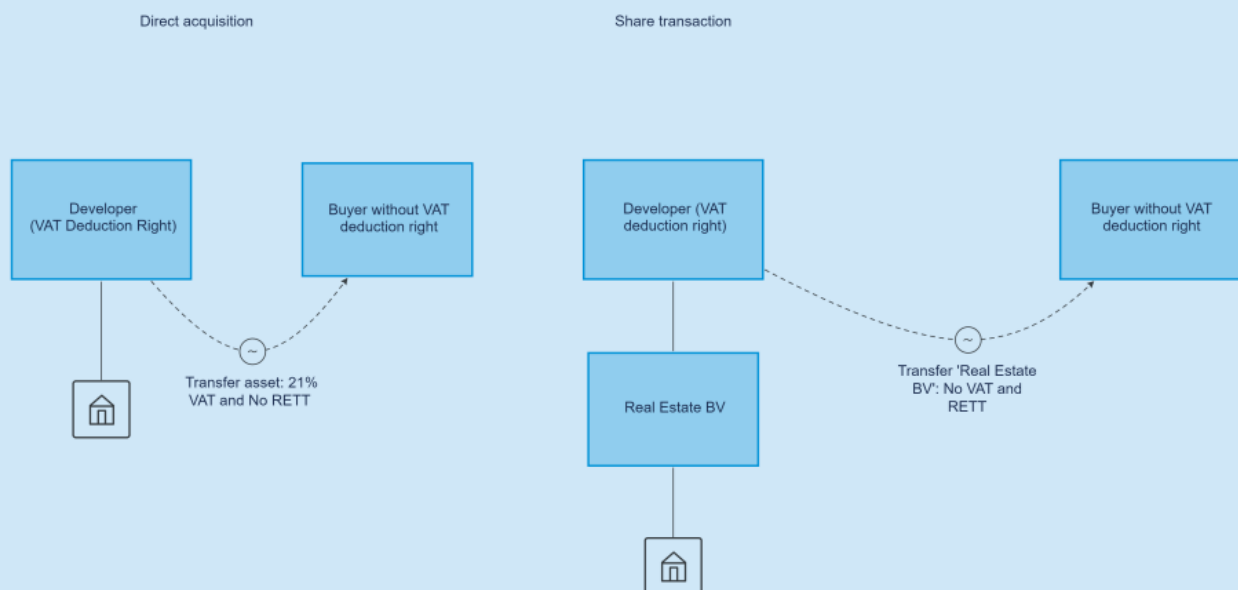


Unofficial translation explanation consultation document

I General

1. Introduction (modification of concurrence exemption in equity transactions)

In VAT, the starting point is that VAT is due (general rate, currently 21%) by the seller on the delivery of new real estate.¹ The acquisition of existing real estate by the buyer is generally subject to transfer tax (general rate, currently 10.4%). However, it is possible to transfer new real estate via a share transaction (instead of a direct delivery of the real estate) where neither VAT nor RETT is due. However, the VAT on the purchase of services acquired as part of the exempt share sale is not deductible and thus constitutes a cost for the seller, for example a property developer. In practice, taxpayers use this tax-saving structure to reduce the tax burden when purchasing new real estate. This structure is of interest when VAT is a cost item, such as when purchases are made by housing landlords, (investors who rent to) educational institutions, pension funds, insurance companies and healthcare providers.² The current situation can be represented in a figure as follows:



