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By PwC Deutschland | 15 February 2019

Does a letterbox company have legal capacity?

In a case involving a charge to real estate transfer tax (RETT), the Supreme Tax Court granted the taxpayer interim relief in the form of a suspension from execution (i.e. a delayed tax payment), as the question arose as to whether one of the parties to the transaction, a letterbox company, had legal capacity.

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Background

A business entity G was a general partner of a limited partnership (the KG) which held real estate in Saxony; the sole limited partner of the KG was X. X reduced his partnership share in the KG from €30k to €2.5k. X then became a limited partner in S which was an entity established in the Seychelles under the International Companies Act. C, an entity with its registered office in the British Virgin Islands held the sole interest in S. X concluded an agreement with C in Cyprus, according to which C held its interest in S as a nominee for X. In 2013 and 2014, S increased its limited partnership interest in the KG to a total amount of € 137,500.

Following these events the tax office assessed, a charge to RETT. Through the increase of its limited partnership interest, direct and indirect transfers of interest in the KG had occurred, through which S had increased its interest in the KG to 96.88%.

The main issue of the proceedings relating to an appeal against the RETT assessment is still pending before the Supreme Tax Court. An application was made for a suspension of the execution of the assessments (i.e. a delay in payment), which was refused both by the tax office and the tax court. The Supreme Tax Court agreed to interim relief and granted the sought suspension.

In delivering its judgment, the Suprem Tax Court noted as follows:

After a summary examination, the Supreme Tax Court expressed doubts as to the legality of the contested assessment, on the basis that S should almost certainly be considered a letterbox company (shell company). It was not clear whether such a company had any legal capacity in Germany at all. As such, it was not apparent whether S was in a position to hold a share in the KG. Thus in the circumstances it was not apparent whether a taxable event could even have occurred under the RETT Act. It followed, therefore,that there was sufficient uncertainty - both on a question of fact and on a question of law - to justify a suspension of execution.

The legal capacity of a corporation incorporated abroad is generally determined according to the law of the place of its seat of effective management (the so-called “seat theory”). By way of derogation, the legal capacity is determined by the so-called “establishment theory” if a company is effectively established in a contracting state of the EU, the EEA or in a state treated under a treaty as an equivalent with respect to the freedom of establishment.

If a corporation does not have legal capacity according to the “seat theory”, it can still have legal capacity as a partnership if more than one partner holds an interest in it. In the present case, however, S had only one shareholder, namely C.

Admittedly, due to the particular circumstances of the case, the actual “seat” of S may have been in Germany. However, it was not apparent that S had complied with the rules for establishing a German company, so that, according to domestic standards, it would not have any legal capacity as a limited liability

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company.

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Keywords

Letter-Box Companies, legal capacity, limited partnership