SZA SCHILLING, ZUTT & ANSCHÜTZ

July 2026

Ruling by the Cologne Fiscal Court on Section 3a of the Income Tax Act (EStG): Strict Requirements for the Tax Exemption of Restructuring Gains

In its ruling of November 4, 2025 (12 K 1413/25), the Cologne Fiscal Court held that the requirements for the tax exemption of restructuring gains under Section 3a of the German Income Tax Act (EStG) are not met in connection with debt waivers granted by creditors of a wind farm general partnership (oHG). Although the Senate acknowledges that the company was in need of restructuring, it denies both the company's ability to restructure and the suitability of the measures implemented for that purpose, and classifies the debt forgiveness essentially as a (co-)entrepreneur-related restructuring rather than a business-related restructuring. The Cologne Fiscal Court is thus largely in line with the Federal Fiscal Court (BFH) (judgment of 21 August 2025; IV R 23/23), but significantly tightens and clarifies the application of the law to the facts. The decision is particularly noteworthy because it demonstrates that Section 3a of the EStG does not provide a general tax exemption for crisis-related debt relief: the provision favours only the restructuring of the business itself, not merely the orderly exit of shareholders or the liquidation of an asset. This also has implications for the practice of solvent liquidations of real estate investment companies where the liquidation proceeds are expected to fall short of the amount needed to cover their debts.

I. Facts of the Case

Since 2002, A oHG had operated a wind turbine financed by a bank loan. The three partners each held a one-third interest and were personally liable.

In 2010–2011, serious damage occurred to the rotor blades, leading to the shutdown of the wind turbine and the loss of feed-in revenues. Neither the company nor the partners could finance the repairs from their own funds, and the financing bank, Bank B, refused to provide additional financing.

To settle the bank liabilities and finance a settlement with its other creditors, A entered into a loan agreement with another company, E, in September 2011. The loan amount was primarily intended for:

- Partial repayment of Bank B in exchange for security (transfer of title to the wind turbine, assignment of feed-in revenues, and other rights),
- Payment of settlement amounts to other creditors (in particular, a supplier).

In parallel with this:

- A and E agreed on an unconditional and irrevocable purchase option for the wind turbine, exercisable as of 1 January 2013; the purchase price corresponded to the amount of A's liabilities to E,
- Bank B and another creditor (F) waived substantial portions of their claims,
- the partners made contributions, predominantly financed by private debt, thereby releasing collateral over their personal assets (land charges, guarantees).

E subsequently repaired the wind turbine. No separate written service agreement was concluded. E exercised the purchase option with effect from 1 January 2015, and operation of the wind turbine was transferred to it. A was dissolved in 2017 following liquidation.

In its 2011 tax return, A reported a profit that included extraordinary income from debt forgiveness. Following an amendment to the return, that extraordinary income comprised the debt waivers granted by Bank B and the supplier, net of the partners' contributions.

The partners initially applied for tax relief on the restructuring gain, citing the "Restructuring Decree" then in effect (Federal Ministry of Finance (BMF) circular of 27 March 2003). This application was based on a "restructuring plan" prepared in 2013, which described the company's financial difficulties (revenues consistently falling short of forecasts, excessive debt, and additional rotor damage) and the measures implemented in 2011 (debt forgiveness, capital contributions, repairs, and recommissioning), and asserted that the restructuring had been successful from both a profit and loss and a balance sheet perspective.

The tax authorities rejected the request for equitable relief and, in the 2011 assessment notice, assessed the profit without the tax exemption. In the subsequent proceedings, and after Section 3a of the EStG came into effect, the partners requested that this provision be applied to the debt waiver (citing Section 52(4a), third sentence, of the EStG for "legacy cases"), together with a declaratory or separate determination of a tax-exempt restructuring gain.

The tax authorities rejected the characterization as a business-related restructuring and instead viewed the arrangement as a (co-)entrepreneur-related restructuring aimed at enabling the partners to transition to private life with as little debt as possible. It based its decision, among other things, on:

- the wind turbine's persistently inadequate earnings even before the rotor damage,
- the purchase option that had to be granted in favour of E,
- the assignment of all feed-in revenues,
- the structuring of the overall arrangement as a liquidation of the wind turbine, with the partners being largely released from liability.

The appeals were unsuccessful.

