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By PwC Deutschland | 05 October 2026

A pre-constituted dependent family foundation subject to unlimited corporate income tax liability, despite its designation in its statutes as a public-law foundation

According to the Supreme Tax Court (I R 20/23) in a recently published decision, a pre-constituted dependent family foundation ("vorkonstitutionelle unselbständige Familienstiftung") administered by a local authority qualifies as a private-law foundation without legal capacity under Section 1(1)(5) of the Corporation Tax Act, even if its approved statutes designate it as a public-law foundation. Its legal character depends on the overall circumstances—particularly its purpose and organisational structure—rather than on the wording of its statutes alone. Because the foundation primarily served private family interests and was not integrated into the state administration, it was subject to unlimited corporate income tax liability.

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Foreword

A "*vorkonstitutionelle unselbständige Familienstiftung*" is a family foundation arranged in advance by the founder to take effect on a future event (for example the founder's death), which is not a separate legal entity but is implemented by having its assets held and managed by another person or legal holder according to the founder's written provisions, with the foundation's purpose being to benefit family members.

Facts

The appellant (a pre-constituted dependent family foundation) was established under Y's 1858 will; Y died in 1871. He bequeathed a property to Town A's Poor Relief Board as a separately administered special trust. After costs, the income funded three equal scholarships for children descended from his five sons; if that line died out, it would support the children of Town A. In 1873, with 16 grandchildren then living, the City incorporated the property into its municipal assets with royal approval while continuing separate administration under the will.

In 1967, the Town Council limited support to descendants in need, capped payments at the social assistance rate and directed surpluses to needy local children. The tax office consequently recognised the appellant as charitable and corporate income tax exempt. After a descendant challenged the statutes, the Higher Administrative Court of North Rhine-Westphalia held them contrary to the founder's intentions and void (judgment of 23 March 1984). The Higher Administrative Court classified the appellant as a municipal foundation under public law without legal personality. Payments then reverted exclusively to the founder's descendants, irrespective of need.

In 2004, the Higher Administrative Court confirmed the appellant's public-law status. Its 2006 constitution was approved by the Town Council in 2007, and the articles amended in 2014 described it as a dependent municipal foundation under public law.

The tax office assessed corporate income tax for the assessment periods 2012–2015. The appellant challenged these assessments, claiming public-law special fund status exempting it from corporate income tax. The Tax Court Cologne dismissed the foundation's claims leading to the appeal against the assessments for 2014 and 2015.

Decision

The Supreme Tax Court dismissed the appeal.

· From a tax law perspective, there appears to be no justification in a modern constitutional state for treating family foundations established before the Civil Code came into force—through a transfer to a state or local authority—differently from those whose trustees are natural persons or legal entities under private law. Accordingly, allowing a pre-constituted family foundation sponsored by a local authority to remain tax-exempt solely because of historical circumstances, while disregarding subsequent legal developments and its purpose of serving private interests, would breach the general principle of equality under Article 3(1) of

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the Constitution. A family foundation's current income is subject to corporate income tax, while distributions to beneficiaries are subject to income tax, either as income from capital assets or as other income. The grounds of appeal did not identify any plausible reason why, in the claimant's case, waiving taxation at foundation level would be justified under the principle of equality.

As the lower court correctly found, the appellant's classification as a family foundation primarily serving private interests was not changed by its 2006 statutes, which expressly described it as a "foundation under public law".

The legal nature of a foundation established before the Civil Code came into force must be determined from the overall circumstances of the individual case, particularly its specific purpose. Where, as here, the substantive provisions of the statutes show that the foundation continues to serve primarily private interests, merely designating it as a foundation "under public law" does not alter its private-law character, at least for corporate income tax purposes. The same applies to the fact that the City of A issued the grants by way of administrative acts. Nor does this assessment infringe the municipalities' right to self-government under Article 28(2) of the Constitution, as alleged in the appeal. As a matter of principle, the City of A cannot dispose of the foundation's assets autonomously, but only in accordance with the founder's intentions.

Source

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Keywords

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