# *Case Review*

## Inheritance tax liability on pension payments derived from the assets of a Liechtenstein family foundation

## Review of Federal Tax Court, judgment from 11 December 2024

*BFH, Urt. v. 11.12.2024 – II R 50/22, IStR 2025, 592*

*Jonas Franz*[*]

The Liechtenstein family foundation is a proven instrument of asset protection.[1] In the present case, the German Federal Tax Court (*Bundesfinanzhof, BFH*) addresses the extent to which pension payments from the assets of a Liechtenstein family foundation are subject to German inheritance tax.

### A. Simplified facts of the case

The claimant (C), a resident of Germany, is the daughter of the deceased (D), who passed away in 2015. In 1990, D established a family foundation (*Familienstiftung*) based in the Principality of Liechtenstein, whose legal relationships are subject exclusively to Liechtenstein law. The foundation mainly pursued family-related purposes. During her lifetime, D was the sole beneficiary of the foundation. Through a contract of mandate (*Mandatsvertrag*) with the Liechtenstein Trust and Administration Institution (*Treuhand- und Verwaltungs-Anstalt*) E, D retained the authority to direct the members of the foundation council (*Stiftungsrat*) appointed by E. The foundation council was the sole and supreme body of the foundation. Consequently, the provisions in the foundation's statute

---

[*] Law graduate (first state examination) and Head of the Department for Civil Law of the Heine Law Review.
The author gives his thanks to Prof. Dr. Lisa Guntermann for her valuable feedback.

[1] The advantages of a Liechtenstein family foundation compared to a German family foundation result from a comparatively low tax burden. Corporations in the Principality of Liechtenstein are taxed at a rate of 12.5% (Article 61 Liechtenstein Tax Act/*Steuergesetz* - SteG), while the corporation tax rate in Germany amounts to 15% (Section 23 paragraph 1 number 1 of the Corporation Tax Act (*Körperschaftsteuergesetz*, *KStG*). In addition, Liechtenstein does not levy commercial tax (*Gewerbesteuer*). Moreover, pursuant to Section 1 paragraph 1 number 4 of the Inheritance and Gift Tax Act (*Erbschaft- und Schenkungsteuergesetz*, *ErbStG*), German family foundations are subject to a so-called substitute inheritance tax (*Erbersatzsteuer*) every 30 years. This does not apply in Liechtenstein. A comprehensive overview of the taxation of Liechtenstein family foundations is provided by *Rüdiger Werner*, 'Die leichtensteinische Familienstiftung' (2020) 4 IStR 130.

(*Stiftungsstatut*) could only be amended with D's consent. Upon D's death, the contract of mandate expired. However, the composition of the foundation council remained unaffected.

According to the foundation's statute, C was entitled an annual pension funded by the foundation's assets. In 2010, the foundation's statutes were amended to stipulate that payments should commence during D's lifetime.

The defendant, the tax authority (*Finanzamt*) levied gift tax on the payments received during D's lifetime. Concerning the payments received upon D's death, it held that C's pension entitlement (*Rentenstammrecht*) against the foundation constitutes an acquisition by reason of a contract for the benefit of a third party (*Vertrag zugunsten Dritter*) pursuant to Section 3 paragraph 1 number 4 of the German Inheritance and Gift Tax Act (*Erbschaft- und Schenkungsteuergesetz*, ErbStG). According to the tax authority, the taxable enrichment does not lie in a transition of the foundation's assets but rather in C's pension entitlement against the foundation, which D had arranged in the foundation's statutes. However, C took the view that there was no contract for the benefit of a third party and that the pension payments are therefore not subject to inheritance tax.

