

Client Briefing

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BFH Confirms High Barriers of the Trade Tax Participation Exemption in the Case of Intra-Year Restructurings

The Federal Fiscal Court (BFH) once again addressed an important issue of trade tax law regarding restructurings during the year: Does the trade tax participation exemption (so-called „gewerbesteuerrechtliches Schachtelprivileg“) which (largely) exempts participation income from the parent company's trade tax base, apply even if the acquiring company in a restructuring acquired its interest in the distributing company during the fiscal year? The Federal Fiscal Court (BFH) answered the question negatively, thereby confirming its earlier case law. For intra-group restructurings, the decision presents pitfalls, if the trade tax participation exemption cannot be claimed for subsequent distributions. Furthermore, the transferor's prior holding periods are not taken into account, meaning that distributions must be deferred or a type of conversion with tax retroactive effect to 31 December of the previous year should be chosen.

Under the trade tax participation exemption of § 9 No. 2a and No. 7 of the German Trade Tax Act (GewStG), the trade tax base of a business must be reduced by the profits (among other things) from shares in a non-exempt (domestic or foreign) corporation if the interest in the distributing corporation *amounts to at least 15 percent of the share capital or stock capital at the beginning of the trade tax period*. The provision aims – similar to § 8b(1) of the German Corporation Tax Act (KStG) with regard to corporate income tax – to prevent double taxation of distributions, which would otherwise arise if taxes were levied on the distribution at both, the level of the distributing corporation and that of the dividend recipient. Accordingly, the provision has great practical significance.

In its decision of December 17, 2025 (I R 9/23), the Federal Fiscal Court (BFH) (once again) addressed the question – which is subject of controversial debates of legal scholars – of whether the trade tax participation exemption must be granted to the dividend recipient even if the recipient did not actually – as required by § 9 No. 2a Sentence 1 GewStG – hold at least a 15% stake in the distributing corporation at the beginning of the tax period, but

instead acquired such a stake during the year by way of a so-called qualified share exchange. The decisive factor in this regard is whether provisions of the German Reorganization Tax Act (UmwStG) – namely § 4(2), sentence 3 UmwStG and/or § 12(3), first clause UmwStG – allow or require the crediting of the holding periods of the legal predecessor (the transferring corporation) under § 9 No. 2a, sentence 1 GewStG.

The Federal Fiscal Court (BFH) has ruled against this, thereby upholding its previous legal opinion (judgment of April 16, 2014, I R 44/13, BStBl. II 2015, 303) contrary to the opinion expressed in the lower court by the Düsseldorf Fiscal Court (judgment of Nov. 24, 2022, 14 K 392/22 G,F).

I. Facts underlying the judgment

The Federal Fiscal Court's ruling was based on the following facts: The plaintiff and respondent in the appeal was X-GmbH, whose sole shareholder was V. V was also the sole shareholder of V-GmbH. X-GmbH was also the general partner of A-GmbH & Co. KG. The shareholders' meeting of X-GmbH resolved in the course of 2016 to increase the share capital by issuing a new share. The capital contribution was to be made by way of a so-called qualified share exchange, whereby V, as the transferee of the new share, would contribute his holding in V-GmbH to X-GmbH. The share exchange took effect during the year. The shares in V-GmbH had previously been accounted for in V's special business assets (*Sonderbetriebsvermögen*) at A-GmbH & Co. KG. The participation was contributed by X-GmbH at book value. In September 2016, X-GmbH, now the sole shareholder of V-GmbH, received a profit distribution from the latter.

The tax office subject the profit distribution to trade tax. The Düsseldorf Fiscal Court upheld X-GmbH's appeal in the first instance and stated that, contrary to the tax administration's view, the requirements of § 9 No. 2a GewStG were met. In the case of a qualified share exchange, the period of prior ownership is attributed pursuant to § 23(1) UmwStG in conjunction with § 4(2), sentence 3 UmwStG and § 12(3), first clause UmwStG.

