

Real Estate Tax Services News

Keeping you informed

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Internet consultation on limitation of RETT exemption

In brief

The Dutch Ministry of Finance has launched an internet consultation on a draft proposal of law limiting the application of the real estate transfer tax (RETT) exemption applicable to the acquisition of newly developed property through the acquisition of shares. It has been proposed to abolish this exemption as of 1 January 2024. The aim of the proposal is to fight value-added tax (VAT) saving structures by indirectly acquiring newly developed real estate through the acquisition of shares but has a broader effect and also impacts situations where no VAT saving is realised. The exemption does continue to apply in case newly developed real estate is acquired directly (asset deal).

Responses to this consultation could be submitted until 27 March 2023.

Background information

The acquisition of a qualifying interest (1/3 or more) in a real estate rich entity (RRE) is in principle subject to real estate transfer tax. If the RRE – in short – owns new real estate or a building site, the acquisition of the shares is exempt from real estate transfer tax. The Supreme Court decided in 2011 that if the acquisition of the real estate itself would be exempt from RETT, this must also apply to the acquisition of the shares in a company that holds the real estate. In this context, despite the literal text of the law, it is irrelevant that no VAT is due on the sale of the shares.

Legislative proposal

A share transaction may be of interest to buyers who have no or limited right to deduct VAT such as an investor in residential real estate. In the case of a share transaction, no VAT is due on the sale price of the

shares. In principle, the advantage of a share transaction compared to an 'asset transaction (direct purchase of the property) is that on balance no VAT is due on the development profit and underlying development costs not subject to VAT, such as interest and internal costs. In the case of an asset transaction, the VAT basis would be the full purchase price of the newly developed real estate. The legislator considers this undesirable and therefore proposes to exclude the acquisition of shares in a RRE from the RETT exemption. The purpose of the proposal is therefore to deal with situations in which a VAT benefit is obtained through a share transaction. This does not take into account that parties may have opted for a share transaction for reasons other than VAT savings.

What is striking about the proposal is that share transactions where no VAT advantage is intended and/or achieved (and so the share transaction is chosen for other reasons), are also excluded from the exemption. The proposal therefore (for the time being) has a broader effect than it appears to be intended for and can result in a substantial amount of double taxation (cumulation of VAT and RETT).

The proposal includes that the existing policy with regard to the acquisition of participations in partnerships (e.g., Dutch CVs) will also be adjusted. The RETT exemption will also be abolished in those situations.

Our view

If enacted, it is expected that a share deal with respect to newly developed residential real estate (or other real estate that is leased out exempt from VAT) will lead to a higher tax burden than an asset transaction. VAT savings with respect to newly developed residential real estate through share deals seems no longer possible, resulting in higher investment costs which may impact the feasibility of residential projects in a market that is already under pressure in the Netherlands. Furthermore, since the proposed legislation also results in an extra levy of RETT - compared to an asset deal - in case of share transactions related to newly developed real estate in situations where the real estate is fully used for VAT taxed activities (i.e., no VAT savings as a result of the share transaction) it is expected that no share transactions will be carried out with respect to RRE's holding newly developed real estate. The currently proposed legislation does not provide grandfathering rules for transactions already entered into, but to be completed after the date of the new legislation entering into force. We expect parties will react to the consultation addressing the market consequences and the substantial amount of overkill in the legislative proposal.

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