FEDERAL FISCAL COURT

Income adjustment pursuant to section 1 (1) of the External Tax Relations Act (*Außensteuergesetz*) with regard to writing off an unsecured loan within a group of companies

1. The distinction between loans taken out for business purposes and contributions made on the basis of the corporate relationship must be made on the basis of the totality of the objective circumstances. The individual criteria of the arm's length principle are not to be regarded as indispensable conditions for the evaluation (confirmation of the Senate's judgment of 29 October 1997 I R 24/97, Decisions of the Federal Fiscal Court (BFHE) 184, 482, Federal Tax Gazette II 1998, 573, see II.2.).

2. The term "group support" (*Konzernrückhalt*) only describes the legal and economic structure of links between companies and expresses the fact that it is customary for loans within a group of companies to not be guaranteed in the same way as they would be if they were between unrelated parties (in this respect contrary to Senate judgments of 24 June 2015 I R 29/14, BFHE 250, 386, Federal Tax Gazette II 2016, 258, and of 29 October 1997 I R 24/97, BFHE 184, 482, Federal Tax Gazette II 1998, 573, under II.3.d).

3. The lack of a guarantee for a loan would generally be included in the non-arm's length "terms" referred to in section 1 (1) of the External Tax Relations Act. The same applies to Article 9 (1) of the OECD Model Convention (here: Article 9 of the 1967 German-Belgian DTA).

4. Article 9 (1) of the OECD Model Convention (here: Article 9 of the 1967 German-Belgian DTA) does not limit the scope of the adjustment pursuant to section 1 (1) of the External Tax Relations Act to price adjustments; rather, it makes it possible to also neutralise a profit-reducing write-off of a claim in respect of a loan or a write-down to the going-concern value (contrary to Senate judgments of 24 June 2015 I R 29/14, BFHE 250, 386, Federal Tax Gazette II 2016, 258, and of 17 December 2014 IR 23/13, BFHE 248, 170, Federal Tax Gazette II 2016, 261).

5. Whether an adjustment pursuant to section 1 (1) of the External Tax Relations Act is in conflict with the principle of proportionality under EU law is determined in accordance with an overall assessment of the circumstances of the respective individual case. As part of this, the economic interest and the financing responsibility, on the one hand, as well as the structural similarity to a supply of equity capital and the change to the status of the assets and liquidity of the lender, on the other hand, must be taken into consideration.

External Tax Relations Act as amended by the Tax Concessions Reduction Act - (*Steuervergünstigungsabbaugesetz*), section 1 (1), section 1 (4) -
Corporation Tax Act (*Körperschaftsteuergesetz*), section 8b (3), third sentence -
Vienna Convention on the Law of Treaties, Article 31 (1) -
OECD Model Convention, Article 3 (2), Article 9 (1) -
1967 German-Belgian DTA, Article 3 (2), Article 9 -

Judgment of 27 February 2019 I R 73/16 -
Lower court: Düsseldorf Fiscal Court from 10 November 2015 6 K 2095/13 K -
(Decisions of the Fiscal Courts 2017, 553) -

FEDERAL FISCAL COURT

Case no. I R 73/16

JUDGMENT IN THE NAME OF THE PEOPLE

In the proceedings

Düsseldorf-Mettmann Tax Office, Harkortstrasse 2, 40210 Düsseldorf, -

defendant and appellant, against -

ADCO Umweltdienste Holding GmbH, Halskestrasse 33, 40880 Ratingen, -

plaintiff and appellee, -

authorised representative: auditor, lawyer, tax adviser -

Karl-Wilhelm Schröder, Nöckerstrasse 34, 44879 Bochum, for corporation tax for -

2005, -

joined the proceedings: Federal Ministry of Finance, Wilhelmstrasse 97, 10117 Berlin, -

the First Senate has, with the -

participation of the presiding -

judge -

at the Federal Fiscal Court the judge	Prof. Dr Wacker,
at the Federal Fiscal Court the judge	Dr. Märtens,
at the Federal Fiscal Court	Dr. Schwenke,

the judge

at the Federal Fiscal Court

the judge at the Federal Fiscal Court

Prof. Dr. Herlinghaus and

Dr. Witt

on the basis of the oral hearing on 27 February 2019 -
hereby rules: -

On appeal by the plaintiff, the judgment of Düsseldorf Fiscal Court of -
10 November 2015 6 K 2095/13 K is annulled. The action is dismissed. -
The costs of the whole proceedings are to be borne by the plaintiff. -

Reasons

I.

