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# Application for transfer at book value to be made also in a notarial deed

**In a most recent judgment, the Supreme Tax Court held that the application for maintaining the book values in accordance with Section 3 (2) sentence 1 of the German Reorganization Tax Act can be made in the notarial deed on the reorganization of which the notary sends a certified copy to the responsible tax office in accordance with § 54 para. 1 of the Income Tax Implementation Ordinance.**

## Background

According to Section 3 (2) Reconstruction Tax Act (RTA) the assets transferred may be taken up on application uniformly at book value under certain conditions laid down in numbers 1 to 3. The application is to be made by, at the latest, the first filing of the tax closing balance sheet to the tax office responsible for the taxation of the transferring corporation.

The plaintiffs S GmbH and A GmbH converted a GmbH into a GmbH & Co. KG by notarial decree of 25 August 2010 with retroactive tax effect to 30 December 2009, 24:00 hrs. (change of legal form).

The resolution on the retroactive change of legal form contained the following clause in the chapter "tax arrangements": "The right to apply for the transfer at book value is hereby expressly exercised". It further stated that the transfer would take place at book value based on the transfer balance sheet prepared on 30 December 2009. The resolution was forwarded to the tax office by the certifying notary.

The transferring GmbH whose legal form was to be changed submitted a tax balance sheet to the tax office as of 31 December 2009 by recognizing the book values. The GmbH & Co. KG then continued the book values in its opening balance sheet as of 31 December 2009. A closing tax balance sheet or transfer balance sheet as of 30 December 2009 was not submitted to the tax office. Also, no explicit application for the continuation of book values was made.

For the years 2010-2011, the GmbH & Co. KG requested the determination and recognition of losses based on depreciation of the capitalization of the customer base resulting from the change of legal form. The tax office denied the capitalization of the customer base with reference to the book value approach chosen.

## Decision

The Supreme Tax Court confirmed the decision of the lower tax court by stating that the **application to carry the book values** pursuant to Section 3 (2) RTA was valid. On this matter of dispute, the plaintiff's appeal was dismissed.

The book value application in accordance with Section 3 (2) sentence 1 RTA can be made in the specific notarial deed of which the notary sends a certified copy to the competent tax office in accordance with § 54 para. 1 of the Income Tax Implementation Ordinance.

In the absence of applicable statutory provisions to this effect the book value application is not subject to any formal requirements and can thus also be submitted without any further preconditions. The Supreme Tax Court first points out that the agreements of the parties in the (notarial) reconstructive agreement are generally not to be interpreted as an application within the meaning of Section 3 (2) sentence 1 RTA in lieu of a specific and stand-alone statement to that effect made by the transferring company towards the tax office. The situation in the case of dispute, though, is different since the notarial deed, a certified copy of which was sent to the tax office by the notary, expressly contains a clause stating that the right to apply for the transfer of the business assets at tax book values is expressly exercised. This must without doubt be regarded as an application to the tax office for book or interim valuation. For an effective book value

application, however, it is not further required that the assets are recorded at book value in the closing tax balance sheet.

As regards a **further claim brought by the plaintiff** and contrary to the conclusion of the tax court of first instance the Supreme Tax Court held that the tax office was not allowed to **separately determine the amount of the deductible transfer loss**.

If the co-entrepreneur of the acquiring partnership is another partnership or a corporation that qualifies as a controlled company (subsidiary) as part of an *Organschaft* (tax consolidation group) within the meaning of Section 14 (1) sentence 1 Corporation Tax Act, the tax office responsible for issuing the notice of determination is not allowed to determine the deductibility of the transfer loss within the meaning of Section 4 para. 6 RTA when determining the taxable profit of the acquiring partnership.

#### **Source**

Supreme Tax Court, decision of 10 July 2024 (IV R 8/22) – published on 14 November 2024.

#### **Keywords**

Tax Book Values, restructuring, transfer at book value