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No income tax on redemption of a right to usufruct in GmbH shares against payment

In a most recent decision, the Supreme Tax Court held that the termination of the right to usufruct is a non-taxable transaction if the holder of the right to usufruct over shares in a private limited company (GmbH) is not also the economic owner of the shares in the GmbH.

Background

The plaintiff is a natural person who, in 2012, transferred shares in a GmbH, which accounted for 20% of the share capital in the amount of EUR 250,000, to her son free of charge by way of anticipated succession. The plaintiff retained the usufruct of the shares which included the entitlement to profits. A German usufruct („*Nießbrauch*“) is the right to use and enjoy real or personal property in accordance with §§ 1030 to 1067 of the German Civil Code. Usufruct is generally acceptable for tax purposes. The usufructuary (i. e. the beneficial owner) and not the (civil) owner is generally subject to income tax on income derived from the asset encumbered with the usufruct.

In 2018, the son sold the shares he had received to co-shareholders for a purchase price of EUR 2.4 million. In this connection, the son concluded an agreement with the plaintiff according to which the plaintiff waived her usufruct in return for payment of around EUR 1.93 million. The payment was made directly to the plaintiff by the buyers.

In her 2018 income tax return, the plaintiff took the view that the redemption of the usufruct right was a non-taxable restructure of assets. In contrast, the tax office assumed a sale of shares in a corporation in accordance with Section 17 Income Tax Act (ITA) and took the payment for the waiver to be taxable under the partial income method.

The Nuremberg Tax Court confirmed the view held by the tax office. The tax court found that the son had become the beneficial owner of the GmbH shares in 2012. It granted the plaintiff's alternative request to have the redemption amount taken into account as taxable income from capital investments according to Section 20 (1) No. 1 ITA as dividend and/or other remuneration from shares or as loss of revenues (Section 24 No. 1 letter a ITA).

Decision

The Supreme Tax Court reversed the decision of the Nuremberg Tax Court and granted the appeal of the plaintiff in full.

As the economic ownership of the shares in the GmbH has already been transferred from the plaintiff to her son as part of the anticipated succession it is not possible to later tax the payment upon the waiver of the usufruct as income from investments in accordance with Section 20 (1) No. 1 ITA.

The concession of the right for use can be arranged under civil law in such a way that the economic ownership of the shares is attributable to the holder of the usufruct from a tax point of view. In the case of dispute, however, this was not the case as the lower tax court has determined. Without retaining economic ownership of the shares the plaintiff was not in a position to generate any taxable income from capital investment upon receipt of the redemption amount.

Source:

Supreme Tax Court, decision of 20 September 2024 (IX R 5/24) – published on 28 November 2024.

Keywords

economic ownership, share transfer