1 - The participants disagree over the lawfulness of an income adjustment pursuant to section 1 of the External Tax Relations Act (*Außensteuergesetz*), as amended by the Tax Concessions Reduction Act (*Steuervergünstigungsabbaugesetz*) of 16 May 2003 (Federal Law Gazette I 2003, 660, Federal Tax Gazette I 2003, 321).

2 - The plaintiff and appellee (plaintiff), a German limited liability company (GmbH), is the sole shareholder and also controlling company (Organträger) of the German company ADCO International GmbH (A GmbH). The latter company held a 99.98% stake in the company Toi Toi & Dixi N. V. (B N.V.), a public limited company established in Belgium. The remaining shares in B N.V. were held by the plaintiff.

3 - The company A GmbH managed a clearing account on behalf of B N.V. which bore annual interest of 6% after 1 January 2004. On 30 September 2005, A GmbH and B N.V. agreed upon a debt waiver in exchange for a debtor warrant (Besserungsschein) totalling € …. In the opinion of the contracting parties, this amount corresponded to the worthless share of the claims against B N.V. from the clearing account. Although this amount was recorded on the balance sheet of A GmbH with the effect of reducing profits, the defendant and appellant (the Tax Office), taking into consideration the fact that no collateral had been provided for the debt, neutralised the profit reduction pursuant to section 1 (1) of the External Tax Relations Act, by means of an off-balance inclusion.

4 - The action that was brought against this step was successful (judgment of Düsseldorf Fiscal Court of 10 November 2015 – 6 K 2095/13 K, Decisions of the Fiscal Courts 2017, 553).

5 In its appeal, the Tax Office submits that substantive legal arrangements have been violated and requests that the challenged judgment be annulled and the action dismissed.

6 - The plaintiff requests that the appeal be dismissed.

7 - The Federal Ministry of Finance joined the proceedings (section 122 (2) of the Code of Procedure for Fiscal Courts (Finanzgerichtsordnung)). It supports the Tax Office's appeal without submitting its own petition.

II.

8 - The appeal is justified. The challenged judgment is to be annulled and the action dismissed (section 126 (3), first sentence, no 1 of the Code of Procedure for Fiscal Courts). The lower court incorrectly presumed that the income of A GmbH does not need to be adjusted.

9 - 1. According to the findings of the lower court, a fiscal unity for corporation tax purposes (known in German as an Organschaft) existed between A GmbH (as controlled company (Organgesellschaft)) and the plaintiff (as controlling company (Organträger)) in the year under dispute. Pursuant to section 14 (1), first sentence, in conjunction with section 17, first sentence, of the Corporation Tax Act (Körperschaftsteuergesetz), in the version applicable in the year under dispute, this has the consequence that the income of A GmbH is to be attributed to the plaintiff and the objections in the redress procedure against the amount of the attributed income from the plaintiff as controlling company are to be asserted against the corporation tax assessment notice directed at the plaintiff. The tax assessment notice concerning the controlled company is in this respect not a basic assessment notice (cf. Senate judgment of 6 July 2016 I R 25/14, BFHE 254, 326, Federal Tax Gazette II 2018, 124).

