

Acquisition of only the legal ownership of shares in real estate legal entities is not subject to real estate transfer tax

The judgment rendered by the Court of Appeals 's-Hertogenbosch on January 24, 2020 was published on February 27, 2020. In dispute was whether real estate transfer tax was payable on the acquisition of shares in three Dutch real estate legal entities (*onroerendezaakrechtspersonen*). The case concerned whether the fund manager of a *Sondervermogen* incorporated under German law had also acquired the **interest** in the shares for which it had acquired the legal ownership.

1. Background and judgment

In the case in question a *Kapitalverwaltungsgesellschaft* incorporated under German law (hereinafter: **the taxpayer**) acquired all the shares in three Dutch real estate private limited liability companies (*besloten vennootschappen*; hereinafter: BVs). These BVs qualify as real estate legal entities. The shares can therefore be classified as deemed real estate. At the time of the acquisition, the taxpayer acted as the fund manager of a *Sondervermogen* incorporated under German law (hereinafter: **SV**). Under German law, the SV is regarded as a segregated fund without legal personality. It invests in real estate for the account and risk of its participants. The participants of the SV are each entitled to less than a one-third share of the income and value of the acquired shares in the real estate legal entities.

Pursuant to the provisions of the *Kapitalanlagegesetzbuch* and the *Allgemeine Anlagebedingungen* and *Besondere Anlagebedingungen* (hereinafter: **KAGB**), the taxpayer acquired the legal ownership of the shares in the three BVs. It also follows from these provisions that the taxpayer is not entitled to the income from the shares, because it distributes the income to the participants in the SV. The shares also did not become part of the taxpayer's assets, but were kept segregated from them.

The taxpayer and the tax inspector disagreed about whether the taxpayer, when acquiring the shares in the real estate legal entities, acquired an interest and thus must pay real estate transfer tax.

The Court of Appeals ruled that the provisions of the KAGB so severely restrict the legal ownership rights that the taxpayer has no interest in the shares. It follows from the facts that although the taxpayer, as legal owner, may exercise the voting rights in those shares, this does not mean that it thus also has an interest in those shares. The fund manager holds the shares solely for the account and risk of the SV. The participants in the SV are those who actually have the interest in the shares in the real estate legal entities. However, the participants each hold less than one-third of the interest. There is thus no taxable event and both the taxpayer and the participants do not have to pay real estate transfer tax.

2. Practical consequences

The acquisition of shares in real estate legal entities is, in principle, a taxable event, provided that the acquirer also acquires an interest of one-third or more in the shares. The interpretation of the term 'interest' depends on the facts and circumstances that arise. The Court of Appeals judgment could also be important in practice with regard to shares in real estate legal entities that are acquired by investment funds without legal

personality. This may for example be the case when a general partner acquires the shares in a real estate legal entity on behalf of the participants in a limited partnership (*commanditaire vennootschap*).

At present it is not known whether this judgment will be appealed before the Supreme Court.

The advisors of Meijburg & Co's Real Estate Indirect Tax Group can of course help you identify the potential tax implications of this judgment. Feel free to contact one of them or your regular advisor for more information.

Meijburg & Co
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