

By PwC Deutschland | 04. August 2025

The Supreme Tax Court considers the double assessment of real estate transfer tax for the acquisition of company shares in so-called ‘signing/closing’ cases to be legally questionable

In an interim decision, dated 9 July 2025 (II B 13/25 (AdV) and published on 31 July 2025, the Supreme Tax Court considered it doubtful, following a summary examination, that in cases where the contractual acquisition transaction (signing) and the transfer of the shares (closing) take place at different times, real estate transfer tax can be assessed twice – namely once upon signing under Section 1(3) No. 1 of the German Real Estate Transfer Tax Act (“RETTA”) (signing) and once upon closing under Section 1(2b) RETTA – if the tax office is aware at the time of assessment for the signing that the closing has already occurred.

The execution of the contested real estate transfer tax assessment notice concerning the consolidation of all shares in a real estate company pursuant to Section 1 (3) RETTA was therefore to be stayed. The Supreme Tax Court thus contradicted for the first time the view of the tax authorities, according to which real estate transfer tax filings must be complete and submitted in a timely manner in order for the tax assessment to be revoked. Against this background, the decision gives hope that the Supreme Tax Court will also rule accordingly in the main proceedings, thereby resolving the considerable practical problems associated with the administrative opinion on the taxation of share deals.

Background

For legal transactions that establish a claim to the transfer of at least 90% of the shares in a company that owns real estate, the tax authorities assume that, on the one hand, the conclusion of this transaction is subject to tax pursuant to Section 1 (3) No. 1, No. 3 or (3a) of the Real Estate Transfer Tax Act (RETTA) (signing) and, on the other hand, that the elements of Section 1 (2a) or (2b) RETTA can be realised through the subsequent execution of this legal transaction in rem (closing). According to the introductory sentence of Section 1 (3) RETTA, only transactions which cannot be taxed under Section 1 (2a) or (2b) RETTA are subject to tax under Section 1 (3) RETTA. However, the authorities do not consider this to be the case here, as both transactions must be carried out simultaneously (as in the case of mergers). However, double taxation should be avoided by Section 16(4a) of the RETTA, introduced by the Finance Act 2022, which in principle allows the tax assessment for the signing to be revoked. To this end, however, the tax debtors must notify the tax office of both the signing and the closing in a timely manner and in full (Section 16 (5) sentence 2 RETTA), which did not occur in the case before the Supreme Tax Court.

Decision of the Supreme Tax Court

In its present decision, the Supreme Tax Court expressed doubts for the first time about the stance taken by the tax authorities and granted the suspension of enforcement sought by the applicant and denied by the lower court. The starting point is the introductory sentence of Section 1(3) RETTA, which does not imply a time limit such as the simultaneity required by the tax authorities. The Supreme Tax Court cannot infer anything else from other legislative materials either. In particular, the restriction of the introductory sentence to Section 1(3) RETTA assumed in the explanatory memorandum to the introduction of Section 16(4a) RETTA is not reflected in the actual wording. The Supreme Tax Court therefore expressed doubts as to the extent to which the correction provision in Section 16(4a) RETTA actually restricts Section 1(3) Sentence 1 RETTA. Finally, the Supreme Tax Court refers to opinions in the literature which, in its view, justified doubts over the tax administration's view. The Court also pointed out that, in the present case, notwithstanding Section 16(4a) RETTA, it would have been possible to amend the tax assessment notice under Section 164(2) General Fiscal Code as the assessment reserved the right to review.

Outlook

The present decision concerned proceedings for interim relief. In this respect, the Supreme Tax Court found that there were compelling reasons for questioning the legality of the assessment notice, which were

sufficient to grant a suspension of enforcement. A decision on the 'signing/closing' issue in the main proceedings is still pending, so that taxpayers have no choice but to continue ensuring that their reporting obligations in relation to share deals are fulfilled in full and in a timely manner. At the same time, however, the present decision gives some hope that the Supreme Tax Court will also rule similarly in the main proceedings.

Source:

Supreme Tax Court interim decision dated 9 July 2025 (II B 13/25 (AdV) published on 31 July 2025.

Schlagwörter

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