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By PwC Deutschland | 24. Februar 2025

RETT: No tax relief for foreign intra-group share transfer

The Supreme Tax Court decided that the contribution of all shares in an indirectly property-owning company by a corporation under Irish law to the plaintiff against consideration is subject to real estate transfer tax pursuant to Section 1 (3) Real Estate Transfer Tax Act. The exemption on intra-group restructures (conversions) under Section 6a Real Estate Transfer Tax Act was not available.

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Legal background

The RETT exemption on conversions according to **Section 6a Real Estate Transfer Tax Act** (RETT ACT) applies to:

(i) Restructurings/conversions regulated by Section 1 (1) Nos. 1 through 3 of the German Reconstruction Act or any equivalent (company) law of a Member State of the EU or the European Economic Area;

(ii) Entities involved in the restructuring must form part of the same group (i.e. there must be a common parent, which - directly or indirectly - holds at least 95% of the shares in all entities involved; the parent itself may also be part of the restructuring);

(iii) Restructurings where the participation(s) of at least 95% exist during the five years before and after the transaction.

Section 1 (1) Nos. 1 - 3 of the Reconstruction Act covers legal entities having their registered seat in Germany who are transformed by way of a merger, a division into several enterprises (split-up, spin-off, drop-down), or by transfer of assets.

Case of dispute

A Group Unlimited (A) was the sole shareholder of B Holdings Limited (B), both were based in Ireland. B was the sole shareholder of other companies with real estate in Germany. The corporate structure had been in place for more than five years. The plaintiff was founded by A in 2010 with its registered office in the British Virgin Islands. In the same year, A transferred all shares in B to the plaintiff in exchange for shares. Since then, the plaintiff has been resident in Ireland for tax purposes. Following an external tax audit, the competent German tax office (in whose district the property or the most valuable part of the property was located) assessed the steps of the restructure in 2010 as a taxable acquisition pursuant to section 1 (3) no. 4 RETT Act and refused to grant an exemption under Section 6a RETT Act (tax relief for for intra-group restructures).

The complaint before the Münster Tax Court was not successful.

Decision

The Supreme Tax Court also rejected the plaintiff's appeal. The tax court of first instance had correctly assumed that the transfer of A's shares in B to the plaintiff was subject to RETT and that tax exemption was not possible.

Unification of shares (Section 1 (3) RETT Act):

The plaintiff was of the opinion that a taxable transaction pursuant to Section 1 (3) RETT ACT has not taken

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place. The Supreme Tax Court did not agree. It is irrelevant that, from an economic point of view, there is no change in the allocation of the properties (as in the present case of an extension of the shareholding chain). In the opinion of the Supreme Tax Court, the taxation also does not violate the EU Council Directive 2008/7/EC concerning indirect taxes on the raising of capital as it is clear from its wording that it does not apply to legal transactions subject to real estate transfer tax. A suspension of the proceedings for a referral to the ECJ was therefore not necessary, the Supreme Tax Court said.

Disallowance of tax relief for intra-group restructuring (Section 6a RETT Act);

First, the Supreme Tax Court agrees with the conclusions reached by the tax court of first instance that the contribution at issue is not a “transformation” eligible for preferential treatment (under German law).

According to the relevant provisions, the transfer took place by way of sole succession for a symbolic consideration which does not carry the characteristics of a transformation under the Reconstruction Act. The fact that the plaintiff had been established shortly before the contribution and that it was intended to transfer the shares to the plaintiff at the time of its formation also does not result in the legal transaction being comparable to a spin-off for the purpose of setting up of new company within the meaning of the Reconstruction Act .

The fact that the transfer of shares in a property-owning company to a foreign company is not privileged under Section 6a RETT Act does not violate either the freedom of establishment (Art. 49 of the Treaty on the Functioning of the European Union) or the free movement of capital.

Section 6a RETT Act also does not constitute state aid within the meaning of Art. 107 (1) TFEU. Although the provision has a selective effect because it favors certain companies with regard to the real estate transfer tax due in the event of a change of legal entity, it is nevertheless justified by the nature and structure of the real estate transfer tax system; with reference to the ECJ judgment **C-374/17** *A-Brauerei* of 19 December 2018, para. 44 (a summary of the decision to be found in our **blog post of 21 December 2018**).

Source:

Supreme Tax Court, judgment of 25 September 2024 (II R 36/21), published on 20 February 2025.

Schlagwörter

restructuring, share transfer, unification of shares