In parallel proceedings before the Cologne Fiscal Court, based on Federal Fiscal Court (BFH) case law (IV R 1/22), it was clarified that the tax-exempt status of the restructuring gain must be determined separately pursuant to Section 3a(4) of the EStG. Consequently, in 2025 the tax authorities issued negative notices to the partners refusing to conduct a separate and uniform assessment procedure under Section 3a(4) of the EStG. The plaintiffs filed a leapfrog action against these notices.

II. Legal Framework

1. Applicability of Section 3a of the EStG to "Legacy Cases"

The court first confirms that Section 3a of the EStG, via Section 52(4a), third sentence, of the EStG, also applies to debt forgiveness occurring before 9

February 2017, provided that the taxpayer so requests. The partners had filed a corresponding request.

2. Conditions for a Tax-Exempt Restructuring Gain

a. Principle: only business-related restructuring qualifies

Section 3a(1), first sentence, of the EStG exempts increases in business assets or business income resulting from debt forgiveness for the purpose of a business-related restructuring from taxation. According to Section 3a(2) of the EStG, a business-related restructuring requires the cumulative fulfilment of the following conditions:

- **Need for restructuring** (evidence of the crisis)
- **Ability to restructure** (evidence that the company is economically viable)
- **Suitability for restructuring** (evidence that the debt forgiveness contributes to the restructuring)
- **Intent to restructure** on the part of the creditors (evidence of a genuine restructuring intent)

In its interpretation, the Fiscal Court draws on earlier case law relating to Section 3(66) of the EStG (as previously in force) and the Restructuring Decree, and emphasizes:

- the relevant assessment date is the date of the debt forgiveness,
- the taxpayer bears the burden of proof for all requirements,
- the absence of even one requirement precludes the tax exemption (exception: specific circumstances under Section 3a(5) of the EStG).

> The burden of proof lies with the taxpayer: all requirements of Section 3a(2) of the EStG must be cumulatively satisfied, and particular care should be taken to ensure they are properly documented.

b. Exception: business-related restructuring under Section 3a(5) of the EStG

Section 3a(5) of the EStG provides a narrowly defined tax benefit for certain business-related restructuring measures, in particular measures under insolvency law; restructuring measures not included in this exhaustive list do not qualify for the benefit.

III. Assessment by the Cologne Fiscal Court

1. Continuation of BFH IV R 23/23

In a similar case (IV R 23/23), the Federal Fiscal Court (BFH) set aside a ruling of the Münster Fiscal Court — not on the ground that the business was clearly incapable of, or unsuitable for, restructuring, but because the Münster Fiscal Court's findings were insufficient to establish these requirements: "The findings of the Fiscal Court are insufficient to affirm these requirements." In particular, the BFH criticized the fact that, despite indications of a significant need for investment, the poor condition of the business, and competitive pressure, the Münster Fiscal Court had failed to make sufficient findings as to whether and how profitability could be restored.

The Cologne Fiscal Court goes a step further. It does not merely note a lack of findings but explicitly denies that the requirements are met. Decisive factors include, in particular, the absence of a reliable earnings forecast, the irrevocable purchase option in favour of the acquirer, the subsequent actual cessation of operations, and the sale, which, in the court's view, had already been planned at the time of the restructuring.

2. Need for Restructuring: Affirmed

The court acknowledges that A was in need of restructuring: without the debt waiver, the financing for the repairs, and the partners' capital contributions, the company would not have been able to continue operations.

3. Business-Related versus (Co-)Entrepreneur-Related Restructuring

At the heart of the decision lies the strict distinction between business-related and (co-)entrepreneur-related restructuring:

- The wording of Section 3a(1) and (2) of the EStG grants preferential treatment only to business-related restructuring.
- The purpose of the provision is to protect the company undergoing restructuring from the renewed risk of taxation of the restructuring gain, and to safeguard creditors' interest in the company's continued existence.
- According to the legislative history — subject to Section 3a(5) of the EStG — cases in which debts are forgiven to enable the taxpayer or another interested party to make a debt-free transition to private life, or to establish a new livelihood, are expressly excluded from preferential treatment.
- Section 3a(5) of the EStG contains an exhaustive list of eligible business-related cases; the court rejects any analogous extension to other scenarios, given the absence of an unintended regulatory gap and the clear intent of the legislature.

Against this background, the Senate emphasizes that debt forgiveness granted to a partnership generally also constitutes forgiveness of debt owed by the personally liable partners. In the case of a general partnership (oHG), this applies to every partner by virtue of personal liability; in the case of a limited partnership (KG), it may also be relevant despite limited liability, for example in respect of loans held as special business assets. As a precautionary matter, therefore, in the case of the solvent liquidation of over-indebted real estate GmbH & Co. KGs — a common practice — sufficient liquidity should be maintained to settle the tax on the forgiveness of residual claims, and the tax authorities should be engaged regarding the tax exemption of the resulting restructuring gain under Section 3a of the EStG.