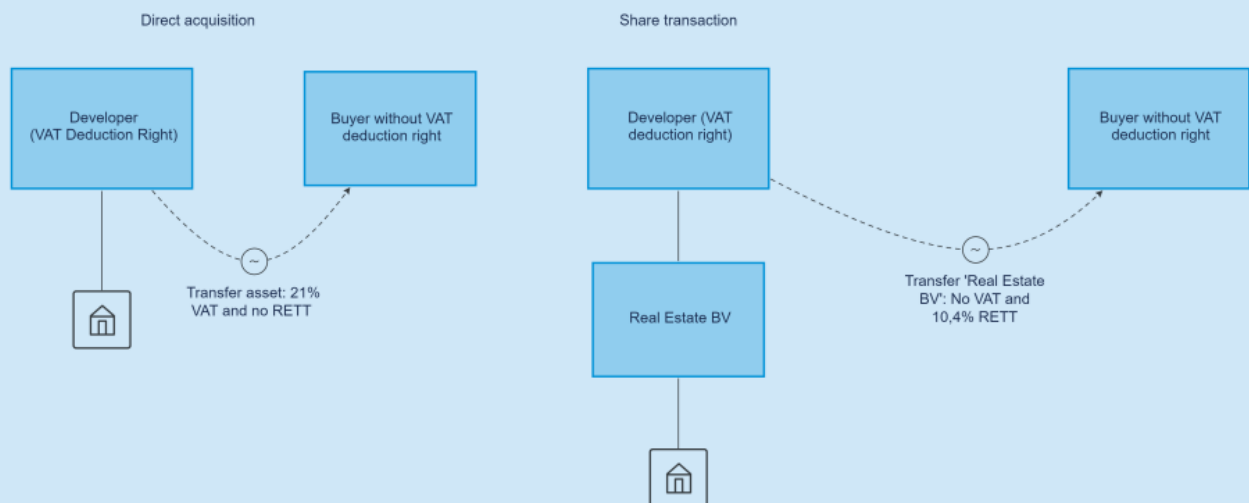
This tax-saving structure is possible within the current legal framework,³ but is obviously undesirable and not intended.

¹ As a rule, the so-called concurrence exemption then also applies so that no ovb is due on the acquisition of the new immovable property.

² The buyer of a new property who will use the property entirely for VAT-exempt activities cannot deduct the VAT charged. The VAT constitutes an expense for this entrepreneur.

³ The Supreme Court has addressed the legal question whether a transfer tax exemption also applies to the acquisition of shares in a real estate legal entity in a situation where the direct acquisition of the underlying real estate shares in an exemption in three judgments. The Supreme Court ruled in the affirmative and has since used this look-through approach' which allows the tax-saving structure. HR 23 February 2007, ECLI:NL:HR:2007:AU8559, HR 10 June 2011, ECLI:NL:HR:2011:BQ7580 and HR 30 November 2018, ECLI:NL:HR:2018:2110.

After all, the effect of the described structure is essentially to minimize the tax burden.⁴ The existence of the structure (indirectly) motivates project developers to use (tax-saving) share transactions when delivering new real estate. The tax authorities currently have no means of combating this because the structure does not violate laws, regulations and case law. In the absence of mitigation methods, it is likely that the use of share transactions for the sake of tax benefit will continue to increase in this type of situation. In the VAT laws and regulations, there is no conclusive possibility to increase the VAT burden of the aforementioned share transactions (see Section 5, Efficiency and Effectiveness). However, there is a workable possibility to combat the tax savings in the RETT laws and regulations. This bill therefore contains a proposal to amend the so-called concurrence exemption in the RETT laws and regulations in such a way that in any case RETT (currently 10.4%) is levied on the acquisitions of new real estate via a (qualifying)⁵ equity interest (because in those cases the concurrence exemption does not apply). Although this measure does not create a completely level playing field between new real estate transferred via shares and new real estate transferred directly, it appears to be the most efficient and effective measure to reduce the disparity in tax burden between these two forms of transaction. The proposed situation can be depicted in a figure as follows:



It should be borne in mind that even in this proposed situation, the fact remains that the seller of the shares cannot deduct the VAT on the purchase of services acquired in the context of the exempt share sale and that this VAT is therefore an expense for him. Thus, the effective tax burden will normally be higher than the 10.4% RETT mentioned in Figure 2. In this regard, see section 3 “Budgetary aspects”.

2. Outline of the proposal

The proposed legislative amendment ensures that the concurrence exemption does not apply to the acquisition of a qualifying equity interest in a real estate legal entity. The purpose of this legislative amendment is to reduce the inequality in the playing field that has arisen between market parties who, in order to save on VAT and RETT, shape the disposal of immovable property through a share transaction and market parties who directly transfer the immovable property. The proposed measure does not aim to create a completely level playing field but partially removes the benefit of the unwanted VAT savings by levying RETT in appropriate cases.

⁴ Although the use of legal entities/share transactions is also done for other reasons (such as mitigating liability) and as such is accepted. However, that does not negate the undesirability of not charging when use of the structure.

⁵ It should be noted that the proposed measure only levies ovb to the extent ovb is due under the WBR on an acquisition of the shares. If, pursuant to the WBR, no ovb is due because not all requirements for taxability set forth in the law are met (e.g. if less than 30% of the assets of the legal entity whose shares are transferred consist of immovable property situated in the Netherlands), the exclusion of the concurrence exemption will not apply.

