeting is also tax effective. Thus, the “left out” shareholder does not realize taxable income by way of a hidden distribution (more details to be found in our **blog post of 20 December 2022**).

Based on this judgment, the Federal Ministry of Finance (MoF) has now revised and updated its earlier circular from 2013 on the tax recognition of incongruent profit distributions.

I. The revised MoF circular

The current circular addresses incongruent profit distributions for **limited liability companies (GmbH)** and **stock corporations (AG)**. While incongruent profit distributions in the case of an AG (as previously) are only to be recognized if a different profit distribution key is determined, the MoF now distinguishes between several scenarios within a GmbH. In response to the above-mentioned decision of the Supreme Tax Court, the MoF now also includes the constellation of a specificresolution to deviate from the articles of association (“*punktuell satzungsdurchbrechender Beschluss*”) in certain cases.

Acceptance of incongruent profit distributions from a tax point of view

Incongruent profit distributions - i.e. profit distributions that deviate from the share in the share capital or nominal capital - are generally recognized under tax aspects if they are effective under civil law.

1. Limited liability company (GmbH)

a) Section 29 (3) sentence 2 of the Act on Limited Liability Companies (*GmbHG*) provides for distribution ratios other than a proportion to the shares. If a subsequent amendment to the articles of association is envisaged to that effect the consent of those shareholders who are adversely affected by the change is required.

b) Escape clause (“Öffnungsklausel”) for deviating distribution

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This is the case if the articles of association contain a proviso according to which, with the consent of the impaired shareholders, a profit distribution deviating from the articles of association or the statutory regulation can be resolved. The resolution has been passed with the required shareholder approvals and, if applicable, the majority specified in the articles of association.

c) Specific resolution in deviation from the articles of association

According to the above decision of the Supreme Tax Court a resolution that has been passed by the shareholders' meeting with the votes of all shareholders and that cannot be contested by the shareholders is effective under civil law and thus also valid for tax purposes**.** The effect of a resolution that selectively deviates from the articles of association is limited to the particular measure in question as an individual act, with the result that the articles of association are violated but it should not to be amended with future effect. (*this is consistent with the decision VIII R 20/20 of the Supreme Tax Court who held that an individual measure who is only temporarily in breach of the Articles of Association did not have a (harmful) permanent effect as it is not binding for future dividend resolutions*).

A shareholders' resolution to that effect which establishes a different legal situation with permanent effect (even for a limited period) is null and void if not all material and formal provisions of an amendment to the articles of association (in particular the notarization and entry of the resolution in the commercial register) were adhered to at the time the resolution was passed.

d) Split appropriation of profits, temporal incongruent profit distribution

In an earlier judgment from 2021, the Supreme Tax Court held that a shareholder resolution effective under civil law and according to which the share of profit attributable to the majority shareholder in accordance with its shareholding is not distributed but instead allocated to a shareholder-related surplus reserve (retained earnings), is generally to be recognized for tax purposes. This is also the case if the profit shares of minority shareholders are distributed at the same time. The allocation of a profit share to a shareholder-related surplus reserve is not taxable as investment income, also for a controlling shareholder.

The MoF points out that this conclusion does not contradict an earlier ruling

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by the Supreme Tax Court. In that case, it was decided not to distribute profits to individual shareholders but rather to expressly allocate the profit share to a shareholder-related surplus reserve. In the absence of a profit distribution the question of maturity does not arise for these shareholders.

2. Stock corporation (AG)

In the case of an AG, incongruent profit distributions are only to be recognized if a profit distribution key deviating from the ratio of shares in the share capital has been defined in the articles of association in accordance with Section 60 (3) Stock Corporation Act (*Aktiengesetz*) and the distribution complies with this key. An incongruent profit distribution based on an escape clause (opt-out provision) in the articles of association or a specific resolution to deviate from the articles of association does not meet this requirement.

II. Application

This MoF circular replaces the earlier circular of 17 December 2013 and is to be applied in all open cases.

Source:

Federal Ministry of Finance, circular dated 4 September 2024 (IV C 2 - S 2742/19/10004 :003).

Keywords

incongruent advance distribution