10 - 2. Düsseldorf Fiscal Court did not make sufficient findings in order to be able to decide whether the clearing account represented a loan from A GmbH that was made for business purposes, which could therefore be recognised for tax purposes, or if this account represented a contribution to the assets of B N.V. made on the basis of the corporate relationship and therefore represents retroactive acquisition costs in the amount of the claim proportionate to the size of A GmbH's holding (more details are given under point 3 below). However this question can remain open, given that in both cases the reduction to the asset

must be adjusted off-balance-sheet (see point 4 below).

11 3. According to the case-law pertaining to contracts between related entities, the distinction between carrying out actions for private or business purposes, following the decisions of the Federal Constitutional Court of 7 November 1995 2 BvR 802/90 (Federal Tax Gazette II 1996, 34, under B.I.2.) and of 15 August 1996 2 BvR 3027/95, must be made on the basis of the totality of the objective circumstances, subject to the proviso that not every deviation of individual circumstances from the arm's length principle precludes the recognition of the contractual relationship for tax purposes, in the sense of a condition with absolute effect. Rather, the individual arm's-length criteria must be given appropriate consideration within the required examination of the overall context (see most recently the judgment of the Federal Fiscal Court of 10 October 2018 X R 44-45/17, BFHE nn, with further references). This must by necessity also apply to contractual relationships between companies and their shareholders and hence to the question of whether a capital contribution is to be attributed to the company's own business sphere or that of the corporate relationship (here: A GmbH's shareholding in B N.V.).

12 a) This means that, when assessing capital contributions between related enterprises, it is also necessary to make a distinction regarding whether the capital contribution was supposed to permanently become part of the assets of the receiving company and a repayment was not planned (Federal Fiscal Court judgment of 6 November 2003 IV R 10/01, BFHE 204,·438, Federal Tax Gazette II 2004, 416) or whether the participants assumed – in the sense of a serious agreement – that the capital was being provided on a temporary basis and they were able to assume that the loan agreement would be carried out and, in particular, that the loan would be repaid (see Senate judgment of 17 December 2014 I R 23/13, BFHE 248, 170, Federal Tax Gazette II 2016, 261, paragraph 26). Admittedly, this distinction can only be made on the basis of objectively verifiable circumstances, and arm's-length conditions for granting a loan must be assumed (arm's length principle). However, here too, the individual criteria of the arm's length principle cannot be regarded as indispensable conditions for the evaluation. As the Senate expressly pointed out in its judgment of 29 October 1997 I R 24/97 (BFHE 184, 482, Federal Tax Gazette II 1998, 573, under II.2.), these are to be treated more as indicators (cf. Federal Fiscal Court judgment of 16 October 2014 IV R 15/11, BFHE 247, 410, Federal Tax Gazette II 2015, 267, paragraph 24 et seqq.).

13 b) Based on this, it is admittedly true on the one hand that the non-provision of collateral for

the negative balance on the clearing account, which is the key aspect of the dispute in question, can be viewed as a non-arm's-length circumstance, given that a creditor that is not related to B N.V. would have insisted that it provide collateral of the kind that is standard in the banking sector. It is also not possible to derive a different interpretation from the notion of "group support" (Konzernrückhalt), because group support – in the absence of a legal obligation to vouch for the repayment of the loan – only expresses the legal and economic framework of the links between companies, and the fact that loans within a group of companies are not usually guaranteed in the way they are among unrelated parties (e.g. Greil, Jahrbuch der Fachanwälte für Steuerrecht 2018/2019, 947, 963 et seqq.). To the extent that different interpretations can be found in the Senate judgments of 24 June 2015 I R 29/14 (BFHE 250, 386, Federal Tax Gazette II 2016, 258) and in BFHE 184, 482, Federal Tax Gazette II 1998, 573, under II.3.d, these are not adhered to. On the other hand, however, this does not rule out – as explained above – assuming the existence of a serious (i.e. concluded for business purposes) loan agreement also from the income tax perspective (Senate judgment in BFHE 184, 482, Federal Tax Gazette II 1998, 573, see 11.2.). When performing the required overall assessment, in addition to the fact that it is not usual to secure loans within a group (see Senate judgement of 21 December 1994 I R 65/94, BFHE 176, 571), the other circumstances of the conclusion of the contract (e.g. justified earnings expectations on the part of the borrower, the lender's influence on the borrower's business activities, fundamental willingness to support the borrowing company in external business transactions) must mainly be treated as indicators when considering whether – despite the non-arm's-length waiver of a valuable collateral for the loan claims – the participants assumed that it was a temporary capital contribution and that, in particular, the assumption was made that the loan would be repaid and that this assumption could be made from an objective perspective.

