ARUBAN REAL ESTATE TRANSFER TAX REFORM AND ITS IMPACT ON M&A AND RESTRUCTURING

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On January 1, 2023, an amendment to the real estate transfer tax came into force in Aruba. This amendment introduces inter alia a new regulation concerning the taxation of transfers of shares in companies that own real estate situated in Aruba. This amendment has a direct impact on best practices with respect to business acquisitions by means of the transfer of shares in companies that own real estate situated in Aruba. This amendment also impacts restructuring transactions, especially any share issuance transaction regarding shares in companies that own real estate situated in Aruba, so it looks at the moment.

REAL ESTATE TRANSFER TAX BEFORE 2023

Real estate transfer tax was traditionally only levied on the transfer[1] of the legal ownership of real estate situated in Aruba and of ships[2] belonging to Aruba[3]. This implied that the transfer of only the beneficial ownership of a real estate situated in Aruba and of a ship belonging to Aruba was not subject to the real estate transfer tax. Nor was this the case for transfers of shares in companies that own real estate situated in Aruba and of ships belonging to Aruba.

REFORM OF THE REAL ESTATE TRANSFER TAX

As of January 1, 2023, this situation changed. As of January 1, 2023, the real estate transfer tax was reformed to include both the transfer of shares in companies that own real estate situated in Aruba and the transfer of the beneficial ownership of real estate situated in Aruba as taxable events. This is in addition to the regular taxable events of the real estate transfer tax, being the transfer of the legal ownership of real estate situated in Aruba and of ships belonging to Aruba. Both new regulations explicitly exclude ships belonging to Aruba. Therefore, according to the text of the new regulations and its explanatory notes, it can be concluded that no real estate transfer tax will be due on the transfer of the beneficial ownership of ships belonging to Aruba and the transfer of shares in companies that own such ships.

As of January 1, 2023, the real estate transfer tax tariffs also changed. Whilst more recently a distinction was made in the real estate transfer tax tariffs between real estate as main residences and other real estate and ships, as of January 1, 2023, all real estate and ships will be subject to the same real estate tax tariff scheme which is 3% over the first Afl. 250,000 of the real estate and/or the ship, and if a real estate and/or ship value more than that amount, 6% over the remaining value of the real estate and/or the ship.

This article will only elaborate on the effects of the amendment to the real estate transfer tax to tax the transfer of shares in companies that own real estate situated in Aruba.

TRANSFER OF SHARES

At first glance, the context of the terms 'transfer of shares' seems obvious. In the explanatory notes to this amendment to the real estate transfer tax and the advice of the Council Board in this regard is reflected that this amendment most often will regard the actual sale of the shares in a company that owns real estate. This seems also a main target of this amendment.

Thinking through, however, the effects of this amendment go further than only taxing the sales of shares in companies that own real estate. Transactions accustomed to the business restructuring practice by means of in example issuance of new shares in a company that owns real estate to its existing shareholders, or the issuance of bonus shares in the case of the tax-free repayment of contributed capital to the shareholders of a company that owns real estate, will as of January 1, 2023, also be subject to the real estate transfer tax since these transactions are also considered as transfers of shares for the purposes of the real estate transfer tax. With this amendment it is fair to say that the impact of this amendment to the real estate transfer tax for future business acquisitions and restructuring transactions is potentially significant. But is it fair and reasonable for the corporate practice to subject every movement of shares in companies that own real estate to the real estate transfer tax?

This question can certainly be asked when issuing new shares in a company that owns real estate to its existing shareholders in the same participation percentages already owned by the shareholders. In such cases no actual value will be transferred supporting a taxable transfer for the real estate transfer tax since each shareholder will still indirectly own the same percentage of the real estate owned by the company.

The law on the transfer tax in the European part of the Netherlands provides, contrary

to Aruba, for special regulations in which specific taxable transactions related to companies that own real estate are facilitated (upon fulfilment of certain conditions), for the sake of the act of fairness and reasonableness. The Dutch government issued for example a special regulation regarding the facilitated treatment (upon fulfilment of certain conditions) of amongst others the issuance of new shares to existing shareholders in the same participation percentage for the purposes of the transfer tax. In this regard relief can be granted in the amount of the transfer tax due or a part thereof.
The Aruban government has not provided for similar special regulations. As such, at this moment, in principle all transactions entailing a transfer (read: movement) of shares in companies that own real estate will be subject to the real estate transfer tax.