Risk Group: Partnerships: The distinction between business-related restructuring covered by Section 3a of the EStG and non-preferential (co-)entrepreneur-related restructuring plays a particularly significant role for partnerships, where debt forgiveness typically also affects the partners.

4. Inability to Restructure and Unsuitability for Restructuring

a. Assessment criteria

The court largely views the company's ability to restructure and the suitability of the debt forgiveness for restructuring purposes as two sides of the same question: Can the debt forgiveness — possibly combined with other measures — ensure the company's economic survival and sustainable profitability?

The following factors, among others, are decisive for this assessment:

- Profitability before and after the measures,
- Development of operating assets,
- Future ability to service debt (including principal repayments),
- Structure of the overall measures,
- Existence of a comprehensible restructuring plan or subsequent restructuring success.

b. Persistent operating losses

The Fiscal Court found that the wind turbine had fallen significantly short of its projected revenues since commencing operations. Even before the rotor damage, revenues were insufficient to cover depreciation and operating costs, excluding financing costs. The economic crisis was thus structural, rather than merely a consequence of the damage.

Structural Revenue Problems: The court emphasizes that the wind turbine had consistently fallen short of forecasts even before the rotor damage occurred; debt forgiveness alone does not resolve such structural revenue problems. Consequently, the company lacked the ability to restructure. Where a company was already underperforming before the crisis, its ability to restructure may be doubtful, generally requiring comprehensive operational and financial measures rather than debt forgiveness alone.

c. Lack of a restructuring-oriented plan at the time of the debt forgiveness

A transparent, verifiable restructuring plan is required as key evidence of the company's ability to restructure. In the present case:

- No earnings forecast was prepared at the time of the debt forgiveness in 2011,
- The "restructuring plan" was only prepared retrospectively, in 2013,
- There is no documented forecast showing that, following the debt forgiveness, repairs, and continued operations, A would have been permanently capable of:
- Covering operating expenses,
- Paying interest and making principal payments on both the remaining corporate debts and the private loans taken out to finance the partners' contributions.

The plan drawn up in 2013, and the financial projections submitted at a later stage, did not satisfy the court, as they did not realistically reflect the company's actual total debt (including special business assets) or the necessary debt service. The projected cash surpluses were mathematically insufficient to meet the existing obligations. This is typical of restructuring situations, in which debt forgiveness is a common tool.

> Preparation of a Restructuring Plan in Advance: The ruling makes clear that a plan prepared retrospectively — as with the plan prepared in 2013 for measures taken in 2011 — is insufficient. A comprehensible and verifiable restructuring plan must be in place at the time of the debt forgiveness and must include earnings and liquidity projections that also take into account principal repayments and special business assets.

In IV R 23/23, the Federal Fiscal Court (BFH) had primarily objected that the Münster Fiscal Court had not made sufficient findings regarding investment needs, financing, and future earnings prospects. The Cologne Fiscal Court effectively turns this into a question of the burden of proof: anyone relying on Section 3a of the EStG must be able to present a transparent restructuring and going-concern forecast at the time of the debt forgiveness.

The pro forma financial statement submitted retrospectively did not convince the Cologne Fiscal Court, particularly since the facility had already been falling short of earnings expectations for years and the partners' contributions were predominantly debt-financed. The court concludes from this that the company's ability to restructure and the suitability of the restructuring measures cannot be established.

d. Drafting of the contract with E: designed to facilitate enforcement and limit liability

The Senate considers the terms of the agreement with E to be central:

- E's loan was granted only in exchange for the transfer of title to the wind turbine as security, the assignment of feed-in revenues, and the granting of an unconditional, irrevocable purchase option.
- The agreed-upon purchase price corresponded to the amount of the loan and was below the market value of the wind turbine as estimated by the partners themselves.
- Given the strained financial situation of A and its partners, it was not objectively apparent how A would have been able to repay the loan from its ongoing business operations without ultimately having to liquidate the wind turbine, whether through the exercise of the purchase option or through enforcement of the collateral upon termination.
- Thus, as early as the time of the debt forgiveness, it was highly probable that the restructuring measures would lead to the sale of the wind turbine and, consequently, to the termination of A's operations.
- The court views this as evidence that the objective of the measures was not the long-term preservation of A as a going concern, but rather the orderly liquidation of its sole significant asset, combined with a substantial release of the partners from personal liability.

e. Subsequent events confirm that no restructuring of the business took place

In the Cologne Fiscal Court's view, subsequent events likewise confirm that the restructuring was not suitable.

