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Taxation Choice and Optimization of Legal Forms for Startups: The Most Taxation-Efficient Legal Structures at Different Company Life Stages from a German taxation law perspective.

ABSTRACT: Le start-up, a differenza delle aziende tradizionali, spesso passano rapidamente dalla nascita alla vendita di alto valore. Per questo, è cruciale che i consulenti fiscali comprendano le fasi di vita di queste aziende per offrire le migliori raccomandazioni legali, utilizzando il diritto tributario trasformativo. Nelle fasi iniziali, caratterizzate da perdite, è preferibile un modello di impresa personale, specialmente se il fondatore ha altre entrate. Quando l'azienda entra nella fase di espansione del capitale, un modello societario diventa più attraente, in linea con le preferenze degli investitori di capitale di rischio. Le "Phantom Stocks" possono essere una soluzione vantaggiosa per tutti i soggetti coinvolti. In vista della vendita, una struttura di holding societaria offre significativi

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vantaggi fiscali, come un'esenzione del 95%. Pertanto, potrebbe essere utile adottare una configurazione di holding societaria sin dall'inizio, con il fondatore che detiene una partecipazione silente atipica nella start-up (GmbH & società silente atipica).

ABSTRACT: Unlike traditional companies, start-ups often transition from inception to high-value sale within a few short years. It is imperative for tax consultants to understand the typical life stages of such nascent companies, enabling them to proactively respond with the most suitable legal form recommendation, perhaps even leveraging transformational tax law. Start-ups require a flexible legal structure tailored to their current phase from a taxation standpoint. In the early, loss-heavy stages, it's more favorable to adopt a personal enterprise model, especially when the founder has other income streams, like part-time work. However, as the company moves to the financing or capital expansion phase, transitioning to a corporate model becomes more appealing. This is largely due to the preferences of risk capital investors, who often operate within corporate structures. Additionally, granting shares tied to the company's success to key employees is simpler in the corporate realm than in personal enterprises. One potential solution is "Phantom Stocks", which could offer mutual benefits for all stakeholders. When looking at selling the business, a corporate holding structure provides unparalleled tax benefits, leveraging a 95% tax exemption and the accumulation effect. To enjoy the immediate loss benefits of personal enterprises during inception and the merits of a holding framework, it might be wise to employ a corporate

holding setup from the outset. Here, the founder would also have an atypical silent stake in the initially loss-incurring start-up company (GmbH & atypical silent partnership).

PAROLE CHIAVI: Start-up; Consulenza fiscale; Struttura legale flessibile; Impresa personale; Modello societario; Investitori di capitale di rischio; Phantom Stocks; Holding societaria; Esenzione fiscale

KEYWORDS: Start-up; Tax consulting; Flexible legal structure; Personal enterprise; Corporate model; Venture capital investors; Phantom Stocks; Corporate holding; Tax exemption

Promotion of equity investments: section 19a Income Tax Act - 5.1. Intermediate conclusion - 6. Gearing up for sale: transitioning from individual ownership to enduring investment - 6.1. Holding model - 6.2. Solution approach: limited liability company & atypical silent partnership - a) Loss offset - b) Tax pitfalls- bb) Understanding limited liability company (LLC) & atypical silent partnership from a taxation perspective - c) For the sake of mere completeness: option under § 1a of the corporate Income Tax Act - 7. Conclusions

1. Defining the essence of startup companies

When the term "Start-up" is mentioned herein, it inherently refers to any young enterprise, regardless of its products or services offered, that is in the (pre-) formation process and is seeking financial resources (start-up in a broader sense). Nevertheless, in general parlance, the term "start-up" has predominantly come to denote young growth companies with significant innovative potential, especially those looking to venture into areas like the Internet/Web, primarily social media, mobile applications, and gaming (start-up in a narrower sense). As readers peruse this book, they might initially associate the term "start-up" with a company or a business foundation within the aforementioned new media sectors.[1] Yet, despite

[1] A. COMELLI, M. ALLENA, *Ecological transition and Environmental taxation*, Milano, 2023; A. F. URICCHIO, *Tecnologie digitali, intelligenza artificiale e saperi multidisciplinari: la prospettiva del*

the somewhat overused term "start-up", it's worth noting that the financing options introduced in this book, tailored to each business phase, don't differentiate based on the industry the business belongs to.[2] Regardless, the majority of the capital sources presented are mainly suitable for (young) companies that, owing to their extraordinary innovative strength (for instance, employing new technologies in product development, devising new scalable business models, or introducing new service offerings), coupled with their exceptional growth and return potential, consequently draw the specific interest of the capital providers listed here. A start-up's continuous, adequate liquidity is crucial for its survival. Ensuring liquidity in every business phase is, thus, the primary motive for business financing and, given the current liquidity situation, also acts as a guide in selecting the financing structure and means.[3] A particular source of capital should only be tapped considering the latter aspect when the liquidity situation genuinely demands it. Readers of specific news platforms, especially "GSDS" readers (an acronym representing the most renowned platforms in Germany: "*Gründerszene*" (gruenderszene.de) and "*Deutsche Startups*" (deutsche-startups.de), might be inclined to believe, considering the almost daily success stories of substantial financing rounds reported there, that securing equity financing,

tributarista, in F. BIONDI, R. SACCHI (a cura di), *Dialogo transdisciplinare e identità del giurista*, 2023.

[2] M. HAHN, *Financing and Taxation of Start-up Companies*, Wiesbaden, 2014, 4 ss.

[3] For an introduction on environmental taxation cfr. A. COMELLI, M. ALLENA, *Ecological transition and Environmental taxation*, Milano, 2023; A. F. URICCHIO, F.L. GIAMBRONE, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* 150 ss.

especially from venture capital firms (VCs), is an absolute necessity for a successful start-up's existence.[4]

It's essential not to overlook that, in reality, VCs account for an infinitesimal fraction of the overall start-up financing volume. A vast majority of equally successful start-ups either obtain the necessary funding from private individuals ("Family and Friends", a resource which, according to a 2012 KfW study, over 25% of start-ups resort to) or ideally generate a positive cash flow in a relatively short period, paving their way to conventional bank loans. Even more business foundations, as per a 2012 KfW study, show that over 40% of start-ups access debt finance through traditional bank loans in their founding phase, with the founders personally committing due to the lack of adequate securities from the young enterprise. Although this mode of capital procurement isn't ideal from a financing perspective, founders learn firsthand - despite the limitation of liability offered by the choice of a legal entity as the company form - the essence of entrepreneurship, taking personal responsibility for their business decisions.[5]

[4] BUNDESMINISTERIUM FÜR WIRTSCHAFT UND KLIMASCHUTZ (BWK), *Die Start up Strategie der Bundesregierung*, 2022; A. KOLLMANN, D. JUNG, T. KLEINE-STEGEMANN, M. ATAEE, K. DE CRUPPE (a cura di), *Deutscher Startup Monitor*, 2020, 21 ss.

[5] A. F. URICCHIO, G. SELICATO, *La fiscalità dello sviluppo sostenibile*, in A. BUONFRATE, A. URICCHIO (a cura di), *Trattato breve di diritto dello sviluppo sostenibile*, Cedam, 2023.

2. Defining traits of start ups

Start-ups are characterized by a substantial capital requirement for research, product or service development, market introduction, and further establishment of corporate structures .[6] Traditional banks, wary of the high associated risks, typically shy away from financing these ventures. Instead, the necessary venture capital is furnished by conventional equity firms or venture capital companies and so-called Business Angels. Venture capital refers to the high-risk capital principally allocated to young, groundbreaking companies. Venture capital investments are thus a distinct form of equity financing wherein capital is typically introduced to a company via a minority share. Business Angels, in essence, are affluent private investors, who provide equity capital directly to a company, that is, without the intervention of a financial intermediary, and who also contribute their expertise, knowledge, and networks to the firm.[7] Typically, these are affluent individuals who hold or have held senior management positions. Business Angels bring invaluable experience to the table, especially in areas such as corporate management, finance, marketing, and sales. They actively assist or provide advisory support to the company, creating significant added value in the process. Business Angels often invest in small, emerging companies that are in the early stages of their life cycle. This not only allows them to substantially influence the company's

[6] A. KOLLMANN, D. JUNG, T. KLEINE-STEGEMANN, M. ATAEE, K. DE CRUPPE (a cura di), *German Startup Monitor 2020*, 21.
[7] T. HEßLER, R. MOSEBACH, *Deutsches Steuerrecht*, 2001, 813.

development but also to benefit from the firm's appreciation in value.[8] It's common for Business Angels to assume roles as advisory board or supervisory board members in the companies they support.[9] In making their investment decisions, apart from expecting high returns, personal reasons such as self-fulfillment or recognition, as well as altruistic motives like job creation or promoting regional economic growth, often play a pivotal role.[10] Start-ups with pronounced innovation capabilities (e.g., deploying new technologies in product development or crafting novel, scalable business models or services) and exceptional innovation potential stand a better chance, promising remarkable growth and yield potentials. For start-ups, the initial phase often marked by start-up losses seamlessly transitions into the second phase.[11] Here, venture capital investors and equity participation by skilled employees play a pivotal role.[12] Upon securing funding for their innovative business idea, entrepreneurs soon face a subsequent phase: deciding between selling their enterprise – either partially or wholly – or committing to a long-term investment within it.[13] Quite often, these founders reinvest the profits from such sales into a new

