

Mandanteninformation

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Tax Court of Schleswig-Holstein: No protection of legitimate expectations for RETT blocker arrangements – Significance of the notification obligations under section 19 of the Real Estate Transfer Tax Act

In its judgment of 03.06.2025 (3 K 47/23), the Schleswig-Holstein Fiscal Court ruled on the real estate transfer tax treatment of so-called RETT blocker structures in connection with share deals and restructurings. The focus was on the questions of the limitation period for assessments, the notification obligations and the protection of legitimate expectations in the event of changes in the case law of the highest courts and administrative practice. The decision has considerable significance, as it clarifies the limits of the protection of legitimate expectations in the case of the retroactive application of new Federal Fiscal Court case law to old cases. At the same time, the importance of the notification obligations under Section 19 of the Real Estate Transfer Tax Act is also underlined.

I. Background and significance of the decision

In the case at issue, the plaintiff had carried out a reorganization in 2012, which, according to the published administrative opinion and case law at the time, did not trigger real estate transfer tax. However, the tax authorities subsequently changed their legal opinion – as a result of new Federal Fiscal Court rulings from 2014/2017 onwards – and retroactively assessed real estate transfer tax. The plaintiff in-

voked the protection of legitimate expectations, reasons of equity and the objection that the assessment was time-barred. The Tax Court of Schleswig-Holstein had to decide whether and to what extent the retroactive application of the amended case law is permissible and whether there is a claim to equitable measures or the protection of legitimate expectations.

II. Facts of the case

The plaintiff held shares in land-owning companies. In the course of a group reorganization carried out in July and August 2012, shareholdings were reorganized, whereby so-called RETT blocker structures were used to avoid a real estate transfer tax burden:

- Initially, the plaintiff held only 50% of the shares in C-GmbH, which held 93.34% of the shares in D-GmbH, which in turn held 100% of the shares in the real-estate-owning E-GmbH.
- As a result of the restructuring, the plaintiff held a 100% stake in C-GmbH, which still held 93.34% of D-GmbH, which, however, only held 94.9% of E-GmbH. The remaining 5.1% of E-GmbH was transferred to an N-KG, in whose limited partnership capital the plaintiff held 100%.

In 2013, the plaintiff then filed an application for a binding ruling regarding further planned restructuring steps. While describing the facts in the request for a binding ruling, the plaintiff informed the tax office about the restructuring steps already taken in 2012, but did not receive an explicit finding on the tax liability of the facts that had already occurred.

It was only after a tax audit in 2019 and with reference to the amended case law of the Federal Fiscal Court that real estate transfer tax was assessed: The intermediary N-KG, in which the plaintiff held a 100% stake, was meant to serve as a RETT blocker when the plaintiff acquired 100% of the shares in C-GmbH, so that no taxable event under section 1 (3) no. 1 or no. 2 of the Real Estate Transfer Tax Act (RETT-A) was to be triggered. In the meantime, however, the Federal Fiscal Court had clarified in two judgments from 2014 and 2017 that the acquisition of shares in an intermediary partnership can also lead to an indirect unification of shares pursuant to section 1 (3) no. 1 or no. 2 of the RETT-A if at least 95% of the shareholding in the share capital of the partnership is attributable to the acquirer.

The plaintiff claimed that the limitation period for assessment had already expired, since the notification obligation had been fulfilled. In addition, it applied for the remission of the tax on grounds of equity and invoked the protection of legitimate expectations on

the basis of the administrative opinion and case law at the time.

III. Reasons for the decision of the Tax Court of Schleswig-Holstein

1. Limitation period for assessment and notification obligations

A limitation period for assessment pursuant to section 169 of the German Fiscal Code (AO) could only have prevented the first issuance of a real estate transfer tax assessment notice in 2020 if the four-year assessment period had expired at that time. Section 170 (2) no. 1 of the German Fiscal Code provides that if a tax return is to be filed, the assessment period begins at the end of the calendar year in which the tax return is submitted. Pursuant to section 19 (5) of the RETT-A, the real estate transfer tax notification constitutes a tax return within the meaning of the Tax Code, which triggers the limitation period for assessment.

With regard to the restructuring at issue in July and August 2012, only the notary had made a notification pursuant to section 18 of the RETT-A to the corporation tax office of the tax office; the plaintiff was unable to demonstrate whether there had been any forwarding internally to the real estate transfer tax office at all.

