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Framework Concept for a New Legal Form for Companies: Company with Tied Assets

The Federal Ministry of Justice and Consumer Protection and the Federal Ministry of Finance are proposing the introduction of a new legal form for companies: the company with tied assets. It is intended to promote sustainable entrepreneurship oriented towards long-term goals.

In the coalition agreement for the 21st legislative period, the governing parties agreed: "We are modernising the law governing cooperatives and want to introduce a new, independent legal form called a "company with tied assets". The characteristics of this legal form are unalterable asset commitment and participation according to membership logic without tax privileges or discrimination."

In detail, the framework concept now presented for the company with tied assets provides for the following:

1. Securing long-term asset retention

In a company with tied assets, the assets should remain within the company. It should therefore not be possible to simply pay out profits. Instead, these should be reinvested. Particularly in cases of company succession, this should ensure that the company is not sold for short-term profit. Constructive dividends should also not be possible. It should not be possible to change the legal form and the asset commitment in the articles of association. A company with tied assets should be subject to auditing by the existing cooperative auditing structures; compliance with the asset commitment requirements should also be checked in this way.

2. Membership structure

Like cooperatives, companies with tied assets should be organised on a membership basis: they should therefore be companies in which you can be a member, but in which you cannot buy shares. Unlike cooperatives, there should be no minimum number of members. One member as a board of directors should be sufficient when establishing a company with tied assets. The rules of cooperative law are to apply to the management board, the general meeting and the supervisory board. When members leave the company, they should only receive the funds they have paid without any return.

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3. Uncomplicated establishment

It should be easy and uncomplicated to set up a company with tied assets with a low capital investment. The company with tied assets should exist as an independent form of company alongside traditional corporations such as the limited liability company or the stock corporation. In accordance with cooperative law, an establishment audit is to be carried out by the auditing association. The auditing association should offer start-up counselling and help with the drafting of articles of association to promote the establishment.

4. Basic principles of tax law

The taxation of the company with tied assets should be based on the regulations for cooperatives. Corporate income tax and trade tax are to be payable on profits. Dividends would not be taxed as there are no profit distributions to the shareholders. The company with tied assets would be taxed in the same way as a limited liability company or a stock corporation under current law if its shareholders reinvest the profits in the company instead of having them distributed to themselves. There should therefore be no tax privileges or discrimination. There should be a regular substitute inheritance tax for the company with tied assets, as there can be no inheritance of the company shares. In this respect, the company with tied assets would be treated like a family foundation.

The framework concept is a discussion proposal that has not yet been agreed by the federal government. The next step will be an exchange with the federal states, specialist groups and associations. According to the press release, the regulations will then be further developed into a "practicable draft law" based on these discussions.

Federal Tax Court (I R 37/22): Requirements for the Performance of a Profit Transfer Agreement in a Tax Group

A prerequisite for forming a tax group for corporate income tax purposes is the conclusion of a profit transfer agreement (PTA). The PTA must be performed throughout its entire period of validity, which is at least five years. If the PTA is not actually performed, the tax group risks non-recognition, meaning that the tax income of the controlled company will not be attributed to the controlling company (“stand-alone” taxation).

The statutory provisions governing tax groups do not provide further clarification as to what exactly constitutes the performance of the PTA. Consequently, numerous questions of doubt arise, all of which are of high practical relevance because they are linked to the recognition of the corporate income tax group.

In a recent ruling (I R 37/22 of 5 November 2025) regarding the actual performance of the PTA, the Federal Tax Court has now decided as follows:

1. The statutory provisions governing tax groups do not provide further clarification as to what exactly constitutes the performance of the PTA. Consequently, numerous questions of doubt arise, all of which are of high practical relevance because they are linked to the recognition of the corporate income tax group.

2. By using a clearing account, PTA claims can be effectively fulfilled, provided that the account is not a “non-genuine” clearing account for which neither a settlement nor a regular closing of accounts is performed.

The principles of the ruling may give rise to risks for existing tax group structures if the PTA obligations are not fulfilled within twelve months of the due date and/or if the transactions are recorded via clearing accounts.

