

By PwC Deutschland | 02. November 2021

Revocation of a waiver to a VAT exemption on real estate transactions

The waiver of a tax exemption under Section 4 No. 9a) VATA can be revoked as long as the tax assessment for the year in which the service was rendered is still open or can still be changed under Section 164 General Tax Code. Section 9 (3) Sentence 2 VATA in the version of the 2004 Act to Accompany the Budget does not regulate the revocation.

Background

The plaintiff, a limited liability company (GmbH), purchased real estate from A Immobilien GmbH (seller) for €320,000 by way of a notarized property purchase agreement dated May 18, 2009. A building requiring renovation occupied the land. In Section 3 (1) of the contract, the seller waived the tax exemption applying to supply of real estate.

The plaintiff wished to renovate the property and resell it subject to VAT. In its 2009 VAT return dated July 15, 2010, it declared turnover of €320,000 for which it owed the VAT as the recipient of the service according to Section 13b (2) Sentence 1 in conjunction with Sec. (1) sentence 1 no. 3 VATA, as amended, and deducted the resulting tax of €60,800 as input tax according to Sec. 15 (1) Sentence 1 No. 4 VATA

The seller submitted its own 2009 VAT return on June 16, 2010; the responsible tax office approved the return on September 23, 2010. There were no further changes to the tax assessment until 2013.

By notarized property purchase agreement dated November 1, 2011, the plaintiff sold the part of the property with the unrenovated building --without waiving the tax exemption-- for €820,000. By notarized agreement ("Amendment of a Real Estate Purchase Agreement") dated April 23, 2012, the (original) seller and the plaintiff agreed to rescind the waiver of the tax exemption included in the real estate purchase agreement dated May 18, 2009.

In its VAT return for 2011 (year in dispute) dated April 25, 2013, the plaintiff declared a tax-exempt land supply of €820,000. It did not make any adjustment to the input tax deduction from the acquisition transaction. The tax return for 2009 also remained unchanged.

At a subsequent tax audit, the tax auditor did not consider the reversal of the waiver of the tax exemption to be effective. The input tax deduction made in 2009 was to be adjusted in the amount of €30,400 in the year in dispute pursuant to Sec. 15a (2) VATA.

The tax office responsible for the plaintiff at the time issued a VAT amendment notice for the year in dispute on September 1, 2015. The reservation of a right to review (Section 164 General Tax Code - GTC) in the VAT notice for 2009 was lifted in an amendment notice of the same date.

The plaintiff's administrative appeal was rejected by the tax office as unfounded on the basis that the waiver of the VAT exemption of the transfer of real estate could only be declared in the notarial contract for that particular transfer and that the same applied to the revocation of the waiver.

The plaintiff was successful before the local tax court and the tax office appealed.

Decision

According to Section 4 No. 9(a) VATA, transactions that fall under the Real Estate Transfer Tax Act are tax-exempt. Under Section 9 (1) VATA, the entrepreneur may, *inter alia*, treat such a transaction as taxable if the transaction is made to another entrepreneur for the latter's business. According to the wording of Sec. 9

(3) Sentence 2 VATA (amended by the 2004 Act to Accompany the Budget) the entrepreneur performing the supply (seller) can only waive the tax exemption **in the relevant notarised agreement** transferring the real estate transfer itself. Section 9 (3) Sentence 2 VATA prohibits the parties from **subsequently** opting to tax through an amendment of the original agreement even if this amendment is also notarized.

However, this time limit only applies to the waiver itself, but **not to the revocation of a waiver** of a tax exemption previously made. A revocation of a waiver can be made outside the notarial deed. A revocation is possible for as long as the tax assessment for the year in which the supply was made is still open or can still be changed in accordance with Section 164 GTC (i.e. the subject to review provision in the GTC).

The principle under previous case law, that the time limit should be applicable to both the option to tax and the revocation of the option (as *actus contrarius*) in a similar manner, no longer applies as a result of changes made in the 2004 Act to Accompany the Budget. The logic of this is that if the revocation of the waiver of the tax exemption had to be exercised at the same time as the waiver, a revocation of the waiver would in effect be excluded. The purpose of Section 9 (3) sentence 2 VATA does not conflict with this premise. The provision is intended to protect the purchaser from a retroactive waiver through the seller in order to prevent the purchaser subsequently being subject to tax liability. A revocation of a waiver of the tax exemption, however, would not give rise to a tax burden for the purchaser.

Source:

Supreme Tax Court decision (XI R 22/19) of 2 July 2021, published on 28 October 2021

Schlagwörter

Real Estate, VAT, option for VAT