14 - c) Düsseldorf Fiscal Court did not carry out this type of overall assessment. It is also not possible to carry out this overall assessment at a later stage at the appeal level.

15 - 4. However, in the case under dispute, the distinction is not relevant to the judgment, because the profit reduction associated with the loan write-off must nevertheless be adjusted off-balance-sheet, irrespective of whether A GmbH made a capital contribution to the assets of B N.V. for reasons of the corporate relationship (shareholding relationship) (see a below) or if it made a loan for business purposes to B N.V. (see b and c below).

16 a) In the event of a capital contribution, A GmbH's acquisition costs for its shareholding in B N.V. would have increased. A profit-reducing write-down of this shareholding to the going-concern value would be precluded pursuant to section 8b (3), third sentence, of the Corporation Tax Act.

17 b) In contrast, in the event of a write-off of a claim in respect of a loan made for operational purposes, the reduction of the tax balance sheet gain would have to be neutralised pursuant to section 1 (1) of the External Tax Relations Act with the same result, as advocated by the Tax Office.

18 aa) The profit-reducing write-off of the claim in respect of the loan is not precluded by group support (Konzernrückhalt); hence it is also not precluded by the fact that A GmbH was the controlling shareholder of B N.V. To the extent that it can be derived from the Senate's previous case-law that only the controlling shareholder's possibility of exerting influence on the borrower can be viewed as an arm's-length (valuable) guarantee of repayment in the sense of an active guarantee, the Senate does not adhere to this, as previously explained (in this respect against the Senate judgment in BFHE 176, 571). Accordingly, group support neither precludes a loan from becoming worthless and therefore being written down to the lower going-concern value, nor does it have the consequence, in the case of the write-off of the claim in respect of the loan, which is to be assessed in the pending proceedings, that this is compensated for by the use of an equity contribution amounting to the nominal amount of the loan waiver (cf. Senate judgment in BFHE 250, 386, Federal Tax Gazette II 2016, 258; of 12 April 2017 I R 36/15, Federal Fiscal Court/Not Published (BFH/NV) 2018, 58, paragraph 22). The value of the contribution is determined rather by the going-concern value of the share of the loan that is waived; therefore in the case under dispute – according to the findings of the lower court – the value is €0 (cf. decision of the Grand Senate of the Federal Fiscal Court of 9 June 1997 GrS 1/94, BFHE 183; 187, Federal Tax Gazette II 1998, 307; as well as following Senate judgments of 15 October 1997 I R 23/93, BFH/NV 1998, 826; I R 58/93, BFHE 184, 32, Federal Tax Gazette II 1998, 305; I R 103/93, BFH/NV 1998, 572; of 28 November 2001 I R 30/01, BFH/NV 2002, 677).

19 bb) The resulting profit reduction is, however, subject to the adjustment pursuant to section 1 (1) of the External Tax Relations Act in the full amount.

20 If a taxpayer's income from business relations with a related party is reduced as a result of

the fact that, in connection with such international business relations, it agrees to terms that diverge from those which independent third parties would have agreed under the same or similar circumstances, then, pursuant to section 1 (1) of the External Tax Relations Act, the taxpayer's income must, without prejudice to other provisions, be assessed to be as it would be under terms agreed between unrelated third parties. Business relations in this sense are, pursuant to section 1 (4) of the External Tax Relations Act, defined as any contractual relationship upon which the income is based, which is not agreed in the company statutes and which is part of an activity of either the taxpayer or the related party to which sections 13, 15, 18 or 21 of the Income Tax Act (Einkommensteuergesetz) apply or which, in the case of a non-resident related party, would have applied if the activity had taken place in Germany.

