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By PwC Deutschland | 26. Juli 2021

Purchase of land by trustee and transfer of exploitation right to trustor subject to RETT

The Supreme Tax Court, in a most recent decision, has again stated that in the case of the purchase of a property from a third party, which is held by a trustee for the trustor as the subsequent acquirer of the site, real estate transfer tax will arise twofold.

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Background

A, a civil-law partnership (GbR), was the owner of a piece of land. X held 94% and Y 6% of the shares in A GbR. X holds 94% and Z 6% of the shares in another GbR (the plaintiff). The plaintiff instructed Z to acquire the property in its own name as trustee and for the account of the plaintiff. Eventually, A GbR sold the property to Z. The tax office issued an assessment notice for real estate transfer tax to Z. Furthermore, the tax office assessed real estate transfer tax against the plaintiff because of Sec. 1 (2) of the German Real Estate Transfer Tax Act. The basis of assessment was the purchase price refunded to Z, plus the real estate transfer tax also refunded to Z, less a tax-exempt portion of 6% pursuant to Sec. 5 (2) of the German Real Estate Transfer Tax Act, corresponding with Z's share in the plaintiff. The Lower (regional) Tax Court had granted the appeal in which the plaintiff claimed the exemption also of the remaining 94 % share.

Decision

If a trustee acquires real property from a third party on behalf of the trustor, both the acquisition of the real property by the trustee and the transfer of the exploitation rights by the trustor is subject to real estate transfer tax. With its judgement the Supreme Tax Court granted the appeal of the tax office and reversed the earlier decision of the lower court.

The Supreme Tax Court held that in the case of dispute not only the purchase of the land from the third party is subject to real estate transfer tax (which was not in dispute) but also the exploitation right to the property which the plaintiff acquired from Z. The only decisive factor to determine whether the acquisition of the exploitation power is fully or partially exempt from RETT is the trustor-trustee relationship and not the one between the seller of the real estate and the trustee. It follows from this that the taxable acquisition of the power of exploitation was only tax-privileged to the extent of 6% pursuant to Sec. 5 (2) Real Estate Transfer Tax Act (GrEStG): *If real property is transferred from a sole owner to a joint ownership, the tax is not levied in the amount of the share in which the transferor participates in the assets of the joint ownership*. This provision is applicable to all chargeable transfers listed in Sec. 1 GrEStG, in particular S**ec. 1 (1) no. 1** (subject to tax is: ... "*a contract of sale or other deed founding a claim to transfer of ownership*") regarding the acquisition of the land by the trustee from the third party) and **Sec. 1 (2)** ("*RETT is also levied on transactions enabling another person, legally or in effect, to dispose over a domestic site for his own account, but without establishing a claim for the transfer of ownership*") following the acquisition of power of exploitation by the plaintiff).

Source:

Supreme Tax Court decision of 23 February 2021 (case ref.: II R 22/19), published on 22 July 2021.

Schlagwörter

exploitation right, real estate transfer tax, trustee