II. Legal rulings of the Federal Fiscal Court

In response to the tax authority's appeal, the BFH denied the attribution of the prior holding period in the case at hand, overturned the judgment of the Düsseldorf Fiscal Court, and dismissed the claim.

It was undisputed that X-GmbH did not in fact hold at least a 15% stake in V-GmbH at the beginning of the assessment period, i.e., on January 1, 2016, since the acquisition of the shares did take place during the course of 2016. However, the issue was whether provisions of the Reorganization Tax Act, which provide for the crediting of prior holding periods in favor of the acquiring legal entity, take legal effect within the scope of § 9 No. 2a GewStG and whether X-GmbH should therefore be treated, with respect to § 9 No. 2a GewStG, as if it had already held the shares in V-GmbH at the beginning of the tax period.

In the case of a qualified share exchange, pursuant to § 23(1) UmwStG, the provision of § 4(2), sentence 3 UmwStG applies *mutatis mutandis*, provided that – as in the case at hand – the acquiring company values the contributed business assets at a value below fair market value. Section 4(2), sentence 3 UmwStG provides: *"If the duration of an asset's inclusion in business assets is relevant for taxation, the period during which it was included in the business assets of the transferring corporation shall be credited to the acquiring legal entity."*

In the opinion of the Federal Fiscal Court (BFH), § 4(2), sentence 3 UmwStG is irrelevant for the granting of the trade tax participation exemption under § 9 No. 2a GewStG; in other words, it does not result in the transfer of the transferring corporation's holding periods to the acquiring corporation. The court argues strictly based on the wording: According to its "unambiguous wording," § 4(2), sentence 3 UmwStG permits the crediting of the period of the contributed asset only if the *duration* of the asset's inclusion in the business assets is significant. § 9 No. 2a GewStG, on the other hand, requires ownership *"at the beginning of the assessment period"*, which

represents a (specific) point in time (January 1, 12:00 a.m.; the so-called “cut-off date” principle). However, § 4(2) sentence 3 UmwStG is precisely not applicable to time-based provisions.

In the opinion of the Federal Fiscal Court (BFH), § 4(2) sentence 3 UmwStG does not result in the crediting of prior periods of ownership within the framework of § 9 No. 2a UmwStG, since in § 9 No. 2a UmwStG a specific point in time (and not a period) triggers legal consequences.

Furthermore, the BFH assumes that – contrary to the opinion of the Düsseldorf Fiscal Court – a crediting of prior ownership periods also does not occur on the basis of § 23(1) UmwStG in conjunction with § 12(3), first clause UmwStG. Under § 12(3), first sentence UmwStG, the acquiring corporation assumes the tax status of the transferring corporation. Part of this (comprehensive) assumption of legal status may – at least in the opinion of the Düsseldorf Fiscal Court – also include the crediting of a specific date of ownership.

The adjudicating panel of the Federal Fiscal Court (BFH) denies the applicability of § 12(3), first sentence UmwStG in the case at hand. The restriction of § 4(2), sentence 3 UmwStG to time-period-related characteristics must not be circumvented by the inclusion of time-point-related characteristics in the general provision of § 12(3), first sentence UmwStG. The court therefore assumes that § 4(2), sentence 3 UmwStG, as a more specific provision (or rather, its inapplicability), has a blocking effect on § 12(3), first sentence UmwStG. Nor should anything else follow from the fact that § 23(1) UmwStG refers to both § 4(2), sentence 3 UmwStG and § 12(3), first half-sentence UmwStG and does not, at least not expressly, establish a hierarchy of precedence.

In the opinion of the Federal Fiscal Court (BFH), prior ownership periods cannot be credited under § 12(3), first sentence

UmwStG either, since § 4(2), sentence 3 UmwStG has a blocking effect in this regard.

