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By PwC Deutschland | 07 November 2023

Joint decrees: Attribution of real estate for the supplementary facts in Section 1 (2a) to (3a) of the Real Estate Transfer Tax Act (RETTA)

On 16 October 2023, the long-awaited joint decrees (issued by the Supreme Tax Authorities of the Federal States) on the attribution of real estate for the purposes of the taxation of share deals (Section 1 (2a) to (3a) RETTA) became available.

These adopt the previous case law of the Supreme Tax Court from 1 January 2021 (II R 44/18) and 14 December 2022 (II R 40/20) and illustrate the legal opinion with examples.

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A. Principles (Part 2)

Following on from their previous legal opinion, the Supreme Tax Authorities of the Federal States take the view that neither civil law nor Section 39 General Tax Code are decisive for the question of whether a property constitutes a part of the company's assets for the purposes of Section 1 (2a) to (3a) RETTA (Paragraph 2). Rather, the (preceding) execution of the events under Section 1 subsections 1, 2, 3 and 3a RETTA will be relevant for deciding the beginning and the end of the attribution.

Parts 2.1 and 2.2 contain more detailed explanations on this, which largely reflect the principles of attribution developed upon by the Supreme Tax Court in its decision of 14 December 2022 (II R 40/20):

Attribution in asset deals (Part 2.1 subpart 5): A property is attributable to a company where the company previously executed an event under Section 1 (1) or (2) RETTA (i.e. "an acquisition transaction" under these subsections) This relates to acquisition transactions that relate directly to domestic properties ("asset deals"). The company acquiring land in this way is referred to as a "land-owning company" (in contrast to the "other company" in Part 2.2). In contrast to the principles set out by the Supreme Tax Court of 14.12.2022 (II R 40/20), the joint decrees do not contain the requirement - in order to meet the requirements of Section 1 (1) RETTA - that the acquisition transaction also includes the acquisition of the right to exploit the property.

De-attribution in the case of asset deals (Part 2.1 subpart 6): The attribution of the property to the land-owning company ends for the purposes of Section 1 (2a) to (3a) RETTA where a third party has realised "an acquisition transaction" in relation to the relevant property in accordance with Section 1 (1) or (2) RETTA. It is clear from the wording and the attached examples that the occurrence of a taxable share deal in accordance with section 1 (3) or (3a) RETTA in relation to the property concerned will not be sufficient for a change in the attribution of the property from the land-owning company.

Attribution in the case of share deals (Part 2.2 subpart 7): In addition to a company owning the property, the property can also be attributed to a company if it has previously executed "an acquisition transaction" in relation to the property concerned under Section 1 (3) or (3a) RETTA. This applies to taxable acquisition transactions vis-à-vis shareholdings in land-owning companies (share mergers, share transfers, share transfers pursuant to Section 1 (3) or (3a) RETTA). The company acquired in this way is referred to in the joint decrees as "other company". Transactions pursuant to Section 1 (2a) or (2b) RETTA ("share transfers" - in contrast to Section 1 (3) and (3a) RETTA) or the mere holding of shares should not be enough to result in an attribution.

De-attribution in the case of share deals (Part 2.2 subpart 8): The property attributed in this way should no longer be attributable to the other company where:

- a third party executes a transaction in relation to the relevant property under Section 1 (3) or (3a) RETTA or
- the participation in the company owning the land falls below the relevant participation threshold

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(currently: 90 %) or

- the land is no longer attributable to the land-owning company (i.e. if, in accordance with Subpart 6, a third party has executed “an acquisition transaction” under Section 1 (1) or (2) RETTA in relation to the land, e.g. the land itself has been sold).

As a result, in the opinion of the Supreme Tax Authorities, a double attribution to both the "land-owning company" and to the "other company" is possible. This means that the realisation of a taxable acquisition transaction (share movement pursuant to Section 1 (2a) and/or (2b) RETTA) is possible for both companies (see also example 1 from subpart 14). The decrees do not contain any provision to the effect that, in the event of a double attribution, no tax is to be assessed for one of the two acquisition transactions realised ("priority rule"). If a double attribution comes into question, it must therefore be assumed in future that tax will be assessed for both the "land-owning company" and the "other company" (double collection of tax).

B. Priority of share movements (Part 3.2)

When examining whether property of a land-owning company is attributable to another company because of a share deal realised in the past, the priority of share movements pursuant to Section 1 (2a) or (2b) RETTA are generally to be considered. The basis for this is that, on the one hand, a share movement under Section 1 (2a) or (2b) RETTA cannot per se lead to the attribution of a property to the "other company" and, on the other hand, the application of Section 1 (2a) or (2b) RETTA supersedes the application of Section 1 (3) and (3a) RETTA (and thus the associated attribution) in certain cases (so-called point-in-time approach). The tax authorities distinguish as follows:

- There is a simultaneous realisation of transactions under Section 1 (3) (here either No. 2 or No. 4) or (3a) RETTA and under Section 1 (2a) or (2b) RETTA. In this case, the share movement pursuant to Section 1 (2a) or (2b) RETTA completely supersedes the taxation under Section 1 (3) or (3a) RETTA, so that no change in the attribution can occur. This occurs when both events are based on the transfer in rem of the shares, as can be the case, e.g., in reorganisations.
- There is a time-delayed realisation of the transactions pursuant to Section 1 (3) (here either No. 1 or No. 3) or (3a) RETTA and under Section 1 (2a) or (2b) RETTA. In this case, both elements of the event apply in parallel; an assessment in accordance with Section 1 (3) or (3a) RETTA can be cancelled or amended in accordance with Section 16 (4a) RETTA. As a result of the realisation of the taxable events per Section 1 (3) or (3a) RETTA, there should be a change in the attribution in this case (i.e. additional attribution to the "other company"), which should not end with the cancellation or amendment of the tax assessment in accordance with Section 16 (4a) RETTA. Such a case typically arises in cases of classic share purchase agreements in which the legal transaction that establishes the claim to transfer of ownership ("signing") and the actual transfer ("closing") diverge.

C. Cancellation (Part 3.3)

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Subparts 12 and 13 contain explanations on how to proceed with the attribution in the event of cancellation of acquisition transactions pursuant to section 16 (1) and (2) RETTA.

If “an acquisition transaction” (e.g. property purchase agreement in accordance with Section 1 (1) No. 1 RETTA) is cancelled before ownership has been transferred to the purchaser and the assessment is waived or an existing assessment is cancelled in accordance with Section 16 (1) RETTA, the attribution should not cease to apply retroactively (i.e. already at the time of conclusion).i.e. at the time of the conclusion of the purchase agreement) but only from the time at which the claim for cancellation of the assessment/assessment arose (in our opinion therefore at the earliest at the time of the reversal).

In the cases of Section 16 (2) RETTA (reacquisition of ownership of the sold property), the attribution should end as soon as the legal transaction triggering the tax for the reacquisition has been concluded.

D. Scope of application of the provision (Part 6)

The joint decrees apply to all open cases. Insofar as other (previous) decrees contain statements to the contrary, these are no longer applicable.

Reference

Joint decrees of the Supreme Tax Authorities of the Federal States dated 16 October 2023 - 31-S 4501/18#01#07-.

Keywords

Real Estate, Real estate enterprises, real estate transfer tax