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By PwC Deutschland | 26. Februar 2025

No tax exemption for contribution of limited partner shares to shelf company which was acquired shortly before

The change in the shareholder structure of a limited property-owning partnership due to a contribution of the limited partners' shares in the partnership to a shelf-company may be exempt from real estate transfer tax pursuant to Section 6a sentence 1 RETT Act provided that the transferor, i. a., held at least 95% of the shares directly or indirectly or partly directly for an uninterrupted period of five years before the legal transaction took place. This was decided by the Supreme Tax Court in a most recent judgment.

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Background

The plaintiff, a GmbH & Co. KG which owned real estate in Germany, was held by seven natural persons as limited partners (in addition to a general partner who did not participate in the company's assets). In 2013, the partners each acquired their own shelf company (GmbH), of which they became the sole shareholder. In 2014, the limited partners transferred their shareholdings in the plaintiff to said shelf GmbHs through a non-cash (physical) capital increase (capital in kind) at book values in accordance with Sections 20 et seq. Reconstruction Tax Act.

The plaintiff believed that, with regard to the tax exemption rule in Section 6a sentence 1 RETT Act, it made no difference whether the transaction was a reorganization under the Reconstruction Act or an economically comparable contribution. But this was not shared by the tax office and the tax courts who held the appeal to be unfounded.

Decision

The change in the shareholder structure of a limited property-owning partnership due to a contribution of the limited partners' shares in the partnership to a shelf-company may be exempt from real estate transfer tax pursuant to Section 6a sentence 1 RETT Act. As one important precondition though, the tax exemption requires that the transferor has held more than 95% of the shares in the shelf-company for more than five years prior to the transfer. Compliance to that pre-change holding period cannot be waived according to the Supreme Tax Court.

Compliance with the five-year holding period also cannot be waived based on the principles laid down in the decision of 21 August 2019 (case: II R 16/19). Here, the Supreme Tax Court held that the fact that the controlling company could not have held a 95% share in the subsidiary in the 5 years prior to the restructuring because the subsidiary had been newly established through a spin-off 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 as a result of the restructuring process.

These principles are not applicable to the case of dispute. In contrast to the spin-off and subsequent new formation, the shelf companies already existed under civil law prior to the contribution of the limited partner shares in 2014. They were already acquired by the limited partners in 2013. It would therefore have been possible to acquire the shelf GmbHs earlier in order to comply with the five-year holding period prior to the contribution.

Takeaway: With its decision the Supreme Tax Court underlines the strict minimum pre-change holding period of five years pursuant to Section 6a RETT Act. Taxpayers planning restructurings, such as the one in this case, by using shelf companies must ensure that the acquisition is initiated early enough in order to take advantage of the tax privilege.

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Supreme Tax Court judgment of 25 September 2024 (II R 46/22) – published on 20 February 2025.

Schlagwörter

change of shareholders, real estate transfer tax, real property