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No tax exemption for group restructurings under Section 6a Real Estate Transfer Tax Act

In two parallel decisions the Supreme Tax Court held that a group of natural persons who are not organized in the legal form of a partnership or another corporation is not considered as a legal entity under civil law and real estate transfer tax law and cannot therefore be a controlling company within the meaning of Section 6a Real Estate Transfer Tax Act which provides tax exemption for transfer or concentration in the hands of a single shareholder of at least 95% of the equity capital of a property-owning company.

Background

According to Section 6a (1) of the Real Estate Transfer Tax Act (RETTA), the real estate transfer tax is not levied on certain legal group transactions resulting from a restructuring under the Reaorganizations Act. A controlling company (and one or more of its subsidiaries) must be involved in the restructuring. A company is dependent if the controlling company has held at least 95 percent of its capital or assets directly or indirectly, or partly directly and partly indirectly, without interruption for a period of five years prior to the legal transaction **and** five years after the legal transaction.

In the one **case II R 56/22**, a limited liability company (L-GmbH) with several shareholders had transferred its shares in another real property-owning company (P-GmbH) by way of a spin-off to the plaintiff who had been established for this purpose. As compensation the four shareholders of L-GmbH, who held shares amounting to 15/40, 12/40, 10/40, and 3/40, received shares in the plaintiff in the same proportions as before in L-GmbH.

Decisions

The aforementioned transaction is not exempt from RETT under Section 6a RETTA. In the case in question, there was no participation of a controlling company. A group of altogether four shareholders in which no single shareholder meets the 95% participation threshold is not a controlling company. It was not proven that the group of shareholders formed a GbR (civil law partnership) or another company and that their participations in such a company had to be consolidated so that the company itself could have been a controlling company with a participation of at least 95%.

In the **parallel case II R 31/22** decided on the same date a community had transferred its municipal operation of an assembly hall along with the connected immovable property to a company newly established for this purpose by way of outsourcing through acquisition. This transaction was also not eligible for tax exemption under Section 6a RETTA because the municipality had not held a stake in the acquiring company for at least five years prior to the conversion as required under Section 6a sentence 4 RETTA.

In the case of a spin-off with the intention of establishing a new company, the five-year pre-transaction holding period cannot be met for reasons related to the restructuring because the newly formed company only comes into existence following the restructuring. It would on the other hand have been legally possible to meet the deadline in the case of a spin-off to an existing company. For this reason, compliance with the relevant provisions cannot be forgone in the case of dispute. Finally, the different treatment of spin-offs for the purpose of forming a new company and spin-offs for the purpose of incorporation does not violate the principle of equal treatment under Article 3(1) of the Basic Law, the Supreme Tax Court said.

Source:

Supreme Tax Court judgments of 21 May 2025 II R 56/22 and II R 31/22 published on 30 October 2025.

Keywords

RETT exemption, group structure, unification of shares