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By PwC Deutschland | 06 April 2025

Corporation tax group and non-typical silent partnership

An untypical silent partnership in the controlled group company does not generally prevent the recognition of a consolidated tax group for corporation tax purposes. With this current decision, the Supreme Tax Court disagrees with the previous opinion of the tax authorities.

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Background

A limited partnership (KG) had concluded a profit pooling agreement with a GmbH (the plaintiff) to establish a tax group (*Organschaft*). According to the agreement, the GmbH, as the controlled company, was obliged to surrender its entire profit to the KG (the controlling company). The group taxation through an *Organschaft* follows the principle of attribution. Each member of the tax group computes its tax profit or loss individually. These are then combined on the parent and charged to tax. If the legal requirements are met, the consolidated results are charged to tax at the level of the controlling (parent) company. Losses and profits of the various subsidiaries can thus also be offset directly against each other.

In the specific case of dispute, there was an untypical (atypical) silent partnership in the GmbH. Because the atypical silent partner was entitled to a share of 10% of the GmbH's profit the tax office and subsequently also the tax court of first instance took the view that only 90% of the profit had been transferred to the KG as the controlling company, but that Section 14 of the Corporation Tax Act (CTA) rather requires the subsidiary to surrender its entire income to the parent. The tax group was therefore denied as a whole.

Decision

The Supreme Tax Court upheld the plaintiff's appeal. Section 14 (1) CTA presupposes a profit transfer agreement within the meaning of Section 291 of the German Stock Corporation Act and the strict fulfillment of the contractual obligations under civil law. What is meant by „the entire profit“ is determined in accordance with civil law.

However, under civil law, profit shares to which a silent partner is entitled are deductible from the GmbH's profit as ordinary business expenses. This applies to both the typical and the atypical silent partnership. As a result, the “remaining profit” - in the case of dispute “90%” - is the “entire profit” that must be transferred to the parent company. This conclusion is not affected by the fact that a typical or atypical silent partnership is qualified under civil law as a partial profit transfer agreement , the Supreme Tax Court said. Thus, this (reduced) annual net profit represents the “entire profit” within the meaning of Section 291 para. 1 sentence 1 Stock Corporation Act that must be transferred under commercial law and subsequently also under tax law.

With its current decision, the Supreme Tax Court contradicts the view of the tax administration. The tax authorities are of the opinion that a corporation in which an atypical silent partnership exists cannot be a member of a corporation tax group, be it as the parent, be is as a subsidiary (Ministry of Finance, circular of 20 August 2015).

Note: In its case law, the Supreme Tax Court had not yet conclusively answered the specific question of the case in dispute. In its earlier decision I B 177/10 of 31 March 2011 in connection with a complaint relating to non-admission, the question in dispute was not relevant to the decision. There, a subsidiary took a silent partner with a profit share based

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on the results of a foreign branch. The silent partnership was “untypical” inasmuch as the silent partner took an active part in the management of the company. The profits from the foreign branch (permanent establishment) were exempt from German taxation under the relevant double tax treaty.

Source:

Supreme Tax Court judgment of 11 December 2024 (I R 33/22) – published on 27 March 2025.

Keywords

corporation tax group, non-typical silent partnership