

Current legislation and jurisprudence

11 | 2023

For entrepreneurs

Inheritance and gift tax: application for Saving options involves risk

| The Münster Finance Court recently decided that the standard exemption for business assets acquired through donations cannot be claimed if the option exemption was previously applied for but the requirements for this exemption are not actually met. |

background

Various benefits are possible (depending on the amount of the acquisition) for favored assets (especially business assets) within the meaning of Section 13b Paragraph 2 of the Inheritance Tax and Gift Tax Act (ErbStG). As a rule (beneficiary assets up to EUR 26 million), the purchaser has the choice between two exemption models:

The standard exemption is 85% with an additional deduction amount of a maximum of EUR 150,000. If the total value of this asset exceeds the value limit of EUR 150,000, this deduction amount is reduced by 50% of the amount exceeding this value limit. This means: If the benefited assets are up to EUR 1 million, complete relief is achieved.

Upon application, a 100% exemption from options will be granted if the ratio of management assets is a maximum of 20%.

Depending on the exemption regulation, care must be taken within a period of five or seven years to ensure that certain minimum wage amounts are not fallen below.

ü Facts (abridged and simplified)

The father transferred an OHG shareholding to his son (S) by way of anticipated inheritance and real estate. In his gift tax return, S applied for option exemption in accordance with Section 13a (10) of the ErbStG for the entire acquisition of the beneficiary assets. According to further information in the declaration, the OHG's administrative assets accounted for 90% or more.

Data for the month December 2023			
ü TAX DATES			
Due date:			
• VAT, LSt = 12/11/2023			
<small>• Income tax, corporate tax = December 11, 2023</small>			
Transfers (payment grace period):			
• VAT, LSt = 12/14/2023			
<small>• Income tax, corporate tax = December 14, 2023</small>			
Check payments:			
If paying by check, the check must be submitted to the tax office at least three days before the due date!			
ü SOCIAL SECURITY CONTRIBUTIONS			
<small>Due date for contributions 12/2023 = December 27, 2023</small>			
ü CONSUMER PRICE INDEX			
(Change compared to previous year)			
9/22	2/23	5/23	9/23
+ 10.9%	+ 9.3%	+ 6.3%	+ 4.3%

The company tax office provided the value the share of the OHG's business assets as well as the sum of the common values of the administrative assets, whereby these accounted for more than 70% of the business assets. It valued the property as a business agriculture and forestry.

The person responsible for gift tax
The tax office then issued financial income tax, whereby a benefit according to Section 13a ErbStG was taken into account for the agricultural and forestry assets, but not for the OHG share. The option exemption cannot be granted in this respect because the administrative asset ratio of 20% has been exceeded. Since S's application for exemption from options is irrevocable, standard exemption is also out of the question.

S subsequently lodged an objection to this and withdrew his application for exemption from options, which he had inadvertently submitted. He now wanted regular relief.
S also stated that when he submitted the application he had mistakenly assumed that the property did not represent a preferential business asset.

According to the decision of the Münster Finance Court, the tax office rightly granted neither the option exemption nor the standard exemption for the OHG shares:

- The option exemption fails due to the exceeded management assets ratio of 20%.
- The standard exemption cannot be granted because S effectively and irrevocably applied for the option exemption in the gift tax return.

The application means that individual elements of the offense that apply to the standard exemption are replaced by others. The declaration of options expressly concerns the entire acquisition of the beneficiary assets. The possible error of the S about the qualification of the property as agricultural and forestry business assets

For GmbH managing directors

Minimum wage: GmbH managing directors are not personally liable

| In two recent decisions, the Federal Labor Court (BAG, judgments of March 30, 2023, ref. 8 AZR 120/22 and ref. 8 AZR 199/22) has clarified that managing directors are not personally liable for outstanding minimum wages in the event of a GmbH insolvency. A managing director of a GmbH is only personally liable for the company's liabilities if there is a special reason for liability. But the Federal Labor Court was convinced that this was not the case in this case. |

This does not affect the OHG participation, as the option can be issued separately for each economic unit.

Relevance for practice

In its decision, the Münster Finance Court referred to the case law of the Federal Finance Court on the previous regulation (Section 13a Para. 8 ErbStG), according to which there is no "relapse" to the standard exemption after the irrevocable declaration of the optional full exemption is possible.

In addition, the Federal Finance Court has highlighted the following: In the case of a uniform donation from several economic units, the declaration of optional full exemption can be made separately for each economic unit.

Note | The Münster Finance Court had no grounds for an appeal. To the non-admission complaint subsequently filed by S
However, the Federal Finance Court has now allowed the appeal (decision of July 12, 2023). It remains to be seen whether the Federal Finance Court will provide new insights here.

NOTE | For the time being, in inheritance tax or gift tax cases, it should be noted that the application for optional full exemption can be associated with a (high) risk, especially since the 20% limit of the administrative assets depends on several aspects and sometimes is not easy to determine.