21 - (1) The loan relationship between A GmbH and B N.V. is this type of business relationship, whose terms include the non-provision of collateral for claims (left open in Senate judgment in BFHE 248, 170, Federal Tax Gazette II 2016, 261, paragraph 15). Although the word "terms" is not legally defined, in typical business transactions it can however be expected to usually also include – in addition to agreements on the maturity, type and method of repayment and the amount and the payment date for interest – agreements about the collateral that must be provided (cf. no 13 of the Terms and Conditions of German Banks (AGB-Banken), no 22 of the Terms and Conditions of German Savings Banks (AGB-Sparkassen)). The case-law also supports this view (e.g. Senate judgment of 7 September 2016 IR 11/14, BFH/NV 2017, 165, paragraph 21, in the context of a "transferred group loan" and section 8a (1) of the Corporation Tax Act 2002 revised version; Federal Fiscal Court judgments of 16 December 1998 X R 139/95, BFH/NV 1999, 780, and of 28 November 1990 X R 109/89, BFHE 163, 264, Federal Tax Gazette II 1991, 327).

22 - (2) The non-provision of collateral deviates – as explained above – from the arm's length principle, because an unrelated creditor would have made the provision of a loan (the clearing account in this case) dependent on the provision of valuable collateral rights. It is not possible to object to the assumption that the arm's length principle is not satisfied by arguing that the agreement upon which the negative balance is based is seen as a loan in terms of tax law. The latter circumstance is based – as also explained above – on the assessment of the total agreement, which, despite the fact that individual indicators (here: no collateral) do not satisfy the arm's length principle, can lead to the assumption that it is not a contribution caused by the business relationship (shareholding relationship) but the provision of capital as -

a loan. However, this does not have the consequence that the contract as a whole corresponds with what unrelated third parties would agree with each other. Rather, the categorisation of the affected parts of the contract that are not typical for the market (typical in the banking sector) as not satisfying the arm's length principle remains unchanged. Section 1 of the External Tax Relations Act does not provide for any other interpretation. On the contrary: this provision also makes a distinction between international "business relations" – here: the loan which is to be recognised for tax purposes – and the individual "terms" which do not satisfy the arm's length principle, based on their structure (characteristics and legal consequences), with the further consequence that only the income reductions caused as a result – i.e. by the fact that individual terms (here: the lack of collateral) do not satisfy the arm's length principle – are subject to the provision's adjustment obligation.

23 - (3) As set out in section 1 of the External Tax Relations Act, the income reduction is still caused by ("as a result of") the lack of collateral (left open in the Senate judgments in BFHE 250, 386, Federal Tax Gazette II 2016, 258, paragraph 16, and in BFHE 248, 170, Federal Tax Gazette II 2016, 261, paragraph 15). In this context, the key aspect is – in accordance with the causation principle (see Senate judgment of 18. April 2018 I R 37/16, BFHE 261, 166, Federal Tax Gazette II 2019, 73, paragraph 23) – the "triggering factor" for the profit-reducing loan write-off. The evaluating assessment that is required for this purpose is therefore to be based not on the insolvency of B N.V. but primarily on the lack of collateral, because A GmbH, precisely as a result of this waiver, linked its claim to the repayment of the loan to the economic performance of its subsidiary, and this type of "mixing of asset risks" would not have happened if valuable collateral rights had been provided.

24 - cc) The resulting income adjustment pursuant to section 1 (1) of the External Tax Relations Act is not precluded by Article 9 of the Agreement between the Federal Republic of Germany and the Kingdom of Belgium for the Avoidance of Double Taxation and the Settlement of Certain Other Questions with respect to Taxes on Income and on Capital, Including Trade Tax and Real Property Taxes of 11 April 1967 (1967 German-Belgian DTA) (Federal Law Gazette II 1969, 18, Federal Tax Gazette I 1969, 39) (departure from the Senate's previous case-law).

