

Unofficial translation

Explanation consultation document

I – General

1. Introduction (amendment of concurrence exemption for share transactions)

The starting point of this proposal is that VAT is due (standard rate, currently 21%) by the seller on the supply of new real estate.¹ Acquisition of existing real estate by Purchaser is generally subject to RETT (standard rate, currently 10,4%). However, it is possible to transfer new real estate via a share deal (instead of a direct supply of the real estate) where neither VAT nor RETT is due. However, VAT on the purchase of services acquired as part of the exempt share deal is not deductible and thus constitutes a cost for the seller, for example a 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 burden, such as when purchases are made by landlords of residential properties, (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:

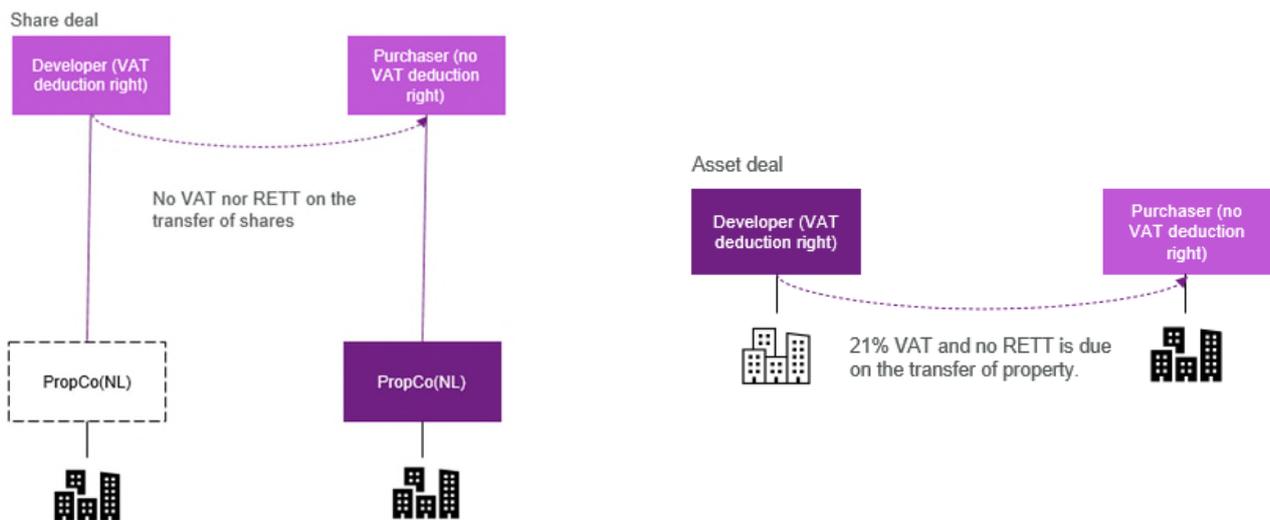


Figure 1 - example difference in taxation when supplying directly/acquiring via shares or asset deal

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

² The purchaser of a newly developed property, who will use the property entirely for VAT-exempt activities cannot deduct the VAT charged on the acquisition. The VAT constitutes an expense for this entrepreneur.

This tax-saving structure is possible within the existing legal framework³ but is obviously undesirable and not intended. After all, the effect of the described structure is essentially to reduce the tax burden.⁴ The existence of the structure motivates property developers (indirectly) to make use of the structure when supplying new properties to use tax-saving) share deals. The tax authorities currently have no remedies because the structure does not violate laws, regulations and case law. In the absence of remedies, it is likely that the use of share deals for the sake of tax advantages in this type of situation will further increase.

There is no viable option in the VAT law and regulations to increase the VAT burden of the aforementioned share deals (see section 5, efficiency and effectiveness). However, a workable option to combat tax savings does exist in the RETT law and regulations. This bill therefore contains a proposal to amend the so-called concurrence exemption in RETT law and regulations in the sense that amend that at least RETT (currently 10.4%) is levied on acquisitions of new immovable property via a (qualifying)⁵ shareholding (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 supplied via shares and new real estate supplied directly, it appears to be the most efficient and effective measure to reduce the disparity in the tax burden between these two transaction forms. The proposed situation can be depicted in a figure as follows:

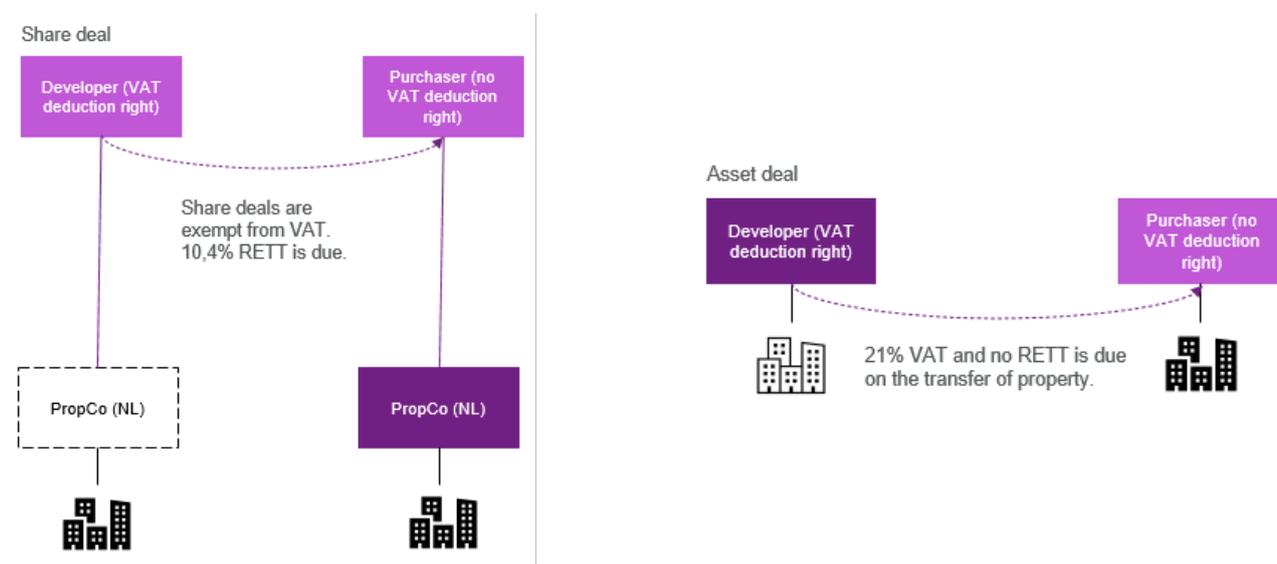


Figure 2 - example difference in taxation when supplying directly/acquiring via shares or asset deal

it should be kept in mind that even in this proposed situation, it remains the case that the seller of the shares cannot deduct the VAT on the purchase of services acquired in the context of the exempt share deal and that this VAT is therefore an expense for him. deduction and that this VAT is therefore an expense for the seller. The effective tax burden will normally thus be higher than the 10.4% RETT mentioned in Figure 2. In this regard, see section 3 "Budgetary aspects".

³ The Supreme Court dealt with the question whether a RETT 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' that allows for 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

⁴ Although the use of share deals is also done for other reasons (such as mitigating liability) is accepted. However, that does not diminish the undesirability of non-taxation when using this deal structure.

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

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 remove the inequality in the playing field that has arisen between market parties who, in order to save on VAT and RETT the disposal of immovable property through a share deal and market parties who transfer the transfer immovable property directly, to be reduced. The proposed measure does not aim to create a completely level playing field but partially removes the benefit of unwanted VAT savings by levying RETT in appropriate cases.

3. Budgetary aspects

The height (amount) of tax savings for the purchaser (which this bill aims to partially eliminate) depends on the specific circumstances of the case. For example, whether the seller hires or employs its construction staff 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. The savings per transaction are thus highly dependent 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 standard RETT rate of 10.4%.

4. EU aspects

There are no EU aspects associated with the measure.

5. Efficiency and effectiveness

Policy alternatives examined in VAT legislation

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

1. Reintroduction of the so-called integration tax for immovable property. Until 2014, the integration levy was an adjustment to the VAT levied on self-produced goods. With the integration levy, on balance, VAT was levied on self-made products on which no VAT had yet been calculated. This included, for example, the cost of using in-house staff to manufacture 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 remove 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 entrepreneurs as a barrier when converting existing, vacant offices into new homes to be rented out, and deterred them also from temporarily renting out new homes built for sale, pending that sale. letting. The abolition of the integration tax meant a saving in implementation costs for the Tax Administration and a reduction in the administrative burden for business. Moreover, both the business community and the Tax Administration had difficulties in determining the basis of this levy, which led to discussions. Therefore, this policy option does not seem to be preferable if 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 thus equating their sale with the supply of immovable property. This possibility has Netherlands has not taken advantage of this possibility to date. Experience with similar RETT laws and regulations shows that these regulations are very complex to implement. In order to implement (part of) the undesirable saving

⁶ This does not alter the fact that the reintroduction of the integration levy could solve the outlined but also other problems 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 turns out to be less effective than estimated.

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

methods along this path effectively, legislation is needed that leads to overkill (in the sense of excessive implementation complexity but also excessive levy). Again, this policy option seems therefore not to be preferred if more efficient and effective alternatives are available.

Proposed RETT measure

The RETT law and regulations provide a workable option to combat tax savings (the proposed measure). That measure does not result in a completely level playing field between entrepreneurs who supply new real estate in a directly provide new real estate and entrepreneurs who provide new real estate through a share deal. The proposed measure results in taxation of RETT of 10.4% on acquisition of a (qualifying) equity interest. This measure, as a possibility to tax savings (partially) eliminated, is the most efficient and effective.