[8]BWK, *Die Start up Strategie der Bundesregierung*, 2022
[9] INVEST EUROPE, *2015 European Private Equity Activity, Statistics on Fundraising, Investments & Divestments,* 2016.
[10] L. GRAMLICH, *Gabler Lexikon*, 15 Auflage Springer Verlag, 2019.
[11] Cfr. A. F. URICCHIO, F.L. GIAMBRONE, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* Bari, 2020.
[12] F. GALLO, A. F. URICCHIO, *La tassazione dell'economia digitale*, Bari, 2022.
[13] P. J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen,* in *NWB*, 2022, pp. 160 – 172; BWK, *Die Start up Strategie der Bundesregierung*, 2022.

pioneering concept. Historically, a span of four to seven years typically elapses between the original idea and its lucrative sale.[14]

3. From idea to inception: early setbacks and part-time endeavors

In their formative years, many start-ups embark on a unique value creation journey. Traditional profit and loss statements during this period often serve more to meet general accounting obligations than reflecting the company's actual value.[15] Instead, start-ups need to persuade investors using specific performance metrics. Such Key Performance Indicators (KPIs) do not represent standard accounting results[16] but rather illustrate the degree of strategy implementation.[17] Therefore, achieving profits is not typically a primary focus in this initial phase. Substantial initial losses often arise due to expenses related to research, development, and the launch of entirely novel products and services.[18] Consequently, it's not uncommon for founders within the start-up sphere to retain part-time employment roles alongside their entrepreneurial endeavors to ensure their livelihood.[19]

[14] EU COMMISSION, *Effectiveness of tax incentives for venture capital and business angels to foster the investment of SMEs and start-ups*, 2017.
[15] S. SIERINGHAUS, *Haufe Tax Office*, 2019, HI12510725..
[16] M. GEHRIG, H. HEBERTINGER, P. SEDLARIK, *IRZ*, 2020, 457.
[17] Cfr. A. F. URICCHIO, *Postfazione*, in G. MONGELLI, S. ROMANAZZI (a cura di), *La controversa riforma "De' Stefani" del 1923*, 2023.
[18] P. STEINHAUSER, K. NADILO, *Haufe Tax Office*, 2019, HI9679810..
[19] L. METZGER, *KfW Start-up Monitor*, 2021, 1; J. HAHN, *Financing of Start-up Companies*, 2018, 6.

From a tax perspective, considering the legal form during this initial business phase, one might deduce that on the one hand, there may be earnings from non-self-employed work per § 19 Income Tax Act (*EStG*), and on the other, initial losses from the start-up engagement. [20]

"Incomes derived from non-self-employed work, as stipulated in § 19 of the Income Tax Act, predominantly include salaries, wages, bonuses, and other compensations or benefits rendered for employment in public or private service (No. 1). This also covers waiting or pensionary benefits, widows' and orphans' pensions, and other benefits or compensations stemming from previous services (No. 2), as well as provisions in accordance with § 19, paragraph 1, No. 3 of the Income Tax Act (corporate pension provisions).[21] The wage as outlined by § 19 of the Income Tax Act is accrued by the employee under directives (refer to § 1 of the Wage Tax Implementation Regulation). This is contingent upon the gross wage, as specified in § 2 of the Wage Tax Implementation Regulation. The nature of these benefits, whether they are recurrent or one-time, or the existence of a legal entitlement to them, as per § 19, paragraph 1, sentence 2 of the Income Tax Act, is immaterial. Components of the gross wage also comprise: the employee's contribution to the pension insurance, the wage tax as an advance payment on income tax, and in-kind benefits, as outlined in § 8, paragraph 2 and subsequent

[20] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, 2023.
[21] A. F. URICCHIO, *Depenalizzazione dei reati formali e il reato di omessa dichiarazione nel sistema penale tributario*, in *Sicurezza e Giustizia*, 1, 2023.

of the Income Tax Act, which includes provisions such as the use of a company vehicle for private purposes, are all crucial components of employee compensation.[22]

This raises the question: which legal form allows these losses to be utilized immediately for tax purposes? Generally, choices range between personal enterprises (individual enterprises and partnerships) or corporations (e.g., entrepreneurial company or limited liability company).[23]

3.1. Personal enterprises

Choosing the legal form of an individual enterprise, in most cases, results in the founder generating earnings from a trade or business as per § 15 Income Tax Act.

Consequently, the losses incurred during the start-up phase can initially be offset against the positive income from non-self-employed work using the vertical loss compensation (§ 2 para. 3 Income Tax Act). To alleviate peak demands arising from high refundable amounts during annual income tax assessment and to enhance liquidity, provisional adjustments can be made to reduce income tax deductions, approximating the consideration of the anticipated loss from the start-up (§ 39 para. 1, 4 no. 3 Income Tax Act in

[22] T. JESGARZEWSKI, J. M. SCHMITTMANN, *Grundlagen und Anwendungsfälle aus der Wirtschaft*, 2018..

[23] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, 2023.

conjunction with § 39a para. 1 sentence 1 no. 5 letters a, b Income Tax Act). If not all losses can be taken into account, the amounts are incorporated into the loss offset per § 10d Income Tax Act. Distinguishing between the loss carryback to the previous assessment period and the loss carryforward to subsequent assessment periods is crucial.[24] The loss carryback takes precedence over the loss carryforward (§ 10d para. 1, 2 Income Tax Act). The Third Corona Tax Assistance Act[25] raised the maximum amount for loss carrybacks for the 2020 and 2021 tax assessment periods to €10 million for individual assessment and €20 million for joint assessment. In contrast, the loss carryforward is capped: it's unrestricted up to a total income amount of €1 million, and beyond that, up to 60% of the total income exceeding €1 million – prioritized over special expenses, extraordinary burdens, and other deductible amounts (§ 10d para. 2 sentence 1 Income Tax Act).[26]

3.2. Corporations

If the founder chooses the corporate legal form (e.g., Limited Liability Company), it implies that any generated losses remain "locked in" at the

[24] EU COMMISSION, *Effectiveness of tax incentives for venture capital and business angels to foster the investment of SMEs and start-ups*, 2017; BWK, *Die Start-up Strategie der Bundesregierung*, 2022.
[25] FEDERAL LAW GAZETTE, I, 330; A. F. URICCHIO, N. TREGLIA (a cura di), *Il processo tributario alla luce della Riforma di cui alla legge 130/2022*, Edizioni Duepuntozero, 2023.
[26] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, NWB 2022, 160-172.

company level .[27] Without a commercial enterprise at the founder's level, a corporate group tax regime per § 14 Corporate Income Tax Act would often be ruled out.[28] The founder would then have to wait until accumulated initial losses can be offset against later profits of the corporation.[29] Regarding a potential share sale or the introduction of additional shareholders, attention must be paid to the provision on the loss of carried forward losses due to harmful share acquisition under § 8c Corporate Income Tax Act. If a future investor acquires more than a 50% stake in the start-up LLC, the accumulated start-up losses would essentially be completely lost under § 8c paragraph 1 sentence 1 Corporate Income Tax Act. For completeness, it's important to note in connection with § 8c Corporate Income Tax Act that, in some cases, exceptions such as the so-called Hidden Reserves Clause (§ 8c Abs. 1 Corporate Income Tax Act), the so-called Restructuring Clause (§ 8c paragraph 1a Corporate Income Tax Act), and the application for determination of the carryforward of losses tied to continuity (§ 8d Corporate Income Tax Act) can apply.[30]

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[27] Noted as the "Lock-in Effect" – see V. PRINZ, K. KAESER in W. KESSLER, T. KRÖNER, F. KÖHLER (a cura di), *Group Tax Law*, 2018, para. 429 ss.

[28] FEDERAL FINANCE COURT, *Judgment dated 12.8.1965 - IV 322/64 U*, in, *Federal Tax Gazette*, 1965, III, 589.

[29] INVEST EUROPE, *2015 European Private Equity Activity, Statistics on Fundraising, Investments & Divestments*, 2016.

[30] ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), *Financing SMEs and Entrepreneurs 2016: An OECD Scoreboard*, OECD Publishing, Paris, 2016; M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, NWB, 2022, 160-172; A. URICCHIO, F. GALLO, A. CUVA, C. BUCCICO, S. DONATELLI, *Le novità introdotte con legge 130/2022 di riforma del*

3.3. Interim conclusion

From a tax perspective, during the start-up company's first phase, which is mainly characterized by significant initial losses, a sole proprietorship is generally recommended.

4. Beginning to flourish: the journey from initial moves to expansion

4.1. Financing through venture capital

"Venture Capital" (commonly referred to as "VC") can also be described as risk capital or speculative capital. This form of capital procurement differs significantly from traditional debt financing. The unique feature of venture capital is that the investor commits to an investment without demanding collateral, and such investments neither accrue interest nor require repayment.[31] Thus, venture capital is particularly suited for financing nascent enterprises during their startup phase. Notably, startups in the digital and high-tech sectors require substantial capital influx. Consequently, the support from VC firms becomes especially pivotal for these industries. Typically, investor involvement in a startup takes the form of either a silent partnership (with no operational influence) or an active stake (with a role in management). In exchange for their

processo tributario. Prime riflessioni, 2023; H. BREITHAUPT, R. OTTERSBACH, *Part 1. C. § 1, Rn. 22*, 2010).