III. Classification and Comments

The Federal Fiscal Court's decision is not inevitable. The wording of the law could also have supported a different decision – one favorable to the taxpayer. Accordingly, the Federal Fiscal Court's earlier ruling had already been criticized, and the First Senate was given another opportunity to review its case law following the divergent decision by the Düsseldorf Fiscal Court. However, the BFH stuck to its earlier view, thereby clarifying how the BFH (and the tax authorities) assess such intra-year restructuring cases. The decision increases the complexity of intra-group restructurings and their tax implications and must be strictly observed by corporate groups.

However, the trade tax participation exemption – at least in the view of the tax authorities (BMF, Jan. 2, 2025, BStBl. I 2025, 92) – is to be granted if the restructuring takes effect retroactively pursuant to § 2 (1) UmwStG to the start of the assessment period. However, such retroactive effect is not provided for by law in the context of the so-called qualified share exchange and is therefore not possible in this respect. For other transformations (*Umwandlungen*) and contribution transactions, however, the trade tax participation exemption may be preserved in the following year through a retroactive restructuring effective as of December 31 of the previous year.

Furthermore, according to the case law of the Federal Fiscal Court (BFH), the attribution of prior holding periods is also unlikely to be considered in the case of § 9 No. 7 UmwStG (distributions of profits by foreign corporations), since the prerequisite for the reduction in this regard is also a holding “*at the beginning of the assessment period*” (the point in time triggering legal consequences). The requirements applicable to domestic and foreign shareholdings are identical in this respect.

IV. Special Case: EU cross-border dividends

Dividends from EU-based foreign companies, however, could constitute a special case. Where dividends are distributed by foreign companies to domestic companies, each of which meets the requirements of the Parent-Subsidiary Directive (Directive 2011/96/EU), it is questionable whether the levying of trade tax (including the 5% penalty for multi-tier applicable even where the dividend is otherwise exempt) is consistent with a recent judgment of the ECJ in the 'Banca Mediolanum' case (C-92/24). The ECJ's reasoning could, in fact, mean that German trade tax on dividends from subsidiaries subject to the Parent-Subsidiary Directive (Directive 2011/96/EU) contravenes EU law. The tax authorities have not yet taken a position on this; such cases should therefore, as far as possible, be kept open.

V. Practical recommendations

Where corporate restructurings are planned during the financial year for companies that continue to generate investment income in the same year, there is a risk of significant trade tax liabilities. This can be particularly relevant in the case of post-closing restructurings as part of an M&A process.

Therefore, consideration should generally be given to structuring reorganisations in such a way that the shareholding exists at the start of the tax period (1 January). In this context, types of conversion with retroactive tax effect to 31 December of the previous year can be utilised to preserve the participation exemption.

In the case of dividends from EU subsidiaries, the trade tax liability could be contrary to EU law, so these cases should be kept open for further proceedings.

As part of tax due diligence, it must be analysed in connection with (hidden) profit distributions whether the holding company held at least a 15% stake in the distributing corporation at the beginning of the relevant tax period.

VI. Conclusion and Outlook

The BFH did not use the deviation by the Düsseldorf Fiscal Court as a basis for a change in case law but

rather confirmed its earlier – controversial – decision from 2014 (I R 44/13). The tax authorities have also since expressly endorsed the BFH's view (see BMF of Jan. 2, 2025, BStBl. I 2025, 92, para. 04.15). Consequently, distributions made following a restructuring during the fiscal year may be subject to significant trade tax liabilities on the corresponding distribution amounts.

While this does increase legal certainty in practice, it remains the case that share acquisitions and restructurings during the fiscal year are particularly prone to errors and problematic from a tax law perspective. Recognizing the crediting of prior holding periods within the framework of the trade tax participation exemption would have contributed to a welcome simplification of restructuring processes and a logical equality of tax burden at the level of the dividend recipient.

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:



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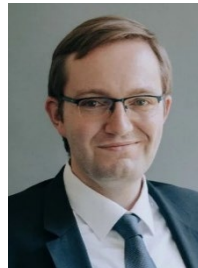
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