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By PwC Deutschland | 29. September 2025

Exemption from real estate transfer tax and revocation pursuant to Section 16 Real Estate Transfer Tax Act

In a recently published decision, the Supreme Tax Court commented on the repurchase of shares in a property-owning company where the previous acquisition was not subject to real estate transfer tax. Another case decided on the same date concerned the annulment of a chargeable transfer (concentration of 100% of the shares in the property-owning company) which later was reversed a second time restoring the initial level of shareholding.

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Legal background

Real estate transfer tax is charged on transfers of ownership in German property. The tax is also due on direct and indirect transfer, orcollection in the hands of a single shareholder, of 95% of the equity capital of a property-owning company or also in case of partnerships (if at least 95% of the shares are transferred over the course of a ten-year period).

The chargeable transactions are dealt with in **Section 1 (3) of the Real Estate Transfer Tax** Act (RETTA).

Section 16 (2) RETTA: If the seller repurchases the property sold, upon application, the tax shall not be assessed or the tax assessment shall be revoked for both the repurchase and the previous purchase transaction upon application,

no. 1: if the repurchase takes place within two years following the tax becoming due for the previous purchase transaction. If the repurchase requires entry in the land register, the transfer of ownership (conveyance) must be declared and the entry in the land register applied for within the two-year period, or

no. 3: if the contractual terms of the legal transaction that constituted the basis for the claim for transfer of ownership are not fulfilled and the legal transaction is therefore reversed on the basis of a legal claim.

Exemption from real estate transfer tax even if previous acquisition was not subject to tax (case II R 16/23)

Background: In the case of dispute, the plaintiff gave 49% of his 100% stake in a property-owning limited liability company to his son in 2016, subject to rights of revocation (initial acquisition). This transaction was not taxable. In 2018, the son died, the shares were returned to the plaintiff and his wife by way of statutory succession. In a letter addressed to his wife, the plaintiff then revoked the gift. This transaction was undisputedly taxable as a collection in the hands of a single shareholder pursuant to Section 1 (3) No. 1 RETTA. The Münster Tax Court upheld the appeal. The Supreme Tax Court rejected the appeal brought by the tax office.

The revocation of the gift leads to a (re)unification of all shares in the limited liability company in the hands of the plaintiff and is subject to real estate transfer tax pursuant to Section 1 (3) No. 1 or 2 RETTA. The lower tax court further correctly assumed that, albeit the unification of shares is taxable under § 1 (3) No. 1 or 2 RETTA, real estate transfer tax is not to be assessed pursuant to § 16 (2) No. 3 RETTA. Looking beyond its mere wording, this provision also applies to acquisitions falling under § 1 (3) RETTA. The (renewed) unification of shares within the meaning of Section 1 (3) No. 1 or 2 RETTA does not presuppose that the original share transfer has been taxable.

Furthermore, Section 16 (5) RETTA does not preclude tax exemption under Section 16 (2) no. 3 RETTA. This provision only excludes the claim for non-assessment of the tax if the initial acquisition pursuant to

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Section 1 (2) to (3a) RETTA was not reported in full and in a timely manner despite the obligation to do so, but not if - as in the present case - notification of the transfer of the shares by way of gift at the time of the initial acquisition is not required for want of being subject to tax.

Supreme Tax Court, decision of 7 May 2025 II R 16/23 - - published on 25 September 2025.

RETT if 95% threshold is once again exceeded and previous acquisition has not been subject to tax (case II R 26/23)

The original chargeable transaction (first transaction), the acquisition on December 20, 2011, of 5.1% of the shares in R-AG from M-GmbH by the plaintiff (a GmbH), which already held a 94.9% stake in R-AG, was reversed on October 10, 2012 (by means of a share repurchase and transfer agreement). Shortly thereafter (by agreement dated April 8, 2014), the plaintiff again acquired 5.1% of the shares in R-AG (second transaction). The tax office levied real estate transfer tax on both the first and second transactions. The tax office rejected the plaintiff's request to cancel the tax assessment regarding the first acquisition pursuant to Section 16 (2) No. 1 RETTA, citing Section 16 (5) RETTA. The tax court of first instance dismissed the action. The Supreme Tax Court held the appeal to be justified.

Contrary to the opinion of the tax court of first instance, Section 16 (2) No. 1 RETTA applies to the agreement dated April 8, 2014 on the revocation of the share repurchase and transfer agreement dated October 10, 2012. If ownership of the property is transferred back to the seller, this provision allows, upon request, for the tax to be waived or annulled for both the repurchase and the previous acquisition if the repurchase takes place within two years of the tax becoming due for the previous acquisition. Beyond its wording, the provision also applies to the transaction referred to in Section 1 (3) No. 1 RETTA.

Supreme Tax Court, decision of 7 May 2025 II R 26/23 - - published on 25 September 2025.

Schlagwörter

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