Excessive levy in certain cases

It is conceivable that, for a group of acquirers, the RETT measure results in a higher effective tax burden than if they had purchased the new property directly, taxed with VAT. tax burden than if they had purchased the new property directly, taxed with VAT (e.g. where the purchaser is VAT deductible). However, these are effects of the measure because they result from specific business circumstances of purchaser and seller. Those circumstances have such an impact on the effective tax burden per transaction that they must be considered here in (clear, workable and enforceable for entrepreneurs) legislation cannot take them into account.⁸

This, in certain cases, potentially excessive levy has an adverse effect on the efficiency and effectiveness of the proposed measure. However, in the government's view, the benefit of creating a more level playing field for entrepreneurs and purchasers in the real estate market is of greater importance than preventing excessive taxation in specific cases. The government also notes that the option to choose to buy the new property directly will always remain open so that excessive levy will not necessarily apply. Parties will, as now, remain free to choose a mode 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 immovable property by means of shares so that such 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-exempt with shareholdings in non-legal entities (e.g. limited partnerships), new immovable property can be supplied/acquired. This approval serves to create a level playing field compared to (regular) share deals. The government will, if this bill is passed, remove this approval (see paragraph 9, the evaluation paragraph), from the concurrence decree in line with the proposed legislative amendment. In this way, share transactions and transactions with shareholdings treated equally after the proposed legislative amendment.

There are also transaction structures other than a share transfer or a transfer through partial ownership that achieve a similar result (VAT-free and RETT-free transfer of new real estate). Examples include the acquisition of new real estate within a fiscal unity

⁸ A measure that is not entirely tailored to the individual circumstances of taxable persons is thus chosen to avoid complicating the legislation to such an extent that it is no longer workable and/or practicable.

⁹ As noted earlier, the government is aware that more than just tax factors are decisive in shaping transactions. If the bill is adopted, taxpayers will, as always, have to decide how to shape their transaction based on all factors (including tax) relevant to them.

¹⁰ The decision of 16 March 2017, No 2017-51500 (Transfer tax and sales tax. Concurrence.).

for VAT or through the acquisition of (part of) a company, in which the new immovable property is realized.¹¹ 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 one VAT company or the (silent) continuation of a company. For the time being, therefore, the government does not propose to levy RETT in these transaction structures. The government is monitoring the extent to which the market responds to new legislation by an increase in unintended use of the other transaction structures (see section 9, the evaluation section).

Finally, it is possible that parties will structure the acquisition of shares in a real estate legal entity in such a way that it is not a taxable acquisition. 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) will not result in a levy of RETT.¹² This structuring can be avoided with legislation for a so-called cooperating group in RETT. Similar legislation exists in corporate income tax legislation (Art. 10a, sixth paragraph, Corporate Income Tax Act 1969). This is complex legislation, and it is therefore preferable initially to monitor (see paragraph 9, the evaluation paragraph) the extent to which in this way will be structured with the aim of avoiding the effects of this bill. Should significant behavioral effects be observable then the possibility of introducing the so-called cooperating group in the RETT legislation should be considered.

Conclusion efficiency and effectiveness

All things considered, the government is of the opinion that the proposed legislative amendment to the RETT ACT is the most clear and workable/workable way to achieve taxation of acquisitions of new immovable property through shares. This amendment to the RETT ACT appears to be the most efficient and effective way to address the identified distortion of competition.

6. Consequences for citizens and businesses

PM

7. Implementation costs Tax Administration

PM

8. Advice and consultation

PM

9. Evaluations

It is important to obtain good policy information prior to the implementation of new policy to determine 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 will 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 policy.

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 supply 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 involved in a policy evaluation. Within that framework, at least the following research questions will be answered:

¹¹ So-called 37d-transactions to the relevant article in the Turnover Tax Act 1968.

¹² The concurrence exemption is then not excluded because no RETT-taxed acquisition takes place.

- Has the measure created a more level playing field between entrepreneurs who supply new immovable property directly and entrepreneurs who supply new property via 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, in accordance with VAT legislation, constitute a transfer of all or part of a generality of property (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, the equity interest to be obtainable equity interest in a real estate legal entity be split up among cooperating legal entities 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 did the measure lead 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. ARTICLE-BY-ARTICLE NOTES

ARTICLE XXX

Article XXX (Article 15 of the Real Estate Transfer Tax)

It is proposed that, while adjusting the structure of Article 15, paragraph 1 (a), RETT, a

subsection to be added to the end of that provision. This subsection provides that the concurrence exemption included in that provision concurrence exemption contained in that provision does not apply when shares in a real estate legal entity as referred to in Article 4, paragraph 1 (a), RETT are acquired. This prevents the concurrence exemption is applicable when (VAT-exempt) shares are transferred that give entitlement to new immovable property. Except for this amendment, no changes are intended with respect to Article 15, first paragraph, subsection a, RETT.