

## **Internet consultation on draft bill to abolish the property transfer tax concurrence exemption for share transactions**

An internet consultation on a draft bill to abolish the property transfer tax concurrence exemption for share transactions was launched on February 27, 2023. Under current legislation and case law it is possible to use a share transaction to transfer new immovable property and/or building land (for VAT purposes) without this being subject to VAT and property transfer tax. This is considered an undesirable situation and therefore the intention is to make the acquisition of a qualifying shareholding (>1/3) in a real estate entity with new immovable property and/or building land for VAT purposes subject to property transfer tax as of January 1, 2024 (the current property transfer tax rate is 10.4%). Interested parties have until March 27, 2023 to submit their [response](#) to the draft bill.

### **Background and current legislation and regulations**

VAT is, in principle, automatically payable on direct supplies of new immovable property and/or building land for VAT purposes (the current VAT rate is 21%). For property transfer tax purposes, an exemption in principle applies for the acquisition of this immovable property: the concurrence exemption. The property transfer tax concurrence exemption avoids that both VAT and property 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 property transfer tax. This is possible because a supply of shares in a company is VAT-exempt. 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, for example, 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 purchases (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.

## **Draft bill**

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 property transfer tax, use a share transaction to sell immovable property and market parties that transfer immovable property directly. The draft bill therefore contains a measure to amend the property transfer tax concurrence exemption in such a way that property transfer tax is in any case levied (the current rate is 10.4%) on acquisitions of new immovable property and/or building land (for VAT purposes) that take place via a (qualifying) shareholding (>1/3) in a real estate entity (this is because the concurrence exemption does not apply in such cases).

If we compare this with a direct acquisition of the immovable property itself, what stands out is that the acquisition of shares in a real estate entity with new immovable property/building land and the acquisition of the immovable property itself will still not be treated the same. After all, the transfer of the immovable property is in principle subject to VAT, but no property transfer tax is payable. This unequal treatment is expressly acknowledged. Other measures were looked at, such as levying VAT on the indirect supply of immovable property through a share transaction or the reintroduction of the VAT adjustment payment for self-supply (*btw-integratieheffing*). However, these did not prove to be conclusive, feasible options.

If this bill becomes law, the acquisition of shares in a real estate entity will become unattractive, from a VAT/property transfer tax perspective, for buyers with a full VAT recovery right. After all, the acquisition of shares is subject to property transfer tax (current rate: 10.4%), while no property transfer tax is, in principle, payable on the acquisition of the immovable property itself and the VAT can be reclaimed.

## **Withdrawal of approvals**

The approval for immovable property already in use will be canceled, as will the approval for the acquisition of a participation in a non-legal entity, such as a limited partnership.

## **What will remain the same?**

There are structures other than a share transfer (or a transfer by means of a participation) whereby neither VAT nor property transfer tax is payable. For example, the acquisition of new immovable property within a VAT group or through the acquisition of (part of) a business in which the new immovable property has been realized. For the time being, the bill does not aim to change these situations. However, the government will keep an eye on how the market reacts. It will also monitor whether parties cooperate in share transactions in order to avoid property transfer tax, for example by ensuring that each party acquires a shareholding of less than one-third. If the behavioral effects of this prove significant, then the option of introducing 'cooperating group rules' will be considered.

### ***KPMG Meijburg & Co comments***

The proposal seeks to reduce the differences between the acquisition of immovable property and the acquisition of shares in a real estate entity with the same immovable property. However, it remains to be seen whether the leveling of the playing field desired by the government will be achieved in this way. In situations where the VAT is recoverable, we believe that the draft bill is more likely to result in overkill and therefore will have a broader, undesired effect on share transactions in the property market. It has been proposed to have the legislation take effect on January 1, 2024. Given this relatively short timeframe, transitional rules for, for example, already concluded sale and purchase agreements of which the delivery of possession will take place after January 1, 2024 would be reasonable and appropriate.

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

KPMG Meijburg & Co  
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