

# Current tax information for our clients

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## Federal Tax Court Clarifies Requirements for the Performance of a Profit Transfer Agreement in a Tax Group

A prerequisite for forming a tax group (Organschaft) 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** (ruling of 5 November 2025, I R 37/22) regarding the actual performance of the PTA, the Federal Tax Court has now decided as follows:

1. Profit transfer obligations or loss assumption obligations must be fulfilled **in a timely manner**. In principle, fulfillment within **twelve months**

of the due date is sufficient for this purpose.

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.

### 1. 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, rulings of 5 April 1995, I R 156/93; and of 21 October 2010, IV R 21/07). This includes the controlled company's contractual obligation to transfer all of its

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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, rulings of 2 November 2022, I R 37/19 and I R 29/19).

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.

## 2. 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.

## 3. Practical guidance

### Scope

The ruling affects

- in general, all companies with a **tax group** for corporate income tax purposes and
- **specifically** companies with **PTA claims that have been due** for at least **twelve months**, as well as companies that use a **clearing account** to fulfill their PTA obligations.

It is recommended to conduct an **assessment** of the individual situation and the current "**PTA management**". Based on this, existing options for **reducing the risk** of a tax group not being recognised can be analysed, regardless of the

current method used to fulfill the PTA obligations.

### Reaction of the Tax Authorities

The **tax authorities'** response to the ruling remains to be seen. So far, only **a few cases** are **known** in practice where the tax authorities have addressed the two aspects in question. However, it **cannot be ruled out** that the tax authorities may now increasingly take up such cases.

### Duration of fulfillment and due date

**Fulfillment period exceeding twelve months**: The Federal Tax Court **explicitly left open** whether and to what extent "minor irregularities" in contract performance may be harmless, since in the case at hand, the plaintiff had in any event far exceeded the 12-month deadline (by several years) for fulfilling profit transfer obligations. If the 12-month period has indeed been **exceeded**, it is recommended **to document** the reasons for the delay as a precautionary measure, so that the reasons for exceeding the deadline can be explained in the event of an investigation by the tax authorities. Whether this would be accepted by the tax authorities (in exceptional cases) remains open, however.

**Due date of PTA claims**: When calculating the 12-month period, the Federal Tax Court uses the **due date** of the PTA claims as **the starting point**. In this regard, **a distinction** must be **made** between the assumption of losses (by the controlling company) and the transfer of profits (by the controlled company):

- The **claim for the assumption of losses** arises at the **end of the controlled company's financial year** (balance sheet date) and becomes **due on this date** (Federal Court of Justice,

judgment of 11 October 1999, II ZR 120/98).

- With regard to the claim for **profit transfer**, there is **controversy in case law and legal literature** as to whether, in the absence of a contractual provision in the PTA, this claim **arises and becomes due** either at **the end of the financial year** or only upon **the adoption** of the controlled company's **annual financial statements** (see Federal Tax Court, ruling of 22 April 1964, II 246/60 U). However, there is general agreement that this issue can be regulated by the parties in the PTA.

**Delays in the due date of claims:** The Federal Tax Court has **explicitly left open** the question of under what conditions a PTA is performed if, due to **special circumstances**, there are delays in the due date of the claims (e.g., a delay in the adoption of the annual financial statements). In an earlier ruling, the Federal Tax Court stated that there may be an obligation to prepare **preliminary annual financial statements** (see Federal Tax Court, ruling of 2 November 2022, I R 29/19).

#### *Methods of fulfillment*

There are various methods for the actual fulfillment of PTA claims in addition to the fulfillment via clearing accounts addressed in the case at hand. **Typical methods of fulfillment** include:

- **Actual payment**
- **Set-off of claims** (see Federal Tax Court, rulings of 2 November 2022, I R 37/19 and I R 29/19)
- **Novation** into a loan (note, however, Higher Regional Court of Munich, ruling of 20 October 2022, 7 U 1785/18, which questions the civil law

admissibility in the case of loss assumption).

If settlement is made through a **clearing account**, the new principles of the Federal Tax Court must be observed. However, the Federal Tax Court **does not explicitly** define which requirements are sufficient for actual fulfillment. Therefore, it is recommended that the (cumulative) claims on the clearing account are explicitly **settled within the 12-month period**.

Nevertheless, it should follow from the principles of the ruling that **closing** the clearing account **within the 12-month period** is also sufficient. According to the highest court's case law, **acknowledgment** of the balance (abstract acknowledgment of debt) leads to **novation** (see Federal Court of Justice, rulings of 25 June 2009, IX ZR 98/08; 24 January 1985, I ZR 201/82, 2 November 1967, II ZR 46/65; Federal Tax Court, ruling of 4 July 1990, GrS 2-3/88), i.e., the causal claims contained in the causal balance **are extinguished** and replaced by a single abstract claim. Consequently, the PTA obligations should be **considered fulfilled**. For precautionary reasons, further measures should be taken to minimise risk (i.e., **no automaticity, seriousness, and recoverability**). However, the Federal Tax Court did not explicitly state in its ruling that such a closing of accounts is sufficient.

Another fulfillment method encountered in practice is the booking of PTA obligations via a **cash pool**. To date, there is neither case law of the Federal Tax Court nor administrative guidance on the conditions under which the use of a cash pool leads to the actual fulfillment of the PTA (not relevant to the decision in the Federal Tax Court, ruling of 2 November 2022, I R 29/19). From the current decision, it could also be inferred for cash pools that merely posting the

PTA obligations via the cash pool without a (timely) fulfillment effect is likely insufficient. When using a cash pool to reflect PTA obligations, an analysis is also recommended, especially since different cash pool variants are used in practice.

In the case at hand, the controlled company settled third party debts of the controlling company via the **shortened payment method**. The Federal Tax Court **left open** the question of whether this could lead to the fulfillment of the PTA claims (through set-off), since the payment was made long after the 12-month deadline had expired. However, the lower court viewed this as a violation of the requirement that all profits are transferred to the controlling company (see Lower Tax Court Cologne, ruling of 21 June 2022, 10 K 1406/18). Therefore, **payments** by the controlled company or the controlling company **to third parties** to settle debts of the controlling company or the controlled company (shortened payment method) are **risky**. For reasons of **legal certainty**, the settlement of PTA claims should therefore take place **directly** between the controlling company and the controlled company.

#### *Non-recognition of the tax group – affected assessment periods*

If the tax group is **not recognised by the tax authorities** due to the lack of actual performance of the PTA, the following distinction must be made in terms of timing:

1. **Principle:** No tax group in the **year the PTA is not performed**
2. **Non-performance within the five-year minimum term of the PTA:** The tax group is not to be recognised at all from the beginning, i.e., retroactive effect also applies to preceding assessment periods. If a “new” tax group is to be

established, a new PTA is required; in some cases, a new five-year minimum term of the existing PTA may also be sufficient (though this has not yet been clarified by the Federal Tax Court).

- 3. Failure to perform the PTA in one year after the expiration of the minimum term of five years:** The failure to perform the agreement does not have retroactive effect on previous tax assessment periods. According to the **tax authorities**, a **new term of at least five years** for the PTA and uninterrupted performance of the PTA are required if the tax group is to be recognised again starting in a subsequent year.

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Please do not hesitate to speak to your direct contact at KPMG AG Wirtschaftsprüfungsgesellschaft if you have any questions.

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