

LEGAL UPDATE

The Supreme Court confirms: 2% transfer tax due on acquisition of repurposed building

Date: 5 December 2019

Last Friday, 29 November 2019, the Supreme Court handed down three judgments regarding transfer tax on the acquisition of an apartment right in a repurposed building.¹ The central legal question in the judgments is whether the acquisition of an apartment right in a former office building pertains to a dwelling within the meaning of Section 14(2) of the Legal Transactions (Taxation) Act and whether, accordingly, the reduced 2% rate applies instead of the 6% rate.

The Supreme Court first of all refers to its judgments of 24 February 2017, in which it ruled as follows.² A property qualifies as a dwelling within the meaning of Section 14(2) of the Legal Transactions (Taxation) Act if, by its nature, it is intended for habitation. The question of whether a property is by its nature intended for habitation must be answered by a standard that is as close as possible to the characteristics of the building itself. The suitability of the property to serve as a dwelling is decisive. More relevant is the purpose for which the property was originally designed and built. If the purpose was habitation, but the building has subsequently been converted to make it suitable for another use, it can only be considered to have retained its nature as a dwelling if only marginal modifications are required to make it suitable for habitation again. The same applies to a building that was originally designed for a use other than habitation, but is by its nature intended to be used as a dwelling due to a subsequent conversion.

The Supreme Court decided that, in line with the rules set out above, the purpose for which the structure was originally designed and built is relevant. It is up to the party invoking the application of the 2% rate to state (and, if necessary, demonstrate) that the property of the transferred right in rem at the time of transfer is, by its nature, intended to be used as a dwelling.

In a case where conversion work has taken place which, even if not yet completed, may justify the conclusion that such work is clearly aimed at the delivery of a dwelling, the structure can only be deemed to have retained its original nature if the inspector can demonstrate that no more than marginal adjustments are necessary to make it fit for its original purpose again. The scope of the conversion work must be determined taking into account all the circumstances of the case.

The Supreme Court held that the facts established by the Court of Appeal mean that the interested party has acquired a right in rem in respect of part of a property that was structurally prepared for the installation of facilities in order to make that part of the building suitable for habitation, that the transferred right was intended for this purpose, and that the applicable public law provisions had been adjusted to make this occupation possible. Moreover, these facts mean that, at the time of the transfer to the interested party, the situation where the transferred part of the building could be made suitable for its

original (office) use with only marginal modifications no longer applied. The Supreme Court ruled that the view based on these facts that the interested party had obtained a dwelling for the purposes of Section 14 of the Legal Transactions (Taxation) Act does not reflect an incorrect interpretation of the law and dismissed the appeal in cassation as unfounded.

This is a Legal Update from Romy Brandriet and Mervyn Odink.

¹ HR 29 November 2019, [ECLI:NL:HR:2019:1779](#), [ECLI:NL:HR:2019:1872](#) and [ECLI:NL:HR:2019:1874](#).

² HR 24 February 2017, [ECLI:NL:HR:2017:290](#), [ECLI:NL:HR:2017:294](#) and [ECLI:NL:HR:2017:295](#).

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