Real Estate Tax Services News
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Federal Fiscal Court confirms wider scope of application for German Real Estate Transfer Tax (RETT) group relief

In brief

In seven court decisions published on 13 February 2020, the German Federal Fiscal Court (the Court) has given the Real Estate Transfer Tax (RETT) group relief provision a broad and reliable scope. The decisions overturned the narrow interpretation that had actively hindered group restructuring since 2012.

The group relief does not require the group (eg, a two-tier group prior to a merger) to continue after the privileged transaction.

The five-year pre-and post-transfer holding period need not be maintained where a company is incorporated or terminated as part of a privileged transaction.

The "controlling company" need not to be subject to VAT in order to qualify for group relief. Interestingly, one case has an obiter dictum, noting that this is different from RETT fiscal unity rules.

In detail

German RETT is not levied for intra-group transactions which meet certain conditions.

1. According to section 6a of the German RETT Act, "group relief" depends on the following conditions which must be cumulatively met:
   - The transaction is governed by provisions of the German Restructuring Act or a comparable law of an EU or an EEA Member State (a merger, split-up or spin-off) or is a contribution of interest or shares;
   - A controlling company as well as a dependent company, or dependent companies, are involved in the transaction; and
   - The controlling company interest in the dependent company makes up at least 95% of the latter's capital in the five years before and the five years following the restructuring.
2. Shortly after the regulation came into force on 1 January 2010, the tax authorities of the German federal states (the Federal States) tried to severely limit the scope of the group relief, notably in coordinated Decrees of the Federal States on 19 June 2012. Several taxpayers challenged this in court.
3. In seven court decisions from 21 and 22 August 2019, all published on 13 February 2020 (II R 15–21/19), the German Federal Fiscal Court decided that a number of requirements imposed by the tax administration have no legal basis and gave the provision a broad and reliable scope. The controversial issues that have so far been disputed by the tax authorities and their resolution by the Court are as follows:
   - The "controlling company" need not be subject to VAT in order to avail upon the group relief provision. This has particular relevance for holding companies, which, if they are passive, often do not have an active VAT status. Even individuals who hold shares as a private asset can benefit from the group relief provision.
   - The group relief does not require the group to continue following the privileged transaction. Against the view taken by the tax authorities, even a two-tier group, where the subsidiary is merged with the parent, can benefit from the group relief provision.
   - The five year pre-and post-holding period need not be observed where a company comes into existence or is terminated as a consequence of a privileged transaction.

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As regards the latter two bullets: The Court argued that in the case of privileged (its first sentence) mergers, the law cannot (third and fourth sentences) exclude from its scope practically the very most mergers. A potential mismatch between the sections of the law has to be overcome by an extensive interpretation. It would not be understandable that the legislator would in the one sentence rule that a spin-off of a property would qualify for relief, but then exclude spin-offs to new companies as they miss the pre-holding period (so that only spin-offs to companies which have been hold for five years, can avail to the relief) or that the legislator rules mergers fall under the group relief, but then excludes a merger from the scope as one entity is extinguished and cannot meet the five-year post-holding period.

4. The following is also worth mentioning from the judgements:

No state aid: The group relief is generally applicable and does not constitute state aid prohibited by EU law. Insofar the German Federal Fiscal Court follows the Court of Justice of the European Union (CJEU), to which it had submitted the preliminary question and who had taken that decision on 19 December 2018 in the case C-374/17.

Local competence: Where a transaction qualifies both as reorganisation and as share unification, and thus falls under two applicable competency rules, those for the share unification apply and determine which tax office is locally responsible (II R 21/19).

RETT fiscal unity: Last but not least, an obiter dictum in case II R 19/19 note 19 is paramount: The Court noted that the definition of controlling/ dependent entity is different for the group relief, where no reference to VAT law is made, from the definition for the RETT fiscal unity, where there is a reference to VAT law. In the latter case this would “justify” an interpretation in line with VAT law. In other words, the obiter dictum might provide a high comfort level to assume that an entity, which does not qualify as a VAT entrepreneur, cannot be the head of a RETT fiscal unity. This has long been advocated in legal literature, but it's quite helpful to have a note on this in a recent decision of the German Federal Fiscal Court.

Our view

In the past, the RETT group relief provisions could not be relied upon in many cases. Tax rulings could not be obtained in the past. Rather, they were excluded by conflicting administrative provisions (coordinated Decrees of the Federal States of 19 June 2012).

This has now changed following the very clear and taxpayer-friendly statements in the German Federal Fiscal Court cases published on 13 February 2020 and preceding CJEU decision from 19 December 2018. The group relief provision now has a foundation, which can be relied upon and will finally become an important tax planning instrument.

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