The lower court (*Vorinstanz*), the Cologne Fiscal Court (*Finanzgericht Köln, FG Köln*), ruled that C's pension entitlement does not qualify as either an acquisition by reason of death pursuant to Section 3 paragraph 1 number 1 ErbStG, or an acquisition by reason of a contract for the benefit of a third party (Section 3 paragraph 1 number 4 ErbStG).[2]

## B. The Court's decision

The *BFH* concurred with the opinion of the *FG Köln* and denied both an acquisition under Section 3 paragraph 1 number 1 ErbStG and under Section 3 paragraph 1 number 4 ErbStG. However, the Court held that, with respect to the benefit stipulated, a foundation statute conferring third parties an entitlement to benefits subsequent to the demise of the founder of a Liechtenstein family foundation may be classified as a gift upon death (Section 3 paragraph 1 number 2 ErbStG). The *FG Köln* did not determine whether the testator transmitted the required executory donation (*Schenkungsversprechen*) during her lifetime or whether the foundation transmitted it after her death. On that basis, the state of proceedings does not permit final judgement to be given. Pursuant to Section 126 paragraph 3 sentence 1 number 2 Finance Courts Code (*Finanzgerichtsordnung*, FGO) the *BFH* is entitled to task the *FG Köln* with determining the applicable inheritance law: German or foreign.

[2] FG Köln, Urteil vom 6.9.2022, Az. 7 K 2720/20, DStRE 2023, 1247.

## I. Acquisition by reason of death, Section 3 paragraph 1 number 1 ErbStG

The tax liability for acquisitions under the ErbStG is based on the legal framework set out by the German Civil Code (*Bürgerliches Gesetzbuch*, BGB). In transnational cases, this initially raises the question of whether German or foreign inheritance law applies to the succession.

The *FG Köln* applied German inheritance law without providing any reasoning.[3] The *BFH* has expressed reservations regarding this, given that D did not have her habitual residence in Germany and did not possess German nationality (see Article 25 of the Introduction to the German Civil Code, EGBGB).[4] Since the *FG Köln* is the sole factual instance (*Tatsacheninstanz*), the *BFH* remitted the case to the *FG Köln* for the purpose of determining the applicable inheritance law. Under the application of foreign inheritance law, the BFH held that C's pension entitlement against the foundation may constitute an acquisition analogous to a German bequest (*Vermächtnis*, Sections 2147 and following of the BGB) and therefore may be subject to inheritance tax as outlined in Section 3 paragraph 1 number 1 alternative 2 ErbStG.[5]

However, assuming that German inheritance law is applicable, it could be considered that C's pension entitlement constitutes an acquisition by reason of death pursuant to Section 3 paragraph 1 number 1 alternative 1 ErbStG in conjunction with Section 1922 BGB. In the event of succession, according to German inheritance law, the deceased's assets pass in their entirety to the heir (*Gesamtrechtsnachfolge*). In the present case, a distinction can be made between the foundation's assets and C's pension entitlement.

If a foundation's council is found to have the factual and legal capacity to dispose of the foundation's assets, the foundation is deemed legally non-transparent. It is an established principle that the assets of a non-transparent foundation cannot be attributed to its founder (*Stifter*) and thus do not form part of the founder's estate (*Nachlass*).[6] Conversely, if the founder retains extensive powers to instruct the foundation council, as is the case here, then the foundation's assets are considered part of the founder's estate. However, for an inheritance tax liability to arise, a further prerequisite must be fulfilled: the deceased's powers of disposition over the foundation's assets must be inheritable. The authority D exercised over the foundation's council derived from the terms of the contract of mandate which expired upon her death. Accordingly, the foundation's assets did not form part of D's estate. The foundation itself is the successor of its assets.[7]

---

[3] ibid 1250 para 84.
[4] BFH, Urteil vom 11.12.2024, IStR 2025, 592, 594 para 19.
[5] ibid 594 para 27.
[6] BFH, Urteil vom 28.6.2007, DStRE 2007, 1170, 1171; BFH (n 4) 594 para 22.
[7] BFH (n 4) 594 para 22.

