Hot Topics

BAKER & McKENZIE

Tax Law
Germany

August 2016

Judgment of the Federal Fiscal Court on the relevance of a right to name the acquiring entity in M&A transactions for real estate transfer tax purposes

In the early stages of M&A transactions, it is often unclear how the target companies are to be finally allocated within the purchaser's group of companies. For this reason, share purchase agreements setting forth the provisions governing share deals frequently contain clauses that enable the purchaser to name one company of its group as the entity acquiring the shares prior to the closing of the purchase agreement. In the main proceedings, the Fiscal Court Cologne (file no. 5 K 235/11) ruled that the conclusion of the share purchase agreement and the exercise of the right to name the acquiring entity or the transfer of the shares to the named acquiring entity, as the case may be, triggered real estate transfer tax twice. In its judgment of May 12, 2016 (file no. II R 26/14), the Federal Fiscal Court (Bundesfinanzhof; "BFH") now commented on this approach for the first time, stating that it did not share the Fiscal Court Cologne's point of view.

Relevant facts

A-Bank originally held 100% of the shares in B-AG, which in turn held 100% of the shares in various corporations holding real estate in Germany. In September 2006, A-Bank sold its shares in B-AG to C-Bank. The purchase agreement provided for a corresponding pre-closing right in favor of C-Bank to name the final acquiring entity. Making use of this right, A-Bank, C-Bank and the plaintiff entered into an amendment agreement in December 2006 prior to the closing of the transaction and A-Bank transferred the shares in B-AG directly to the plaintiff by means of an agreement of the same day.

Thereupon, the tax office issued an assessment notice reflecting the separate assessment of the bases of taxation for the real estate transfer tax payable for reasons of the purchase agreement concluded in September 2006, which was based on section 1(3) nos. 1 and 2 German Real Estate Transfer Tax Act (Grunderwerbsteuergesetz; "GrEStG") and section 17 GrEStG, and, additionally, another corresponding assessment notice in relation to the share transfer to the plaintiff, which was also based on section 1(3) nos. 1 and 2 GrEStG.

The plaintiff filed an appeal against the latter, which was rejected by the tax office and changed to the effect that the transaction was now classified as a purchase transaction pursuant to section 1(3) no. 3 GrEStG.

The action brought against the ruling on the appeal remained unsuccessful. The Fiscal Court in Cologne adhered to its view that real estate transfer tax was payable twice, but ruled that it was not section 1(3) no. 3 GrEStG but

Our Expertise
Tax Law

section 1(3) no. 4 GrEStG that triggered real estate transfer tax a second time. The plaintiff filed another appeal against this judgment.

Decision made by the BFH

The BFH granted this second appeal filed by the plaintiff, stating the following reasons:

First of all, based on its unambiguous wording, section 1(3) no. 3 GrEStG only provided for a claim for the transfer of at least 95% of the shares in a company but not for the assignment of an already existing claim for transfer or for a corresponding obligation. The BFH further argued that an analogous application of the provisions of section 1(1) no. 5 GrEStG governing interim transactions in connection with the sale of real properties to the sale of shares was inadmissible.

Furthermore, contrary to what the Fiscal Court in Cologne found, the transfer of the shares was not taxable pursuant to section 1(3) no. 4 GrEStG, either. According to the BFH, a transaction does not fall under section 1(3) no. 4 GrEStG if the transfer of shares is preceded by a contractual transaction that gave rise to a claim for the transfer of shares pursuant to section 1(3) no. 3 GrEStG. The BFH stated that, in the case at hand, such a contractual transaction had already taken place in September 2006 when the purchase agreement was concluded. Upon fulfillment of the terms agreed in the purchase agreement, the real properties were no longer allocable to A-Bank but to C-Bank for real estate transfer tax purposes; as a consequence, a fictitious re-sale of the same real properties by A-Bank pursuant to section 1(3) no. 4 GrEStG was excluded.

In this context, the BFH considered it irrelevant that the plaintiff was not a party to the original legal transaction giving rise to the claim for transfer of the shares. This scenario is governed by the same principles that are applicable in the comparable case of a party joining an existing real estate purchase agreement. Regardless of the fact that the parties to the transaction involving the legal obligation (Verpflichtungsgeschäft) and the transaction aimed at the satisfying of the corresponding claim (Erfüllungsgeschäft) are not the same, the conveyance is not subject to taxation pursuant to section 1(1) no. 2 GrEStG because it was preceded by a legal transaction giving rise to the claim for transfer of title.

Outlook

The decision passed by the BFH can be regarded as a positive impulse. However, it does not provide absolute certainty as to the real estate transfer tax treatment of transaction structures of this kind, which are quite common.

This is due to the fact that the BFH did not address the question of whether a taxation pursuant to section 1(3a) GrEStG might also have to be considered. This provision only relates to acquisitions realized after June 6, 2013 and, therefore, was not dealt with in the proceedings concerning transactions effected in 2007. How-ever, section 1(3a) GrEStG is subsidiary to section 1(3) GrEStG. The provision only applies to the extent that a tax treatment pursuant to section 1(2a) and (3) GrEStG is out of the question. As the BFH clearly assigns the discussed acquisition to section 1(3) GrEStG, there are valid arguments suggesting that there is no leeway to assume the applicability of section 1(3a) GrEStG. Given the fact that section 1(3a) GrEStG has not been sufficiently covered by case law, however, there is no absolute legal certainty.

If you have further questions, please contact our experts:

Dr. Dr. Norbert Mückl
Email: norbert.mueckl@bakermckenzie.com

Dr. Cristan Gerhold, LL.M.
Email: cristan.gerhold@bakermckenzie.com

Baker & McKenzie Partnerschaft von Rechtsanwälten, Wirtschaftsprüfern und Steuerberatern mbB

Berlin
Friedrichstrasse 88 / Unter den Linden
10117 Berlin, Germany
Phone: +49 30 2 20 02 81 0
Fax: +49 30 2 20 02 81 199

Frankfurt/Main
Bethmannstrasse 50-54
60311 Frankfurt/Main
Phone: +49 69 2 99 08 0
Fax: +49 69 2 99 08 108

Dusseldorf
Neuer Zollhof 2
40221 Dusseldorf
Phone: +49 211 3 11 16 0
Fax: +49 211 3 11 16 199

Munich
Theatinerstrasse 23
80333 Munich
Phone: +49 89 5 52 38 0
Fax: +49 89 5 52 38 199

Get Connected:

www.bakermckenzie.com