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By PwC Deutschland | 06 December 2020

RETT: Change of shareholders in real estate partnership

The Supreme Tax Court has granted a taxpayer’s appeal against a real estate transfer tax assessment on the grounds that an indirect change in the shareholdings in the members of a real estate partnership was less than a complete change of interest in the partnership. With its decision the court has confirmed its case law regarding share transactions made prior to the enactment of the Tax Amendment Act 2015.

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Background

In a judgement of April 24, 2013 relating to 2006 (year of dispute) the Supreme Tax Court granted a taxpayer's appeal against a real estate transfer tax assessment on the grounds that an indirect change in the shareholdings in the members of a property owning partnership was less than a complete change of interest in the partnership (judgment II R 17/10 of April 24, 2013 published on June 19). This judgement contradicted the opinion of the tax authorities at the time. In the view of the Supreme Tax Court, direct changes of ownership were a matter of legal form, whilst indirect changes could only be a matter of business substance. A sale of 50% of the shares in a company owning the entire share capital of another company owning a 6% partnership share did not give the acquirer a 3% interest in the partnership. Rather, each shareholding level had to be seen separately, and a 50% acquisition did not give the acquirer the right to dictate policy to the company on the management of its investments. As a result of the divergent judgement by the Supreme Tax Court, the former view held by the tax authorities was then put on a statutory (legal) basis in the **2015 Tax Amendment Act** ("Steueränderungsgesetz 2015"), insofar as the extent of the indirect change of shareholders in a partnership be determined depending on legal form.

Case of dispute

The plaintiff, a German partnership (GmbH & Co. KG), was originally held by B-GmbH with 1% and C-GmbH with a share of 99%. C-GmbH itself was held by D with an interest of 16% and later of 40%. In November 2000, the plaintiff acquired real estate property from C-GmbH. On 21 March 2007, C-GmbH transferred 6% of its interest in the plaintiff to its shareholder D. The remaining partnership share of C-GmbH was thus 93%. On April 3, 2007, C-GmbH changed its name to E-GmbH and on April 4, 2007, E-GmbH was merged with F-GmbH. The tax office held that, as a result of the merger of C-GmbH/E-GmbH with F-GmbH and with D joining the partnership with his 6% stake, 99% of the plaintiff's shares were in fact transferred to new shareholders. The complaint before the Lower Tax Court of Duesseldorf was rejected.

Decision

The Supreme Tax Court granted the appeal (i.a. also because of formal inadequacies in the tax assessment notice). Based on the fact finding and the conclusions of the Lower Tax Court, it could not finally be determined by the Supreme Tax Court whether in fact at least 95% of the shares in the partnership's corporate assets were actually transferred when the merger of E-GmbH into F-GmbH became effective. At the time of the merger (20 April 2007), only 93% of the shares in the plaintiff were transferred to new shareholders, namely F-GmbH. D was **not a new** shareholder at that time, as the transfer of 6% of the shares took place earlier, i. e. on March 21, 2007. Moreover, this transfer became effective upon entry/registration in the German Commercial Register, i.e. on December 23, 2008. It therefore was not possible for the Supreme Tax Court to decide whether the shareholder structure of the plaintiff has changed by at least 95% in the period of five years prior to April 20, 2007.

Comment: While the court - in its present decision - adheres to and confirms its earlier interpretation und

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ruling of 24 April 2013 regarding periods prior to enactment of the Tax Amendment Act 2015 it should be noted that the present judgement is therefore no longer applicable for transactions after November 5, 2015.

Source:

Supreme Tax Court decision 17 June 2020 (II R 18/17) published on 3 December 2020.

Keywords

change of shareholders, indirect change, indirect shareholding, real estate partnership