

Also the acquisition of only the legal ownership of shares in real estate legal entities is subject to real estate transfer tax

On Friday, April 9, 2021 the Supreme Court ruled that real estate transfer tax is payable on the acquisition of shares in a 'real estate legal entity' (*onroerendezaakrechtspersoon*), even if this concerns only the acquisition of the legal ownership of the shares and is not accompanied by any economic interest in the shares and/or the underlying real estate. The Supreme Court based its conclusion on a formal interpretation of the term 'interest' in the Legal Transactions Taxation Act (*Wet op belastingen van rechtsverkeer*) and thus ruled differently to the Court of Appeals 's-Hertogenbosch, which, on January 24, 2020, had accorded an [economic meaning](#) to the term 'interest'.

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. 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. According to the Court of Appeals, there was thus no taxable event and both the taxpayer and the participants do not have to pay real estate transfer tax. However, the Supreme Court ruled that, in accordance with legislative history, the term 'interest' must be understood as 'substantial control'. Because the fund manager acquired more than a one-third interest in the shares and the control thereof, the conditions for levying real estate transfer tax were met.

2. Practical consequences

The acquisition of shares in real estate legal entities is, in principle, a taxable event, provided that the acquirer acquires an interest of one-third or more in the shares. The Supreme Court has made clear that the term 'interest' may also cover only the legal ownership of the shares in a real estate legal entity. As a result of this judgment, the acquisition of the legal ownership (of more than a one-third interest) in the shares in a real estate legal entity will be treated the same as the acquisition of the legal ownership of the real estate itself.

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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