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By PwC Deutschland | 14 October 2024

Waiver of claims between shareholders in connection with capital increase subject to gift tax

Where shareholders of a GmbH agreed that payments to the capital reserve are to be allocated on a shareholder-related basis, but in deviation the capital reserve is instead allocated to all shareholders in connection with a capital increase in accordance with their participation quotas, the waiver of an appropriate value adjustment by the shareholder who made the payments may constitute a free gift in favor of the co-shareholders.

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Background

The plaintiff, his father V and his brother B established V-Verwaltungs GmbH in 2006 (each with a 1/3 share). The articles of association determined that the allocation and release of capital reserves would be in proportion to their participation in the company's share capital. Furthermore, it was agreed by shareholder resolution that in the case of disproportionate contributions, each shareholder would remain the legal owner of his share of the capital reserves.

Sometime later in 2006, V transferred his deposit assets (in trust) to the GmbH. The amount was initially recorded as a liability before it was transferred to the capital reserve in 2007 pursuant to a shareholder resolution. In the following years, V paid further amounts into the capital reserve.

In 2012, the shareholders decided to increase the share capital of the GmbH, which was only provided/contributed by the plaintiff and B due to the father's waiver of participation in the capital increase. As a result of the waiver, the father's shareholding in the company's assets was reduced to less than 2%. The tax office considered the father's loss in value to be insufficiently compensated by the waiver to participate in the capital increase and saw this as a mixed gift to the sons. The Baden-Württemberg Tax Court upheld the claim of the plaintiff.

Decision

The Supreme Tax Court granted the appeal of the tax office by stating that the tax court of first instance wrongly denied the existence of a free gift within the meaning of Section 7 (1) no. 1 Inheritance and Gift Tax Act (IGTA) on the grounds that the waiver by V for a full value compensation for his capital contributions did not lead to an enrichment of his co-shareholders because the capital reserve was allocated to each of the shareholders in the amount of their participation quotas. It further failed to recognize that an allocation of the capital reserve that deviates from the shareholding quotas is permissible under civil law and is also generally to be recognized for tax purposes.

In principle, any increase in assets and any reduction in debts or encumbrances of the beneficiary may be viewed as an enrichment. A debt waiver can also be the subject of a gratuitous contribution (gift).

The elements of a gift are present in the case in dispute. V was aware that when determining the compensation payment to be made by the plaintiff, the capital reserve of the GmbH had been allocated to the shareholders in proportion to their share in the company assets, although the shareholders had made a binding decision on July 1, 2006 that each shareholder would remain the legal owner and owner of his share of the capital reserve, i.e. the capital reserve should not be allocated to all shareholders in proportion to their shareholdings. The calculation of the loss of value, in which the capital reserve was divided up according to the shareholding ratios, was also signed by V and attached to the notarial deed. Thus, in the context of the implementation of the capital increase, V was aware that the compensation payment to be made to him by the plaintiff and B would only partially compensate for the loss in value that had arisen. Given this evident awareness of V of the (partial) gratuitousness, the specific motives for the contribution of V are of no further relevance.

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Supreme Tax Court, decision of 19 June 2024 (II R 40/21) – published on 10 October 2024.

Keywords

free gift, waiver