

## **BFH rules on attribution of domestic real estate under RETT**

The BFH has ruled that where a legal entity acquires domestic real estate under a condition precedent, it does not “own” the property within the meaning of the RETT Act.

Germany's Federal Tax Court (BFH) issued a decision on 11 December 2014 in which it held that, where a legal entity acquires domestic real estate under conditions precedent, it does not “own” the property within the meaning of section 1 paragraph 3 of the Real Estate Transfer (RETT) Act until these conditions are fulfilled, even if the seller has declared relinquishment before (II R 26/12).

### **Background**

According to section 1 paragraph 3 No. 1 of the RETT Act, RETT will be triggered by a deed leading to a claim on the transfer of ownership of one or more shares in a property-owning company where the transfer would concentrate a holding of at least 95 % of the shares in the company directly or indirectly in the hands of the acquirer.

In the case, a limited liability company acquired undeveloped real estate based on a condition that construction could be carried out on the property (i.e. a condition precedent). Although this condition was not fulfilled and RETT was not assessed with respect to the acquisition by the limited liability company, the seller declared relinquishment of the real estate. After the declaration of relinquishment but before the fulfillment of the condition, a shareholder of the limited liability company acquired all of the remaining shares in the company from the other shareholders. The German tax authorities assessed RETT on the sole shareholder for the share acquisition with respect to the real estate acquired under the condition precedent based on section 1 paragraph 3 No. 1 of the RETT Act.

The BFH held that section 1 paragraph 3 was not triggered because, at the date of the share consolidation, the limited liability company did not own the real estate within the meaning of the RETT Act since there had not been a RETT-triggering sales transaction before the share concentration according to which the real estate was to be attributed to the company.

The conclusion of the real estate purchase agreement did not constitute a RETT-triggering event under the RETT Act, as the real estate had been acquired under a condition precedent that had not been fulfilled. The declaration of relinquishment also did not qualify as a RETT-triggering event, since relinquishment can be considered relevant for RETT purposes only if it is not based on a deed founding a claim to a transfer of ownership. The sales contract, however, even under conditions precedent, qualified as such a deed.

The above provisions of the RETT Act are special-law regulations and do not allow for other treatment under General Tax Code.

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