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By PwC Deutschland | 25 August 2025

Tax may be retroactively abolished in case of error on tax consequences in marriage contract

In a recent judgment, the Supreme Tax Court decided that the transfer of GmbH shares as part of the principle of equalization of accrued gains between spouses (Zugewinnausgeich) generally constitutes a taxable sale. However, retroactive elimination of the respective capital gain is possible if the transfer is reversed due to an error on the subsequent tax consequences.

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I. Legal provisions relevant in the case of dispute

The German concept of equalization of accrued gains (Zugewinnausgleich)

„Zugewinnausgleich“ is a provision in German family law that comes into play in the event of divorce and equalizes the increase in assets/net worth (the gain) achieved during the marriage between the spouses. The calculation involves subtracting the net worth of each spouse at the beginning of the marriage from their net worth at the time of divorce. The partner with a higher increase in net worth must compensate and pay half of the difference to his or her partner.

Section 313 German Civil Code on the interference with the basis of the transaction

(1) If circumstances that became the basis of a contract have undergone serious change since the contract was concluded and if the parties would not have concluded the contract or would have concluded it with different contents had they foreseen this change, then adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be required to uphold the contract without alteration.

II. Background

The plaintiffs - a married jointly assessed couple - agreed on separation of property (Gütertrennung), deviating from the statutory matrimonial property **regime of community of accrued gains**. This resulted in a claim of the wife for the share of gains acquired during the marriage ("Zugewinnausgeich") which the plaintiff settled by way of transfer of the shares in a limited liability company (GmbH). Both assumed that this transfer would not be subject to income tax. However, the tax office considered this to be a taxable sale in accordance with Section 17 Income Tax Act and charged income tax on the capital gain. This caused the plaintiffs to amend the notarized transfer agreement and instead agree on a cash payment and, in addition, to defer the compensation claim.

III. Decision

The tax court of first instance had acknowledged the retroactive amendment to the marriage contract. The Supreme Tax Court confirmed this view: The change (reversal) of the contract can be treated for tax purposes

- as if the transfer of shares had never occurred, if the error was shared by both contracting parties,
- as if it existed at the time the contract was concluded, and
- if it falls within the sphere of risk of both contracting parties.

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An explicit reference to that effect in the original contract is not necessary. However, from a purely tax point of view, the requirements for the retroactive amendment of similar contractual arrangements remain strict and apply only in exceptional cases, namely when adherence to the initially agreed provision leads to an unacceptable result.

In essence, the governing civil law regulation to this effect is **Section 313 German Civil Code** on the interference with the basis of a transaction: „*If circumstances that became the basis of a contract have undergone serious change since the contract was concluded and if the parties would not have concluded the contract or would have concluded it with different contents had they foreseen this change, then adaptation of the contract may be demanded (…)*“.

According to the Supreme Tax Court, a taxpayer who claims that the basis of the transaction has ceased to exist must therefore demonstrate and prove that, prior to or at the time of conclusion of the disrupted legal transaction, a circumstance was discussed which - after its occurrence - was obvious in such a way that in the mutual understanding of the contracting parties the execution of the legal transaction “ depended on it”.

The circumstances that led to the contract do not have to be apparent from the wording itself, nor do they have to be disclosed to the tax authorities at the time the contract is concluded. It is only relevant whether the tax assessment notice in question can still be amended. If the notice has already become final, it may be amended pursuant to Section 175 (1) sentence 1 no. 2 Fiscal Code where a correction of a tax assessment notice with retroactive effect is possible if an incident occurs with tax implications for the past (retroactive event). However, this does not require that the retroactive event be reported to the tax office promptly at the time it occurs or shortly thereafter.

Source:

Supreme Tax Court decision of 9 May 2025 IX R 4/23 - published on 21 August 2025.

Keywords

correction of assessments, retroactive, share transfer