Time limit for fulfilling claims arising from a PTA (profit transfer / loss assumption)

According to the established case law of the Federal Tax Court, a PTA is deemed to have been performed if it is executed in accordance with the contractual agreements (see Federal Tax Court I R 156/93 of 5 April 1995 and IV R 21/07 of 21 October 2010). This includes the controlled company’s contractual obligation to transfer all of its profits or the controlling company’s obligation to assume all of the losses.

Actual performance occurs in two stages: First, the liabilities and receivables arising from the PTA must be disclosed in the financial statements of the controlled company and the controlling company. In a second step, the actual settlement of all receivables and liabilities resulting from the PTA follows, e.g., through payment or set-off (see Federal Tax Court I R 37/19 and I R 29/19 of 2 November 2022).

The timeframe within which claims arising from the PTA must be settled had not previously been clarified by the Federal Tax Court. Opinions in the tax literature range from three months after the due date to the date of termination of the tax group. The Federal Tax Court has now ruled:

1. Actual performance must take place “promptly”.

2. “In principle”, fulfillment within twelve months of the due date is sufficient.

In the Federal Tax Court's view, it is not sufficient for the claims under the PTA to be satisfied at some point or at the latest after the tax group's dissolution.

However, the ruling does not clearly specify how "in principle" should be interpreted – that is, whether, in exceptional cases, (1) later performance might still be sufficient if special circumstances exist, or (2) a shorter deadline might even have to be met in certain cases.

Fulfillment of PTA claims by using a clearing account

In the case at hand, the controlled company recorded the profits to be transferred to the controlling company in the account "Liabilities to Shareholders" (clearing account). Aside from the profit transfers (and the losses to be assumed by the controlling company), only the interest payable on these amounts was recorded in this account. Counterclaims or lump-sum payments, however, were not recorded in this account.

The Federal Tax Court ruled that the mere recording in the clearing account did not constitute fulfillment of the profit transfer claims. While recording in a clearing account may in principle be suitable for fulfilling the PTA claims, in the case at hand no recording of counterclaims or lump-sum payments had taken place. In particular, there had also been no regular closing of accounts, which under civil law would be a prerequisite for the extinction of the receivables and liabilities recorded there (= conversion into an abstract acknowledgment of debt or into a loan). According to the Federal Tax Court, it follows that, in the case at hand, there is at most a "non-genuine" clearing account on which the claims arising from the PTA have been cumulatively recorded. As a result, the obligation to transfer profits cannot be fulfilled.

Federal Tax Court (I R 40/23): Reduction in a Shareholder's Income in Connection with a Hidden Contribution

According to the Federal Tax Court ruling of 19 November 2025, I R 40/23, the failure to tax a shareholder due to a deemed capital gain in the case of a hidden contribution of shares in a corporation does not constitute a reduction in income.

The German Corporate Income Tax Act provides for corresponding recognition of taxable income at both the corporate and shareholder levels. The tax treatment of a hidden contribution at the shareholder's level is decisive for the tax neutrality of the hidden contribution to the corporation. The corporation's income increases to the extent that a hidden contribution has reduced the shareholder's income. The result is intended to prevent tax loopholes that might arise if the shareholder treats the transaction as a deduction from income and it is tax-exempt for the receiving company.

At the case at hand, L was the sole shareholder and managing director of a limited liability company established in 1990. In 2010, L founded another limited liability company (GmbH), the plaintiff. The plaintiff's share capital was paid in full as a cash contribution. In addition, the shareholder transferred 100% of his shares in the limited liability company to the plaintiff. It was contractually agreed that the transfer of the shares was made free of conditions and without consideration. No consideration was expressly required. In the annual financial statements as of 31 December 2011, the investment in the GmbH was reported under fixed assets and recorded against the capital reserve. In the financial statements as of 31 December 2012, the shares in the GmbH and the capital reserve were carried forward. The final corporate income tax assessment for the year 2011 and L's income tax assessment did not take the transfer of the GmbH shares into account. In the 2012 corporate income tax assessment, information regarding the reporting of the capital reserve was requested. After the relevant information was submitted, the tax office took the view that L had contributed his shares in the limited liability company to the plaintiff and that the contribution was to be valued at its partial value. The reason was that at the level of L, there was a "fictitious" capital gain, which should have been taxed in 2011. Since the corporate income tax assessment for 2011 can no longer be amended, the valuations must be corrected in the first balance sheet that can still be amended, i.e., the balance sheet for 2012. The plaintiff filed an appeal.