[31] H. BREITHAUPT, R. OTTERSBACH, *Part 1. C. § 1, Rn. 22*, 2010.

investments, VCs acquire equity rights in the company's capital or assets.[32] What sets VC firms apart is their higher risk tolerance when compared to traditional financiers, like banks. This tolerance comes from an acceptance that a certain percentage of investments will underperform or fail, but these losses are offset by a broad range of investments and a few significant successes ("high-flyers").[33] This dynamic, uncommon in traditional capital procurement, underscores the importance of understanding the workings of VC firms for fruitful post-investment collaborations. Entrepreneurs should not merely focus on the monetary aspect of a VC investment. Instead, they should also consider the actual implications associated with every VC investment from the perspective of the VC when strategizing their financing endeavors. Before founders engage with potential VC investors, identifying the right investor is crucial.[34] The selection process heavily depends on both the reputation and specialization of the venture capitalist. When multiple suitable investors are identified, the ideal approach is to initiate contact through a mutual acquaintance, such as a Business Angel.[35] The manner and, more importantly, the form of initial contact are critical.[36] Providing VCs with a concise overview of the business plan or pitch deck, ideally in the form of

[32]A.F. URICCHIO, F. L. GIAMBRONE, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses*, 2020.
[33]A. F. URICCHIO, *Prefazione*, in M. CALIGIURI (a cura di), *Studiare l'intelligence in Italia. Esperienze a confronto*, Rubbettino, 2023; see T. JANSON, 2011, 53 ss.
[34]BWK, *Die Start-up Strategie der Bundesregierung*, 2022.
[35]EU COMMISSION, *Effectiveness of tax incentives for venture capital and business angels to foster the investment of SMEs and start-ups*, 2017.
[36]OECD, *Financing SMEs and Entrepreneurs 2016: An OECD Scoreboard*, Paris, 2016.

a one-pager, is recommended. Given that confidentiality agreements are often foregone at this stage, any sensitive information should be carefully redacted or anonymized. It's essential to tread cautiously since many VCs, in practice, avoid signing non-disclosure agreements. Regardless, any genuinely interested VC will not hesitate to sign a confidentiality agreement provided by a reputable founding team when the sharing of confidential data is imminent. Once the VC has the core information, general criteria such as the industry, required investment volume, potential returns, and risks are analyzed. A substantial number of financing requests are declined at this preliminary stage, emphasizing the importance of making a strong impression (Grummer and Brorhilker 2013). If a startup advances beyond this stage, a more detailed analysis ensues. Factors like the founders' skills and experiences become central to securing financing, especially in terms of identifying and mitigating business risks. Further key considerations for VC firms include the product or service offered by the startup, its market potential and risks, and the startup's autonomy from external influences.[37] Should a VC, after detailed analysis, decide to invest in the startup, this intention is commonly conveyed through a "Letter of Intent." Venture Capital, in conjunction with funding from Business Angels, represents another equity financing option, generally considered after the business model's initial validation. Venture capital allows early-stage companies to secure the necessary funds to develop their concept

[37]M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, 2023.

into a viable business model. Traditional financing sources, like banks, typically are not available at these early stages due to the unmitigable financial risk. Therefore, venture capital becomes fundamentally essential for startups.[38] Beyond startups, established firms also leverage venture capital to finance growth. Distinguishing it from traditional bank financing, VC financing sees the VC firm committing to finance a business endeavor or risk over the long term, usually spanning three to eight years, without requiring collateral from the recipient. In this arrangement, the founders aren't obligated to repay or accrue interest on the investment.[39] Thus, the VC shoulders the entrepreneurial risk of the startup as a liable partner, and in return, directly partakes in the company's success. In the foundational and early growth phases of a start-up, acquiring venture or risk capital from backers is a hallmark. Concurrently, the evolution of the company hinges on attracting top-tier talent, notably in leadership roles, prompting discussions about their potential stake in the company's triumphs.[40] Start-ups often grapple with the conundrum that due to their brief corporate existence, modest credit standing, inherent default risks, and absence of solid collateral, external financiers hesitate to extend

[38] W. WEITNAUER, *Handbuch Venture Capital. Von der Innovation bis zum Börsengang*, 2022; A. F. URICCHIO, P. MANNO, *Le emergenze ambientali tra crisi geopolitica e questione ambientale*, Rubbettino, 2023.
[39] W. WEITNAUER, *Handbuch Venture Capital. Von der Innovation bis zum Börsengang*, 2022.
[40] BWK, *Die Start-up Strategie der Bundesregierung*, 2022.

credit.[41] The capital market presents an alternative funding avenue.[42] By tapping into it, a company can amplify its growth trajectory by releasing new shares or floating bonds. Entering the public domain enhances external financing prospects, given the influx of investor capital, which fortifies the firm's equity base. Nevertheless, the stock market is a realm accessible primarily to entities poised to issue shares, and transitioning, for instance, into a public company is a move most start-ups contemplate only in advanced stages, if ever. Furthermore, this shift demands a certain level of market readiness.[43] In light of these dynamics, Venture Capitalists emerge as potential partners, seeing an opportunity to capitalize on the start-up's promising trajectory, with an eye on a substantial return on investment. At the heart of Venture Capital engagements is an understanding that a deep and ongoing dialogue between the investor and entrepreneur commences from the outset of the partnership. Frequently, the investor, who usually infuses the start-up with equity via a minority interest, retains a prerogative to guide both the strategic and daily management decisions.[44]

41 OECD), *Financing SMEs and Entrepreneurs 2016: An OECD Scoreboard*, OECD Publishing, 2016.
42 EU COMMISSION, *Effectiveness of tax incentives for venture capital and business angels to foster the investment of SMEs and start-ups*, 2017.
43 INVEST EUROPE, *European Private Equity Activity. Statistics on Fundraising, Investments & Divestments*, 2015.
44 EU COMMISSION, The *Effects of Tax Reforms to Address the Debt-Equity Bias on the Cost of Capital and on Effective Tax Rates*, *Taxation Paper No 65,* 2016*;* M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, 2023.

a) Tax consequences of introducing new shareholders to a sole proprietorship

Should the nascent enterprise commence as a sole proprietorship, the entry of an investor now fundamentally alters its character to that of a partnership. When admitting an individual as a shareholder to a commercial sole proprietorship, coupled with a payment into the assets of the founding proprietor, this action is fiscally viewed as both a combination contribution into the emergent partnership and a simultaneous disposal.[45]

The object of this disposal encompasses a portion of the sole proprietorship's business assets, particularly that which is transferred in favor of the incoming investor to the partnership. Should the entirety of hidden reserves of the overall operation be disclosed in relation to the contribution (through payment and valuation at fair market value concerning the founder's stake in the new partnership), the principles of §§ 16 and 34 Income Tax Act (EStG) predominantly apply to the profit's taxation.[46] However, if the contributor acquires co-entrepreneur shares in the accepting partnership, the tax reduction of § 34 Income Tax Act is waived per § 24 Paragraph 3 Sentence 3 Conversion Tax Act in conjunction with § 16 Paragraph 2 Sentence 3 Income Tax Act.[47]

[45] A. F. URICCHIO, E. JORIO, *Regionalismo differenziato: gli adempimenti preparatori delle Regioni*, in Astrid online, 5, 2023; BFH, Decision dated 18.10.1999 - GrS 2/98, *Federal Tax Gazette*, 2000 II, 123.

[46] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, 2023.

[47] Assuming a hypothetical ongoing profit, cf. BMF, letter dated 11.11.2011, *Federal Tax Gazette*, 2011 I, 1314 – Conversion Tax Decree, Section 24.12.

Independent of the income tax evaluation as ongoing profit, from a trade tax perspective, it constitutes a business disposal profit.[48] An existing loss carryforward might thus be utilized – within the limits of the minimum taxation – at the founder's level.[49]

Income from trade operations also encompasses profits derived from the sale of an entire business or a subunit thereof (as per § 16 para. 1 no. 1 EStG). The same applies to the sale of an entire stake in a partnership. The gain from the sale is defined by § 16 para. 2 sentence 1 Income Tax Act (EStG) as the amount by which the sale price, after deduction of sales costs, exceeds the value (of the share) of the operational assets. Should certain conditions be met, this gain might be favorably taxed under § 34 Income Tax Act (EStG). Additionally, a one-time tax-free allowance of up to €45,000 may be applied, provided the taxpayer has reached the age of 55 or is permanently disabled in the social insurance sense.[50] This allowance decreases by the amount by which the gain from sale exceeds €136,000, as per § 16 para. 4 sentence 3 Income Tax Act (EStG). Consequently, any gain exceeding €181,000 nullifies this allowance. In instances where only a portion of a partner's share is sold, the gain is considered as non-privileged ongoing profits, per § 16 para. 1 sentence 2 EStG. Sections 16 para. 4 and 34 EStG do not apply. The cessation of

[48] FINANCE COURT OF COLOGNE, *Judgment dated 5.4.2000 - 4 K 7531/96*, *EFG*, 2000, 1271.

[49] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, NWB, 2022, 160-172.