3. Budgetary aspects

The level (amount) of tax savings for the buyer (which this bill seeks to partially eliminate) depends on the specific circumstances of the case. For example, whether the seller hires or employs its construction personnel externally (taxed with VAT) and how (and for what land price) the seller obtained the land (with or without VAT or RETT) is of great influence. Thus, the savings per transaction depend heavily on the seller's (non-deductible) VAT, which weighs on purchased goods and services, and is therefore in any case less than 21%. Based on the portrayed transfers of new real estate, the budgetary yield of this measure is estimated at € 155 million at a general RETT rate of 10.4%.

4. EU aspects

There are no EU aspects associated with the measure.

5. Efficiency and effectiveness

Policy Alternatives in VAT Legislation Examined

Two options were examined for adjustment in VAT legislation, which did not prove to be a conclusive, workable option:

1. Reintroduction of the so-called real estate integration tax. Until 2014, the integration tax was a correction to the VAT levied on self-made goods. With the integration levy, on balance, VAT was levied on self-made products on which VAT had not yet been calculated. This included, for example, the cost of employing one's own personnel in the manufacture of a home, the value of the contributed plot of land on which the home was built, or the value of an empty office building that was converted into new housing. The (re)introduction of the integration tax is, in theory, an appropriate method to eliminate the tax savings at issue in this bill. However, the reasons for abolishing the integration levy in 2014 still apply today. The integration levy was perceived by business owners as a barrier when converting existing, vacant offices into new homes to be rented out and also discouraged them from temporarily renting out new homes built for sale, pending that sale. The abolition of the integration tax meant a saving in implementation costs for the Tax Administration and a decrease in the administrative burden on business. Moreover, both the business community and the Tax Administration had difficulty determining the basis of this levy, which led to discussions. Therefore, this policy option does not appear to be preferable when more efficient and effective alternative policy options are available.⁶
2. Treating indirectly acquired property as the supply of the property itself. The VAT Directive⁷ offers the possibility of looking through share certificates and shares and thus equating their sale with the supply of immovable property. The Netherlands has so far not made use of this possibility. Experience with similar RETT laws and regulations shows that these regulations are very complex to implement. In order to effectively combat (part of) the undesirable methods of saving through this route, legislation is needed that leads to overkill (in the sense of excessive implementation complexity but also excessive taxation). Thus, also this policy option does not seem to be preferable if more efficient and effective alternatives are available.

Proposed RETT measure

The RETT laws and regulations provide a workable way to combat tax savings (the proposed measure). That measure does not result in a completely level playing field between entrepreneurs who directly provide new real estate and entrepreneurs who provide new real estate through a share transaction. The proposed measure results in an RETT levy of 10.4% upon acquisition of a (qualifying) equity interest. This measure, as a possibility to (partially) eliminate tax savings, is the most efficient and effective.

Excess tax in certain cases

It is conceivable that the RETT measure results in a higher effective tax burden for a group of acquirers than if they had purchased the new property directly, taxed with VAT (for example, if the purchaser is VAT deductible). However, these are

⁶ This does not alter the fact that the reintroduction of the integration levy could solve the problems outlined but also others so that it can be kept in reserve as a reserve policy option in case of changed insights, different policy needs or if the proposed alternative measure proves less effective than estimated.

⁷ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (PbEU 2006, L 347).

difficult to avoid effects of the measure because they result from specific business circumstances of the buyer and seller. Those circumstances have such an impact on the effective tax burden per transaction that they cannot be taken into account in (clear, workable and enforceable for entrepreneurs) legislation.

This, in certain cases, potentially excessive levy has an adverse effect on the efficiency and effectiveness of the proposed measure. In the Cabinet's view, however, the benefit of creating a more level playing field for entrepreneurs and buyers in the real estate market is of greater importance than preventing an excessive levy in specific cases. The Cabinet also notes that the option to choose to purchase the new property directly will always remain open so that excessive levy will not necessarily apply. Parties will remain free, as they are now, to choose the method of transfer of new real estate that is most favorable to them.⁹ This bill only aims to reduce the unintended difference in tax burden between the direct transfer of new real estate and the transfer of new real estate by means of shares so that this freedom of choice causes less distortion of competition.