There was therefore no "retrospectively successful" outcome to the restructuring in the sense of the company's sustainable continuation. According to the court, a gain from the sale of the business cannot, by its very nature, prove a successful restructuring, since restructuring presupposes the continuation of the company, not its break-up.

> Required Personnel Continuity: A tax-advantaged transfer-based restructuring requires that the existing owners retain an interest in the acquiring legal entity. A mere sale to a third party without any continuing ownership participation does not constitute a tax-advantaged transfer-based restructuring.

The irrevocable purchase option granted to the new investor was, in the court's view, the decisive evidence that the existing partners never intended to continue the business on a long-term basis. Such arrangements signal an intention to liquidate rather than to restructure.

f. No "transfer-based restructuring"

The concept of "transfer-based restructuring", as defined in the case law of the Federal Fiscal Court (BFH) — involving the transfer of the business to a successor company with the participation of the existing owners — was invoked by the plaintiffs but is expressly rejected by the Fiscal Court:

- The partners of A held no interest in the acquirer E.
- Consequently, the personnel continuity that typically characterizes transfer-based restructurings within the meaning of the BFH's case law is lacking.

The successful continuation of the wind turbine's operation by E — under different economic and organizational conditions — is therefore irrelevant to the assessment of A's eligibility for restructuring.

For a transfer-based restructuring within the meaning of the Federal Fiscal Court's case law, the Cologne Fiscal Court requires a certain degree of personnel or corporate continuity, in particular a stake held by the previous partners in the acquiring legal entity. Since the acquirer simply purchased the facility, and the previous partners did not retain a stake in it, the Cologne Fiscal Court does not regard this as a transfer-based restructuring. The assessment would be different if new partners were to join as part of the transfer-based restructuring; the decisive factor is that the existing partners retain their interests.

> A mere **asset deal does not qualify as a transfer-based restructuring** simply because the business asset continues to be operated by a third party.

5. (Co-)Entrepreneur-Related Nature of the Measures

In this specific situation, the Cologne Fiscal Court views the measures — due in part to the partners' personal liability and the release of their collateral — as primarily aimed at relieving the partners of that liability.

6. Creditors' Intent to Restructure

In the absence of the company's ability to restructure or the suitability of the measures, the Senate leaves open whether the participating creditors (Bank B and F) had a demonstrable intent to restructure. Even if such intent had been proven, it could not have compensated for the failure to satisfy the remaining requirements of the legal test.

IV. Conclusion

The Cologne Fiscal Court concludes that:

- The requirements of Section 3a(1) and (2) of the EStG (business-related restructuring) are not met,
- In particular, the debt forgiveness, in conjunction with the other measures, fails to satisfy both the ability-to-restructure and the suitability-for-restructuring requirements,
- Nor does the case fall under the specific, exhaustively defined preferential provisions of Section 3a(5) of the EStG.

The decision denying the request for a separate and uniform assessment procedure under Section 3a(4) of the EStG is lawful. The action seeking a declaration of a tax-exempt restructuring gain is unsuccessful. Leave to appeal to the Federal Fiscal Court (BFH) was granted.

V. Classification and Consequences

7. Restrictive Application of Section 3a of the EStG

The decision confirms that the courts interpret the substantive requirements of Section 3a of the EStG — in particular the ability to restructure, the suitability for restructuring, and the business-related nature of the measures — restrictively.

> All elements must be proven cumulatively; mere structural relief or the avoidance of insolvency is not sufficient.

8. Document the Restructuring Plan at the Time of the Debt Waiver

The most important implication for advisory practice is that a restructuring plan should be prepared and documented before or, at the latest, upon conclusion of the debt waiver agreement. It should not only describe the crisis but also specifically demonstrate why the debt waiver, together with other measures, is suitable for sustainably restoring solvency and profitability.

> In particular, the plan must include liquidity projections, profit projections, investment needs, sources of financing, assumptions regarding market and competitive conditions, as well as a description of which liabilities remain after the debt forgiveness and how these can be serviced.

Although the law does not require a written restructuring plan, having one serves as strong evidence that the company's eligibility for restructuring is verifiable and transparent.

