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By PwC Deutschland | 22 January 2020

Real estate transfer tax: cancellation of a real estate transfer agreement

In its decision of 4 November 2009 (II B 48/19), published on 16 January 2020, the Supreme Tax Court held that Section 16(1) No. 2 Real Estate Transfer Act (“RETT Act”) did not provide for a time limit for the cancellation of purchase transactions. The special limitation period set out in Section 16 (4) RETT related to the cancellation of the agreement itself and not to the date on which an application was made to cancel the RETT assessment.

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Furthermore, in the circumstances, the cancellation was not a "retroactive event" within the meaning of Section 175 (1) Sentence 1 No. 2 of the General Tax Code.

Background

By notarized purchase agreement dated 29 February 2012, the appellant acquired a plot of land. A priority notice of conveyance had already been entered in the land register for third parties who had previously wanted to acquire the property. The agreement included a right to terminate in the event that this priority notice was not cancelled by 31 December 2012 at the latest. Real estate transfer tax ("RETT") was levied through an assessment dated 20 April 2012 and paid promptly by the appellant.

By notice dated 27 December 2013, the appellant cancelled the contract but only applied to the tax office for the revocation of the RETT assessment pursuant to Section 16(1)(2) of the RETT Act on 19 January 2017. The tax office rejected the application, as the limitation period for the assessment had expired on 31 December 2016.

The tax court also took the view that the limitation period had expired, noting, in particular, that the cancellation of the contract, unlike a rescission, did not constitute a retroactive event within the meaning of Section 175 (1) Sentence 1 No. 2 of the German Tax Code ("GTC"), under which the limitation period would have restarted.

The decision of the tax court to refuse leave to appeal was referred to the Supreme Tax Court, which confirmed the lower court's decision and refused leave to appeal.

Judgment

In its judgment of 18 November 2009 (II R 11/08) the Supreme Tax Court stated that Section 16(1) No. 2, RETT Act – in contrast to Section 16(1) No. 1 -- did not provide for a time limit. This finding, so the Supreme Tax Court in the instant case, referred, however, to the date of the cancellation of the agreement. In its 2009 judgment, the Supreme Tax Court had not ruled that the application to revoke the tax assessment could be made without reference to the time limits by applying the general provisions on limitation periods. This is a conclusion that could not be reached, as it would contradict the whole concept of Section 16 RETT Act.

The cancellation of a purchase transaction on the basis of a legal claim in the event of non-fulfilment of the contractual conditions, which according to Section 16 (1) no. 2 RETT Act can, upon application, lead to a revocation of the tax assessment, may be executed without time limit. i.e. after the expiry of two years or even after the expiry of the limitation period. This follows from the fact that the time limit in Section 16(1) No. 1, RETT Act is not included in Section 16(1) No. 2. However, the omission of the time limit in Section 16 (1) No. 2, RETT Act only relates to the timing of the cancellation of the purchase transaction itself and not to the date by which the application for the revocation of the tax assessment must be made.

Section 16 (4) RETT Act provides that the limitation period for the issuance of an assessment under Sections 169 to 171 GTC does not end before one year after the occurrence of the event. This provides for the possibility to reverse the tax assessment in cases of late cancellation, for example shortly before or after

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the expiry of the limitation period. The linking of the limitation rules to the cancellation of the agreement itself meant that the relevant question was not whether the cancellation would have been possible at a later point in time under the terms of the contract, but rather when it actually took place.

The tax court did not deviate from these legal principles. The appellant had asserted her right of cancellation on 27 December 2013, so that there was no urgency with regard to the ending of the limitation period. The fact that, according to the terms of the contract, the appellant could have asserted her right of cancellation at a later date, did not impact the evaluation of the actual cancellation, neither under the terms of Section 16 (1) No 2 RETT Act nor under the terms Section 16 (4) RETT Act.

Furthermore the finding of the tax court did not diverge from earlier Supreme Tax Court case law with regard to Section 175 (1) Sentence 1 No 2 GTC (an income tax case). In the relevant case the Supreme Tax Court had dealt with the question of whether the cancellation of a contract concerning the transfer of company shares is a “retroactive event” within the meaning of Section 175 (1) Sentence 1 No. 2 GTC and answered this question in the affirmative. However, the Court expressly stated in this regard that the tax effect for the past was based on the substantive tax law applicable in the individual case. The case related to a provision of income tax law on the sale of shares in corporations. In view of this express limitation, the tax court could not rely on that decision in a case involving the cancellation of a purchase transaction as a retroactive event for the purposes of the RETT Act and thus under the framework of a completely different substantive tax law.

The Supreme Tax Court took the view that the appellant’s contention that the tax court made a mistake in substantive law in failing to hold the cancellation of the purchase transaction to be a “retroactive event” within the meaning of Section 175 (1) Sentence 1 No. 2 GTC, was in itself not a reason for granting leave to appeal. The situation would be different if the tax court had made an error in the application of the law or if the matter was of fundamental importance.

A legal question was only of fundamental importance if it was capable of and in need of clarification. The legal situation in the case before the Supreme Court was in its view clear. The cancellation of a purchase transaction within the meaning of Section 16 (1) No. 2 RETT Act was not a “retroactive event” within the meaning of Section 175 (1) Sentence 1 No. 2 GTC. This could be read from Section 16 (4) RETT Act and Section 175 (1) Sentence 2 GTC; it corresponded to the principle that the tax effect for the past should be judged independently for each respective substantive tax law.

Source

Decision of the Supreme Tax Court on 4 November 2019 (II B 48/19) published on 16 January 2020.

Keywords

limitation period, real estate transfer tax, revocation of tax assessments