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By PwC Deutschland | 02 July 2024

RETT: No protection of legitimate expectation in case of indirect unification of shares through intermediary partnership

In a most recent decision, the Supreme Tax Court commented on the tax situation of an indirect unification of shares through intermediary partnership in 2012 with respect to the relevant holding for establishing its interest in the related real-estate holding company. The court further held that there is no protection of legitimate expectations with respect to the tax effects of a subsequent judgment of the Supreme Tax Court in 2017.

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Background

Real estate transfer tax is levied on property sales. However, it is also levied on various other ownership transfers with a similar – direct or indirect – effect, including the accumulation of at least 95% of the shares in a property-owning company in a single hand (Section 1 para. 3 number 1 and 2 Real Estate Transfer Tax Act - RETTA).

The plaintiff, a Luxembourg corporation, was the limited partner of a German partnership (KG). General partner of KG was a German limited liability company (GmbH). In February 2012, the plaintiff and the KG acquired shares in a property-owning company (GL) The plaintiff's share in GL was 94% and the KG held the remaining 6%. The transaction was not reported to the tax office until 2019, which then issued an assessment for real estate transfer tax (RETT). The plaintiff objected and applied for the tax to be set at € 0 on grounds of extra-statutory concession which might in general be possible where the collection of tax would be unreasonable given the circumstances but which is in general at the discretion of the tax office and is only subject to limited judicial review. The appeal before the Tax Court of Hesse was rejected.

Decision

The Supreme Tax Court confirmed the view held by the court of first instance. Where an intermediary partnership holds a direct or indirect interest in a real estate-owning company, the relevant holding for establishing its interest in the related real-estate holding company is its interest in the capital of the partnership and not the interest in the jointly owned property according to the law of property. This current view on share deals involving partnerships is line with the rules already established for corporations.

With its decision the Supreme Tax Court confirms an earlier judgment of 27 September 2017 (case ref. II R 41/15) on the indirect unification of shares in property owning corporations in the case of an intermediate partnership. There, the question was whether the share acquisition of the appellant, a British limited company, had led to a unification of shares for RETT purposes (further details in or **blog post of 31 January 2018**).

In the present case the tax office was entitled to invoke the above decision II R 41/15 even though it was published only after the acquisition of the shares in 2012. At the time of the share transfer, the legal situation was not beyond doubt. The plaintiff could not successfully claim protection of legitimate expectations regarding the RETT assessment since such protection had not (yet) been established by case law of the Supreme Tax Court as regards a clear interpretation of the term "share" within the meaning of Section 1 (3) No. 1 RETTA.

Notwithstanding the aforementioned, a Supreme Tax Court ruling does not create statutory law and therefore **does - as such – not convey absolute legal certainty.** Also, the identical decrees issued by the highest tax authorities of the German Federal States of October 2013 cited by the plaintiff were not yet in force at the time of the acquisition of the shares in 2012.

Finally, the Supreme Tax Court notes that the real estate transfer tax assessment issued in 2019 had **not**

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yet become statute-barred, because the 4-year period for tax assessment (the statute of limitations) had been suspended for three years due to the lack of notification of the share acquisition to the tax authorities according to Section 170 Fiscal Code. Para. 2 sentence 1 no. 1 states that "…*the period for assessment shall begin where a tax return or a self-assessed tax return is to be submitted or a notice posted, at the end of the calendar year in which the tax return, the self-assessed tax return or the notice is submitted, at the latest however at the end of the third calendar year following the calendar year in which the tax has arisen* (…)"

The tax office is now neverthelesss asked to decide whether and to what extent the RETT assessment may be waived on grounds of the concessionary rule mentioned in Section 227 Fiscal Code. This review must be in accordance with the requirements set by the lower tax court (of first instance).

Source:

Supreme Tax Court, decision of 28 February 2024 (II R 7/22), published on 27 June 2024.

Keywords

Protection of legitimate expectations, share transfer