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German Tax and Legal News

Federal Ministry of Finance publishes draft law to amend RETT rules on share deals

Changes are intended to broaden the scope of the rules

On 8 May 2019, the German Federal Ministry of Finance published a first draft of the "Law for the further tax support of e-mobility and for the amendment of additional tax provisions," which includes long-awaited amendments to the real estate transfer tax (RETT) rules. The draft law includes a considerable broadening of the applicability of the RETT rules, following an initiative that originally was announced on 21 June 2018 (see GTLN dated 06/26/2018) by the finance ministers of the German federal states.

Under the current rules, RETT is triggered on direct transfers of real estate, as well as where 95% or more of the shares in a German real estate-owning company are directly or indirectly transferred to a new owner, or where 95% or more of such shares are directly or indirectly combined for the first time in the hands of a new shareholder (or where there is a 95% or greater change, directly or indirectly, of the partners in a German real estate-owning partnership). Under the draft law, the 95% threshold would be reduced to 90%. In addition, a new rule would be introduced for corporations, under which a transfer of 90% or more of the shares to multiple new shareholders within a 10-year period would trigger RETT. A similar rule already applies to real estate-owning partnerships with a 95% threshold and a five-year monitoring period, which would be amended to align with the 90% threshold and ten-year monitoring period for corporations. It is worth noting that the rules for both partnerships and corporations also would apply to indirect changes in the shareholder structure. If 90% or more of the shares of any corporate entity are transferred to new shareholders, the entity would be treated as a deemed new shareholder for purposes of all of its own shareholdings.

In addition to these changes, the minimum holding periods in the RETT code for certain structures to qualify for favorable tax treatment would be expanded from five to 10 years. Notably, the intragroup exemption for certain reorganizations within a 95%-controlled group would not be aligned with the new 90% threshold used elsewhere in the amendments to the RETT act, creating an inconsistency within the rules.

Once enacted, the new rules generally would apply to transactions carried out after 31 December 2019. Complex rules are included in the draft act to manage the transition from the old 95% threshold to the new 90% threshold. For example, it appears that an increase from a 91% shareholding to a 94% shareholding would not be deemed to trigger RETT, while an increase from a 94% shareholding to a 95% shareholding would trigger RETT. Once the shareholding drops below 90%, any subsequent increase above that threshold would trigger RETT.

The expansion of the rules, if enacted as currently drafted, would require taxpayers to exercise additional care in their due diligence when reorganizing shareholdings above any entity owning German real estate. The expansion of the partnership rules to corporations and the introduction of a 10-year monitoring period would add significant complexity to the RETT rules. It is likely that the draft law will officially be introduced in the legislative process before the summer break in July-August 2019.

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