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By PwC Deutschland | 18. Februar 2025

# RETT: Transfer of ownership and unification of shares in a foreign foundation

**In a most recent decision, the Supreme Tax Court held that the unification of shares resulting from the transfer of shares in a property-owning corporation to a Dutch foundation is not exempt from real estate transfer tax pursuant to Section 5 (1) RETT Act if the comparison of legal types reveals that the legal structure of the foundation is not comparable to a joint ownership under German law.**

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## Background

The plaintiff is a foundation under Dutch law (“stichting”) with its registered office in the Netherlands. The purpose of the plaintiff was the acquisition and holding of company shares in return for the issue of certificates. A-B.V. (A) held a 25% stake and B-B.V. (B) a 75% stake in C-B.V. (C)who was the owner of a domestic property.The shareholders of A and B were the brothers E and F, who were also the members of the plaintiff’s management board.

A and B transferred their shares in C to the plaintiff in 2017 and received a corresponding certificate from the plaintiff in return for each share transferred. The plaintiff managed the shares in C for the benefit of E and F. The tax office assessed real estate transfer tax against the plaintiff because the transfer of the shares in C to the plaintiff constituted a merger of shares pursuant to Section 1 (3) no. 1 of the Real Estate Transfer Tax Act (RETT Act) which – in essence – provides that "the tax will (also) be levied in case a deed leading to a claim on the transfer of ownership of one or more shares in the company where the transfer would concentrate a holding of at least 95% of the sharesdirectly or indirectly in the hands of the acquirer (…)“.

In the case of dispute, the main point at issue was the application of tax exemption provisions, in particular Section 5 (1) RETT Act: „If a property is transferred from several partners to a joint ownership, the tax is not levied in accordance with this provision in the amount of the share of indirect transfer of at least 95% or more of the shares in a company (i.e., partnerships/corporations) that owns German real estate (…) or which shares are legally or economically, directly or indirectly, unified in the hands of one shareholder is subject to real estate transfer tax".

## Decision

The Supreme Tax Court agreed with the decision of the tax court of first instance who held the transfer of the shares in C to the plaintiff to be subject to RETT because the foreign company at issue was not a joint ownership. Rather, it was similar to a corporation. The Supreme Tax Court is bound by this assessment of the facts on foreign law as established by the tax court of first instance.

However, the Supreme Tax Court decided that - contrary to the opinion of the lower tax court - the transfer of shares is not subject to RETT according to Section 1(3)**no. 3 or 4** RETT Act but rather pursuant to Section 1 (3) **no. 1 or 2** RETT Act.

**Section 1 (3) nos. 3 and 4** RETT Act cover cases where at least 95% of the shares in a real estate company have been transferred from one legal entity to another legal entity. The application of these circumstances requires that the shares in the real estate holding company were already directly or indirectly concentrated in the hands of the transferring legal entity and that these are then subsequently transferred to a purchaser. The tax court of first instance has not found that at least 95% of the shares in C were already held by either A or B as the selling legal entity prior to the transfer agreement.

However, the concentration of 100% of the shares in C in the hands of the plaintiff as a result of the transfer

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of shares is subject to RETT pursuant to **Section 1 (3) No. 1 or No. 2** RETT Act. At the time of the unification of shares the assets of C also included a domestic property as defined in Section 1 (3) RETT Act.

The unification of 100% of the shares in C in the hands of the plaintiff, which is taxable pursuant to Section 1 (3) no. 1, 2 RETT Act, is not exempt from real estate transfer tax pursuant to Section 3 no. 2 sentence 1 RETT Act (as lifetime gifts such as the transfer of property, and transfers of value passing on death which are subject to the Inheritance Tax and Gift Tax Act). The transfer of the shares in C by A and B to the plaintiff did not take place free of charge. Rather, it was carried out in return for the issue of certificates by the plaintiff to A and B for each share received.

**Source:**

Supreme Tax Court judgment of 30 October 2024 (II R 14/23) – published on 6 February 2025.

**Schlagwörter**

foreign foundation, unification of shares