Real Estate Tax Services News

Keeping you informed

PwC Germany I May 2021

Update on progress of the German real estate transfer tax (RETT) reform: Bundestag and Bundesrat have adopted amendments

In brief

After the Bundestag approved a slightly revised bill on 21 April 2021, the Bundesrat also approved the bill on 7 May 2021. As soon as the Federal President has signed the amended law and it has been published in the Federal Gazette, which is expected shortly, the amendments can enter into force on 1 July 2021.

The bill passed the Bundestag and Bundesrat

Following the completion of the consultation process on proposed changes to the German RETT Act (RETTA) and after the draft amendment to RETTA was passed in the Bundestag on 21 April, the bill also passed the second chamber of Parliament, the Bundesrat, on 7 May to become effective by 1 July this year.

In the following we summarise again the changes - as already described in our previous *Real Estate Tax Services News* in April.

Summary of changes to the German RETT regime

Following previous discussions on proposed changes to the German RETT Act (please refer to our previous NewsAlerts as of December 2018, May, August and October 2019, and April 2020), the changes in the bill are as follows:

- the lengthening of the monitoring period for transfers of interests in partnerships from five to ten years (section 1 paragraph 2a RETTA);
- the introduction of a new RETT triggering event for transfers of 90% or more of the shares in a corporation within a period of ten years (new section 1 paragraph 2b RETTA);
- the lowering of the hurdles from 95% to 90% for legal, economic or tax group unification of shares as well as section 1 paragraph 2a RETTA; and
- the lengthening of the clawback periods for certain privileges applicable to partnerships only.

An exemption for share transfers is envisaged for the ten years/90% share or partnership interest transfer provisions where the share transfers relate to shares listed on EU/EEA regulated markets or very limited specified non-EU/EEA stock exchanges, such as in Hong Kong, USA and Australia (stock exchange exemption). All other exchanges or marketplaces are not privileged and indirect transfers of such shares which would be privileged if executed directly are also not privileged.

The new regulations apply to transactions which are signed (relevant for unification of shares/interests) or closed (relevant for transfers of shares/ interests) after 1 July 2021. However, situations are possible where the same transaction can result in more than one taxable event.

Application and transitional arrangements

The transitional provisions regarding the rules concerning transfers of shares and interests are complex due to the different structure of the RETT provisions and the fact that the Federal Ministry of Finance wishes to avoid situations where non-taxable situations as loopholes arise.

Below you will find a brief overview:

As a basic principle, the new rules apply from 1 July 2021. Therefore, and in relation to the unification rules, the new unification threshold of 90% applies from then on. If, however, before that date a share quota of at least 90%, but less than 95% was reached, the old 95% threshold will continue to apply indefinitely.

For the other rules, ie, the old 95% partnership rule, the relevant transfers are determined by the date of the closing event, being the effective transfer of shares or interests, and not by the signing of the purchase agreement. In addition, there is a specific transition rule for the transfer of partnership interests that allows the application of the old 95% threshold for five years where the sum of changes had reached a quota of at least 90% but less than 95%.

For the new corporation rule (transfer of 90% within ten years), shares transferred after 30 June 2021 would be caught, transfers before that date are aimed to be excluded due to a grandfathering ratio of the law.

A multiple taxation in certain situations can occur as a result of a lack of provisions dealing with overlaps of different tax provisions.

Our view

Real estate investors should immediately review their holding structures with a very long term view to understand and respond to consequences.

Given (i) the high tax rates in the federal states (*Bundesländer*) of up to 6.5%, (ii) that upon a 90% trigger event, the full tax basis is applied, and (iii) the cost at shareholder level in the case of a unification is usually not effectively tax deductible, the implications of this new regime will be far-reaching. Absent a “real estate rich entity limitation”, the application of these rules is not limited to the real estate industry. They will have a substantial impact on corporate real estate owners as there are only very limited exceptions for certain listed corporations and, last but not least, none for any type of funds focusing on real estate investments or, for example, UCITS investing in corporations. Both for the already existing direct or indirect partnership transfer of interest rule and the new one for shares in corporations, the 90% test has to be monitored by the management of the real estate owning entity and the latter has to notify the tax authorities about a taxable event.

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