

# Real Estate Tax Services News

Keeping you informed

PwC Germany | July 2022

## Update to the new decrees on real estate transfer tax (RETT) rules and the Court Ruling (II R 44/18)

### In brief

The Supreme Fiscal Court has finally issued its decision (II R 44/18) that was referred to by certain members of the tax authorities regarding questions left outstanding in the recent decrees published in May 2022 by the Ministry of Finance. This new case law will have an impact on the question whether in case of share transfers in multiple tier entity structures RETT can be triggered multiple times.

### In detail

The German RETT rules have been amended several times, with the latest change with effect as of 1 July 2021, when (inter alia) the “partnership transfer rules” in Section 1 (2a) Real Estate Transfer Tax Act (RETTA) were tightened and the “corporate transfer rules” in Section (2b) RETTA were newly introduced. The wording of both rules is similar to a large extent. The unification rules in Section 1 (3) and (3a) RETTA were amended and remain applicable as well.

The Ministries of Finance of the German Federal States have meanwhile issued new decrees regarding both transfer rules only summarizing the interpretation of this new regime by the tax authorities. Another decree on the new stock exemption has been announced but is not expected until later this year at the earliest. Please refer to our previous Real Estate Tax Services News ([www.pwc.de/real-estate-tax-services-newsalert-en](http://www.pwc.de/real-estate-tax-services-newsalert-en)) for a detailed summary of these decrees.



---

## Supreme Court Ruling (II R 44/18)

---

In the decision dated 1 December 2021, the Supreme Fiscal Court of Germany commented on the deemed allocation of real estate properties in a chain of entities under the unification and transfer rules.

Simplified speaking, the unification rules (Section 1 (3) and (3a) RETTA) stipulate that the direct or indirect acquisition of 90% or more of the shares in a German real estate owning entity is deemed to be treated like the direct acquisition of the underlying real estate and is therefore subject to German RETT at the level of the share purchaser. Under this set of rules the real estate legally owned by a subsidiary is therefore also allocated to the share purchaser.

Under the historic interpretation of the transfer rules (which historically were only applicable to partnerships and were as per July 2021 extended to corporations as well) the share purchaser was treated as real estate rich by the German tax authorities because of the real estate held by its subsidiaries if the share purchaser unified at least 95% (under new law 90%) or more of the shares in the subsidiary under Section 1 (3) and (3a) RETTA. Therefore, the transfer rules were applied under the old regime, even if a partnership did not hold any own real estate but only unified the shares in real estate owning corporations.

In the ruling II R 44/18 the supreme court now specified that the above concept is only applicable at the level of such shareholders that triggered RETT upon the acquisition of the shares in the real estate owning subsidiaries themselves. In contrast, this concept does not apply to shareholders that founded or acquired the subsidiary, prior to the subsidiary acquiring the underlying real estate. Simplified speaking, the concept therefore only applies to such shareholders that acquired the shares and this was subject to RETT.

This court ruling has an impact on the following aspects items under the new regime

---

## Multiple application of the transfer rules in a chain of ownership

---

During the implementation of the new RETT regime, it was extensively discussed whether under the transfer rules RETT can be triggered multiple times, namely at each level, in case of any indirect share transfers of 90% or more in multiple tier chains of entities. This discussion results from the rather technical aspects of how the unification rules (Section 1 (3) and (3a) RETTA) and the transfer rules (Section 1 (2a) and (2b) RETTA) interact. One could have argued that the transfer rules could trigger RETT at each level of a structure with a 90% shareholding at each level with regards to the German Real Estate held by the lowest tier entity, i.e. that the same property is allocated to each entity in the chain either due to legal ownership (at the lowest tier) or due to a deemed ownership under the unification rules (at each of the following upward levels of the structure). The recent decrees remained silent in this respect, but according to initial verbal statements from a member of the tax administration in one of the federal states, the tax authorities did not want to exclude such a double (or multiple) taxation and rather awaited the case law from the German Federal Tax Court discussed above.

