

Proposal for a new division exemption in real estate transfer tax launched for consultation

On April 8, 2024 a proposal to change the division exemption in real estate transfer tax was published and launched for consultation. The new division exemption is, on the one hand, more limited than the current facility, because it has been made subject to the conditions that the property must be transferred as part of a business, that the business must be continued for three years and that the acquired shares must also be held for three years. This will make it more difficult to separate business units with a view to a sale (carve-out). On the other hand, a specific exemption will be introduced for so-called dispute divisions, for which no business requirement is stipulated. This will make it easier to set up personal holding structures and have (quarreling) shareholders of real estate companies go their separate ways.

The newly proposed division exemption is discussed in more detail below.

What is wrong with the current scheme?

Under the current division exemption, property acquired under a legal division is exempt from real estate transfer tax, unless the division was primarily aimed at the avoidance or deferral of tax. In 2006 the current division exemption in real estate transfer tax was brought into line and linked to the division facility in corporate income tax. And because that facility is, in turn, linked to the Merger Directive, EU law and the judgments rendered by the Court of Justice of the European Union (CJEU) also affect the division exemption in real estate transfer tax. According to the government, it has emerged that EU case law leads to a much broader exemption than was intended. In some cases it appears possible to divest business units with property by making them ready for sale via a legal split-off, and then transferring the shares in the acquiring legal entity to a third party without this being subject to real estate transfer tax. Additionally, there has been a lot of debate about how 'avoiding or deferring tax' should be interpreted, as a result of which the enforcement, monitoring and taking of positions in preliminary consultations has become very burdensome for the Dutch tax authorities. Lastly, the division exemption is not in step with real estate transfer tax facilities for acquiring property in a legal merger, business merger and internal reorganization.

The proposed division exemption

The proposed division exemption will be decoupled from the corporate income tax facility and thus from EU law. The division exemption will become a scheme with its own objective conditions. These conditions are more in accordance with the conditions for other business exemptions in real estate transfer tax. Two types of legal divisions are included in the new scheme:

- legal divisions whereby a business¹ is acquired;
- dispute divisions whereby no business is transferred.

¹ 'Business' is understood as also referring to an independent part of a business.

Proposed rules for legal divisions with a business

Business requirement

In a legal division where the acquiring legal entity acquires a business with property under universal title, the acquisition of the property is exempt from real estate transfer tax. This concerns a substantive business for personal income tax purposes. Whether a business is acquired, is considered from the perspective of the acquiring legal entity. If, in addition to the business-related property, other property (investments) is also acquired, then that property is not exempt from real estate transfer tax pursuant to the division exemption.

Continuation requirement

The business must be continued in its entirety by the acquiring legal entity for at least three years. However, the business may be disposed of as part of a subsequent legal transaction exempt from real estate transfer tax, on the condition that the business is then continued for the remaining period by that subsequent acquirer. A subsequent legal transaction exempt from real estate transfer tax is an exempt legal merger, an exempt legal division/split-off, an exempt internal reorganization or a so-called 75% share swap. The subsequent business merger is inadvertently missing from the legislative text, but it is apparent from the explanatory notes that a subsequent business merger should also be possible. If the legal division, together with the subsequent legal transaction, is primarily aimed at avoiding tax, then the acquisition as part of the legal division is subject to real estate transfer tax.

Retention requirement

The shareholders of the separating legal entity must acquire an equivalent interest in both qualitative and quantitative terms in the acquiring legal entity. The proposed text describes this as "(...) holding a similar interest in the acquiring legal entity (...)". 'Quantitatively equivalent' is defined as an interest that is financially and economically equivalent to the relinquished interest. 'Qualitatively equivalent' is defined as an interest that represents the same rights and obligations in the underlying assets, including the property. The acquired similar shares should be held for at least three years, otherwise real estate transfer tax will be payable. In deviation from other real estate transfer tax exemptions where only the acquired shares – and not the similar interest – must continue to be held for three years, the issue of new shares to third parties does however lead to a violation of the retention requirement.

The similar interest may be sold as part of a subsequent legal merger, legal division, internal reorganization or 75% share swap exempt from real estate transfer tax. Here too, an integrated set of transactions that is primarily aimed at avoiding tax will result in real estate transfer tax being payable.

If, at the level of the acquiring legal entity, the division exemption for real estate transfer tax purposes applies to the acquisition of the property, then the acquisition of shares by shareholders of that acquiring legal entity (or a group company) is also exempt from real estate transfer tax, if that acquiring legal entity is a real estate legal entity.

Proposed dispute division rules

A real estate transfer tax exemption also applies to dispute divisions (Section 2:334cc Dutch Civil Code) whereby no business is transferred. The business requirement, and thus also the continuation requirement, does not apply here. However, requirements do apply at the shareholder level. The shareholders must retain a similar interest in the property of the separating legal entity and must retain this similar interest in the (deemed) property. One of the factors compared is the extent to which the shareholders have retained their interest in the value of the (deemed) property immediately prior to the division. If they increase their interest, real estate transfer tax will be payable to that extent. The dispute division facility means, for example, that a holding company that is jointly owned by two shareholders may be split into two personal holding companies. Or to give quarreling shareholders of a real estate company each their own company with a share of the property investments, whereby real estate transfer tax is only levied insofar as a shareholder acquires more property in terms of value than it had before the division.

Legal entity

The proposed legal division exemption only applies to public limited companies (NVs), private limited liability companies (BVs), cooperatives and mutual societies with capital divided into shares or their foreign lookalikes. A foundation (*stichting*) does not qualify.

Effective date

The consultation proposal does not mention an effective date.

KPMG Meijburg & Co comments

The proposed new division exemption has more objective requirements than the current scheme. This is expected to lead to fewer disputes about the application of the exemption. That is good news. Decoupling the exemption from the corporate income tax facility does however mean that a legal division must be assessed on its own merits for both corporate income tax and real estate transfer tax purposes. Real estate transfer tax will more often be an issue, especially where splitting up companies is desired for economic and market-strategic reasons, with the business units then potentially being sold off. This was also expressly intended. It can be questioned whether such economically desired transactions would not better be served by introducing an exemption for the acquisition of businesses, rather than being made more difficult.

We hope that the consultation is used to dot the i's and cross the t's. For example, not all types of legal divisions having been properly included in the legislative text. It is unclear whether a dispute division with a business also falls under the special rules for dispute divisions or simply under the rules for divisions with a business. And what is the relationship between a 'similar interest in the acquiring legal entity' and 'a similar interest in the property'? The anti-abuse provision aimed at integrated transactions could perhaps be reconsidered, because this is already covered by *fraus legis*. And what is precisely understood under a cooperative with capital divided into shares? Perhaps the division exemption can be broadened to also cover foundations (*stichtingen*), as is the case with the legal merger exemption. It is also advisable to take

a closer look at the 'subsequent legal transactions' in the other business exemptions and to streamline this point.

If you would like to know more about this matter or another facet of real estate transfer tax, feel free to contact your Meijburg advisor.

KPMG Meijburg & Co
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