According to the Federal Tax Court, the transfer of the GmbH shares to the plaintiff constitutes a hidden contribution, which did not increase the plaintiff's income. The company's income increases only to the extent that a hidden contribution has reduced the shareholder's income. This is the case, for example, if the hidden contribution was taken into account by the shareholder as income-related expenses or business expenses for tax reduction purposes. In this case, however, the hidden contribution of the shares triggered a "fictitious" capital gain, which was not taxed. If taxation does not occur, this does not constitute a reduction in income. An interpretation going beyond the wording of the provision is not required.

Federal Tax Court (I R 9/23): Relationship Between Crediting of the Period of Ownership and Trade Tax Participation Exemption (Privilege)

In its judgment of 17 December 2025, the Federal Tax Court ruled on the relationship between the crediting of the period of ownership (under the Reorganisation Tax Act) and the trade tax participation exemption (privilege).

The group structure initially consisted of a parent company (M) and two subsidiary companies (T1 and T2). In the relevant year, 2016, T2 carried out a capital increase during the financial year. M made the capital contribution for the new shareholding by way of a share exchange. As part of this, it contributed T1 to T2 in exchange for shares. It should be noted that a share exchange has no retroactive effect. A dividend payment was made by T1 to T2 in 2016.

The question was whether these dividends could be subject to the trade tax privilege at the level of T2. The provision requires a minimum shareholding of 15 % at the start of the tax period. It is true that T2 did not hold a shareholding in T1 as at 1 January 2016. However, it is questionable whether M's period of ownership of T1 can be attributed to T2 under the Reorganisation Tax Act, which the tax office denied. Section 4 (2) third sentence of the Reorganisation Tax Act reads as follows: "Where 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 attributed to the acquiring legal entity."

The Federal Tax Court has upheld the tax office's view. Whilst the wording in the Reorganisation Tax Act generally provides for the crediting of the period of ownership, it nevertheless involves a time-based assessment. The relevant provision in the Trade Tax Act (Section 9 (2a) of the Trade Tax Act), on the other hand, provides for a point-in-time assessment (minimum shareholding of 15% at the start of the financial year). The Federal Fiscal Court had already reached this conclusion in its judgment of 16 April 2014 (I R 44/13). The Lower Tax Court of Dusseldorf (14 K 392/22 G F of 24 November 2022) in the case leading to the current Federal Tax Court decision granted the trade tax privilege. The current Federal Tax Court judgment is likely to provide definitive clarity.

Federal Tax Court (II R 24/22): Unification of Shares for Real Estate Transfer Tax Purposes in Cases Where the Land-Owning Company Acquires Treasury Shares

In its judgment of 22 October 2025 (II R 24/22), the Federal Tax Court ruled that the acquisition of treasury shares by a land-owning company constitutes a unification of shares for real estate transfer tax (RETT) purposes if this acquisition results in the (remaining) shareholder's interest in the land-owning company increasing to at least 95% (now 90%). This applies regardless of how many shareholders remain in the land-owning company after the acquisition of the treasury shares.

In the case at issue, the plaintiff (GmbH – limited liability company) held 94.444% of the shares in the land-owning X-GmbH and 94.9% of the shares in the land-owning Z-KG (limited partnership). The remaining 5.1% of the shares in Z-KG were held by X-GmbH. In 2010, a minority shareholder sold its share in X-GmbH back to X-GmbH (repurchase of treasury shares). The tax office issued a RETT assessment notice and justified the taxation on the grounds of a unification of shares pursuant to Section 1 (3) no. 1 of the Real Estate Transfer Tax Act (RETTA) due to the 2010 agreement regarding the acquisition of treasury shares.