Source | FG Münster, judgment of October 27, 2022, ref. 3 K 3624/20 Erb, Rev. BFH ref. II R 19/23, at www.iww.de, access no. 236917; BFH ruling of July 26, 2022, Ref. II R 25/20

For all taxpayers

Digital pension overview is online

| The digital pension overview has been online since June 30, 2023. All citizens can access an overview of their personal pension entitlements (free of charge) online at www.ren-teneuebersicht.de. The pension entitlements are presented clearly and centrally. The overview provides an overview of the expected financial security in old age. |

Note | The information letters from the statutory pension insurance and the providers of additional pension provision are still available.

The portal provides a list of the pension institutions connected in the current pilot phase. Further pension schemes will follow over the course of the year. The list is then updated.

Source | German Federal Pension Insurance, *summa summarum*, issue 3/2023

For entrepreneurs

Minimum tax law: Government draft is available

| The federal government has passed a draft law to implement Council Directive (EU) 2022/2523 to ensure global minimum taxation and other accompanying measures. |

Background: On December 15, 2022, the EU member states adopted

Directive (EU) 2022/2523 to ensure a global minimum taxation for multinational corporate groups and large domestic groups in the Union (Minimum Taxation Directive) agreed. The government draft serves to implement this directive. The legislative process is scheduled to be completed by the end of 2023.

Source | Law implementing Council Directive (EU) 2022/2523 to ensure global minimum taxation and other accompanying measures, government draft, processing status: August 11, 2023

For landlords

Intention to generate income when purchasing numerous undeveloped properties

Properties

| According to the Munich Finance Court, the taxable activity according to Section 21 Paragraph 1 Sentence 1 No. 1 of the Income Tax Act (EStG) is object-related and not property-related - even if the objects are located on a property condition. After the tax court's decision, the intention to generate income must also be examined on a property-specific basis. |

📄 Facts

Between 2003 and 2016, spouses acquired a total of 111 real estate properties throughout Germany, which they said they intended to generate income from rental and leasing and which they recognized accordingly in Appendix V of the respective income tax returns.

These were mostly undeveloped properties, some of which were used as agricultural land

Storage space should be rented.

Some properties remained unrented. In these cases, the tax office recognized the I definitely don't want to.

The tax court rejected the couple's argument that the intention to generate income and the total surplus forecast to be examined in this context should not be considered in isolation for each individual property, but rather for the entirety of the properties. According to this, the object-related consideration also applies if the objects are located on a piece of land (in the civil law sense).

PRACTICAL TIP | If, on the other hand, the taxpayer rents out several objects or the entire property on the basis of only one legal relationship, the rental activity must be assessed uniformly.

It is also important to note that the presumption of an intention to generate income in the case of long-term rentals only applies to the rental of living space, but not to the rental of commercial real estate or undeveloped land.

Source | FG Munich, judgment of September 26, 2022, ref. 7 K 169/20, at www.iww.de, access no. 235059

For all taxpayers

Family home: inheritance tax exemption despite Move in only after the six-month period has expired

| If an heir cannot move into the apartment (family home) within six months of the inheritance because it is rented for a fixed period of time,

This does not necessarily rule out the possibility of him still leaving the apartment immediately. S. of Section 13 Paragraph 1 No. 4c of the Inheritance Tax and Gift Tax Act (ErbStG) can be used for personal use. This was decided by the Munich Finance Court. The appeal is already pending. |

background

The one previously used by the testator himself Residential property may be subject to inheritance tax can be freely inherited if the spouse lives in the family home for another ten years. If you inherit children or grandchildren (deceased children), it should also be noted that the tax exemption is based on a living space of 200 square meters is limited.

Note | Tax exemption can also be granted if the testator was prevented from using the property for his own residential purposes for compelling reasons.

The purchaser must immediately, ie, without culpable delay, designate the apartment for his or her own residential purposes. According to the case law of the Federal Finance Court, a period of six months after the inheritance is generally appropriate.

Facts and decision

A very elderly person in need of care
The testator had to go to a nursing home

For entrepreneurs

Operating expenses: distinction between Entertainment costs and attention

| The Lower Saxony State Tax Office has pointed out that, depending on the individual case, it must be checked whether business partners are given gifts or whether the deduction restriction for entertainment costs (deduction only at 70%) in accordance with Section 4 Paragraph 5 Sentence 1 No 2 Income Tax Act (EStG) applies. |

Hospitality does not exist if small amounts of attention are given, as is the case, for example. B. is common at company meetings as a gesture of politeness.

However, since hospitality can also be a common gesture of politeness, it depends largely on the extent of the attention given. On

to move and was dependent on renting out the apartment he had previously used to finance the costs of his home. In this case, according to the tax court, a fixed-term rental agreement concluded for four years - without the possibility of termination for personal use - after the death of the testator does not stand in the way of inheritance tax exemption for the daughter as the sole heir - even if the rental agreement still has a remaining term of more than two years after the mother's death and the daughter can only use the apartment for her own residential purposes after it has been renovated.