[50] For a comparison to Italy, cf. A.F. URICCHIO, C. SPRIVIERI, *Sul momento consumativo del delitto di "dichiarazione fraudolenta mediante uso di fatture o altri documenti per operazioni inesistenti" in presenza di un'eventuale successiva dichiarazione integrativa*, in *Responsabilità d'impresa*, 1, 2022.

operations, according to § 16 para. 3 sentence 1 EStG, is akin to a business sale. If there's no sale during this cessation, the fair market value is used to determine the gain from sale, as stipulated in § 16 para. 3 sentences 6 and 7 EStG. In contrast, business dissolution occurs gradually over an extended period. Profits from such dissolution are non-privileged and are deemed as ongoing profits. Exceptional income might be favorably taxed under § 34 EStG by applying a reduced tax rate, provided it's classified as extraordinary income per § 34 para. 2 EStG. This includes gains from sales and cessations as per §§ 14, 14a para. 1, 16, 18 para. 3 Income Tax Act (no. 1), compensations according to § 24 no. 1 Income Tax Act (no. 2), usage fees and interests as per § 24 no. 3 Income Tax Act if paid for a period exceeding three years (no. 3), and remunerations for multi-year activities spanning at least two assessment periods and more than twelve months (no. 4).[51]

Generally, the so-called "fifth rule" applies according to § 34 para. 1 Income Tax Act (EStG).[52] This rule induces a tax reduction by mathematically distributing the income over five years, thereby accessing a lower tax progression. The income tax imposed on the extraordinary income equals five times the differential between the income tax for the income, reduced by these earnings, and the income tax for the remaining

[51] T. JESGARZEWSKI, J. M. SCHMITTMANN (a cura di), *Steuerrecht Grundlagen und Anwendungsfälle aus der Wirtschaft*, 2020; EU COMMISSION, The *Effects of Tax Reforms to Address the Debt-Equity Bias on the Cost of Capital and on Effective Tax Rates*, *Taxation Paper, No 65,* 2016.

[52] A. F. URICCHIO, *Verso una estensione della categoria di redditi di lavoro al lavoro dei robot: una prospettiva non più lontana*, in M. T. P. CAPUTI JAMBRENGHI, A. RICCARDI (a cura di), *La sostenibile leggerezza dell'umano. Scritti in onore di Domenico Garofalo*, 2022.

taxable income plus one-fifth of these earnings.[53] Exceptionally, a reduced tax rate, which a taxpayer can claim once in their lifetime, is applicable under § 34 para. 3 EStG, provided: The taxpayer has reached the age of 55 or is permanently disabled, a business is sold or ceased, and the gain from sale remains within the limits of § 34 para. 3 EStG. In this scenario, the reduced tax rate amounts to 56% of the average tax rate that would be applicable if the statutory income tax was based on the entire taxable income, inclusive of income subject to the progression proviso, but no less than 14%.[54]

b) Joining a corporation – advantages for venture capital investors

Nevertheless, the vast majority of venture capital investors likely favor an investment in a corporation over a stake in a partnership. This preference arises as often venture capital companies act as risk capital providers, hoping to fully capitalize on a 95% exemption from disposal proceeds per § 8b Paragraphs 2 and 3 Corporate Income Tax Act upon appreciating the value of their startup investment. From the perspective of a startup corporation's founder, it is imperative to ensure that a detrimental stake exceeding 50% of the shares is not attained during a venture capital

[53] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, 2023.
[54] T. JESGARZEWSKI, J. M. SCHMITTMANN (a cura di), *Steuerrecht Grundlagen und Anwendungsfälle aus der Wirtschaft*, 2020.

engagement, lest the accumulated loss carryforwards are jeopardized (§ 8c Paragraph 1 Sentence 1 Corporate Income Tax Act).[55]

c) So-called phantom stocks as performance incentives for senior employees

The second major theme during a startup's initial growth phase involves granting company shares to top-tier employees. Startups primarily derive their innovative prowess from their employees and knowledge bearers, who frequently forego market-rate salaries in exchange for incentives through employee share schemes. Conflicts potentially arise here as, especially with startups and venture capital investments, founders and investors typically resist diluting their voting and administrative rights, nor do they wish to grant extensive information and control rights.[56] A potential solution might be found in issuing so-called virtual shares (or Phantom Stocks).[57] These shares can lure or retain top talent in cash-strapped startups with the promise of a future profit share, aiming for a rapid company value increase and a successful company sale.[58] The bet is simple: If the exit succeeds (often referred to as a build-to-sell strategy),

[55] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, NWB, 2022, 160-172.
[56] See in detail H. SCHRADE, F. DENNINGER, *DStR*, 2019, 2616.
[57] Cfr. G. SPINDLER in *Munich Commentary on the Stock Corporation Act*, 5th ed., 2021, § 87 Section 117; A. F. URICCHIO, E. JORIO, *Regionalismo differenziato: gli adempimenti preparatori delle Regioni*, in *Astrid online*, 5, 2023.
[58] EU COMMISSION, *Effectiveness of tax incentives for venture capital and business angels to foster the investment of SMEs and start-ups*, 2017.

employees will significantly benefit financially through the virtual share programs from the exit proceeds. These virtual shares are solidified through a contractual obligation between the startup and participating employees, establishing the bonus-like claim of the employee against the company.[59]

4.2. Tax implications for the employee

Upon the payout of the proceeds claim in the event of an exit, the employee realizes income as per § 19 Income Tax Act.[60] Here, a significant advantage of virtual shares over the granting of "real" company shares emerges: If "real" shares are transferred to employees either gratuitously or at a discount, the associated monetary benefit is typically taxed as salary at the time of share allocation (§ 8 Paragraph 2 Sentence 1 Income Tax Act). This associated tax payment, without actual inflow, could often be unfeasible for startup employees.[61]

[59] W. WEITNAUER, *GWR*, 2020, 127; H. SCHRADE, F. DENNINGER, *DStR*, 2019, 2615.
[60] Cfr. A. F. URICCHIO, G. CHIRONI, F. SCIALPI, P. DISO, *Le zone economiche speciali nella cornice nazionale ed interregionale*, in F. AMATUCCI, C. FONTANA (a cura di), *L'impatto delle zone economiche speciali sugli ordinamenti giuridici e finanziari nazionali*, Editoriale Scientifica, 2022.
[61] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, NWB, 2022, 160-172.

a) Tax implications at the company level

At the company level, no provision needs to be made for the purely exit-dependent employee claim since it represents a forward-looking performance incentive.[62] Consequently, there's no need for a release obligation of the shareholders towards the company to compensate for a negative earnings impact.[63]

b) Potential implications for founding shareholders and investors

The virtual participation of employees dilutes the economic shares of venture capital investors. As a result, there often arises an agreement between the founding shareholders and venture capitalists whereby the founding shareholders bear the economic effects of these virtual participations up to a certain extent (e.g., up to 10% of their shareholding).[64] This assumption of liability by the founding shareholders leads, in the event of an exit, to subsequent acquisition costs in accordance with Section 17 Paragraph 2a Sentence 3 No. 1 of the Income Tax Act.[65] For the startup GmbH, given the devaluing nature of the phantom stock obligation, this exemption by the founding shareholders represents a

[62] BFH, Judgment dated 15.3.2017 - I R 11/15, *BStBl*, 2017 II, 1043.
[63] Cfr. W. WEITNAUER, *GWR*, 2017, 349.
[64] See W. WEITNAUER, J. DUNKMANN, *GWR*, 2013, 371; A. F. URICCHIO, E. JORIO, *Regionalismo differenziato: gli adempimenti preparatori delle Regioni*, in *Astrid online*, 5, 2023.
[65] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, 2023.

corresponding hidden contribution as per Section 8 Para. 3 Sentence 3 of the Corporation Tax Act, which needs to be recorded in the tax contribution account (Section 27 Corporate Income Tax Act).

5. Conveyance of genuine shares as motivations for essential personnel

In addition to virtual participations, "real" shares can also be transferred to employees. To mitigate the aforementioned tax disadvantage of direct taxation without cash inflow, the Fund Location Act (Act to Strengthen the Fund Location Germany and to Implement Directive [EU] 2019/1160 amending Directives 2009/65/EC and 2011/61/EU with regard to the cross-border distribution of collective investment funds [Fund Location Act – FoStoG]) was announced in the Federal Law Gazette 2021 I p. 1498 on June 10, 2021. This is intended to provide stronger tax support for equity investments in startups. Essentially, two new or expanded reliefs were introduced.[66]

a) Promotion of equity investments: § 3 Nr. 39 Income Tax Act

[66] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, NWB, 2022, 160-172.

