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URL: http://mobile.deloitte-tax-news.de/german-tax-legal-news/updated-rett-guidance-published-for-share-deals-and-partnership-exemption-rule.html

24.04.2024

Unternehmensteuer

Updated RETT guidance published for share deals and partnership exemption rule

Decrees incorporate changes to the RETT Code and clarify legal provisions

The German tax authorities on 5 March 2024 issued three decrees related to the application and interpretation of the real estate transfer tax (RETT) rules. The decrees include updated guidance as a result of changes to the RETT Code and provide some additional clarification of the legal provisions. The decrees focus on certain types of share transfers and the exemption rule for transactions between a partnership and its partners.

RETT consequences as a result of the first-time combination of at least 90% of the shares in a German real estate-owning entity at the level of one shareholder (section 1 (3) RETT Code)

Due to RETT reform in 2021, the RETT threshold was reduced from 95% to 90% and the RETT partnership rules were extended to corporations. As a result of the application of the partnership rules to corporations, RETT generally is triggered if 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. RETT is, in addition, triggered if 90% or more of the shares in a German real estate-owning entity are directly or indirectly combined for the first time in the hands of a new shareholder (sections 1 (3) nos. 1 and 2 RETT Code).

The decrees include the following noteworthy comments from the tax authorities related to the application of the 90% first-time combination rule:

- RETT should only be triggered once in multi-tier structures: In the case of multi-tier structures, the same legal transaction might trigger RETT multiple times at different levels of the corporate chain according to section 1 (3) RETT Code. The decree clarifies that, based on section 1 (3) RETT Code, the same transaction should only trigger RETT once and at the level of the entity directly involved in the share transfer.
- Shortening of the shareholder chain: The tax authorities confirm that the shortening of a shareholder chain generally should not result in a RETT triggering event. It should, however, be highlighted that a change from an indirect shareholding to a direct shareholding might trigger RETT based on other provisions in the RETT Code, so that transactions involving the shortening of a shareholder chain still must be carefully reviewed.
- Signing and closing of a share deal transaction as RETT triggering events: If the signing and closing of a share purchase agreement take place on two different dates, RETT might be triggered twice. This result can only be avoided if both events (signing and closing) are notified to the responsible German tax office on time within rather short time periods (i.e., two weeks and one month, respectively). If the notifications were filed on time, RETT that became due because of the signing event will be waived, and RETT should only be triggered once as a result of the closing event. The decree again highlights the importance of the timely filed RETT notifications, including all information as required by the RETT Code.

Application of the RETT exemption for transactions between a partnership and its partners (sections 5 and 6 RETT Code)

German RETT rules provide for an exemption from RETT where real estate is transferred from a partner to its partnership or from a partnership to its partner to the extent that the partner holds an interest in the partnership (certain additional conditions must be met, e.g., a 10/15-year minimum holding period). An exemption also might apply where real estate is transferred from one partnership to another partnership having identical partners with identical ownership percentages. The partnership exemption rule will expire on 31 December 2026.

The decrees include the following noteworthy comments:

- Minimum holding period: The decree clarifies that the 10-year minimum holding

period applies for transactions effected after 1 July 2016.
- Notification obligation: Any decrease in the shareholding of a partnership by a partner must now be reported to the tax authorities, even if the number of partners does not change.

Observations
The updated decrees provide helpful explanations and examples and are a welcome clarification of several provisions in the RETT Code that were amended over the last couple of years. The decrees, in addition, illustrate the increased complexity of the RETT rules and the importance to carefully analyze the RETT implications of transactions that (directly and indirectly) involve German real estate-owning entities. Complying with RETT notification requirements is essential, due to the short notification periods. RETT should be considered early on in a transaction so that sufficient time remains to properly analyze the RETT consequences, filing obligations, and information required for doing the filings. It also should be highlighted that the guidance provided by the decrees is limited to the application of section 1 (3) RETT Code and the partnership exemption rule. Additional RETT rules might have to be considered in transactions, and the application of these rules might add to the complexity.

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