

Asset Pools as Taxable Subjects under German Income and Corporate Tax Law

The legislator elevates "*Zweckvermögen des privaten Rechts*" to independent tax subjects in Section 1 (1) no. 5 KStG (Corporate Tax Code). Unlike the other taxable entities mentioned in Section 1 (1) KStG, such as corporations, cooperatives or foundations, the concept of *Zweckvermögen* or the synonymous concept of *Vermögensmassen* (asset pools) is not pre-structured under civil law. It is therefore the tax law that renders the dogmatic specifications required to treat an asset pool as a taxable entity.

This dissertation elaborates the conceptual content of the term *Vermögensmasse*. It is assumed that the term *Vermögensmasse* is a *Typusbegriff*. *Typusbegriffe* do not possess a strict set of requirements. A term characterised as *Typusbegriff* may trigger a legal consequence even if individual properties are missing if they are compensated by other profoundly present features. To determine the characteristics of a *Vermögensmasse* the dissertation compares entities without members in a process called *Typenreihe*. This comparison shows that an asset pool is treated as a tax subject if all involved parties are excluded from the substance of and income from the assets. This prerequisite is translated by the courts into the following characteristics:

An asset pool has the capacity to be a taxable entity if it

- 1) has been separated from the assets of the donor,
- 2) permanently serves an external purpose,
- 3) has its own income and
- 4) is economically independent.

The dissertation examines these four characteristics in detail with regard to their scope and content. It will be proven that the characteristics partly overlap in terms of their content and that the characteristic "economic independence" offers no additional specification and is thus obsolete.

Based on these findings, the paper develops a new formula to define a taxable asset pool. This formula offers identical results to the four criteria of the case law. However, this formula is easier to use, as it is based on a modified definition of economic ownership as defined in Section 39 (2) no. 1 AO (General Tax Code). The formula states:

"An asset pool constitutes a taxable entity if other taxable entities are permanently excluded from actual and legal influence on the substance and income of the assets in question."

It can be proven that both the characteristic of "separation from the assets of the donor" and the characteristic of generating its own income are included in the formula for economic ownership: If the asset pool is the economic owner, then the assets must have been separated from the assets of the donor. Further, by definition of economic ownership the asset pool can only be the economic owner if it exerts control over the substance of as well as the

income from the assets. The asset pool only exercises control over the income if decisions on the use of the assets in the market are attributed to it, which subsequently leads to income attributed to the asset pool.

This dissertation also establishes that the characteristic "permanently serving an external purpose" describes a permanent exclusion of economic influence on the substance and income of the assets of the asset pool. The equivocal characteristic "purpose" as used by the courts is therefore dispensable in the formula, as its meaning is captured in the permanent exclusion.

Using the formula for economic ownership as basis for this new approach to define a taxable asset pool utilises a well-contoured legal concept to allocate economic capacity according to the ability-to-pay principle. Additionally, using the *Typusbegriff* economic ownership as a basis illustrates that also the term *Vermögensmasse* is a *Typusbegriff*.

The formula developed in this dissertation fits seamlessly into the existing dogmatics that realise the ability-to-pay principle. The state, bound by the principle of equality, may neither tax subjects without economic capacity, nor may it abandon its tax claim for lack of a tax subject. The state is thus obliged neither to tax parties of an asset pool who have no access to the assets' economic content, nor to accept a competition-distorting situation in which taxable income remains untaxed. The formula of this dissertation draws a line between the parties and the creation of a taxable asset pool: If assets and their income can be attributed to the parties of an asset pool, no taxable asset pool is created. If no attribution can be made, the asset pool elevates to a tax subject. This new tax subject then claims the otherwise ownerless tax object and ensures taxation according to the ability-to-pay principle.

The formula is then applied to individual domestic and foreign legal constructions, among others the English Private Express Trust.

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