25 - (1) Article 9 of the 1967 German-Belgian DTA provides for, among other things, that if an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, and conditions are made or -

imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

26 (2) If the Vienna Convention on the Law of Treaties of 23 May 1969 (Federal Law Gazette II 1985, 927) is used as a basis when determining the regulatory content of an international treaty (Senate judgment of 11 July 2018 I R 44/16, BFHE 262, 354), then this type of treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Article 31 (1) of the Vienna Convention on the Law of Treaties).

27 (3) The decisive factor is therefore the wording of the treaty and the “ordinary meaning” of the expressions used. Accordingly, the lack of collateral represents “conditions made” between A GmbH and B N.V. that – as shown above – do not correspond to arm’s-length terms. Previously, the Senate has limited the criterion of the term in the case of loans solely to the agreed interest rate, in the sense of a price adjustment (Senate judgments in BFHE 250, 386, Federal Tax Gazette II 2016, 258, and in BFHE 248, 170, Federal Tax Gazette I 2016, 261). However, this case-law is not adhered to. Nevertheless, the principles of the Senate judgment of 11 October 2012 I R 75/11 (BFHE 239, 242, Federal Tax Gazette II 2013, 1046) remain unaffected by the above. The special term that is to be assessed in this judgment in the form of an “agreement that is clear, made in advance, legally binding and actually carried out” to which controlling companies are subject within the scope of the income adjustment pursuant to section 8 (3), second sentence, of the Corporation Tax Act (known as the formal arm’s length principle) still cannot be considered one of the conditions referred to in Article 9 (1) of the Model Convention of the Organisation for Economic Co-operation and Development (OECD Model Convention).

28 (4) This interpretation is confirmed by the objective of Article 9 of the 1967 German-Belgian DTA. The provision is targeted at the allocation of income in the case of cross-border business relations on the basis of the arm’s length principle supported by the principle of territoriality and the principle of causation (Schwenke/Greil in Wassermeyer Model Convention Article 9 paragraph 2). In addition, it aims to guarantee a level playing field between independent and related enterprises.

29 (5) Based on the preceding remarks and the fundamental consistency with the explanations pertaining to section 1 of the External Tax Relations Act, it is still the case that the Senate does not need to make a definitive decision on the question of whether the interpretation of Article 9 of the 1967 German-Belgian DTA is to be based on the principles of the Vienna Convention on the Law of Treaties or, pursuant to Article 3 (2) of the 1967 German-Belgian DTA (known as the lex fori clause), on the law of the state applying the agreement (for the relationship between Article 3 (2) of the OECD Model Convention and Article 31 et seqq. of the Vienna Convention on the Law of Treaties, see Erhard in Flick/Wassermeyer/Kempermann, German-Swiss Double Taxation Agreement, Article 3 paragraph 155; Oellerich in Gosch, Fiscal Code section 2 paragraph 34; Schaumburg/Häck in Schaumburg, Internationales Steuerrecht, 4th edition, paragraph 19.67; Strunk/Kaminski in Strunk/Kaminski/Köhler, External Tax Relations Act/DTA, Art. 3 OECD Model Convention paragraph 5.1; Wassermeyer in Wassermeyer Model Convention Article 3 paragraph 77).

30 c) Ultimately there is also no conflict between EU law and an income adjustment pursuant to section 1 of the External Tax Relations Act.

31 aa) Pursuant to the case-law of the Court of Justice of the European Union – formerly known as the European Court of Justice (ECJ) – an arrangement such as that of section 1 (1) of the External Tax Relations Act represents a restriction on freedom of establishment which is justified for the purposes of preserving a balanced allocation of taxing rights among the Member States (Article 43 of the Treaty Establishing the European Community as amended by the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Official Journal of the European Communities 2002, C 325, 1; now Article 49 of the Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal of the European Union, C 115, 47; ECJ judgment in the Hornbach-Baumarkt case of 31 May 2018, C-382/16, EU:C:2018:366, Case-Law of the Supreme Fiscal Court (HFR) 2018, 580).

