

The new division exemption in real estate transfer tax

The new division exemption was included in the 2024 End-of-Year Decree and will apply as of July 1, 2025. The new division exemption is, on the one hand, more limited than the current facility, because it requires that the property must be transferred as a business undertaking (business requirement), that it must be continued for three years (continuance requirement), a similar interest must be acquired (similar interest requirement) and the acquired shares must also be held for three years (retention requirement). This will make it more difficult to reorganize just before a sale without real estate transfer tax being payable (making ready for sale via a legal split-off). On the other hand, there will be a specific exemption for 'dispute divisions' (a specific kind of division where, by the way, 'dispute' is not a requirement), whereby no business requirement and the associated continuance requirement is stipulated. This should make it easier to set up personal holding structures and have (quarreling) shareholders of real estate companies go their separate ways. Read more about the newly proposed division exemption below.

What's wrong with the current scheme?

In 2006 the current division exemption was brought into line with and linked to the division facility in corporate income tax. Because that facility is, in turn, linked to the Merger Directive, EU law and judgments rendered by the Court of Justice of the European Union (CJEU) also affect the division exemption in real estate transfer tax. It has emerged that EU case law leads to a 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 third parties without this being subject to real estate transfer tax. Additionally, there has been a lot of debate about the interpretation of the current anti-avoidance assessment in the division exemption and the expression 'avoiding or deferring tax', 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.

On April 8, 2024 a proposal to change the division exemption in real estate transfer tax was published and launched for consultation. As a result of the responses received, on December 23, 2024 the final changes to the division exemption in real estate transfer tax were published in the End-of-Year Decree.

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 be a scheme with objective conditions that are more in line with the conditions for other business exemptions, so that there is certainty sooner about whether or not the division exemption applies. The division exemption will be applied per legal division and per immovable property.

There are two types of legal divisions in the new scheme:

- Legal divisions where a business, or independent undertaking of a business, is acquired;
- Dispute divisions where no business is transferred.

Proposed scheme 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 (investment property) 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 (once) as part of a successive legal transaction exempt from real estate transfer tax and the business is then continued for the remaining period by the next acquirer. A successive exempt legal transaction is an exempt legal merger, an exempt legal split-off/division, an exempt internal reorganization, or a share swap whereby at least 75% of the shares are acquired in exchange for a similar interest represented by own shares. If the legal division, together with the successive legal transaction, is primarily aimed at avoiding real estate transfer tax, the acquisition as part of the legal division is taxed.

Retention requirement

The shareholders of the separating legal entity must, directly or indirectly, acquire an equivalent interest in both qualitative and quantitative terms in the acquiring legal entity (a similar interest). '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 is equivalent in nature because it 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. If they are not, then real estate transfer tax will be payable by the shareholder who does not meet the retention requirement (a 'to-the-extent-that' approach).

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

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

Division of a real estate entity

If a real estate entity is split as part of a legal division, the exemption will only apply if the separating legal entity or the shareholder of the separating legal entity acquires the

entire interest in the acquiring legal entity. This will prevent a real estate company from being split/divided into a company in which a third party participates, thus diluting the interest of (the shareholder of) the separating legal entity.

Proposed dispute division scheme

An exemption also applies to dispute divisions (Section 2:334cc Dutch Civil Code, a specific kind of division of a NV or BV) where 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 shareholder of the separating legal entity must become the 100% shareholder of the acquiring legal entity, be given a similar interest and must hold that similar interest for at least three years. Here too, it is possible to 'further reorganize' (once), provided an exemption is applied and the successive reorganization is not part of a series of transactions, as a result of which there is, in material terms, a disposal of the property.

The new dispute division exemption makes it possible to, for example, split a holding company that is jointly owned by two shareholders into two personal holding companies. Or to give the (quarreling) shareholders of a real estate company each their own company with a share of the real estate investments. However, because the scheme only applies if and insofar as any material interest in the property is not transferred and this assessment is made per property instead of on the value of the property portfolio, real estate transfer tax is payable if and insofar as the interest in the property is increased. As such, we think that the new division exemption will not often offer any relief when (quarreling) shareholders go their separate ways. An example to illustrate this:

A and B are each 50% shareholders of BV X. The company owns property (1, 2, 3 and 4) of EUR 1 million. BV X undergoes a legal division. The acquiring legal entities (BV Y and BV Z) each acquire two properties. BV Y acquires the properties 1 and 2, BV Z the properties 3 and 4. The shares in BV Y are held by A, the shares in BV Z by B. In that case, real estate transfer tax is payable on 50% of the value of the property, because A has increased its economic interest in the properties 1 and 2 by 50%. The same applies to B; B has increased its economic interest in the properties 3 and 4 by 50%.

Legal entity

The proposed legal division exemption only applies to NVs, BVs, cooperatives and mutual societies with capital divided into shares or their foreign lookalikes. A foundation (*stichting*) does not qualify, so that the division exemption does not apply to legal divisions of foundations.

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 and therefore to more legal certainty. 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. Moreover, the fact that the conditions for the division

exemption deviate from the conditions stipulated for other business exemptions, makes 'searching' for the best reorganization exemption for real estate transfer tax purposes tricky. The scheme for dispute divisions seems too limited in many cases, because whether there is a change in control is assessed per property. When dividing up property portfolios, real estate transfer tax will often still be payable. The new division exemption is therefore certainly not always better than the current scheme. If a legal division is planned for 2025, it is worth looking into which scheme would be better suited to apply.

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

KPMG Meijburg & Co
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