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Real estate transfer tax on share acquisitions unconstitutional?

The Supreme Tax Court has asked the Constitutional Court for a ruling on the conformity with the constitution of the real estate transfer tax valuation provisions applicable to share transfers.

Real estate transfer tax is a stamp duty levied on property sales at the rate of 3.5% of the consideration. However, it is also levied on various other ownership transfers with a similar – direct or indirect – effect, including the accumulation of at least 95% of the shares in a property-owning company in a single hand. In this case, though, the tax is levied on one of a set of specific formulae – for different types of site, a built up commercial property at 12.5 times its annual rentable value – given that the consideration for the indirect transfer of ownership in the property is inseparable from that for the rest of the share transfer. The same formulae were also applied when taxing transfers of property by gift or inheritance, but were held in that connection in 2006 by the Constitutional Court to be too arbitrary to meet the constitutional requirement of like treatment of like circumstances. The main argument of the court at that time was that the formulae could lead to values varying between some 20% and “over 100%” of the present value of the property and thus could not ensure that similar transfers were taxed in an even remotely similar way. However, the judgment allowed continued application of the Inheritance Tax Act up to December 31, 2008 in its then form in order to give the government time to make the appropriate amendments. At the time, it was widely assumed that the changes would also be carried over into the Real Estate Transfer Tax Act; in the event, though that act was left as it stood.

The Supreme Tax Court is now faced with a case brought by a taxpayer, claiming on the basis of the Constitutional Court’s 2006 judgment that the present tax on share transfers of property-owning companies is unconstitutional and cannot be levied. Interestingly, the share transfer in was executed on December 2, 2008, that is, in the last month of the period of grace granted to the government. That the government did not avail itself of this opportunity means in the view of many that it cannot now claim that it then still had the right to levy an unconstitutional tax. Because the previous case addressed a different tax, the Supreme Tax Court rule on its present case, but must again refer the issue to the Constitutional Court.

The Supreme Tax Court is clearly convinced that the present real estate transfer tax is unconstitutional. On the other hand, the effect of the Constitutional Court ruling now requested is open. The court might disapply the provision retroactively to the date of the case (2001), it might declare it unconstitutional, but grant a further remedial period of grace to the government, or it might even disallow it retroactively whilst giving the government time to make retroactive amends. That this last possibility is not wholly unrealistic is illustrated by a resolution a month later in which the Supreme Tax Court refused another plaintiff a stay of execution of a real estate transfer tax debt on the grounds that an interim relief granted in advance of the main hearing should not exceed the likely ultimate result.

Supreme Tax Court resolutions II R 23/10 of March 2, 2011 (request to the Constitutional Court) and II B 153/10 of April 5, 2011 (refusal of stay of execution) both published on April 20

Keywords

real estate transfer tax, share transfer, stamp duty