By PwC Deutschland | 10 August 2026

No separate and uniform determination for sub-participation in shares of a corporation

In a recent judgment, the Supreme Tax Court decided that, for a sub-participation of a share in a corporation - whether in the form of a typical or atypical sub-participation - the tax assessment basis is not to be determined separately and uniformly.

Background

The plaintiff (an employee in B-company) and a third party who had an interest in the outcome of the decision and joined the proceedings (joined party) planned to market a software product. For this purpose, the joined party acquired a stake in a limited liability company (GmbH) and entered into a sub-participation agreement with the plaintiff's son. The son acted as trustee on behalf of his father. The secondary partner (joined party) should have a 50% share in the primary partner's profits and losses. Upon the distributions of the GmbH capital gains tax was withheld and corresponding tax certificates issued to the joined party and his co-partner. The joint party paid the plaintiff a share of the sub-participation proceeds.

The tax office refused to issue assessment notices for the atypical sub-participation in the GmbH. It also directly attributed 50% of the GmbH's total distributions to the plaintiff. In order to have the capital gains tax credited against his personal income tax, the plaintiff unsuccessfully sued the GmbH for the issuance of the underlying tax certificates. In addition, he filed tax assessment returns with his tax office regarding the sub-participation arrangement between him and the joined party. The tax office refused to issue the requested tax assessment notices. The appeal before the tax court of first instance was rejected.

Decision

The appeal before the Supreme Tax Court was also dismissed. The tax assessment basis for a company with a sub-participation in another company must not be determined separately and uniformly. It is irrelevant whether the GmbH share represented a typical or atypical sub-participation or whether a fiduciary relationship existed between the plaintiff and his son.

Thus, neither the principal shareholder nor the sub-shareholder generates joint income.

If the structure were classified as a **typical sub-participation** in a GmbH share, the principal shareholder (the joined party) and the plaintiff, as the trustor-sub-participant, would not have generated any joint income subject to allocation. A typical sub-participant in a GmbH share generates only income from capital investment pursuant to Section 20 (1) Number 4 of the Income Tax Act (ITA) as „income from a participation in a commercial enterprise as a silent partner and from profit-sharing loans" while only the principal shareholder receives dividend income.

Even if the structure were classified as an **atypical sub-participation** in a GmbH share, there would still be no participation by several persons in joint income (collective income). As the beneficial owner, an atypical sub-shareholder generates genuine capital investment income pursuant to Section 20 (1) Number 1 ITA from his share in the GmbH. The same applies to the principal shareholder as the civil-law owner of the unencumbered portion of the GmbH share. Thus, neither the principal shareholder nor the sub-shareholder generates joint income.

At this point, a brief excursion to the underlying wording of the law, which might **be useful to sort out the court's overall observations**.

1. A separate and uniform determination of the tax assessment basis is also not possible under **Section 179 (2) of the General Tax Code (GTC)** or **Section 180 (2) GTC** in conjunction with the relevant Regulation. Section 179 (2) Sentence 2 provides for the separate determination to be undertaken uniformly for several participants where this is required by statute or where the object of the determination is attributable to several persons. It goes on to state (**in Sentence 3**) that a special separate determination may be undertaken **where one of these persons participates in the object of the determination solely via another person.**

2. Whereas **Section 180 (2) GTC** explains that, in order to ensure that the law is applied uniformly to similar situations, and in order to simplify the taxation procedure, the Federal Ministry of Finance may stipulate, by way of ordinances issued with the consent of the Bundesrat, that tax bases are to be determined separately and, for several persons, jointly in specific cases (…).

3. According to **Section 180 (1) Sentence 1 Number 2a GTC** income subject to income tax and corporate income tax, as well as other related bases of taxation is determined separately, if several persons have a share in the income and the income is attributable to these persons for tax purposes.

The Supreme Tax court then went on to say, that the conditions laid down in Section 180 (1) Sentence 1 Number 2a GTC refer to situations where several persons "jointly" fulfill the criteria for generating income. This is not the case with either a typical or an atypical silent partnership. An analogous application of Section 179 (2) Sentence 3, GTC is also not possible. While a separate determination in the case of an atypical silent participation may be in the interest of procedural economy if the classification as typical or atypical, as well as individual tax bases, are in dispute, the legal basis for a multi-stage procedure cannot be replaced by general considerations of expediency.

Source:

Supreme Tax Court, judgment of 19 May 2026 (VIII R 33/24) published on 6 August 2026.

Keywords

partnership, share capital