PRACTICAL TIP | Regardless of this decision, it is recommended to include the possibility of terminating the property for personal use in the rental agreement in order to enable immediate use for your own residential purposes after the inheritance.

Source | FG Munich, judgment of October 26, 2022, Ref. 4 K 2183/21, Rev. BFH Ref. II R 48/22, at www.iww.de, access no. 234961; BFH judgment of March 16, 2022, Ref. II R 6/21

Source | LfSt Lower Saxony, order dated July 6, 2023, Ref. S 2145-St 226-2108/2023

For GmbH managing directors

Hidden profit distribution due to private use of the car despite a ban on use?

| If a corporation provides its shareholder-managing director (GGf) with a company vehicle for use, prima facie evidence suggests that the vehicle is also used by the GGf for private journeys. According to the Münster Finance Court, this also applies if private use is expressly prohibited in the managing director's employment contract and in particular if the CEO does not keep a logbook. |

The Münster Finance Court has in its The reasons for the judgment are compared in particular with the previous case law of the Federal Finance Court:

View of the First Senate of the Federal Finance Court

The First Senate of the Federal Finance Court has so far assumed that prima facie evidence applies to the private use of a company vehicle provided to the GGf by the company for use. According to this, prima facie evidence suggests that a (sole) GGf also uses a company car at his disposal for private journeys.

This also applies if a ban on private use is expressly agreed in the managing director's employment contract – especially if • the GGf does not keep a logbook, • no organizational measures have been taken that exclude private use, and • there is unrestricted access to the car.

View of VI. Senate

In contrast, the VI. Senate of the Federal Finance Court is of the opinion that for wage tax purposes, the mere permission of private use, regardless of the actual usage conditions for the employee, constitutes the inflow of a monetary advantage and that prima facie evidence does not apply.

There is no set of experiences based on general life experience according to which an employed GGf generally does not respect bans on use agreed in employment contracts. Even if, in the absence of a "supervisory authority", he does not have to expect any consequences under labor law or criminal law in the event of a violation, this does not justify a corresponding tax penalty.

criminally significant general suspicion.

The fact that the employer does not monitor a ban on private use agreed in the employment contract does not change this. The VI has these principles. Senate also applied to a sole GGf of a GmbH.

point of view of Münster Finance Court

In the case of a sole GGf of a GmbH, the Münster Finance Court has now based itself on the case law of the First Senate of the Federal Finance Court and applied the principles of prima facie evidence.

In the case of the dispute, the GmbH was also unable to shake the prima facie case with the objection that the GGf had a vehicle in its private assets available for private trips. Because when it comes to company driving

According to the evidence, these were very high-quality and powerfully motorized vehicles that were not comparable to "private" vehicles. In addition, these vehicles were also used by the GGf's wife.

Note | The principle to be assumed on the basis of prima facie evidence

The use of the property was not based on a corresponding usage and transfer agreement. Rather, the agreement contained a ban on private use.

The private use by the GGf was therefore not caused by the employment relationship, but by the partnership relationship and led to a hidden distribution of profits.

Since an appeal against the decision is already pending, it can now be eagerly awaited how the Federal Finance Court will position itself.

Source | FG Münster, judgment of April 28, 2023, ref. 10 K 1193/20 K,G,F, Rev. BFH ref. IR 33/23, at www.iww.de, access no. 237191; BFH judgment of January 23, 2008, Ref. IR 8/06; BFH judgment of March 21, 2013, Ref. VI R 46/11

For entrepreneurs

Artist's social security contribution: The tax rate remains the same Year 2024 at 5.0%

| The tax rate for artists' social insurance will also be (unchanged) 5.0% in 2024. The Federal Ministry of Labor and Social Affairs has commented on this as follows, among others: |

In 2022, the amount of fees reported to the artists' social security fund has returned to the level it was before the corona pandemic. This and the use of additional federal funds totaling over EUR 175 million in the years 2021 to 2023 have contributed to the financial stabilization of the artists' social insurance fund and make it possible for the current artist's social insurance tax rate of 5.0% to be reduced. can also be maintained in 2024.

NOTE | Over 190,000 self-employed artists and journalists are covered by compulsory insurance through the artists' social insurance statutory health, nursing care and pension insurance included.

Like dependent employees, artists and journalists pay half of their social security contributions. The other half of the contribution is financed by a federal subsidy (20%) and by the artists' social contribution from companies (30%) that exploit artistic and journalistic achievements.

The tax rate is set annually for the following year. The basis for assessment is all fees paid to self-employed artists and journalists in a year.

Source | Artists' Social Security Contribution Ordinance 2024; BMAS, "Artists' social security contribution will remain stable at 5.0% in 2024," announcement dated July 14, 2023

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