Beyond a purely tax-related perspective, in the context of restructurings aimed at avoiding insolvency, the expert preparation and careful documentation of a restructuring plan are also essential from an insolvency and restructuring law perspective, in order to protect those involved from liability and avoidance risks. In the Fiscal Court's view, every solvent restructuring should also ensure that, prior to the distribution of liquidation proceeds to creditors, a sufficient amount is set aside for the tax liability arising from a taxable restructuring gain resulting from a debt waiver.

9. Clearly Establish the Intention to Continue Operations

It must also be carefully examined whether the transaction actually results in the continuation of the business or merely in an orderly liquidation. Purchase options, put/call structures, prepared asset deals, or agreements through which significant opportunities are already transferred to a third party may argue against a tax-advantaged restructuring.

If a subsequent sale is to remain economically feasible, it must be clearly documented that it was not already planned as a fixed exit strategy at the time of the restructuring.

Otherwise, there is a significant risk that the tax authorities or the courts will classify the measure as (co-)entrepreneur-related debt relief, or as preparation for liquidation, rather than as a privileged business-related restructuring.

10. Actively Seek and Precisely Articulate the Creditors' Intent

The Federal Fiscal Court (BFH) considers it sufficient if the creditors' intent to facilitate restructuring is a contributing factor; it need not be the sole or predominant motive. Nevertheless, the debt waiver agreement, or an accompanying letter to the creditor, should expressly state that the waiver is also being granted to enable the continuation and restructuring of the company. Whether a "transfer-based restructuring combined with debt forgiveness" falls within this category remains uncertain, and a corresponding tax risk should be factored in.

> Purely economic motives on the part of the creditor are not automatically detrimental. However, it becomes problematic if the documentation focuses exclusively on damage limitation, liquidation, or termination of the business relationship.

11. For Partnerships: Clearly Separate Special Business Assets and Partner Liability

In the case of partnerships, advice should not be limited to the financial situation of the partners. The decisive factor is whether the partnership, as a business, is in need of restructuring, able to restructure, and suitable for restructuring.

> While relieving the burden on personally liable partners is unavoidable and not harmful in and of itself, it must not become the primary purpose of the measure.

In the case of loans held in special business assets, particular emphasis should be placed on explaining why the debt waiver functionally benefits the partnership—for example, by preserving an essential operational foundation, securing financing, or preventing the loss of a person critical to the business.

12. Caution Regarding Asset Sales Following Restructuring

If, following the restructuring, individual significant assets are sold, it should be documented whether the sale was already planned at the time of the restructuring, was likely to occur, or was merely a subsequent opportunistic decision. The Cologne Fiscal Court has shown that subsequent events can retroactively become relevant as circumstantial evidence where they had already been factored into the restructuring plan.

> Particularly critical are cases in which, already during the restructuring phase, the acquirer provides loans, receives collateral and assigned income, while simultaneously being granted an irrevocable purchase option.

From the Cologne Fiscal Court's perspective, such structures tend to indicate a premeditated liquidation rather than a restructuring of the existing company.

13. Properly Structuring the Tax Assessment in Proceedings

According to the case law of the Federal Fiscal Court (BFH), the restructuring gain under Section 3a(4) of the EStG must be determined by way of a separate administrative act.

> Therefore, taxpayers should not merely request an amendment to the profit assessment notice, but should explicitly request the issuance of a separate assessment notice under Section 3a(4) of the EStG determining the basis and amount of the tax-exempt restructuring gain.

This is also important from a procedural strategy perspective because the assessment notice serves as the basis for further tax treatment.

14. Expert Planning and Oversight of Restructuring

The Cologne Fiscal Court's ruling reaffirms that expert planning and oversight of restructuring are indispensable, for several reasons. On the one hand, it clarifies the limits of the tax privilege under Section 3a of the EStG; on the other, it provides guidance for developing viable restructuring plans. The ruling also underscores the considerable importance, from an insolvency and restructuring law perspective, of the expert preparation and oversight of restructuring plans in order to effectively limit liability and avoidance risks for managers, financiers, and shareholders or partners.

This client information contains only a non-binding overview of the subject area addressed in it. It does not replace legal advice. Please do not hesitate to contact us for this client information and for advice:

Dr. Christoph Kiegler
Rechtsanwalt | Partner
Tax Law

T +49 621 4257 376
E Christoph.Kiegler@sza.de

Dr. Dietmar Schulz
Rechtsanwalt | Partner
Restructuring & Insolvency Law

T +49 89 4111417 431
E Dietmar.Schulz@sza.de