Applying the concept of the German Federal Tax Court ruling II R 44/18 to this discussion, it still cannot be ruled out that the tax authorities would charge RETT multiple time in case of the transfer of a multiple tier chain of entities. However, based on the court decision, RETT should not be charged at each level but “only” at the level of the respective PropCo and any direct or indirect shareholder that (i) is a member of the transferred chain of ownership and (ii) had triggered RETT under the *unification rules* on that specific property.

In a standard multiple tier structure, where RETT has historically only been triggered upon acquisition of the underlying real estate via asset deal, the share sale at an upper level should trigger RETT only once under the transfer rules, namely at the level of the PropCo. However, the decision does not exclude that RETT is charged multiple times if the shares have previously been unified and this was subject to RETT in a transferred multiple tier structure. The interpretation by the German tax authorities remains to be awaited.

---

## Shortening the chain of shareholdings

---

The decrees confirm that the shortening of the corporate chain of shareholdings does not trigger RETT or count towards the 90% threshold, if

- (i) there is a consistent shareholding of at least 90% at all levels prior to and after the shortening of the corporate chain of shareholdings, and
- (ii) the direct shareholder of the property holding entity remains unchanged, i.e., there must not be a direct change in the shareholding of the property holding entity itself.

If there are any partnerships in the chain, the look through approach applies when verifying the consistent 90% shareholding at all levels.

Due to the complexity, any shortening in corporate chains should be analysed from a German RETT perspective, if any entity in the chain holds German real estate. In this context also the here discussed decision of the supreme Fiscal Court should be considered, in particular if upon the shortening in the chain the shares in an entity that has previously unified shares subject to RETT in its subsidiaries.

## Our view

Overall, the recent decision of the Supreme Fiscal Court is an important cornerstone in respect of the interpretation of the new RETT regime, as it limits the impact of the amendments to the German RETT regime by the German legislator which have been applicable since July 2021. The interpretation of the court decision by the German tax authorities remains to be awaited.

The discussions on multiple RETT charges being triggered in case of the transfer of multiple tier chains of entities has its origin in the lack of guidelines as to which rule takes precedence over the other in the RETT regime. Even though the court decision will limit the impact of this deficiency, only the legislator is in the position to resolve these issues

Meanwhile the taxpayers will have to closely monitor any changes to their corporate structure to be in a position to assess the RETT implications.

# Your contacts

## Global and regional contacts

**Jeroen Elink Schuurman**

Global Real Estate Tax Leader  
Tax Partner, PwC Netherlands  
Tel.: +31 6 53 98 48 10  
jeroen.elink.schuurman@pwc.com

**Ilona McElroy**

EMEA Real Estate Tax Leader  
Tax Partner, PwC Ireland  
Tel.: +353 1 792 8768  
ilona.mcelroy@pwc.com

## Contacts – PwC Germany

**Marcel Mies**

Real Estate Tax Leader  
Tel.: +49 211 981-2294  
marcel.mies@pwc.com

**Dr Michael A. Müller**

Tax Partner  
Tel.: +49 30 2636-5572  
mueller.michael@de.pwc.com

**Sven Behrends**

Tax Partner  
Tel.: +49 89 5790-5887  
sven.behrends@pwc.com

**Josip Oreskovic**

Tax Partner  
Tel.: +49 69 9585-6255  
josip.oreskovic@pwc.com

**Jana Greiser**

Tax Partner  
Tel.: +49 30 2636-5067  
jana.greiser@pwc.com

**Martin Blömer**

Tax Partner  
Tel.: +49 30 26363068  
martin.bloemer@pwc.com

## Previous editions and subscription

For previous editions and subscriptions, please visit our website:  
[www.pwc.de/real-estate-tax-services-newsalert-en](http://www.pwc.de/real-estate-tax-services-newsalert-en)

The publication is intended to be a resource for our clients. Before making any decision or taking any action, you should consult the sources or contacts listed here. The opinions reflected are those of the authors..

© 2022 PwC. All rights reserved. PwC refers to the PwC network and/or one or more of its member firms, each of which is a separate legal entity. Please see [www.pwc.com/structure](http://www.pwc.com/structure) for further details.

[www.pwc.com/realestate](http://www.pwc.com/realestate)