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By PwC Deutschland | 27 January 2025

RETT: New shareholders in case of indirect change in shareholder structure of a property-owning partnership

In a most recent judgment, the Supreme Tax Court sees no taxable event within the meaning of Section 1 (2a) sentence 1 of the Real Estate Transfer Tax Act (regarding the taxation of a consolidation of shares) if a partnership holding an indirect interest in the real estate-owning partnership is interposed in the shareholder structure and where the shareholders themselves remain unchanged.

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Background

According to Section 1 (2a) *Sentence 1* of the Real Estate Transfer Tax Act (RETT Act) in the version applicable at the time RETT is due if at least 95% (currently: 90%) of the ownership interests in a partnership change over a five-year period (currently: ten-year period). Indirect changes in the shareholder structure of the partnerships participating in a partnership are taken into account pro rata by multiplying the percentage of shares in the partnership assets (*Sentence 2*).

X KG indirectly held a 100% interest in the plaintiff, a GmbH & Co. KG (limited partnership with no natural person bearing unlimited liability) via an investment in another KG. Until 16 December 2015, AB and CB each held 20%, EG 20%, MG 30% and TG 10% of the shares in X KG.

By notarial deed of 17 December 2015, EG transferred half of her share in X KG to her sons MG and TG free of charge resulting in MG holding 40% and TG 20% of the shares in X KG. Also on 17 December 2015, MG contributed his 40% share in X KG to Y S.r.L. (Y), a corporation under Italian law. It was further agreed that TG contribute his 20% share in X KG to Z S.r.L. (Z), another corporation under Italian law. Finally, the parties agreed that AB and CB would each contribute 20% of their shares in X KG to W KG, which was incorporated on 20 October 2015. AB and CB were limited partners of W KG with a share of 50% each.

The tax office‘s contention was that the effective composition of the property-owning partnership had changed by more than 95% by taking all changes together and thus the restructuring was falling within the scope of Section 1 (2a) of the RETT Act. The appeal of the plaintiff was rejected by the Munich Tax Court. The preconditions of Section 1 (2a) RETT Act were fulfilled at the level of X KG by way of an indirect participation in the GmbH & Co. KG, because 100% of the shares in the GmbH & Co. KG had been indirectly transferred to new shareholders within five years (40 % to Y, 20 % to Z and 40 % to W KG).

Decision

As a result of the notarized agreement of 17 December 2015, the required minimum of 95% of the shares in the property-owning GmbH & Co. KG have not been transferred directly or indirectly to new shareholders within five years. Following the transfer to W KG of 20% of the shares each held by AB and CB in X KG, which indirectly has held 100% of the shares in GmbH & Co. KG, W KG held an indirect interest of 40% in GmbH & Co. KG. Since AB and CB each held a 50% interest in W KG, they indirectly held a 40% interest in GmbH & Co. KG after the transfer of their shares in X KG.

W KG has been added to the shareholding structure because of the transfer of the shares in AB and CB (leading to an extension of the shareholding chain). However, under the transparency or “look-through approach” in case of multiple-tier partnerships no new shareholders have been added to the property-owning GmbH & Co. KG. The shareholders of W KG were AB and CB, who already held an indirect interest in the GmbH & Co. KG prior to the assignment of their shares. It can therefore be left unanswered whether

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the necessary approvals were granted for the transfer of the shares on 17 December 2015.

Source:

Supreme Tax Court, judgment of 21 August 2024 (II R 16/22) – published on 23 January 2025.

Keywords

change of shareholders, indirect transfers of real estate, real estate companies