The same conclusion applies to C's pension entitlement. An acquisition by reason of death would have required that D had been the owner of the entitlement, which therefore would have formed part of D's estate. However, according to the foundation's statute, the entitlement vested directly in C in her capacity as beneficiary. Consequently, there was no corresponding right in D's estate that could have passed to C upon D's death. Thus, the Court denied an acquisition by reason of death pursuant to Section 3 paragraph 1 number 1 alternative 1 ErbStG in conjunction with Section 1922 BGB.[8]

Furthermore, the *BFH* considered an acquisition by reason of a bequest pursuant to Section 3 paragraph 1 number 1 alternative 2 ErbStG in conjunction with Sections 2147 and following BGB. Under Section 2147 sentence 1 BGB, only the heir or a legatee (*Vermächtnisnehmer*) may be burdened with a bequest. However, the foundation is neither D's heir nor a legatee and therefore cannot be subject to such an obligation.

## II. Acquisition by reason of a contract for the benefit of a third party, Section 3 paragraph 1 number 4 ErbStG

Moreover, the pension payments are not subject to inheritance tax pursuant to Section 3 paragraph 1 number 4 ErbStG. This provision presupposes a contract for the benefit of a third party, i.e. a contract between the promisor (*Versprechender*) and the promisee (*Versprechensempfänger*) for the benefit of a third-party beneficiary. In this case, a contract must exist between the promisee D and the foundation as the promisor. According to Sections 145 and following of the BGB, a contract is a bilateral agreement consisting of two corresponding declarations of intent (*Willenserklärungen*). However, the foundation's statutes only constitute a unilateral declaration of intent and thus not a contract.[9] Given the unambiguous wording of Section 3 paragraph 1 number 4 ErbStG and the absence of a regulatory gap, the *BFH* rejected an analogy of the provision. Accordingly, the foundation statutes do not satisfy the requirements of a contract within the meaning of Section 3 paragraph 1 number 4 ErbStG.

## III. Acquisition by reason of a gift upon death, Section 3 paragraph 1 number 2 sentence 1 ErbStG in conjunction with Section 2301 BGB

In its judgement, the *BFH* held that C's pension entitlement may nonetheless be subject to inheritance tax based on a gift upon death pursuant to Section 3 paragraph 1 number 2 sentence 1 ErbStG in conjunction with Section 2301 BGB.[10] A gift upon death is characterised by an executory donation that is made subject to the condition that the donee survives the donor (*Überlebensbedingung*). The purpose of this provision is to

[8] ibid.
[9] ibid 594 para 26.
[10] ibid 593 paras 13, 14.

safeguard the mandatory formal requirements of succession law and to prevent their circumvention through transactions which are structured as inter vivos dispositions but are intended to take effect only upon death. Therefore, in principle, pursuant to Section 2301 paragraph 1 sentence 1 BGB, the provisions governing dispositions mortis causa (Sections 1922 and following BGB), especially the according formal requirements, apply. However, if the gift has been performed by the donor during his lifetime, pursuant to Section 2301 paragraph 2 BGB this transaction is deemed as a gift inter vivos. A valid donation contract presupposes an agreement between the donee and the donor regarding the non-renumeration (*Unentgeltlichkeit*) of donation pursuant to Section 516 BGB.

In case the *FG Köln* determines that D has made an executory donation, the *BFH* emphasises, with reference to the case law of the Federal Court of Justice (*Bundesgerichtshof, BGH*), that D's executory donation would not be invalid due to non-compliance with the formal requirements of Sections 2247 and following, 2276 BGB.[11] Upon the death of the donor, the donee "automatically" may acquire an entitlement against the promisee. This would lead to the performance of the gift within the meaning of Section 2301 paragraph 2 BGB. The formal requirements of inheritance law set out in Sections 2247 following, 2276 BGB, thus do not apply to the legal relationship between D and C. The formal defect in the possible gift between D and C, which should in fact require notarisation pursuant to Section 518 paragraph 1 sentence 1 BGB, would be cured under Section 518 paragraph 2 BGB.

## C. Commentary

The *BFH*'s judgment fits coherently within the dogmatic structure of the ErbStG, which is predicated on the legal framework set by civil law. In this regard, the denial of a contract for the benefit of a third party with reference to the concept of a contract – which is not satisfied in the case of a foundation's statute – is convincing. Moreover, the unambiguous wording of Section 3 paragraph 1 number 4 ErbStG precluded an analogy of the provision.

