By PwC Deutschland | 09 January 2026

Hidden profit distribution due to worthless right of first refusal not to be eliminated retrospectively

A shareholder with a 50.1% stake in a limited liability company (GmbH) who reduces his debt by assigning a non-valuable position designated as a right of first refusal in connection with a property belonging to him to another group company which he indirectly controls might face the consequences of a hidden profit distribution. In a recent judgment the Supreme Tax Court held that this is the case if the GmbH “pays” for this by “taking over” the negative clearing account with the other group company.

Background

In 2013 (the year in dispute), the plaintiff was the sole shareholder and managing director of A-GmbH (a holding company). This company held 100% of the shares in B-GmbH (a real estate company). In addition, the plaintiff held a 50.1% stake in C-GmbH; the other shares in this company were held by the holding company and a company owned by the plaintiff's father (Z B.V.), each with a 24.95% stake. The plaintiff was also appointed managing director of the real estate company and C-GmbH. In 2010, the plaintiff had acquired a developed property located in Spain and been using the property for his own residential purposes since then. C-GmbH had financed part of the purchase price for the property and debited the plaintiff's shareholder clearing account in this amount.

In the year in dispute, C-GmbH got into financial difficulties. Its local bank terminated its credit line due to an insufficient equity ratio and due to the plaintiff's (unsecured) negative clearing account. Together with another bank, a plan was devised to settle the plaintiff's clearing account using the property located in Spain without selling the property.

The plaintiff granted the real estate company a right of first refusal on the property through various contracts. In 2018, the plaintiff sold the property located in Spain to the real estate company. The acquisition costs for the right of first refusal were credited in full against the purchase price. From then on, the plaintiff rented the property for himself and his family from the real estate company.

Following an external audit, the tax office considered these transactions to be a hidden distribution of profits from the real estate company to the plaintiff. The tax office and subsequently also the tax court of first instance believed the right of first refusal on the property granted by the plaintiff did not represent a burden for the plaintiff and had no value for the real estate company.

Decision

Before the Supreme Tax Court, the plaintiff argued that the sale of the property in 2018, allowing for the acquisition costs for the right of first refusal, had retroactive tax effects and resulted in a change in the legal basis of the debt for the year in dispute. However, the Supreme Tax Court took a different view and dismissed the plaintiff's appeal.

The tax court of first instance correctly confirmed the hidden distribution of profits to be assessed in the year in dispute. It did not have to take into account the circumstances that materialized in 2018 already in the year in dispute. However, even if one wished to take a different view the judgment of first instance would ultimately prove to be correct in any case as the hidden distribution of profits, which was rightfully assessed in the year of dispute, was not retroactively nullified by the sale of the property in 2018 by offsetting the hidden distribution of profits against the purchase price.

The transactions associated with the granting of the right of first refusal (cf. Section 463 of the German Civil Code) were prompted by the plaintiff's position as a shareholder and solely in his interests. There is no sign of any business interest on the part of C-GmbH. B-GmbH had no business interest, and therefore no commercial motivation, in securing access to this particular property.

This gave the plaintiff a tangible pecuniary advantage or real financial benefit, namely release from his personal liabilities towards B-GmbH. This advantage became available to him in the year at issue and no later than at the time it was written off by B-GmbH on 31 December 2013.

The inclusion of the purchase price for the “right of first refusal” in the purchase price for the property does not result in the hidden profit distribution being retroactively nullified if it is based on the assumption that the “right of first refusal” (in this case: pursuant to Spanish law) to a property which was purchased by the shareholder for a fee did not impose any burden on the shareholder as the owner and had no value for the company as the party entitled to the right of first refusal, and if the shareholder, as the owner of the property, later sells the property to the company as holder of the right of first refusal.

Source:

Supreme Tax Court, decision of 21 October 2025 (VIII R 19/23), published on 8 January 2026.

Keywords

hidden distributions, worthless debt