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By PwC Deutschland | 10. April 2026

RETT: Transfer of partnership share from trustee to trustor subject to tax

In a recently published decision, the Supreme Tax Court had to determine whether, and under what conditions, the acquisition of a share in a partnership is subject to real estate transfer tax if the interest is held under a trust arrangement and the share is later transferred from the trustee to the trustor.

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Background

In a trust agreement from March 2004, siblings A and B, who were minors at the time, instructed their uncles C and D to establish a civil-law partnership (GbR - the plaintiff) to purchase a property. Under the trust agreement, C (Trustee 1) was to hold his share in the partnership in trust for A (trustor 1), and D (Trustee 2) was to hold his share in the partnership in trust for B (trustor 2). The trustees founded the plaintiff and acquired property in the course of foreclosure proceedings sometime later in March 2004. Entry into the land register was made on June 30, 2004.

By notarized agreement of October 2017, Trustors 1 and 2 and Trustees 1 and 2 agreed to terminate the fiduciary agreement. Trustee 1 transferred his ownership interest in the plaintiff to Trustor 1, and Trustee 2 likewise transferred his interest to Trustor 2. In light of the changes in the plaintiff's shareholder structure, the tax office assessed real estate transfer tax (RETT) against the plaintiff pursuant to Section 1 (2a) of the Real Estate Transfer Tax Act (RETTA). The plaintiff argued that the trustors could not acquire property from themselves. Under the trust agreement, the property had been attributable to the trustors from the outset. Section 39 (2) No.1 of the General Tax Code (GTC) would apply in the context of real estate transfer tax. The lower tax court granted the plaintiff's appeal.

Section 39 GTC deals with the attribution of assets which shall - as a general rule - be attributable to their owner. However, where a person other than the owner exercises effective control over an asset in such a way that he can, as a rule, economically exclude the owner from affecting the asset during the normal period of its useful life, the asset shall be attributable to this person. In the case of fiduciary relationships, assets shall be attributable to the beneficiary, in the case of transferred ownership for security purposes to the security provider, and in the case of proprietary possessions to the proprietary possessor (Section 39 (2) No. 1 GTC).

Decision

The Supreme Tax Court upheld the tax office's appeal. It is not disputed that the acquisition by the trustor of a direct interest in a partnership from the trustee constitutes a taxable event under § 1 (2a) Sentence 1 RETTA. However, contrary to the view of the lower tax court, the tax exemption provided for in Section 6 (3) Sentence 1 in conjunction with Section 6 (1) Sentence 1 RETTA is not applicable here, the Supreme Tax Court said.

1. Transaction is subject to RETT

Section 1 (2a) Sentence 1 RETTA provides that where a partnership owns a domestic site and where partnership changes over a five-year period lead to at least 95 per cent (currently: 90 per cent) of the capital falling directly or indirectly to new partners, the ownership of the site shall be deemed to have been transferred to the new partnership.

The conditions for taxable transaction under § 1 (2a) Sentence 1 RETTA were met upon

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the termination of the fiduciary relationships. The acquisition in rem of the partnership shares by the trustors led to a direct change in the plaintiff's shareholder structure because under civil law the trustors became new shareholders of the plaintiff. The fact that the trustors already held an indirect interest in the plaintiff prior to the acquisition of the shares due to the fiduciary relationships that are recognized under tax law does not preclude taxability under Section 1 (2a) Sentence 1 RETTA. Thus, within five years 95% of the shares were transferred to new shareholders, namely Trustors 1 and 2.

2. No tax exemption available

If real property is transferred from joint ownership to the co-ownership of several persons who were previously part of the joint ownership, the **tax is not levied** to the extent that the share received by each individual acquirer corresponds to the proportion of the joint ownership's assets in which they held an interest; **Section 6 (1) Sentence 1 RETTA**.

According to **Section 6 (3) Sentence 1 RETTA** the provisions of para. 1 apply mutatis mutandis to the transfer of real property from one joint ownership to another.

Section 6 (3) Sentence 1 RETTA is meant to exempt the acquisition of real estate by a joint ownership group from RETT to the extent that, due to the joint ownership relationship among the partners, the property remains within the scope of attribution defined in Sections 5 and 6 RETTA and despite the change in legal ownership. However, in the case of the acquisition of a partnership interest by the trustor from the trustee there is no identity of ownership. Although the trustor is a new partner of the partnership, he did not previously hold an interest in the partnership's assets. A fiduciary relationship is not sufficient to attribute an interest in the assets of joint ownership to a trustor. A "share in the assets of the joint ownership" within the meaning of the relevant statutory provisions is to be understood as the individual joint owner's share, in terms of value, in the assets of the joint ownership.

Source:

Supreme Tax Court, judgment of 5 November 2025 (II R 9/23) published on 2 April 2026.

Schlagwörter

fiduciary, share transfer