The appeal before the tax office as well as the action before the Lower Tax Court and Federal Tax Court against the RETT assessment were unsuccessful. In the opinion of the Federal Tax Court, the acquisition of its own shares by X-GmbH (0.553%) resulted in a unification of shares at the level of the plaintiff, both with respect to the real estate of X-GmbH and with respect to the real estate of Z-KG. When determining whether the 95% threshold (now 90%) is reached in the case of a direct or indirect unification of shares within the meaning of Section 1 (3) no. 1 or no. 2 RETTA, the Court states that treasury shares held by a corporation itself – whether as an intermediate company or as a land-owning company – are not taken into account. If a land-owning GmbH acquires its own shares and this causes a shareholder's interest in the land-owning GmbH – excluding the shares held by the GmbH itself – to increase to at least 95% (now 90%), the conditions for a share unification are met. The Court justified the – partly direct, partly indirect – unification of the shares in Z-KG on the grounds that, because the 95% threshold had been exceeded, the indirect shareholding via X-GmbH amounting to 5.1% was for the first time (fully) attributable to the plaintiff for RETT purposes. In the opinion of the Court, the assessment period had not yet expired when the RETT assessment notice was issued in November 2017. Due to the three-year suspension of the statute of limitations, it did not end until 31 December 2017. The notary's letter addressed to the tax office was not sufficient to terminate the three-year suspension of the stat-

ute of limitations, as the information regarding the real estate in question was entirely missing.

Federal Ministry of Finance: New Guidance on the Capitalisation of Fund Establishment Costs

Expenses incurred in connection with the establishment of certain closed-end funds during the investment phase, known as "fund establishment costs", are considered acquisition costs of the investment objects (Sec. 6e Income Tax Act – ITA). They cannot therefore be immediately deducted as operating expenses. This presupposes that the initiator of the fund provides a pre-formulated contract and that investors cannot exert any significant influence on its structure. Whether and how the expenses can be considered for tax purposes in the future depends on the individual case. The legal provision applies to all closed-end funds in the legal form of a partnership, such as investments in participations, real estate, ships, or other assets.

The legal provision introduced at the end of 2019 applies retroactively to financial years ending before 18 December 2019 (“genuine retroactivity”). In addition to the question of the admissibility of this genuine retroactivity, questions regarding the concrete practical implementation of the provision, which uses some vague legal terms, have also shaped the discussion since its introduction.

In July 2025, the Federal Tax Court already concluded that genuine retroactivity is constitutionally justified (Ref. IX R 13/24). Another decision by the Lower Tax Court of Hamburg (Ref. 6 K 27/22), which affirms the retroactive application for commercial partnerships, is pending before the Federal Tax Court under Ref. IV R 6/24.

The Federal Ministry of Finance (MoF) recently issued guidance on 19 January 2026, regarding "Questions of doubt concerning the income tax treatment of fund establishment costs as acquisition costs". The principles set out in this guidance are to be applied in all open cases, i.e. wherever tax assessments concerning such investments are not yet final. The guidance also clarified the relationship to the loss offset restriction for tax deferral models (Sec. 15b ITA) in line with previous case law. The loss offset restriction is to be applied to the loss determined in accordance with the regulations for fund establishment costs.

The provisions of the MoF guidance apply in particular to:

- closed-end funds in the form of partnerships, which are generally investment funds within the meaning of the German Investment Code.
- funds that generate commercial income
- asset management funds
- so-called blind pools and semi-blind pools, i.e., funds for which the investment objects are not yet finally determined at the time of issue
- models with only one investor
- structures in which assets are attributable separately to several persons who have established or maintained similar legal relationships with third parties in the planning, manufacture, maintenance, or acquisition of these assets (overall objects).