Section 3 No. 39 Income Tax Act Firstly, Section 3 No. 39 of the Income Tax Act was amended, which allows companies to offer their employees tax-free and social-security-exempt benefits from company participations up to an annual maximum amount.[67] The tax-free maximum amount for asset participations was raised from €360 per year to €1,440. This new provision applies to asset participation transfers after June 30, 2021. It is essential to note as a condition for tax exemption, according to Section 3 No. 39 Sentence 2 Income Tax Act, that the offer of the free or discounted transfer of shares must be open to all employees who have been continuously employed by the company for one year or longer at the time of the offer's announcement. Thus, tax exemptions are not granted if they are meant to benefit only selected employees.[68]

b) Promotion of equity investments: section 19a Income Tax Act

The so-called "Funds Location Act" (FoStoG) was adopted by the German Bundestag in April 2021 and the German Bundesrat in May 2021. Its intent is to bolster Germany as a fund hub, especially for venture capital and other risk capital funds. Germany aims to become more appealing for startups. The federal government identified them as pivotal for the innovation and growth potential of the German economy. Moving

[67] For a comparison to Italy, cf. A. F. URICCHIO, *Verso la riforma della giustizia tributaria: forse è la volta buona*, in *Unità e Pluralità del sapere giuridico*, 2022.
[68] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, 2023.

forward, it will be easier for startups to grant shares to their employees, making it more convenient to attract highly skilled professionals. The current tax framework for such equity grants is notably unfavorable in Germany compared to international standards. The new Section 19a of the Income Tax Act (EStG) introduces a temporary tax exemption for income from non-self-employed work when a company transfers asset participation to an employer either free of charge or at a reduced cost. This must be in addition to the regular salary. This new provision applies to all transfers made after June 30, 2021. Taxation of the monetary benefits from a gratuitous or discounted share purchase by the employee will only occur after twelve years, or when the employer transfers the shares to the employee or if the employment relationship ends earlier.[69]

Any potential decrease in the value of the shares at this time can be considered during taxation. Moreover, the general exemption for asset participation per Section 3 No. 39 EStG has been raised from 360 euros to 1,440 euros annually. Privileges apply to companies that were founded no more than twelve years ago and are considered small or medium-sized enterprises (SMEs) at the time of transfer. The thresholds include: fewer than 250 employees, 50 million euros in annual turnover, and 43 million euros in annual balance sheet total. According to the new Section 19a Income Taxation Act (EStG), taxation takes place twelve years post-transfer or if beforehand, the asset participation is transferred partially or

[69] Cfr. A. F. URICCHIO, *Crisi energetica, transizione ecologica e ruolo della fiscalità*, in *Rass. Trib.*, 4, 2022.

in full, either for consideration or gratuitously, or if the employment relationship with the current employer ends.[70]

To assess the taxable value, the point of share transfer to the employee is the reference, even if the actual taxation occurs much later. If the shares have decreased in value by the time of taxation and their fair market value is below the value of the non-taxed salary, then only the actual market value minus any payments made is taxable. However, this doesn't apply if the decrease isn't business-related or is due to a corporate measure, especially a distribution or capital reduction. On the other hand, any increase in value and dividends are subject to the flat-rate withholding tax of 25% (plus solidarity surcharge and church tax) or, under certain conditions, the partial income procedure, whereby 40% of the income is tax-free. When employment ends, the law provides a relief: any income tax borne by the employer is not part of the taxable income. A new addition is that the local tax office must confirm the non-taxed benefit by the employer after a share transfer upon request. The reason being to prevent future disputes with tax authorities concerning the share value at the time of the transfer. This new rule of Section 19a EStG also applies when partnerships indirectly hold the asset participation, a common practice to avoid notarization during employee turnover. If at least three

[70] EU COMMISSION, *Effectiveness of tax incentives for venture capital and business angels to foster the investment of SMEs and start-ups*, 2017.

years have passed since the share transfer, one can apply the one-fifth rule, which might lead to a reduced tax burden.[71]

Regarding wage tax deduction, employers can only avoid taxing the transferred asset participation with the employee's consent. The provisional non-taxation can't be recovered during income tax assessment. In terms of social security, this provisional exemption doesn't apply. Thus, the share transfer remains subject to social security contributions at the time of transfer unless already exceeded by other wages. It's hoped that soon there'll be an adjustment to the social security regulations in line with the new Section 19a Income taxation Act (EStG), bringing it in sync with tax law. The Bundesrat also advocated for this but was ultimately unsuccessful. Effective July 1, 2021, the general exemption for asset participation under Section 3 No. 39 EStG has been raised from 360 euros to 1,440 euros per calendar year. Hence, it already applies for the 2021 assessment period. The goal is to encourage all employers, regardless of their size and duration of existence, to grant asset participations to their employees.[72] This presupposes that all employees who have been continuously employed for a year or longer at the time of the offer are eligible. It must be real equity participation. Selective employee capital participation remains ineligible for this general exemption, as are phantom stocks. In comparison to Europe, this exemption is still relatively low,

[71] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, 2023.

[72] A. F. URICCHIO, *Capacità contributiva e "agenda" del terzo millennio: dalla tutela dell'ambiente all'economia circolare*, in V. MASTROIACOVO, G. MELIS (a cura di), *Il diritto costituzionale tributario nella prospettiva del terzo millennio*, 2022, 150 ss.

even after the increase. It would be desirable if a higher, separate exemption for asset participations according to the new Section 19a (1) EStG were introduced. The Bundesrat advocated for an additional 3,000-euro exemption, but this was not successful. As of July 1, 2021, startups have the opportunity to genuinely involve employees in the company's capital with tax benefits.[73] The taxation point is deferred, and at the same time, any increase in value of the capital participation and future dividends are already taxable as income from capital assets subject to the withholding tax or the partial income procedure. This advantage of genuine employee participations over phantom stocks is significant. Thus, it's worth reconsidering existing phantom stock plans and possibly replacing them with genuine equity participations. Likewise, genuine employee participations might be preferable over phantom stock plans in the future.[74]

5.1. Intermediate conclusion

In the second life phase of a startup, as opposed to the initial phase, there's a clear trend towards a corporation. This is true from the perspective of both venture capitalists and the startups themselves. To grant shares to especially qualified (leadership) employees, virtual participations are likely

[73] A. F. URICCHIO, P. DE GIOIA CARABELLESE, *La Council Tax nel Regno Unito come modello per la finanza locale italiana*, in *Rivista della Corte dei Conti*, 6, 2022.
[74] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, 2023.

to prove more beneficial than "real" participations, despite the regulations introduced in 2021.[75] This is because, on the one hand, there's no further real dilution of shares from the perspective of the founders or venture capitalists, and on the other, there's no taxation due to a lack of monetary benefit grant to the employees.[76]

6. Gearing up for sale: transitioning from individual ownership to enduring investment

When a startup owner sells their sole proprietorship or their stake in a business partnership, such a sale usually enjoys tax advantages as laid out in Sections 16 and 34 of the Income Tax Act. Section 16 (4) of the act provides a tax exemption for profits up to a certain limit. Furthermore, any profit beyond this exemption is taxed at a reduced rate, as described in Section 34. Typically, this involves applying the one-fifth rule (Section 34 (1)), though on request, this rate can reach 56% of the average tax for disposal profits not exceeding €5 million (Section 34 (3)).[77]

A notable tax perk is the non-applicability of trade tax on the disposal profit, as indicated by R 7.1 (3) sentence 1 no. 1 of the Trade Tax

[75] EU COMMISSION, *Effectiveness of tax incentives for venture capital and business angels to foster the investment of SMEs and start-ups*, 2017.
[76] For a detailed discussion, see H. SCHRADE, F. DENNINGER, *German Tax Law*, 2019, 2616.
[77] A. F. URICCHIO, *Verso la regolazione e la tassazione dell'intelligenza artificiale: dal fantadiritto a prospettive di riforma*, in *Rivista di diritto tributario internazionale*, 2, 2022.

Guidelines. But, many other tax reliefs may not be valid. For instance, most startup founders might be too young to qualify for the tax breaks under Section 16 (4) or to be granted the "half" average tax rate as per Section 34 (3). Plus, the benefits of the one-fifth rule (Section 34 (1)) decrease with rising disposal profits. This could mean that if they retain the sole proprietorship structure, these entrepreneurs may end up with a near 50% tax obligation, factoring in a 45% income tax and additional charges like the solidarity surcharge and potential church tax.

Considering share disposal in a corporation: An alternative approach might be to restructure the sole proprietorship into a corporation during its early stages, following Sections 20-23 of the Conversion Tax Act, and later selling the corporation's shares. In such a scenario, the subsequent sale would primarily be governed by Section 17 of the Income Tax Act. This would subject only 60% of the disposal profits to the founder's personal income tax, as per Section 3 No. 40 letter c alongside Section 3c (2) of the same act. This translates to an effective tax of roughly 30%, inclusive of additional charges. Such a strategy presents a nearly 20% tax savings in contrast to the basic sale of a sole proprietorship.[78]

While undergoing the transition, certain aspects should be considered:

Transferred business assets should ideally be evaluated at their market value as stated in Section 20 (2) sentence 1 of the Conversion Tax Act, which might uncover concealed reserves. However, under specific

[78] A. F. URICCHIO, *Capacità contributiva e "agenda" del terzo millennio: dalla tutela dell'ambiente all'economia circolare*, in *Diritto e processo tributario*, 2, 2022.

conditions outlined in Section 20 (2) sentence 2, these assets can be assessed at book value or a midway valuation, given certain conditions are met.[79]

The duration between the asset transfer and its eventual sale is critical. The entrepreneur will possess shares derived from the transition. If these shares are traded within seven years of the transfer, the tax would be applied retroactively on hidden reserves from the time of transfer, decreasing annually by 1/7, as per Section 22 (1) of the Conversion Tax Act. Moreover, Section 22 (1) sentence 6 of the act stipulates other equivalent conditions. Taxation following the partial income procedure becomes applicable only after this seven-year mark. This ensures that the entrepreneur, by transitioning their business into a corporation, is never at a tax disadvantage compared to the original scenario. Equal tax liabilities arise if shares transferred are sold within one year post-transfer. It's worth noting potential disparities if the company's valuation drops between transfer and sale, contingent on the decline's scale and duration, which might lead to a less favorable tax condition.[80]

6.1. Holding model

[79] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, 2023.

