

Tax Amendment Act 2015

The amendments apply as from November 6, 2015.

Germany's Tax Amendment Act 2015 was published in the federal gazette on November 5, 2015 and generally applies as from 6 November, although other effective dates apply for changes relating to the intragroup restructuring exception under the change in ownership rules and the real estate transfer tax (RETT).

Intragroup restructuring exception

The act introduces a new exemption from the change-in-ownership rules that result in the forfeiture of tax loss carryforwards. According to the rules introduced in the 2008 business tax reform, a direct or indirect transfer of more than 25% of the shares of an entity to an acquirer will result in a pro rata forfeiture of tax loss carryforwards, and a transfer of more than 50% of the shares will result in a complete forfeiture of tax loss carryforwards. For transfers taking place after December 31, 2009, an exemption for intragroup reorganizations applied if the "same person" directly or indirectly held a 100% participation in both the transferring and the purchasing entity. The 2015 tax amendment act extends the intragroup exemption to apply to changes of shareholders within a 100% controlled group, including a situation where an ultimate parent is the transferring or the purchasing entity and is held by more than one person. In addition, the ultimate shareholder may be a partnership or an individual. The new exemption applies retroactively to share transfers taking place after December 31, 2009.

RETT rules for real estate held by partnerships

RETT is triggered if 95% or more of the interests in a real estate-owning partnership is transferred directly or indirectly to new partners within a five-year period. In such a case, the real estate-owning partnership is deemed to have transferred the real estate to a fictitious new partnership.

In a decision issued in 2013, the federal tax court (BFH) held that an "economic" approach should be used to determine whether there has been an indirect change in the ownership of a real estate-owning partnership, under which both partnerships and corporations should be treated as transparent. The BFH went a step further by holding that only a 100% direct or indirect change in ownership of the direct partners in the real estate-owning partnership would qualify as an indirect change in ownership under the applicable provisions of the RETT Act (introduction of an "ultimate ownership test").

The new rule codifies the position of the tax authorities and abolishes the BFH approach. According to the new rule, separate tests apply for corporate partners and for partnerships that are a partner of the real estate-owning partnership. For a corporate partner, an indirect ownership transfer is deemed to take place if at least 95% of the shares in the corporation are transferred directly or indirectly to a new shareholder. For a partnership that is a partner, a harmful ownership transfer is deemed to occur based on the partner's pro rata indirect interest in the real estate-owning partnership.

The amended rule applies to share transfers taking place after November 5, 2015.

Reorganizations with "boot":

The 2015 German Tax Amendment Act introduced a limitation regarding boot (i.e. non-share consideration, such as cash or loan receivables) that a receiving entity provides to the transferor in certain tax-neutral reorganizations that are described in the Tax Reorganization Code. The new rule limits the boot to 25% of the book value of the contributed assets or a maximum amount of EUR 500,000 in a tax-neutral reorganization. To the extent the boot exceeds this threshold, the transaction is treated as a taxable event.

The new rule applies retroactively to transactions that took place after December 31, 2014.

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