Fund establishment costs payable by the investor in connection with the acquisition of a fund share are part of the acquisition costs of the assets acquired by the fund. An acquisition transaction is always assumed to have taken place if the investors, in their corporate affiliation

- have no significant influence
- on the pre-formulated contract drawn up by the project provider.

According to the MoF guidance, the criterion of a "pre-formulated contract" requires that the joint investment of the investors be based on a contract pre-formulated by the project provider (partnership agreement / articles of association / bundle of individual contracts; typically, with the marketing of an investment prospectus). Individual investors may not exert any significant influence on the drafting or execution of the contract but may only accept or reject it. Significant influence can be said to exist if investors are legally and factually in a position to help shape and change central components of the investment concept.

The MoF guidance defines the term "costs" broadly in accordance with the legal provision and provides numerous specific examples of fund establishment costs that must be capitalised, including:

- Liability remuneration and management fees for general partners
- Management fees in the case of an exchange of services under the law of obligations
- Closing costs
- Construction costs for the construction of the investment property
- Consulting costs and processing costs
- Brokerage
- Costs for financing brokerage
- Conceptualisation costs for the development of the basic technical, economic, and tax concept.

The investment phase, during which fund establishment costs are capitalised, begins with the initial planning and preparatory activities (e.g., establishment of the

fund under the partnership agreement prior to investor participation) with a view to the subsequent acquisition and ends when the target investments are ready for operation. Regardless of the number of assets acquired, there is always only one uniform investment phase for the fund. If the investments are made indirectly through a corporation, the end of the investment phase is determined by the acquisition of the assets by the corporation.

Draft Guidance on the Principles of Administration for the Definition and Establishment of Permanent Establishments in Domestic and International Tax Law

On 13 February 2026, the Federal Ministry of Finance (MoF) published a draft guidance on the principles of administration for the definition and establishment of permanent establishments (PE) in domestic and international tax law.

In cases involving foreign countries, the concept of a PE is a key point of reference for establishing and assigning taxation rights in domestic tax law and treaty law. The MoF guidance dated 24 December 1999 (known as the "Permanent Establishment Administrative Principles") already contained statements on profit allocation as well as explanations on the concept of PE under domestic and treaty law. While the statements on profit allocation remain unchanged, the explanations on the concept of PE are to be replaced by the draft guidance dated 13 February 2026, due to recent developments.

The draft guidance contains 165 margin numbers on 51 pages. The core of the guidance is the discussion of the relationship between domestic tax law and treaty law (margin number 6 and margin number 74 et seq.) and how both define the term PE (margin number 7 et seq. and margin number 70 et seq.). Also relevant in practice are the individual cases described in margin numbers 126 et seq., some of which are illustrated with examples, including those relating to home offices (margin numbers 140 et seq.) and influencers (margin numbers 147 et seq.), as well as the application rules (margin numbers 164 and 165).

If the existence of a PE or a permanent representative is required for a tax claim, the first step is to check whether the requirements for a PE under Section 12 of the German Fiscal Code (GFC) or a permanent representative under Section 13 GFC are met. In a second step, it must be examined whether a Double Tax Treaty (DTT) restricts Germany's right of taxation, i.e. whether a (representative) PE also exists under treaty law. In this examination, it should be noted that the domestic concept of a PE may differ from the concept of a PE under treaty law (margin numbers 1 to 6).

In principle, there is a high degree of substantive agreement between the domestic and treaty-law concepts of PE. The domestic requirements for the existence of a fixed place of business apply equally to PE under treaty law. Differences exist, among other things, in activities of a preparatory nature and auxiliary activities. Furthermore, the domestic concept of a PE does not require the actual use of the place of business (or facility). The operational readiness of the place of business or facility is sufficient. For the treaty-based concept of a PE, however, a purely abstract suitability of the place of business to promote the purpose of the enterprise is not sufficient (margin numbers 78 to 79).

The provisions of the MoF draft guidance are to be applied in all open cases. The guidance dated 24 December 1999 is repealed insofar as it refers to the concept of a PE and its justification in domestic and international tax law (margin numbers 164 and 165). The final version of the guidance is not expected to be published before April 2026.

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