



## Acquisition of forest land – no real estate transfer tax, but VAT?

02 | 2023

### 1 German Federal Fiscal Court: No real estate transfer tax for so-called pseudo-components

In the case of the acquisition of forest land used for forestry purposes, no real estate transfer tax is due insofar as the forest's trees are to be qualified as pseudo-components (Scheinbestandteile). Woody plants, including the forest's trees, are deemed to be pseudo-components if it was already intended to remove them from the immovable property at the time of sowing or planting. According to the German Federal Fiscal Court, this applies both to Christmas tree cultivation (German Federal Fiscal Court, judgment of 23.02.2022, II R 45/19) and, in general, to the forest's trees where it is clear, from the outset, that they are to eventually be cut down when they have reached a sufficient height (German Federal Fiscal Court, judgment of 25.02.2022, II R 36/19).

### 2 Essential components versus pseudo-components

The essential components of immovable property include things firmly connected to the land, including the products of the immovable property, as long as they are connected to the land. Seed becomes an essential component of immovable property when it is sown, a plant when it is planted (sec. 94 para. 1 of the German Civil Code). Therefore, standing woody plants are, initially, essential components of the immovable property, regardless of whether they have grown directly on the site by self-sowing or third-party sowing or whether they have otherwise been pre-grown and planted. Components of immovable property do not include things which are only connected to the land for a temporary purpose, no matter how firm the connection may be. These are so-called pseudo-components (sec. 95 of the German Civil Code). Woody plants are deemed pseudo-components if, at the time of sowing or planting, it was already intended to ultimately remove them from the property. The crucial question as regards determining the taxable amount for real estate transfer tax purposes is



Prof. Dr. Oliver Zugmaier  
Lawyer

+49 (0) 89 217 50 12-60  
oliver.zugmaier@kmlz.de

therefore whether it was already intended at the time of sowing or planting that the woody plants would later be removed or deforested. In protected forests, as well as in natural forest reserves and natural forest areas no intention for deforestation will be given. In the case of Christmas tree cultivation, however, this intention will always be present. Also, even as regards “normal” forests, the intention will usually be present. If the forest already indicates, by means of appropriately arranged rows of trees, that it was established for the purpose of logging, an intention to deforestation will usually be given.

#### Apportionment of the purchase price between plant growth and land

Ideally, the parties to the contract should apportion the purchase price between plant growth and land in the purchase agreement. However, as is often the case, the interests of the purchaser and the vendor conflict for income tax reasons: The purchaser is interested in the highest possible share of the purchase price for the plant growth, as this can be written off in the case of clear-cutting. For the vendor, on the other hand, the highest possible share of the purchase price for land is more advantageous, as the hidden reserves of the land can be transferred to a wider circle of assets by means of sec. 6b of the German Income Tax Act. If both parties cannot agree on an apportionment, an order issued by the Bavarian State Tax Office of 27.03.2014 can assist: for forest areas up to 5 ha, 40% is apportioned to land and 60% to the plant growth. For larger areas, the apportionment is made on the basis of stock value tables or by means of expert opinions.

#### VAT implications

If a forest's trees are qualified to be pseudo-components, no real estate transfer tax will become due. However, for VAT purposes this means that the VAT exemption, in accordance with sec. 4 No. 9 lit. a of the German VAT Act, cannot be applied. According to this, supplies that fall within the Real Estate Transfer Tax Act are VAT exempt. Pseudo-components are therefore not VAT exempt. However, prior to considering VAT exemption, the supplies must be subject to VAT in accordance with sec. 1 para. 1 no. 1 of the German VAT Act. A forest owner who (regularly) sells timber is a taxable person within the meaning of sec. 2 of the German VAT Act. However, even a subsistence farmer who sells wood, which has only accrued in large quantities that he cannot personally consume due to storm damage, in order to mitigate the storm damage is – as the ECJ already stated in 2012 – carrying out an economic activity that makes him a taxable person for VAT purposes.

If the forest is sold as a pseudo-component of the immovable property within a taxable transaction subject to VAT, the average rate of 5.5% pursuant to sec. 24 of the German VAT Act is generally applied. The input VAT is also 5.5%, based on the taxable amount of the output supply. This means that there is no VAT liability for the vendor, why this is referred to as fictitious taxation. If both the vendor and the purchaser do not realise that the transaction is subject to VAT, this generally has no effect on the purchase price under civil law. The basic rule here is that VAT is an integral part and thus a dependent part of the price agreed between the contracting parties. Thus, the contractual remuneration generally consists of a gross price which includes the statutory VAT. Against the background of the fictitious taxation just described, this result is also appropriate; no supplementary interpretation of the agreement (KMLZ VAT Newsletter 12 | 2019) is required here.

#### Conclusion

In terms of VAT, the new principles established by the German Federal Fiscal Court have no effect in cases of taxation according to average rates. This is the result of the politically intended fictitious taxation of farmers and foresters. However, the real estate transfer tax can be reduced by 60% in many cases. The tax offices have not (yet) implemented the new jurisprudence. An appeal should be lodged against assessments of real estate transfer tax. For future purchase agreements, the purchase price should be apportioned between the plant growth and the land itself. VAT should only be taken into account if the average rate taxation method has been waived.