[80] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, NWB, 2022, 160-172; A. F. URICCHIO, *Il ruolo di Anvur nella valutazione dei percorsi formativi per gli insegnanti*, in A. DE VIVO, M. MICHELINI, M. STRIANO (a cura di), *Professione insegnante. Quali strategie per la formazione?*, 2022.

Further steps to optimize income tax might entail converting the sole proprietorship to a holding corporation and subsequently transferring its shares (in line with Section 21(1) of the Conversion Tax Act). Here, the Holding GmbH would eventually sell the shares of the operational startup GmbH. Profits from this sale, according to Sections 8b(2) and 8b(3) of the Corporate Tax Act, would be taxed at just 5% for corporate and trade tax, leading to an effective tax rate of around 1.5%. If profits are kept within the holding company (a process known as the retention effect), they aren't usually taxed at the shareholder's level. However, any distributed dividend will be subject to a 25% withholding tax, along with additional charges like the solidarity surcharge and church tax. When we compare this to the earlier scenarios, the startup owner gets to decide the taxation level for disposal gains beyond the nominal 1.5%.

Given this backdrop, tax-wise, it's beneficial for startups to have a holding structure with the holding corporation at the helm, overseeing the operational startup entity. Post-exit, this is advantageous for entrepreneurs since the holding company can reinvest the 98.5% post-tax disposal profit, for example, by supporting other startups as a venture capital source or purchasing real estate via a subsidiary, leveraging the extended asset-managing company deductions as per Section 9(1)(2) of the Trade Tax Act. In the latter case, the consistent taxation for the real estate entity would stand at 15%. Often, after selling the startup, the holding company transforms into the "family office", centralizing all business and asset

management functions to optimize taxes. So, are there any downsides to starting with a holding structure? One significant drawback is the inability to counterbalance startup deficits or the potential forfeiture of loss carryforwards when incorporating venture capital stakeholders. At first glance, this may seem to advocate initiating as a partnership to use startup losses quickly, transitioning to the holding structure once profitability is achieved. However, the challenge lies in the seven-year commitment period, ensuring the full perks of the holding structure only after this period. This is tricky, considering businesses often undergo sales within three to four years.[81]

6.2. Solution approach: limited liability company & atypical silent partnership

The objective, therefore, is to implement the holding model from the outset while still utilizing startup losses at the founder's level (the term being "part-time job"). For this, the founding partner additionally participates in the loss-making startup company as an atypical silent partner, resulting in the legal form of a limited liability company & atypical silent partnership. Unlike a typical silent partnership, where the silent partner participates in the profit (and marginally in the loss) solely through an investment, the atypical silent partnership is characterized by the

[81] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, NWB, 2022, 160-172.

atypical silent partner (in this case, the founding partner) also sharing in the hidden reserves and business value while maintaining a degree of influence over the management.[82] This partner is treated like a co-entrepreneur, earning commercial income pursuant to Section 15(1)(1)(2) of the Income Tax Act from the atypical silent participation. A noteworthy advantage is that the formation of the atypical silent partnership and the drafting of the partnership agreement are generally not bound by a specific form. Moreover, registration of the atypical silent partnership in the commercial register is not necessary since it is an internal company.[83]

a) Loss offset

Profit and loss shares are assigned to the atypical silent partners at the level of the atypical silent partnership as part of the separate and uniform determination according to Section 180(1)(2)(a) of the Tax Code (.[84] The loss shares of the atypical silent can be offset against income from other sources, just like other partnerships. However, offsetting the losses against

[82] Cfr. A. COMELLI, *Profili europei della tassazione ambientale*, in *Diritto e pratica tributaria*, 2023,6, 2265 ss; Cf. V. PRINZ, J. KAHLE, in *Beck's Handbook of Personal Partnerships*, 2020, para. 50 ss.
[83] Cfr. A. COMELLI, M. ALLENA, *Ecological transition and Environmental taxation*, 2023, Milano, *passim;* A. F. URICCHIO, *I tributi ambientali e la fiscalità circolare*, in *Dir. prat. trib.*, 2017, I, 1849 ss.; M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, NWB, 2022, 160-172; A. F. URICCHIO, *Le prospettive di riforma della fiscalità ambientale in ambito UE nell'ottica della transizione ecologica e della fiscalità circolare*, in *Rivista di diritto tributario internazionale*, 1, 2022.
[84] FINANZGERICHT MÜNCHEN, judgment of 8.10.2018 - 7 K 519/14; R. BITZ in H. LITTMANN, R. BITZ, M. PUST, *Income Tax Law*, 2020, Section 15 EStG para. 7.

other income requires a natural person as a participant (Section 15(4)(8) of the Income Tax Act). In this manner, the isolation of losses in the corporation is mitigated. At the same time, the 95% disposal profit exemption according to Sections 8 b (2) and (3) of the Corporate Tax Act is ensured unrestrictedly at the holding level from the outset.[85] Potential considerations include the restrictions of Section 15a of the Income Tax Act when a negative capital account arises. However, by applying Section 15a EStG, the so-called minimum taxation according to Section 10 d (2) of the Income Tax Act is avoided, as there is no corresponding reference there.[86]

b) Tax pitfalls

bb) Understanding limited liability company (LLC) & atypical silent partnership from a taxation perspective

Starting a business involves a myriad of decisions, from choosing a name to defining the legal structure. Among the various forms is the combination of a Limited Liability Company (LLC) and an atypical Silent Partnership. The two entities, though separate, can work synergistically under certain conditions, benefiting both parties involved. The initial

[85] A. F. URICCHIO, *The Future of European Environmental Policy in Appreciation of German Federal Constitutional Jurisprudence*, in *The Italian Law Journal*, 8, 2022.
[86] Cfr. A. COMELLI, *Profili europei della tassazione ambientale*, in *Diritto e pratica tributaria*, 2023, 6, 2265 ss; M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, 2023.

transfer should be highlighted and regarded as essential part. The first significant step in establishing a combined entity involves the LLC transferring its business operations to the atypical silent partnership. This might seem like an internal reshuffling, but it is essential for several reasons. The Conversion Tax Act, particularly § 24, paragraph 2, sentence 2, sheds light on this. As per this stipulation, any transfer should be made by ensuring the continuation at book value. This strategy helps in evading potential pitfalls, such as the inadvertent exposure of hidden reserves that can attract undesirable tax implications. [87]

In the partnership model, the founding partner can introduce assets, influencing both tax advantages and profit distribution, emphasizing their pivotal role in financial outcomes.[88]

The role of the founding partner in this partnership model is indispensable. This individual has the option to contribute in kind. It means they can bring assets to the partnership, which will then be valued according to their partial value, as dictated by § 6, para. 1, no. 5 of the Income Tax Act. However, if they wish to avoid any immediate tax implications, they can introduce assets from their operational holdings tax-

[87] *See* K. WACKE, *§ 15 Income Tax Act*, in F. SCHMIDT, EStG, *2021 para. 350;* B. BAUSCHATZ, P. LEVEDAG, *§ 24 Conversion Tax Act*, in M. WIDMANN, B. BAUSCHATZ, *eCommentary*, 2021, *para. 87; unless otherwise agreed in the partnership agreement; however, this must represent a customary profit-sharing, FEDERAL FINANCE COURT, Judgment of 18.6.2015 - IV R 5/12, in* BStBl, *2015 II, 935.*

[88] H. SPREITZER, *Haufe Tax Office*, in *HI1098735,* para. 48, 2019; P. JOHANNEMANN, T. HÄUSELMANN, *Corporate Tax Law*, in J. LÜDICKE, K. SISTERMANN, *para. 13;* A. F. URICCHIO, *Profili fiscali dell'impiantistica sportiva*, in AA. VV., *Argomenti di diritto nazionale e internazionale dello sport e di giustizia sportiva,* Edizioni Duepuntozero, *2022.*

free, a provision under § 6, paragraph 5, sentence 3 of the Income Tax Act. The size and nature of this contribution are not merely procedural.[89] It has twofold implications: it establishes the potential for offsetting any future losses, a guideline articulated in § 15a of the Income Tax Act. Furthermore, it has a direct bearing on the distribution of profits or losses within the partnership.[90] The structure rewards silent partners differently based on their stake in the company. If one holds a minimum of 10% in the LLC, the rewards are more pronounced. Such shares, as per the established norms, are recognized as 'special operating assets II', specifically catering to the silent participation. It is not just a title; this classification has ramifications for the holding or parent company. Profits that flow to the silent partner from the LLC must be earmarked as 'special operating income'. This allocation subjects them to a partial income treatment as per § 3, no. 40, letter d of the Income Tax Act. Furthermore, any costs the silent partner incurs while refinancing their contribution are not lost. Recognized as special operating expenses, they effectively reduce the taxable profit share, making the financial proposition more appealing. A Bright Spot for Atypical Silent Partnerships When it comes to trade tax, the atypical silent partnership structure shines brightly. For starters, it enjoys a tax exemption up to €24,500. Additionally, if the founding partner has paid any trade tax, they might be eligible for a credit on their income