32 bb) To the extent that the ECJ, in the form of the last-mentioned judgment in favour of the gratuitous assumption of guarantee commitments and comfort letters, recognised, as part of its deliberations on proportionality, that the economic interest of the ultimate parent entity in its associated companies, as well as a certain responsibility as a shareholder for the

financing of those companies, could justify ("explain") transactions under terms that deviated from arm's-length terms, and hence could preclude an adjustment pursuant to section 1 of the External Tax Relations Act, this restriction does not apply in the current case.

33 (1) It may be assumed that the specified economic reasons (here: "certain" financing responsibility of A GmbH for B N.V.; participation in its success e.g. via the distribution of profits) pursuant to the ECJ's judgment in the Hornbach-Baumarkt case (EU:C:2018:366, HFR 2018, 580) do not automatically lead to the protection of the Member States' territorial taxing rights being (universally) displaced. Rather, it undoubtedly results from the wording of the judgment (cf. paragraph 54, 56 et seq. of the judgment: "may") that the national court must take into account reasons of this type and hence, as part of an assessment, must gauge with what weight the respective deviation from the arm's length principle that is to be assessed impinges on the principle of territoriality and the allocation of taxing rights that is based on this principle (on the required assessment in the individual case see Graw, Der Betrieb (DB) 2018, 2655, 2657; Rasch/Chwalek/Bühl, Internationale Steuer-Rundschau 2018, 275, 279; Schreiber/Greil, DB 2018, 2527, 2534; for a possibly different opinion, see Federal Ministry of Finance circular of 6 December 2018, Federal Tax Gazette I 2018, 1305).

34 (2) According to this, a restriction of the adjustment pursuant to section 1 of the External Tax Relations Act is not possible in the case under dispute.

35 Admittedly, A GmbH – in contrast to unrelated third parties – had the choice of providing B N.V. either with loan capital or with equity capital. However, if the provision of loan capital compensates for an insufficient supply of equity capital, and is therefore at the same time a precondition for the company receiving the loan being able to (continue to) fulfil its intended economic function, then this does not only resemble an allocation of equity capital in structural terms (cf. with regard to section 1 of the External Tax Relations Act, old version, Senate judgments of 23 June 2010 I R 37/09, BFHE 230, 156, Federal Tax Gazette II 2010, 895; of 27 August 2008 I R 28/07, BFH/NV 2009, 123; cf. also section 8b (3), fourth sentence, et seqq. of the Corporation Tax Act, new version) but has furthermore the consequence that a different treatment of contributions (see 4.a) and loan waiver with regard to the claim to the profit reduction – which is also recognised under EU law – in accordance with arm's length terms is precluded.

36 The question of what implications will result from this for gratuitous guarantee statements

and comfort letters which were based on the ECJ judgment in the Hornbach-Baumarkt case (EU:C:2018:366, HFR 2018, 580) does not require any further discussion in the present case because, apart from anything else, obligations of the latter kind are not associated with any changes to the assets and liquidity status of the affected companies, whereas the declarations of a waiver until the occurrence of an improvement – equivalent to the provision of a contribution – that are to be assessed in the pending case were directed at a capital loss, or at least at a capital transfer. This too must be given the appropriate weight – as demonstrated – when carrying out the required assessment, with the result that the freedom of establishment under EU law does not restrict an income adjustment pursuant to section 1 of the External Tax Relations Act.

37 - 5. In accordance with the above explanations, the judgment of Düsseldorf Fiscal Court is to be annulled and the action dismissed.

38 - 6. The decision concerning costs is based on section 135 (2) of the Code of Procedure for Fiscal Courts.

Dr. Wacker - Dr. Märtens Dr. Schwenke

Dr. Herlinghausen - Dr. Witt

Federal Fiscal Court seal