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VwGH confirms decision by Court of Appeals: Real Estate Transfer Tax Planning with a trustee could be seen as misuse (Sec 22 BAO)!

According to the clear wording of Sec 1 para 3 Real Estate Transfer Tax Act RETT is triggered **only in case 100%** of the shares in a company holding real estate are pooled in the hand of one single shareholder (or in the hands of several shareholders that meet the criteria for forming a VAT group). Based on the case law by the Administrative Supreme Court (VwGH) this provision is to be interpreted formally meaning that RETT is only triggered if 100% of the shares are **legally pooled in the hand of one single shareholder** (or a VAT group). Consequently, in practice RETT was often avoided by a so called "trustee solution", i.e. a minority share was legally not transferred to the purchaser but remained in the hands of the seller or a third party acting as trustee for the purchaser.

In its decision RV/0226-I/09 dated 25 June, 2010 the Court of Appeals (UFS) Innsbruck held that a trustee solution (in the case at hand the father transferred 99% of the shares in a GmbH to his son but kept the remaining 1% share in his hands on trust for his son) to avoid RETT on a share transfer was **misuse**, as its only purpose was to work around RETT on the share transfer and levied RETT. Surprisingly the VwGH in its recent decision 2010/16/0168 dated 5 April, 2011 confirmed this decision by the UFS.

It is worth noting that the VwGH on the one hand stuck to its view that in general only legally pooling all shares in the hand of one single shareholder triggers RETT even though a minority share is held by a trustee. However, the court shared the view of the UFS that a "trustee solution" could be challenged under the **general anti abuse provision (Sec 22 BAO)** on an individual basis, if there are no solid business reasons other than tax planning for such structuring.

It seems questionable if this decision could have an impact on any "trustee solution" in the course of share transfers. We therefore await with interest the reaction of the Ministry of Finance. In practice "trustee solutions" in the course of share transfers should no longer be chosen, in case **no solid business reasons** other than the avoidance of RETT can be established for such structuring.

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