

Potential impacts of amended RETT rules for share deal transactions

Amended RETT rules could result in unexpected tax consequences in share deal transactions.

An act amending the German real estate transfer tax (RETT) rules entered into force on 1 July 2021. The amended RETT rules that are applicable as from this date are significantly more complex than the former rules, and the threshold triggering the application of the rules has been reduced from 95% to 90% (certain provisions apply during a transition phase to manage the change from the former threshold to the new threshold, for further details see [GTLN dated 05/10/2021](#)). The amended rules could result in unexpected tax consequences in relation to share deal or merger and acquisition (M&A) transactions, some of which are highlighted in this article.

Under the amended rules, the circumstances that trigger RETT include direct transfers of real estate, as well as where 90% or more of the shares in a German real estate-owning corporation are directly or indirectly transferred to either one new owner or multiple new owners within a 10-year monitoring period, or where 90% 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 90% or greater change, directly or indirectly, of the partners in a German real estate-owning partnership within a 10-year monitoring period, see [GTLN dated 05/10/2021](#)).

Currently, there are some legal uncertainties, in particular with regard to the shortening of (multi-tier) shareholder chains in real estate-owning corporations and the questions of when and by whom a share deal or M&A transaction must be disclosed to the German tax authorities. The answers to these questions could have implications concerning both the timely notification of a RETT-triggering event to the German tax authorities (which is of importance if the deal does not close and a refund of RETT is claimed) and the question of which party is liable to RETT and, therefore, ultimately has to bear the RETT obligation for a share deal or M&A transaction.

Shortening of (multi-tier) shareholder chains in German real estate-owning corporations

With respect to the former rules applicable until 30 June 2021, there was legal clarity that the direct or indirect shortening of the corporate shareholder chain above a real estate-owning corporation (e.g., by way of merging or liquidating a company above the German real estate-owning corporation) was not considered a RETT-triggering event, provided the parent company already directly or indirectly held at least 95% of the shares in the real estate-owning corporation.

Based on the new RETT rules, the change of a direct shareholder in a German real estate-owning corporation (direct shortening of the corporate shareholder chain) is now considered a RETT-triggering event if the shareholder that is being merged (upstream into its shareholder) or liquidated holds at least 90% of the shares in the real estate-owning corporation. However, it is unclear whether the German tax authorities would treat a change at any level above the direct shareholder (indirect shortening of the corporate shareholder chain) as a mere shortening of the corporate chain that would not trigger RETT or whether, based on the new rules, such a change would be considered as a RETT-triggering event as well.

Given the uncertainty, taxpayers considering a transaction that includes an indirect shortening of the corporate shareholder chain of a corporation owning German real estate should carefully assess the situation. In a case where the German real estate is owned by a German company, the tax authorities must be notified of the RETT-triggering event within two weeks of the event; in a case where German real estate is owned by a foreign company,

the notification period is extended to one month from the RETT-triggering event.

Share deal or M&A transactions involving German real estate-owning corporations

Disclosures/RETT notifications

Prior to 1 July 2021, the signing of a share purchase agreement (SPA) that included an obligation to transfer the shares in a German real estate-owning corporation was generally considered a RETT-triggering event and, as a result, a RETT notification had to be filed with the German tax authorities. In a case where a taxpayer was assessed for RETT and the transaction did not close or was later rescinded, a RETT refund could be claimed from the tax authorities, provided the taxpayer had notified the authorities within the required two-week or one-month period counted from the RETT-triggering event.

Under the new rules that are effective as from 1 July 2021, RETT generally should now be triggered only as of the closing date in a transaction where at least 90% of the shares in a real estate-owning company are directly or indirectly being transferred. The signing date of the SPA generally should no longer be treated as a RETT-triggering event, provided that closing occurs. However, in a scenario where closing does not occur or where a transaction is rescinded at a later point, the signing date should still be of relevance.

In the absence of further guidance and as a precautionary measure, a notification at the signing date of the SPA (including a reference to the expected closing) and a second notification at the closing date (referring back to the notification filed at signing) are recommended. It seems likely that in such cases the tax authorities would not process the notification filed as of the signing date, but would await the notification filed as of closing. When preparing such filings, it should be carefully analyzed which parties need to file which notifications and, based on the determinations made as a result of this analysis, whether a two-week or a one-month notification period applies.

SPA and determination of purchase price

Prior to 1 July 2021, generally both the seller and the buyer were (jointly) liable to RETT in a typical greater-than-95% share deal transaction, and it was common market practice that the RETT burden was shifted to the buyer. Based on the amended rules, as from 1 July 2021, it is now generally the corporation holding the German real estate that is liable to RETT, and the obligation no longer may be contractually shifted to the buyer. In these kinds of situations, therefore, the relevant tax clause in the SPA should be reviewed (and updated as needed) to ensure that both parties to the share deal or M&A transaction are properly indemnified and that the associated RETT exposure is properly reflected.

Additional comments

The tightening of the German RETT rules requires taxpayers to exercise additional care in their due diligence when restructuring a corporate group that includes entities holding German real estate. In share deal transactions involving the direct or indirect transfer of 90% or more of the shares in a real estate-owning company, taxpayers should anticipate additional layers of complexity and prepare to avoid traps for the unwary.

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