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By PwC Deutschland | 13 February 2020

Tax exemption for group restructurings under Section 6a Real Estate Transfer Act: Supreme Tax Court applies a broad interpretation.

The tax exemption from real estate transfer tax (RETT) in the event of restructuring within a group under Section 6a of the Real Estate Transfer Tax Act (RETTA) does not constitute State Aid prohibited by EU law.

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It can also apply to cases where a dependent company is merged with a controlling company. This was decided by the Supreme Tax Court in its ruling of 22 August 2019 - II R 18/19, published on 13 February 2020.

Background

For more than five years, the appellant had been the sole shareholder of a subsidiary that was merged into it. As a result, the real estate of the subsidiary was transferred to the appellant. The tax office took the view that the conditions for a RETT exemption under Section 6a RETTA had not been met. In contrast, the tax court decided that the RETT exemption was available and the tax office appealed the decision.

Judgment

The Supreme Tax Court confirmed the tax court's decision. It stated that according to Section 6a Real Estate Transfer Tax Act RETT is not levied on certain taxable acquisitions arising by reason of a restructuring (e.g. merger). One of the prerequisites was that a controlling company and a dependent company are involved in the restructuring process and that the controlling company's participation in the dependent company must be at least 95% in the five years before the transaction and the five years after. The European Court of Justice (ECJ) has ruled, the tax exemption granted by Section 6a RETTA did not constitute State Aid prohibited by EU law.

Contrary to the view of the tax authorities, the Supreme Tax Court considered that the merger of the subsidiary into the appellant could benefit from the RETT exemption. The fact that the controlling company could no longer hold a share in the merged subsidiary following the restructuring and thus meet the 5-year post transaction holding period did not harm its entitlement to the RETT exemption. The holding periods set out in Section 6a Sentence 4 RETTA need only be observed to the extent that they can in fact possibly be observed as a result of the restructuring process.

Source: Judgment of 22 August 2019 II R 18/19, published on 13 February 2020

Also interesting…

In contrast to the Federal Ministry of Finance, the Supreme Tax Court also applied a broad interpretation of the RETT exemption in the taxpayer's favour in five other proceedings (II R 15/19, II R 16/19, II R 19/19, II R 20/19 and II R 21/19). This applied both to the interpretation of the term "controlling enterprise" used in the provision and to the question of which restructurings are covered by the RETT exemption. Only in one case (II R 17/19), did the Supreme Tax Court did not consider that the conditions for the RETT exemption had been met.

In case **II R 15/19** (decision of 21 August 2019 also published on 13 February 2020) the Supreme Tax Court ruled that the RETT exemption could be applied where the real-estate-holding subsidiary was merged into a controlling enterprise, where the "controlling enterprise" an individual who was a registered trader. The Court ruled that the RETT exemption applied to all legal entities within the meaning of RETTA which are economically active. It is irrelevant whether the participation in the dependent company is held as private or

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business assets.

In cases **II R 16/19** and **II R 21/19** (both decisions of 21 August 2019 also published on 13 February 2020) the Supreme Tax Court ruled that the fact that the controlling company could not have held a 95% share in the subsidiary in the 5 years prior to the restructuring because the subsidiary had been newly established through a spin-off did not harm the entitlement to the RETT exemption. The holding periods set out in Section 6a Sentence 4 RETTA need only be observed to the extent that they can in fact possibly be observed as a result of the restructuring process.

In case **II R 19/19** (decision of 21 August 2019 also published on 13 February 2020) the Court held that the RETT exemption could be applied in a case where a subsidiary was merged into a sister company – the pre-transaction holding period having been met - where the sole shareholder of both companies was a charitable trust. The Court ruled that ruled again that the RETT exemption applied to all legal entities within the meaning of RETTA which are economically active. There was no requirement in Section 6a RETTA that the controlling enterprise had to be an entrepreneur within the meaning of the VAT Act.

The case **II R 20/19** (decision of 21 August 2019 also published on 13 February 2020) also related to a merger where – again - it would have been impossible for the controlling company to hold shares in the subsidiary in the 5 years post-restructuring because the subsidiary had been merged into the controlling company and thus no longer existed. The Court again came down in favour of the taxpayer and allowed the RETT exemption.

The case **II R 17/19** (decision of 22 August 2019 also published on 13 February 2020) was the only case of the seven which the Supreme Tax Court did not rule in favour of the taxpayer. This case involved the merger of two sister companies, whereby the controlling company had held its 100% interest in the transferring subsidiary for the full 5-year pre-restructuring holding period but had held its 95% interest in the absorbing company for less than five years prior to the merger. The Court held that the conditions of Section 6a RETTA had not been met as the holding period must apply to both companies; this was the case even though the absorbing company had been financially, economically and organisationally integrated into the undertaking of the controlling company for at least five years (i.e. but with a holding of less than 95%).

Keywords

RETT, RETT exemption, Spin-off, merger, real estate transfer tax, restructuring