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By PwC Deutschland | 05. Dezember 2022

RETT exemption in case of upstream merger of second-tier company

The tax exemption from real estate transfer tax (RETT) in the event of restructuring within a group under Section 6a of the RETT Act also applies to cases where a dependent second-tier company is merged with a subsidiary of a group parent company, even if in the five years after the transaction 25 percent of the shares in the parent company are transferred to a new shareholder. In his decision the Supreme Tax Court held that the subsidiary must be regarded as “controlling company” within the meaning of the RETT Act.

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Background

The plaintiff held an interest in a real estate company. The plaintiff's sole shareholder was a GmbH (limited liability company), whose shares were in turn fully held by an AG (stock corporation). The three-tier shareholding had existed for more than five years. In 2011, the real estate company was merged with the plaintiff and the company's real estate transferred to the plaintiff. The local tax office initially granted the tax concession of Sec. 6a RETT Act. In 2013, the AG sold 25,01 percent of its shares in the GmbH to a third party. The tax office was of the opinion that the conditions for the tax exemption (i. e. the controlling company's participation in the dependent company must be at least 95% in the five years before the transaction and the five years after) had ceased to exist with retroactive effect.

The question before the courts, therefore, was who - in in the chain of shareholding – is the controlling company for the purpose of the RETT exemption. In contrast to the tax office, the Düsseldorf Tax Court decided that the RETT exemption was available and the tax office went before the Supreme Tax Court. The Federal Ministry of Finance had joined the proceedings in support of the tax office.

Decision

The Supreme Tax Court rejected the appeal and ruled in favor of the plaintiff.

According to Section 6a RETT Act the tax is not levied on certain taxable acquisitions arising by reason of a restructuring (e.g., merger). One of the prerequisites is that a controlling company and a dependent company are involved in the restructuring process and that the controlling company's participation in the dependent company must be at least 95% in the five years before the transaction and the five years after.

Contrary to the view of the tax authorities, the Supreme Tax Court in the present case considered that the RETT exemption is available following the merger and the transfer of real estate of the real estate company into the plaintiff. The fact that the plaintiff as “controlling company” could no longer hold a share in the merged subsidiary following the restructuring and thus meet the 5-year post transaction holding period did not harm the entitlement to the RETT exemption. The holding periods set out in Section 6a Sentence 4 RETT Act need only be observed to the extent that they can in fact possibly be observed because of the restructuring process.

If, in a three-tier group as in the present case with parent company, subsidiary and second-tier subsidiary, the second-tier subsidiary is merged with the subsidiary, the relationship between the companies involved in the merger must be considered separately. In such a given situation, the subsidiary (here: the plaintiff) is the "controlling company", the second-tier subsidiary the "dependent company". Both are involved in the taxable legal transaction for which RETT is not charged under the provisions of Sec. 6a Sentence 3 RETT Act.

Finally, the Supreme Tax Court notes that in case of a merger between a dependent company and a controlling company only the 5-year pre-transaction holding period must be observed. The post transaction holding period - for all practical purposes – cannot and for that matter also does not have to be met in the event of a merger.

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Supreme Tax Court judgment of 28 September 2022 (II R 13/20) published on 1 December 2022

Schlagwörter

RETT exemption, controlling member, merger