[89] H. PROTZ, S. KROME, *Beck's Manual of the Limited Liability Company*, in V. PRINZ, J. WINKELJOHANN, 2021, *paras. 191-192.*
[90] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen, 2023.*

tax. The specifics of this provision are spelled out under § 35 of the Income Tax Act. Every business has a life cycle, and there might come a time when the holding company decides to sell the start-up LLC to an investor. If such a decision is on the horizon, typically within the next two to three years, preparations should begin well in advance. The partnership, as it stands, will need to be dissolved. But the process isn't straightforward. The holding company's equity, which is essentially a mirror of the founding partner's assets within the partnership, should be extracted methodically. For those seeking a smooth transition, one strategy stands out: Setting up a Limited Liability Company & Limited Partnership, known as GmbH & Co. KG in some jurisdictions. If initiated alongside the atypical silent partnership, and with the founding partner holding a stake, it can prove beneficial. The tangible benefit? The equity of the holding company, categorized as a special operating asset, can seamlessly move tax-free into the combined assets of the GmbH & Co. KG. This maneuver essentially means that within the parameters of his atypical silent partnership, the founding partner is now free of any special operating assets. Before the prospective sale materializes, the partnership's dissolution can be orchestrated. For instance, the founding partner can bow out of the partnership and sell his silent stake back to the LLC, a move supported by § 234 of the Commercial Code.[91] When the atypical silent stake is up for sale, it primarily aligns with the guidelines of § 16,

[91] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, in *NWB*, 2022, 160-172.

paragraph 1, sentence 1, no. 2 of the Income Tax Act.[92] The best tax outcomes are reserved for those scenarios where the entire entrepreneurial share changes hands. Post-sale, if there's a surge in capital gains, it's not an unabated financial windfall. The gains can be balanced out with any permissible losses from prior years, courtesy of § 15a of the Income Tax Act.[93] The silent partner's departure signals the culmination of the atypical silent. Subsequently, its assets naturally flow into the operating start-up LLC under § 738 of the Civil Code.[94] However, if the founding partner exits with a payout that overshadows the taxable equity, there are tax implications to consider. Careful adjustments are required to keep the tax balance sheet in check. With the silent partnership chapter closed, the business operations revert to their original form, nestled within the start-up LLC. From here on, a potential sale by the holding company to any investor is a relatively streamlined affair, especially from a tax perspective, thanks to provisions in the Corporation Tax Act. In summary, while the combined entity of an LLC and atypical Silent Partnership offers distinct advantages, navigating its intricacies requires a meticulous understanding

[92] A. F. URICCHIO, *Sulla legittimità costituzionale dell'obbligo di versamento all'erario posto a carico delle BCC che optino per il conferimento del proprio patrimonio netto a una SPA*, in *Giurisprudenza costituzionale*, 2022, n. 1.
[93] See J. SEUFER, *§ 15a Income Tax Act*, in K. KIRCHHOF, K. KULOSA, A. RATSCHOW, *Beck's Online Commentary*, 2021, paras. 145-146.
[94] BMF, decree of 20.11.2019, *Federal Tax Gazette*, 2019 I, paras. 10, 16, 1291; BFH, judgment of 17.12.2014 - IV R 57/11, *Federal Tax Gazette*, 2015 II, 536.

of both the legal and financial landscapes. It is a dance of strategy, timing, and compliance, but when done right, the benefits are manifold.[95]

c)For the sake of mere completeness: option under § 1a of the corporate Income Tax Act

Section 1a of the Corporate Income Tax Act provides the opportunity for partnerships to be taxed as a corporation. Transitioning between the two tax regimes is less formalistic than the methods previously used under the Conversion Law/Conversion Tax Law.[96]

It's common for start-up entrepreneurs to initially operate their business as sole proprietorships. In such cases, the new option under § 1a of the Corporate Income Tax Act isn't applicable, as it's limited to limited partnerships, general partnerships, and partnership companies. Furthermore, the personal partnerships to which § 1a of the Corporate Income Tax Act applies, and especially the concept of special operational revenues and expenses in an international context, are largely unknown.[97] This is likely to further diminish its appeal. In relation to this option, it's also noteworthy that it has direct implications for any real estate involved. For instance, according to §§ 5 and 6 of the Real Estate Transfer Tax Act, the tax-neutral transfer of properties to or from an identical total

[95] A. F. URICCHIO, M. AULENTA, *Profili tributari e finanziari delle società partecipate pubbliche e delle società in house*, in *Gazzetta Forense*, n. 4, 2017.
[96]Cfr. detailed in F. BRÜHL, C. WEISS, *DStR*, 2021, 889, 945, 1617.
[97] Cfr. M. KUDERT, T. KAHLENBERG, *PIStB*, 2017, 44; FG HAMBURG, judgment of 4.8.2021 - 2 K 102/18, *NWB*, QAAAH-94630.

ownership is possible. Exercising the option under § 1a of the Corporate Income Tax Act triggers a so-called "real estate transfer tax block". As a result, the aforementioned tax-neutral transfers can no longer be carried out without issues (§ 5 paragraph 1, clause 2, § 6 paragraph 3, clause 4 of the Real Estate Transfer Tax Act). Thus, the perceived benefit of reduced formalism is more than offset by the various disadvantages embedded in § 1a of the Corporate Income Tax Act.[98]

7. Conclusions

From a tax perspective, start-up companies require a dynamic legal framework, reflecting the different stages of their lifecycle. During the initial loss-making phase, a personal enterprise is clearly preferred, especially when the founder has other sources of income, such as a "part-time job".[99] This recommendation shifts during the subsequent financing/capital increase phase towards a corporation, as this is often preferred by venture capitalists, who typically operate as corporations themselves. Moreover, it's considerably more challenging in the world of

[98] F. GALLO, A. F. URICCHIO, *La tassazione dell'economia digitale*, Cacucci, 2022; M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, in *NWB*, 2022, 160-172.

[99] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, in *NWB*, 2022, 160-172; F. L. GIAMBRONE, *Tax Treatment of Professional Football Players Remuneration in Germany and Italy. A Comparative and EU Analysis of a Sector with Tax Gaps from a Fiscal and Administrative Angle*, in *amministrativ@mente*, Fascicolo n. 1, 2022.

personal enterprises to provide employees with a share in the company's success than it is for corporations. Here, granting virtual shares (phantom stocks) might prove to be the most advantageous option for all parties involved.[100] Regarding the disposal, the holding model with corporations offers the maximum tax advantage due to the 95% tax exemption combined with the savings box effect. To combine the benefits of immediate loss utilization by personal enterprises during the start-up phase with the advantages of a holding model, it might be worth considering establishing a holding structure with corporations from the outset, where the founder also participates as a silent partner in the initially loss-making start-up limited liability company (Company with Limited Liability & atypical silent partnership).[101]

The atypical silent participation is viewed as a partnership in a commercial enterprise. In the case of a Company with Limited Liability & atypical silent partnership, the Company with Limited Liability shares represent special business assets for the partner. This stems from the fact that the atypical silent partner fulfills the characteristics of a co-partner. The cumulative prerequisites are found in the co-partner's initiative and the

[100] A. URICCHIO, E. JORIO, *Regionalismo differenziato: gli adempimenti preparatori delle Regioni*, in *Astrid online*, 2023, 5; C. GIUSTI, F. L. GIAMBRONE, *The relationship between European law and German law regarding the protection of the right to be forgotten as a fundamental right: the right to oblivion in the judgement of the German Constitutional Court "Right to be forgotten I" from a comparative point of view*, in *medialaws, Rivista di diritto dei Media*, 2022, 2.

[101] M. PETER, J. SOLA, S. MOOS, *Steuerliche Rechtsformwahl und -optimierung bei Start-up-Unternehmen*, in *NWB*, 2022, 160-172; F. L. GIAMBRONE, *Future perspectives of European corporate taxation. Towards a harmonized European corporate taxation within the Member States*, in *Rivista di Dottrina fiscale*, pp. 159-191, 32.

associated risks. According to the Federal Finance Court's perspective, one is considered an entrepreneur if they participate as an atypical silent or similar internal partner in a commercial enterprise. Consequently, the jointly achieved income, in the context of § 179 paragraph 2 sentence 2 and § 180 paragraph 1 sentence 1 No. 2 lit. a AO, must be determined separately and uniformly. The contribution of the deposit is a fundamental business foundation to the company, thus representing equity. In addition to influence and participation rights in the company's management, the atypical silent partner has a right of objection under § 164 HGB and, as a result, holds a position comparable to that of a limited partner.[102] Besides profit and loss participation, upon leaving the company, he is also appropriately involved in the silent reserves and the company's (added) value.[103] Income derived from profit shares through an atypical silent participation is equivalent to income from a partnership interest. They represent business income as per § 15 paragraph 1 sentence 1 No. 2 of the Income Tax Act and are subject to income tax treatment, akin to that of a General Partnership (Offene Handelsgesellschaft) and a Limited Partnership (Kommanditgesellschaft). Various types of special remunerations are also added to the business income and channeled for a separate and unified determination of income tax. Provided economic

[102] A. F. URICCHIO, G. SELICATO, *Green deal e prospettive di riforma della tassazione ambientale. Atti della II summer school in circular economy and environmental taxation*, Cacucci, 2022.
[103] JUHN PARTNER GMBH STEUERBERATUNGSGESELLSCHAFT, *Unterschiede zwischen typisch und atypisch stiller Gesellschaft*, 2018, 6 ss.; F. L. GIAMBRONE, *Future perspectives of European corporate taxation. Towards a harmonized European corporate taxation within the Member States*, in *Rivista di Dottrina fiscale*, 2023, pp. 159-191.