COMPANIES THAT OWN REAL ESTATE

The introduction of this new taxable event for the real estate transfer tax has brought a change that has considerable implications for the practice of movements of shares in companies that own real estate. The main question that presents itself is when a company can be considered as a 'company that owns real estate' in the context of the real estate transfer tax.
Not all companies that own real estate will qualify as companies that own real estate for the purpose of the real estate transfer tax. Real estate transfer tax will only be levied from the transfer of shares in a company that owns real estate if two conditions are fulfilled. First, the assets of the company must consist of at least 30% of real estate situated in Aruba. This is the possession requirement.
Second, the real estate must aim primarily (70% or more) to acquire, to transfer, or to exploit real estate. This is the purpose requirement.

The possession requirement goes without saying. Relevant is that for the real estate transfer tax, the possession requirement not only refers to the possession of actual real estate. As real estate also qualifies the shares held in companies that own real estate (fictitious real estate), the rights to which real estate or fictitious real estate is subjected, and the beneficial ownership of

such real estate or rights. In the case that a company owns 100% real estate of which only 20% is situated in Aruba, per its literal text, the possession requirement will not be fulfilled since the 30% threshold will not be met.

The more difficult requirement is the purpose requirement because the question arises when does a company aim primarily at obtaining, transferring, or exploiting real estate? In practice, the answer to this question is not always obvious and certainly, the exploitation component of this requirement can cause headaches. Take as an example the hotel business: does the company that owns the hotel aim primarily at the exploitation of real estate or is it providing other services to its guests? In my view, it is peculiar that the Aruban government introduced the transfer of shares in companies that own real estate as a taxable event for the real estate transfer tax with the intention to specifically target transfers of shares in companies that own hotels. This because the basis for this same amendment to the real estate transfer tax

is the very similar article in the transfer tax in the European part of the Netherlands and the applicable Dutch case law that ironically explicitly excludes companies that own hotels from aiming at primarily at the exploitation of real estate.
The Aruba government appears as such to consider companies that own hotels as companies exploiting real estate in the context of the purpose requirement and as such as companies that own real estate for the purpose of the real estate tax, without verifying whether the purpose requirement is met by companies that own hotels.

Dutch literature and the numerous Dutch case law established regarding this subject prescribe that companies that own hotels cannot be considered as exploiting a real estate in the context of the very similar purpose requirement in the Dutch transfer tax legislation. In the European part of the Netherlands the standpoint is taken that the exploitation element is not present since in the hotel business it is not the real estate that is being exploited, but services to guests is the core of the hotel business. As such, in cases where real estate is needed to carry on a business that does not consist of acquiring, transferring, or exploiting real estate, the purpose requirement is not met.

The Dutch legislative history even mentions the hotel business specifically as not fulfilling the purpose requirement. As the Council Board indicates in its reaction on the proposal of this amendment to the real estate transfer tax, this amendment shows a large similarity with the Dutch transfer tax. If applied in accordance with the Dutch legislation, the standpoint can be taken, that upon applying the legislation which is very similar to the Dutch article in this regard, supported by the established case law regarding this matter, does a hotel in fact qualify as a company that owns real estate for the purpose of the real estate transfer tax? This uncertainty is taken away by the Aruban government in its reaction to the recommendations of the Council Board. The Aruban tax department also explicitly and expectedly agreed to this view in answer to this question. The Aruban government bodies take the position that the purpose requirement is met by a company that owns a hotel. However, in my view the question remains if this view is correct. Undoubtedly future case law will provide a final answer to this question.

The Aruban government certainly has the authority to also cover the transfer of shares in companies that own hotels with this amendment to the real estate transfer tax. It is in my view however contradicting if this same amendment would only apply upon fulfillment of specific requirements that companies that own hotels might not meet. In any way, this observation of the Aruban government bodies leaves in my view room for a different interpretation.
The impact of this amendment to the real estate transfer tax for business transactions in general and the hotel business specifically is significant. In my view regretfully, the changes in the real estate transfer tax legislation have created new uncertainties with respect to the taxability of transactions for the real estate transfer tax. In this article I only touched upon one of the uncertainties. I hope that Aruba will follow The Netherlands with respect to the policies which The Netherlands applies to its similar tax.

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[1]The real estate transfer tax provides for equivalences to a transfer in article 3 of the State Ordinance transfer tax.
[2]Qualifying ships are ships belonging to Aruba, measuring at least 20 cubic meters gross capacity. We will not elaborate further on the aspect of belonging to Aruba.
[3]Per July 2018 the real estate transfer tax also applied to acquisitions under inheritance law of real estate located in Aruba and of ships belonging to Aruba. This additional taxable event is abolished from the real estate transfer tax in the reform of 2023.