Nota bene: A liability of the notary for damages suffered by the taxpayer due to a mistake by the notary in the fulfilment of his duty to notify is excluded: According to the case law of the Federal Court of Justice, the notarial notification obligations under section 18 of RETT-A only serve tax purposes and not the protection of the tax debtor. A violation of the notarial duty of notification therefore does not lead to the liability of the notary towards the taxpayer.

It is undisputed that the plaintiff had not made a notification pursuant to section 19 of the RETT-A. According to the established ruling of the Federal Fiscal Court, the parties pursuant to section 19 (1) sentence 1 of the RETT-A are also subject to a duty of notification under section 18 of the RETT-A if courts,

authorities and notaries are subject to their own duty of notification under section 18 of the RETT-A. It is true that it is generally sufficient for the purposes of the start-up suspension of § 170 (2) AO if the fulfilment of the notification obligation pursuant to §§ 18, 19 of the RETT-A is carried out by an obligated party: the assessment period then begins with receipt of the notification. The start of the assessment period is not further postponed by the fact that other notifiers do not comply with their duty to notify. However, according to the established ruling of the Federal Fiscal Court, the notification must be sent to the real estate transfer tax office of the competent tax office in accordance with Section 18 (5) of the RETT-A. In the present case, the notary had submitted the notification to the corporation tax office. The plaintiff was unable to prove whether there had been an internal forwarding.

In principle, the notification can only be effectively submitted to the real estate transfer tax office of the competent tax administration office with local and factual jurisdiction. A submission to the corporate income tax office is not sufficient.

There may also be different centralised responsibilities for real estate transfer tax matters, such as in Baden-Württemberg, where the Baden-Württemberg State Central Office for Corporate Real Estate Transfer Tax Cases (LZgG) was established at the Schwetzingen tax office on 1 March 2020.

However, the plaintiff asserted that the facts at issue had been communicated to the tax authorities by the application for a binding ruling in 2013 and were therefore known, so that the limitation period for assessment would have been set in motion as a result. However, the notification obligation under section 19 of the RETT-A had also not been properly fulfilled in the context of the application for binding information, since the information and documents required under section 20 of the RETT-A were not attached.

The assessment period therefore did not begin with the notification in the context of the request for a binding ruling (i.e. at the end of 2013), but according

to sec. 170 para. 2 no. 1 AO only at the end of the third calendar year following the year in which the tax arose (i.e. at the end of 2015). The announcement of a tax audit in 2019 suspended the expiry of the assessment period pursuant to section 171 (4) of the German Fiscal Code, so that the plaintiff's appeal of the limitation period for assessment with regard to the real estate transfer tax assessment notice issued in 2020 was ultimately unsuccessful.

The timely and complete fulfilment of the notification obligations had recently gained in importance, in view of the opinion of the tax authorities, according to which real estate transfer tax should be triggered both at the signing and closing of a company acquisition; only the corresponding notification of the signing and closing would enable the taxpayer to avoid a double real estate transfer tax assessment (see also section 16 (5) sentence 2 RETT-A). The Federal Fiscal Court opposed this in its decision of 9 July 2025 (II B 13/25) and considered a double real estate transfer tax on signing and closing to be legally dubious at least if the tax office is aware at the time of the assessment of the real estate transfer tax for the signing that the closing has already taken place.

In the present case, the timely and complete notification of the facts would have triggered the limitation period for assessment. These two aspects underline the high practical relevance of the real estate transfer tax notification obligations.

2. No protection of legitimate expectations in the event of a change in case law

The Tax Court of Schleswig-Holstein clarified that there was no general protection of legitimate expectations with regard to the retroactive application of the amended Federal Fiscal Court case law to so-called RETT blocker arrangements.

A legitimate expectation worthy of protection can only be assumed if there has been established case law of the highest courts for decades, which has also been implemented in administrative regulations. This

was not the case in the case at issue, as the relevant Federal Fiscal Court rulings on the RETT blocker problem had only been issued from 2014/2017 onwards and no established case law had existed before that.

The "retroactive" application of the principles of the Federal Fiscal Court judgment of 29 July 2017 (II R 41/15) also does not violate the principle of the rule of law, since the case law of the highest courts does not create statutory law and does not create a comparable legal obligation.

The relevant state decrees from 2007 et seq. also did not expressly refer to the interpretation of the concept of shares in the case of intermediary partnerships, which is relevant here. The taxpayer could only demand to be taxed in accordance with the administrative instruction if the facts of the case were manifestly covered by the administrative instruction, which was not the case in the present case.