(Preventing) behavioral effects

There is currently an approval in the concurrence decree¹⁰ which regulates that VAT- and RETT-free with shareholdings in non-legal entities (e.g. limited partnerships) new real estate can be supplied/acquired. This approval serves to create a level playing field within current laws and regulations compared to (regular) share transactions. The government will, if this bill is adopted, remove this approval (see paragraph 9, the evaluation paragraph), from the concurrence decree in line with the proposed legislative amendment. In this way, equity transactions and transactions with shareholdings will be treated equally after the proposed legislative amendment. There are also other transaction structures other than a share transfer or a transfer through shareholdings that achieve a similar result (VAT-free and RETT-free transfer of new real estate). Examples include the acquisition of new immovable property within a VAT fiscal unity or through the acquisition of (part of) a company, in which the new immovable property has been realized¹¹. The bill does not aim to change this situation. After all, these situations do not involve the disposal of a separate immovable property to a third party, but rather the supply within a single VAT company or the (silent) continuation of a company. Therefore, for the time being, the government does not propose to levy VAT on these transaction structures. The government is monitoring the extent to which the market reacts to new legislation by increasing unintended use of the other transaction structures (see section 9, the evaluation paragraph). Finally, it is possible that parties will structure such that there is no taxed acquisition of shares in a real estate legal entity. This can be done, for example, by having four cooperating parties acquire the shares, as a result of which this acquisition (each 25% of the shareholding) does not result in taxation of RETT.¹² This structuring can be prevented with legislation for a so-called cooperating group in the RETT. Similar legislation exists in corporate income tax legislation (Art. 10a, sixth paragraph, Corporate Income Tax Act 1969). This is implementation-technically complex legislation and it is therefore preferable to initially monitor (see paragraph 9, the evaluation section) the extent to which legislation will be structured in this way with the aim of avoiding the effects of this bill. Should significant behavioral effects be observable, the possibility of introducing the so-called cooperating group into the RETT legislation will have to be considered.

Conclusion efficiency and effectiveness

All things considered, the government is of the opinion that the proposed legislative amendment to the WBR is the most clear and workable/workable way to achieve taxation of acquisitions of new real estate through shares. This amendment to the WBR appears to be the most efficient and effective way to combat the identified distortion of competition.

6. Impact on citizens and businesses

PM

7. Implementation costs Tax Administration

PM

8. Advice and consultation

PM

9. Evaluations

It is important for obtaining good policy information to determine prior to the implementation of new policy how that information will be gathered and how the policy will be evaluated. For this reason, legislative proposals that result in a substantial policy change include an evaluation paragraph. This will explain whether and how the policy will be evaluated. This contributes to an effective review of the effectiveness and efficiency of government policies. By taxing the acquisition of new real estate through shares with RETT, the government aims to create a more level playing field between entrepreneurs who provide new real estate directly and entrepreneurs who provide new real estate through a share transaction. In order to examine whether the chosen design of the proposed measure is effective and efficient, the proposed measure will be included in a policy evaluation. In that context, at least the following research questions will be answered:

- Has the measure created a more level playing field between entrepreneurs who provide new real estate directly and entrepreneurs who provide new real estate through shares (research method: information from the Tax Administration's Real Estate Knowledge Center or quantitative analysis by a research firm)?
- To what extent has the measure led to a shift from share transactions to transactions with shareholdings in non-legal entities (e.g., limited partnerships) or transactions that constitute a transfer of all or part of a generality of goods in accordance with VAT legislation (research method: information from the Real Estate Knowledge Center or quantitative analysis by a research firm)?
- To what extent is structured around the proposed change in the law by, for example, splitting the equity interest in a real estate legal entity to be acquired among cooperating legal entities in such a way that there is no longer a taxable acquisition? (research method: information from the Real Estate Knowledge Center or quantitative analysis by a research firm)
- To what extent has the measure led to a price increase in the rental sector? (research method: information from the Real Estate Knowledge Center or quantitative analysis by a research firm).

II. ARTICLEWISE EXPLANATION

ARTICLE XXX

Article XXX (Article 15 of the Dutch Legal Transaction (Taxation) Act).

It is proposed to add a subsection to the end of Article 15, paragraph 1 (a) WBR, while adjusting the structure of that provision. This subsection provides that the concurrent exemption contained in that provision does not apply when shares in an immovable property legal entity as referred to in Article 4, paragraph 1, subparagraph a, of the WBR are acquired. This prevents the concurrence exemption from applying when (VAT-exempt) shares are transferred that entitle the holder to new immovable property. Except for this amendment, no changes are intended with respect to Article 15, paragraph 1 (a) WBR.

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