

Real Estate Transfer Tax: Fiscal Court issues new interpretation of indirect aggregation of shares with interposed partnerships

Germany: January 2018

In Brief

Structures aiming to avoid real estate transfer tax due on acquisitions by inserting 'Blocker' partnerships have already been tackled by the legislator a few years ago, leading to a new rule on the economic allocation of shares and partnership interests. Surprisingly, the Federal Fiscal Court has now ruled in contradiction to the generally accepted view of practitioners and the Fiscal Authorities and explicitly abandoned earlier Court interpretations. For testing the aggregation of German property company ownership, the court now rejects that partnership interests are being different from share ownerships, demonstrating that certain blocker structures are no longer acceptable. This is of particular interest for older structures.

Indirect aggregation of real estate shares

Background

The legal transfer of shares in a company holding real estate situated in Germany is subject to Real Estate Transfer Tax ('RETT') where the transfer results in the aggregation of direct or indirect ownership of 95% or more of the real estate shares, under Sec. 1 para. 3 no. 1 Real Estate Transfer Tax Act (RETTA). According to Sec. 1 para. 3 no. 2 RETTA, the same applies where shareholdings are accumulated even if no legal transaction took place, as described above.

In contrast to a direct acquisition of real estate shares where the purchaser becomes a civil shareholder, an indirect share acquisition cannot be tied to civil law. Therefore, an indirect share acquisition is defined as a transfer resulting in the acquisition of legal influence over a property.

An acquisition of shares in a real estate company may result in the aggregation of interests in a property where a purchaser is

able to realise its intention in both an intermediary company and the property company itself. In general, this is assumed if there is a chain of corporations where each direct parent company holds at least 95% of the shares of its subsidiary. If these conditions are fulfilled, the intermediate company's shareholding in the property company is attributed to the purchaser as an indirect shareholding in the property company.

According to a decree published by the tax authorities in 2003, the *direct* interest in a property holding *partnership* is understood as the joint ownership in the partnership's total assets (on a 'look through basis'), rather than the participation in the share capital. Therefore, a general partner with less than 5% - or even 0% - interest in such a company may prevent a direct share transfer from triggering RETT. This was previously the common view.

Latest case law

Recently, the Federal Fiscal Court ruled that for the purpose of Sec. 1 para. 3 no 1 and 2 RETTA an *interposed* partnership “share” should be interpreted as a share capital participation, rather than a legal participation in the joint assets of the partnership and, therefore, is treated in the same way as that of an interposed corporation.

The court ruled holding an interest in a partnership of at least 95% conveys the qualified participant the legal opportunity of enforcing its will, in a sense of RETT, not only in the partnership itself, but also in subsidiary companies. For the attribution to the qualified participant it is irrelevant that there are further interest holders with 5% or less interest in the partnership.

By ruling so, the previous view of the court (cf. reference II R 66/98, dated 08 August 2001) is abandoned by the present judgment.

Consequently, where an interposed partnership is a direct or indirect shareholder in a property company, their combined interest in that property company should now be taken into account in calculating the accumulated ownership of a purchaser under the above 95% RETT test.

The court’s latest legal position means that the general partner of an interposed partnership must hold more than a 5% interest in the partnership for it to effectively act as a blocker to RETT being triggered on the indirect accumulation of 95% or more of a property company’s shares.

Since this is contradicting the common view of the practice so far, the court was also of the view that “protection of legitimate expectation” is not applicable in this case, as the requirements, e. g. turning away from a long established jurisdiction of the supreme court which further is applied by the tax authorities, and the Federal Fiscal Court acting similarly to a standard setter in the respective legislation, are not met.

Our view

This judgment keeps the debate going on whether RETT rules appropriately deal with direct or indirect share transfers. In addition to expected share deal changes reported in our recent NewsAlerts, this decision asks for a closer look at historical structures. Given the fact that this decision is against the interpretation applied by Fiscal Authorities in official guidance and individual tax rulings in the past, it may be considered fair for the tax authorities to issue a further ruling allowing the grandfathering of existing structures. However, this is uncertain and will require thorough discussions.

Contact

Uwe Stoschek
Global Real Estate Tax Leader
Phone: +49 30 2636-5286
uwe.stoschek@de.pwc.com

Jeroen Elink Schuurman
EMEA Real Estate Tax Leader
Phone: +31 88 792-6428
jeroen.elink.schuurman@nl.pwc.com

Germany

Sven Behrends
Partner, München
Phone: +49 89 5790-5887
sven.behrends@de.pwc.com

Helge Dammann
Partner, Berlin
Phone: +49 30 2636-5222
helge.dammann@de.pwc.com

Marcel Mies
Partner, Düsseldorf
Phone: +49 211 981-2294
marcel.mies@de.pwc.com

Dr. Michael A. Müller
Partner, Berlin
Phone: +49 30 2636-5572
mueller.michael@de.pwc.com

Josip Oreskovic-Rips
Partner, Frankfurt am Main
Phone: +49 69 9585-6255
josip.oreskovic-rips@de.pwc.com

Uwe Stoschek
Partner, Berlin
Phone: +49 30 2636-5286
uwe.stoschek@de.pwc.com