assets constitute special business assets, which must be considered separately.[104] In the business tax treatment of atypical silent partnerships, it is disadvantageous that previous income from non-independent work, in accordance with § 19 paragraph 1 sentence of the Income Tax Act (EStG), now represents special business assets due to the existing co-partnership and is treated as special operational income and expenses. As a basis for calculating the trade tax, these are added, resulting in a loss of a trade tax benefit. The atypical silent partnership itself is not subject to trade tax.[105] The trade tax debtor is the business owner, the Limited Liability Company (GmbH). Due to the existing co-partnership, the GmbH only submits the trade tax return as an external addressee for the GmbH & atypical silent partnership. For the same reason, the GmbH & atypical silent partnership receives treatment as a personal company. Consequently, it is credited with the tax exemption according to § 11 paragraph 1 sentence 1 No. 1 Trade Tax Act amounting to 24,500 EUR. Additionally, the shareholder benefits from a tax reduction amounting to 3.8 times the trade tax assessment base, in accordance with § 35 Income Tax Act.[106] From a tax perspective, the atypical silent partnership among silent participations offers a savings opportunity in the form of the tax

[104] Vgl. J. ELMAR, K. VOGL, *Beck'sches Steuer- und Bilanzrechtslexikon – Stille Gesellschaft*, 2017, Rn. 13, 2017; C. A. GIUSTI, F. L. GIAMBRONE, *Towards an European harmonized environmental taxation policy. Comparative aspects of fiscal federalism and taxation aspects with regard to Germany*, in *Comparazione e diritto civile*, 2023.
[105] A. F. URICCHIO, F. L. GIAMBRONE, *The EU budget powering the Recovery plan for Europe*, in *Open Review of Management, Banking and Finance*, 2020.
[106] D. SCHULZE ZUR WIESCHE, *Die GmbH & Still – Eine alternative Gesellschaftsform*, 2013, 275, Rn. 601.

burden through business taxation. According to § 11 Abs. 1 phrase 3 Nr.1 of the Trade Tax Act, the benefit in the form of an allowance amounting to 24,500 EUR is applicable only to natural persons and personal companies. Consequently, the GmbH, as a capital company, is excluded from this commercial advantage. By establishing a silent partnership or involving an atypical silent participant, this advantage can also be achieved for a previously existing capital company.[107] In its most elemental aspect, the atypical variant of silent participation offers its premier advantage.[108] Upon contribution of the atypical silent participation, it is recognized in the form of equity, thereby aligning the shareholder with the company's asset value. Should the relationship terminate, or the participant decide to leave the company, he, apart from his invested capital, holds a claim to a proportionate value of the latent reserves of the fixed assets and the added business value. With the emergence of a partnership-like co-entrepreneurship, the operations of the external company (Limited Liability Company) transition to the internal company (Limited Liability Company & atypical silent).[109] The mandatory submission of a trade tax declaration is made by the Limited Liability Company due to its external representation, on behalf of the Limited Liability Company & atypical silent, which remains inconspicuous to the external view. Owing to the

[107] D. SCHULZE ZUR WIESCHE, *Die GmbH & Still – Eine alternative Gesellschaftsform*, 2013, 2, Rn. 2.
[108] A. F. URICCHIO, *La delega fiscale, occasione mancata per disegnare la finanza locale*, in *Rass. trib.*, 2022, LXVI, p. 188
[109] C.H. SMEKAL, T.H. THEURL, *Globalisierung: globalisiertes Wirtschaften und nationale Wirtschaftspolitik*, gemeinsam mit THERESIA THEURL, Tübingen, 2001.

characteristics of a personal company that become evident in this scenario, the allowance as per § 11 Paragraph 1 Sentence 1 No. 1 of the Trade Tax Act is granted.[110] Moreover, upon determining the income in a separate and unified manner, the shareholder receives a trade tax reduction in accordance with § 35 of the Income Tax Act, equivalent to 3.8 times the trade tax assessment amount in their income tax declaration. Viewed critically, the profit entitlement of an atypical silent partner is not recorded as a business expense in the books of the Limited Liability Company. However, mitigating this drawback is the fact that while the profit share, given its approach in the separate and unified declaration, is subjected to the trade tax, it sidesteps the corporate tax, thereby realizing a decrease in the taxable income.[111]

Several elements play a role in shaping Venture Capital and Business Angel investment behaviors. One might wonder what factors stimulate and hamper VC and BA investments. Depending on their specifics, these elements can either foster or hinder investment activities in the Venture Capital and Business Angel domains. While numerous studies delve into what drives VC investments, only a handful have analyzed the role of distinct tax policies. Several inherent characteristics of VC and BA investments that might repel investors encompass: the heightened risk profile of such investments; informational discrepancies where one entity

[110] JUHN PARTNER GMBH STEUERBERATUNGSGESELLSCHAFT, *Unterschiede zwischen typisch und atypisch stiller Gesellschaft*, 2018, 6 ss; D. CHECCHI, T. JAPPELLI, A. URICCHIO, *Teaching, research and academic careers*, Springer Nature, 2022

[111] J. ELMAR, K. VOGL, *Beck'sches Steuer- und Bilanzrechtslexikon – Stille Gesellschaft*, 41. ed., Rn. 11, 2017.

is better informed than the other, leading to unequal dynamics; and moral dilemmas, where there's a chance that a party might not have engaged in a contract with integrity. Moreover, the dynamics of Venture Capital and Business Angel investments can be either propelled or obstructed by macro-level factors, such as the robustness of IPO markets, financial market conditions, preferences of institutional investors, labor market constraints, governmental strategies (taxation included), and the broader economic and business climate.[112]

In assessing the investment landscape, one might wonder how taxation influences VC and BA investments.[113]For an investor, it's crucial to consider all relevant taxes and incentives throughout the investment's lifespan at the initial decision-making stage. During the holding phase, income tax holds diminished relevance for VC and BA investments in startups, which might not yield any profits initially. Yet, the disparity in tax rates applied to corporate and wage incomes might influence entrepreneurial activities, thereby potentially affecting the demand for Venture Capital and Business Angel investments. Elevated capital gains tax rates could adversely affect the volume and caliber of investments.[114] However, there's no unanimous agreement on this impact's depth and

[112] EU COMMISSION, *Effectiveness of tax incentives for venture capital and business angels to foster the investment of SMEs and start-ups*, 2017.
[113] A. F. URICCHIO, F. L. GIAMBRONE, *European Finance at the Emergency Test*, Cacucci editore, 2020.
[114] EU COMMISSION, *Effectiveness of tax incentives for venture capital and business angels to foster the investment of SMEs and start-ups*, 2017; A. F. URICCHIO, C. SPRIVIERI, *Sulla applicabilità della causa di non punibilità "forza maggiore" in materia di sanzioni amministrativo-tributarie*, in *Responsabilità d'impresa*, 2, 2022.

relevance. Representatives from the VC and BA sectors emphasize their primary investment goal in SMEs and startups: to escalate the business to a significant financial milestone. Thus, capital gains tax treatment can sway the risk appetite and decision-making of potential investors. For example, tax advantages for capital gains or offering loss reliefs superior to the standard tax system could aid in reducing investment risks in burgeoning and innovative enterprises.[115] Although there isn't a unanimous stance on exact figures and projections, there's a shared understanding that tax rates across nations profoundly influence pivotal foreign direct investment decisions. Furthermore, the EC's expert group's report highlighted that the potential administrative expenses stemming from inconsistencies among Member States' tax regimes act as a significant impediment to cross-border VC and BA investments within the EU.[116]In the evolving financial landscape, a critical contemplation emerges: should VC and BA investments be promoted through the tax framework? Utilizing the tax system, perhaps through specialized tax benefits, to encourage VC and BA investments is merely one of several strategies at policymakers' disposal. Numerous nations offer assistance via direct monetary aids or government-endorsed VC funds.[117] Tax incentives can lessen the marginal

[115] C.H. SMEKAL, T.H. THEURL, *Globalisierung: globalisiertes Wirtschaften und nationale Wirtschaftspolitik*, gemeinsam mit THERESIA THEURL, Mohr Siebeck, Tübingen, 2001.
[116] A. F. URICCHIO, *La costruzione della società ecologica: il Green New Deal e la fiscalità circolare*, in *Rivista di diritto agroalimentare*, n. 1, 2021; OECD, *The Impact of the Global Crisis on SME and Entrepreneurship Financing and Policy Responses*, Working Party on SMEs and Entrepreneurship (WPSMEE), 2009.
[117] A. F. URICCHIO, F. L. GIAMBRONE, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses*, Cacucci editore, 2020.

costs associated with investing in smaller firms. Theoretically, this should entice more investors to pour more capital into these businesses via VC entities or as business angels with tax benefits, expecting reduced pre-tax returns. While empirical data on the effects of tax incentives and grants is varied, there's indication suggesting that both, whether individually or combined, can prove successful if they are meticulously crafted and adapted to the situation.[118]

[118] A. F. URICCHIO, F. L. GIAMBRONE, *European Finance at the Emergency Test*, Cacucci editore, 2020; EU COMMISSION, *Effectiveness of tax incentives for venture capital and business angels to foster the investment of SMEs and start-ups*, 2017.