Likewise, the *BFH*'s consideration of a tax liability on pension payments by virtue of a gift upon death under Section 3 paragraph 1 number 2 ErbStG is compelling. The tax liability in this context hinges substantially on whether D conveyed an executory donation during her lifetime or whether the foundation's council conveyed it after her death. However, there is a counterargument to this construction. The argument is that it could lead to a "race between heirs and beneficiaries", as the heir could revoke the executory donation

[11] ibid 594 para 19.

established by the testator.[12] In accordance with Section 130 paragraph 1 sentence 2 BGB, the revocation of the executory donation is possible until it reaches the beneficiary. Nevertheless, these concerns do not arise where the heir and the beneficiary are the same person, as in the present case. Meanwhile, it remains unclear why the *BFH* was unable to determine the existence of an executory donation by D; it would have been reasonable to interpret the foundation's statutes as an implied executory donation by D in favour of C.[13] C's receipt of the payments would constitute the acceptance of this executory donation.

The Court's opinion that under the applicability of foreign inheritance law, there might be an acquisition analogous to a German bequest pursuant to Section 3 paragraph 1 number 1 alternative 2 ErbStG does not withstand critical scrutiny. For this interpretation to be tenable, the foundation would have to be burdened with a bequest under foreign inheritance law. As demonstrated, the foundation is not an heir to D. Additionally, it is important to note that the endowment granted to the foundation by D constitutes a gift inter vivos under civil law.[14] However, the recipient of a gift inter vivos cannot, in principle, be burdened with a bequest. This applies to German civil law[15] as well as to those of Austria[16], Switzerland[17] and Liechtenstein[18], as all of these jurisdictions maintain a distinction between transactions inter vivos and dispositions mortis causa. If the donor wishes to impose an obligation upon the donee, the gift may be made subject to a charge (*Auflage*).[19] Imposing a testamentary encumbrance on the donee would undermine the gift inter vivos by creating an obligation that was not defined at the time the gift was given.[20]

## D. Conclusion

The present judgment underscores the necessity for a comprehensive assessment of both succession law and inheritance tax implications when advising on transnational foundation arrangements. If the *FG Köln* acknowledges the existence of an executory

[12] cf OLG Stuttgart, Urteil vom 29.06.2009, ZEV 2010, 265 para 87; Anton Löhmer and Daniel Heilmann, commentary on BFH, Urteil vom 11.12.2024 – II R 50/22 (2025) 16 IStR 592, 597.

[13] Likewise: Löhmer and Heilmann (n 12) 597.

[14] This classification is clearly regulated by the Liechtenstein Law on Person and Companies (*Personen- und Gesellschaftsrecht, PGR*), cf Article 552 Section 1 paragraph 1 PGR.

[15] See BGH, Urteil vom 06.03.1985, NJW-RR 1986, 164.

[16] According to Sections 649, 650 General Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*) only the heir or legatee can be burdened with a bequest. Section 603 of the ABGB deals with the gift upon death and shows that the case of succession does not affect the legal treatment of the transaction as a gift inter vivos.

[17] cf Article 484 Swiss Civil Code (*Schweizerisches Zivilgesetzbuch, ZGB*).

[18] The General Civil Code of the Principality of Liechtenstein (*Allgemeines Bürgerliches Gesetzbuch, ABGB*) adopts the Austrian ABGB almost verbatim, cf Section 649 ABGB.

[19] cf Section 525 BGB, Section 709 ABGB (Austria), Article 245 OR (Swiss Code of obligations), Section 709 ABGB (Liechtenstein).

[20] cf BGH (n 15) 164; Löhmer and Heilmann (n 12) 596.

donation by D, a potential "tax trap" may arise, which should be avoided in similar circumstances. However, it appears unlikely that the *FG Köln* – under the application of foreign inheritance law – will impose tax liability under Section 3 paragraph 1 alternative 2 ErbStG. This is because the principle that the beneficiary of a gift inter vivos cannot be burdened by a disposition mortis causa is not merely a feature of German civil law.