KPMG Meijburg & Co
Tax & Legal

Bill to abolish the real estate transfer tax concurrence exemption for share transactions: mitigation and postponement

In response to the reactions to the internet consultation, the draft bill to abolish the real estate transfer tax concurrence exemption for share transactions will be watered down and the effective date will be postponed by one year. This was announced by Deputy Minister of Finance Mr. Van Rij in a letter sent to the Lower House of Parliament on June 23, 2023.

The intention of the original draft bill was to make the acquisition or extension of a qualifying shareholding (>1/3) in a real estate entity with new immovable property and/or building land for VAT purposes subject to real estate transfer tax as of January 1, 2024 (the current real estate transfer tax rate is 10.4%).

This bill is amended as follows:

1. The proposed effective date is postponed until January 1, 2025.
2. The scope of the proposal is limited to new immovable property and/or building land that is **not** used for more than 90% for VAT-taxed purposes for two years after the acquisition of (> 1/3 of) the shares of the real estate entity. This means that:
    - the acquisition of (> 1/3 of) the shares in the real estate entity is exempt from real estate transfer tax if 90% or more of the underlying property is used for VAT-taxed purposes during the aforementioned two-year period (e.g. in the case of VAT-taxed leasing of commercial property);
    - the acquisition of (> 1/3 of) the shares in the real estate entity is not exempt from real estate transfer tax if less than 90% of the underlying property is used for VAT-taxed purposes during the aforementioned two-year period (e.g. in the case of VAT-exempt housing rental).
3. If the acquisition of the shares in the real estate entity is nevertheless taxed, the real estate transfer tax payable is a maximum of 4% instead of 10.4%.
4. Transitional rules are provided for with regard to projects that are already underway at the time the bill is introduced. The new legislation will not apply to projects in which a letter of intent ('LOI') is in any case signed before the presentation of the bill and the acquisition of the shares takes place before January 1, 2030.

We do not yet have access to the text of the legislation and therefore do not yet know (i) precisely how the transitional rules will be formulated and (ii) how the real estate transfer tax will be levied if, during the first two years after acquisition of (> 1/3) interest in a real estate entity, the use of the property changes, resulting in the condition of (> 90%) use for VAT-taxed purposes no longer being met. The letter sent to the Lower House of Parliament states that the details of the bill are currently being elaborated upon and that the final bill will be announced as part of the 2024 Tax Plan package on Budget Day later this year.

Original bill and existing regulations

The intention of the original draft bill was to make the acquisition or extension of a qualifying shareholding (>1/3) in a real estate entity with new immovable property

and/or building land for VAT purposes subject to real estate transfer tax as of January 1, 2024 (the current real estate transfer tax rate is 10.4%). Interested parties had until March 27, 2023 to submit their response to the draft bill and the responses were almost entirely critical. The government aims to use the draft bill to level the playing field to reduce inequality between market parties that, in order to save on VAT and real estate transfer tax, use a share transaction to sell immovable property and market parties that transfer immovable property directly.

VAT is, in principle, due by virtue of law on direct supplies of new immovable property and/or building land for VAT purposes (the current VAT rate is 21%). For real estate transfer tax purposes, an exemption in principle applies for the acquisition of this immovable property: the concurrence exemption. The real estate transfer tax concurrence exemption prevents that both VAT and real estate transfer tax have to be paid. Based on a judgment by the Dutch Supreme Court from 2011 (the so-called 'Look through judgment'), the concurrence exemption may also be applied to the acquisition of shares in a real estate entity in situations where the exemption would have applied to a direct acquisition of the underlying immovable property. Under current legislation and case law it is therefore possible in practice to use a share transaction to transfer new immovable property and/or building land (for VAT purposes) without this being subject to VAT and real estate transfer tax. This is possible because no VAT is due in respect of a supply of shares in a company. A share transaction with new immovable property and/or building land for VAT purposes thus usually results in a lower tax burden if the VAT constitutes a cost item (for example, due to VAT-exempt leasing). In contrast to a direct acquisition of new immovable property and/or building land, a share transaction is thus especially interesting for buyers without a VAT recovery right, such as landlords of residential property, lessors of educational institutions and financial institutions, and healthcare providers. The tax burden is then limited to the non-deductible VAT on costs incurred (including building/development costs), whereas in a direct supply of the immovable property itself it is the non-deductible VAT on the often higher purchase price. In addition, a share transaction usually also produces a corporate income tax benefit (timing), because tax is not required to be paid on the untaxed gains and reserves, while the participation exemption means that no tax is levied at the shareholder.

This situation, which the government regards as an 'unintended tax savings structure' has now, after almost 12 years, been deemed undesirable.

For more background information, please refer to our news alert on the original draft bill.

KPMG Meijburg & Co comments

It is commendable that the adverse effects of the original draft bill, as previously commented on by us, are to be mitigated. By providing for transitional rights for ongoing projects, the property market is less caught off guard. Limitation of the scope of the bill to new immovable property and/or building land that is *used for less than*

90% for VAT taxed purposes for two years after the acquisition of the real estate entity shares, somewhat mitigates the overkill contained in the original draft bill. Property that is intended to be used or leased (for > 90%) for VAT-taxed activities and is actually used for such purposes during the aforementioned two years is not affected by the remedial legislation. However, the property market and the Dutch tax authorities are confronted with a new ongoing latent risk and concern that initially unforeseen changes in the actual use of the property included within the acquired real estate entity could nevertheless lead to the payment of (up to 4%) real estate transfer tax. The question that then arises, in our view, is how to deal with (initially) vacant space during that two-year period.

If you would like to know more about how this bill will affect your situation, please feel free to contact a tax specialist at KPMG Meijburg & Co.

KPMG Meijburg & Co
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