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Obligation to register usufruct in the land register also subject to real estate transfer tax

If the seller of a property has granted a third party a right of usufruct prior to the conclusion of the purchase agreement, and this right has not yet been entered in the land register at the time of conclusion of the agreement, the transaction is subject to real estate transfer tax. This was decided by the Supreme Tax Court in a most recently published judgment.

Background

Section 9 (1) No. 1 Real Estate Transfer Tax Act (RETTA) states that, and in the event of a purchase, the purchase price, including other services assumed by the buyer, and the sellers' right to use are subject to real estate transfer tax.

In 2015, the plaintiff acquired a heritable building right (*Erbbaurecht*) by way of notarial deed. In addition to the purchase price, she undertook to pay an annual ground rent. The seller had already undertaken to establish a right of usufruct in favor of the owner of the land for the duration of the heritable building right with regard to specified apartments built on the heritable building land. At the time of conclusion of the purchase agreement in March 2015, the usufructuary right had not yet been entered in the land register.

The tax office then assessed real estate transfer tax based on the purchase price, the capitalized annual value of the ground rent, and the capitalized annual value of the usufruct. The plaintiff objected to the capitalized annual value of the usufruct being taken as taxable value of consideration. In his view it was a violation of Section 9 (2) No. 2 Sentence 2 RETTA according to which the taxable consideration does not include the permanent encumbrances on the property. The ground rent is not a permanent encumbrance, the plaintiff said. The tax court of first instance dismissed the action.

Decision

The Supreme Tax Court considered the plaintiff's appeal as unfounded and upheld the tax office's opinion. The tax court of first instance had correctly concluded that the acquisition of the heritable building right was subject to real estate transfer tax and that both the ground rent (annual ground rent – *Erbbauzins*) and the usufruct right must be included in the assessment basis for real estate transfer tax at their capitalized annual value.

"Other services" within the meaning of Section 9 (1) No. 1 RETTA are all obligations of the buyer which, although they do not directly constitute the purchase price for the property under civil law, nevertheless are consideration for the acquisition of the property. The decisive factor is not what the contracting parties describe as consideration but rather what obligations or services they have undertaken in return. Accordingly, all payments made by the buyer for the sale of the property or leasehold rights are subject to real estate transfer tax (assessment basis). "Other obligations" also include the assumption of commitments by the buyer on behalf of the seller. However, this is contingent on the seller having already incurred these commitments.

According to Section 9 (2) No. 2 Sentence 1 RETTA, the consideration also explicitly includes any encumbrance on the property insofar as it is transferred to the purchaser by virtue of law. An exception is made for permanent encumbrances on the property (Section 9 (2) No. 2 Sentence 2 RETTA). However, according to established case law of the Supreme Tax Court, this latter refers only to encumbrances that already exist on the

property at the time the property transaction is concluded, and which are transferred to the purchaser by virtue of law and without any special arrangement.

Hence, the requirements for exemption in Section 9 (2) No. 2 Sentence 2 RETTA are not met because the usufruct had not yet been established in rem at the time the purchase agreement for the hereditary building right was concluded.

Source:

Supreme Tax Court, decision of 22 October 2025 (II R 5/22), published on 5 February 2026.

Note: In a similar case concerning a transfer of right of habitation (residential right), the Supreme Tax Court reached the same conclusion. (judgment of 22 Oktober 2025 II R 32/22 published on the same day): “If the purchaser of a property obtains a personal right of residence the assessment basis for real estate transfer tax is increased by the capitalized value of such a right. The right of residence is not a permanent encumbrance within the meaning of Section 9 (2) No. 2 Sentence 2 RETTA.”

The plaintiff had acquired ownership of two plots of land, one of which with a two-family house. In favor of the seller's brother, a lifelong right of residence (right of residence according to Section 1093 Civil Code) had been granted on the building, which had already existed for several years but was only registered in the land register shortly before the sale and entered after the conclusion of the purchase agreement. In addition, a right of usufruct on the property was granted. The tax office assessed the real estate transfer tax based on the purchase price plus the value of the right of residence but without taking into account the value of the usufruct.

By concluding the purchase agreement, which establishes the claim for transfer of ownership, the plaintiff had assumed the obligation to grant the right of residence in addition to the payment. The purchase price and the obligation together constitute consideration within the meaning of Section 9 (1) No. 1 RETTA, the Supreme Tax Court said.

Schlagwörter

residential buildings, sale of property