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Real estate transfer tax on share accumulation is an immediately deductible expense

The Supreme Tax Court has settled a long-standing dispute within the profession on the capitalisation or immediate write off of the real estate transfer tax payable when at least 95% of the share capital of a property-owning company is accumulated in one hand.

The one significant stamp duty still current in Germany is the 3.5% transfer tax payable on the consideration for a conveyance of property. However, real estate transfer tax is also payable on a share transfer (or share issue) leading to an accumulation of at least 95% of a company's issued share capital in a single hand. Since there is no identifiable consideration for the property, the tax is assessed at 3.5% of a deemed value based on the annual rental achieved or said to be achievable. A strong body of professional opinion holds that this real estate transfer tax payable on a share accumulation should be capitalised as part of the cost of acquiring the holding. However an equally august body maintains in public that the expense should be written off as incurred. The Supreme Tax Court has now given its support to the latter view.

The court saw the real estate transfer tax on the accumulation of shares as a measure to prevent an effectively tax-free transfer of property through selling the shares in the company owning the property, rather than the property itself. As an anti-avoidance measure, it was solely founded on a transfer tax statute without any counterpart in civil or income tax law. Thus deemed effective ownership of the property through a 95% shareholding gave the holder neither any rights of disposal over the property, nor any right to take it up in his own balance sheet. From this point of view, the tax was a transfer tax payable on reaching a certain limit and should be seen as the consequence of a given transaction, and not as part of the cost of that transaction. There were thus no grounds for accounting for it as a cost of acquisition of a shareholding, the more so when one considered that the tax could be triggered by a very minor change in the shareholding structure of a company and be assessed in an amount far exceeding the consideration for the immediate transfer. All told, the tax payable on the accumulation of shareholdings was a revenue expense immediately deductible as part of the cost of earning income.

Supreme Tax Court judgment I R 2/10 of April 24, 2011 published on June 22

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