3. Equitable measures pursuant to section 163 AO

The court denied the existence of objective equitable reasons for a remission or a different assessment of the real estate transfer tax. The retroactive application of the amended case law is not unfair, since the legislature had expressly regulated the taxation of RETT blocker structures with the introduction of section 1 (3a) of the RETT-A from 2013 and the change in case law was within the framework of a foreseeable development.

Nor does the principle of equality under Article 3 of the Basic Law give rise to a right to equitable measures, since there is no unobjective unequal treatment.

The administration does not have a general obligation to suspend the application of a changed case law for a certain transitional period – e.g. by way of an equitable measure.

4. No application of section 176 AO to initial assessments

Although the Tax Court annulled the tax office's decision refusing to apply section 176 AO for formal

reasons, it clarified that section 176 AO only applies to the amendment or cancellation of existing tax assessments, but not to the first tax assessment according to changed case law. An isolated administrative act on the (non-)applicability of section 176 AO was inadmissible. On the merits, however, the plaintiff lost the proceedings and bore all the costs of the proceedings.

IV. Practical guidance

The decision of the Tax Court of Schleswig-Holstein confirms the restrictive line of the case law on the protection of legitimate expectations in the event of changes in case law in tax law.

In principle, taxpayers cannot invoke the protection of legitimate expectations or equitable measures in the case of RETT blocker arrangements that were implemented before the amended case law of the Federal Fiscal Court, unless there was established case law of the highest court and no explicit binding information relating to the individual case. The mere existence of administrative provisions or a uniform administrative practice is not sufficient to establish a claim to the protection of legitimate expectations.

In practice, this means that in the case of restructurings and share deals with real estate transfer tax relevance, the development of case law and the fulfilment of the notification obligations must be carefully documented. The possibility of invoking the protection of legitimate expectations is limited to exceptional cases. Since the buyer typically assumes the payment of real estate transfer tax within the SPA, it is primarily in his interest to fulfil the notification obligations in a timely and complete manner.

In the case of corporate transactions, the acquirer should pay great attention to the timely and complete notification of facts relevant to real estate transfer tax in accordance with Section 19 of the RETT-A.

This is the only way to start the limitation period for assessment and, in addition, to avoid a double real estate transfer tax burden until this legal doubt will have been finally clarified.

Since the notification is in the interest of the purchaser, he will want to prepare and submit the real estate transfer tax notification. Since this must be done within two weeks of signing according to Section 19 (3) RETT-A (one month for tax debtors resident abroad), close coordination and cooperation with the seller is required here, which should also be regulated accordingly in the company purchase agreement.

Since the acquirer does not yet have control over the company before closing, a power of attorney (limited to the real estate transfer tax notification) is therefore required.

Within the SPA, clauses on the real estate transfer tax notification should be agreed upon. The notifying acquirer (or his advisor) then regularly also needs a (limited) power of attorney issued by the seller.

V. View

The appeal to the Federal Fiscal Court is pending under file number II R 32/25. Until clarification has been made by the highest court, it is advisable to keep comparable cases open and refer to the appeal proceedings. The decision is particularly important for old cases in which RETT blocker structures were implemented before the amended case law of the Federal Fiscal Court.

VI. Summary and recommendation

The Tax Court of Schleswig-Holstein denies a general protection of legitimate expectations for RETT blocker arrangements in the case of retroactive application of new Federal Fiscal Court case law. Neither administrative provisions nor previous administrative practice establish a claim to equitable measures or the protection of legitimate expectations, unless there was established case law of the highest courts. Ongoing proceedings are to be kept open with regard to the pending appeal. Taxpayers should not rely on the protection of legitimate expectations in RETT blocker structures, but should always keep an eye on the current legal situation and case law.

In practice, it is advisable to clearly document the legal structure and the fulfilment of the notification obligations and to include corresponding provisions in the SPA. The notification obligations of the notary under section 18 of the RETT-A and of the tax debtor under section 19 of the RETT-A exist in parallel, so that for the purposes of the commencement of the limitation period for assessment, the effective notification of one obligated party is sufficient. However, the notary is not liable to the taxpayer for any errors he or she may make in fulfilling this duty to notify. Therefore, the acquirer should in any case fulfil his own notification obligation under Section 19 of the RETT-A in full and in good time. For this purpose, he may need a (limited) power of attorney from the seller.

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