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German Tax and Legal News

Amended RETT rules would result in increased importance of timely filed RETT notifications in case of share purchase transactions

Timely filings would be required in order to avoid triggering RETT twice in the same transaction.

The German lower house of parliament (Bundestag) on 2 December 2022 approved amended real estate transfer tax (RETT) rules, which would result in significantly increased importance of timely filed RETT notifications in case of share purchase transactions. Noncompliance with these rules or the late filing of the required notification could result in highly disadvantageous RETT consequences, i.e., RETT might be triggered twice in the same transaction.

Background

The amended RETT rules are related to the more fundamental change of the RETT rules back in 2021. Prior to 1 July 2021, the signing of a share purchase agreement (SPA) that included an obligation to directly or indirectly transfer shares in a company owning German real estate generally was considered an event that triggered RETT (section 1, paragraphs 3 and 3a of the RETT Act) and, as a result, a RETT notification had to be filed with the tax authorities. In a case where a taxpayer was assessed for RETT and the transaction did not close or was later rescinded, a RETT refund could be claimed from the tax authorities, provided the taxpayer had notified the authorities within the required two-week or one-month period (described further below) counted from the RETT-triggering event.

Based on an additional set of RETT rules for corporate entities that was newly introduced as from 1 July 2021 (section 1, paragraph 2b of the RETT Act), RETT now is triggered as of the closing date in a transaction where at least 90% of the shares in a real estate-owning company are directly or indirectly transferred. However, as the rules that refer to the signing of an SPA in a transaction as the RETT triggering event (i.e., section 1, paragraphs 3 and 3a of the RETT Act) were not amended accordingly, there are now two sets of rules in place that refer to both the signing and closing event as two separate RETT triggering events. Both events are triggering notification requirements to the tax authorities. The first RETT notification becomes due within a two-week or one-month period after the signing of the SPA and must be filed by the seller and the buyer in the SPA. The two-week period applies where a German tax resident seller or buyer is involved in the transaction, and the one-month period applies where no German tax resident seller or buyer is involved. The second RETT notification becomes due within a two-week period starting from the date the company that owns the German real estate and whose shares are being directly or indirectly transferred has knowledge of the closing of the transaction, and the notification would need to be filed by such company. If the company is not resident in Germany, then the RETT notification becomes due within a one-month period.

In order to deal with this situation and to ensure that RETT is effectively only triggered once at the closing event, the tax authorities in a decree dated 10 May 2022 provided guidance that where the closing event of a transaction can be expected within a one-year period starting from the date when the tax authorities are notified of the signing event, a RETT assessment for the signing event will not take place. Based on the opinion of the tax authorities, this should have provided the required relaxation of the rules and was intended to make sure that RETT would only be triggered once in situations where signing and closing take place on different dates. It was, however, unclear how situations would have to be dealt with, where the one-year period between siging and closing mentioned in the decree was exceeded. In this case, RETT would need to be assessed for the signing event, and it was unclear how this assessment could be reversed once closing took place. Due to a lack of procedural measures, i.e., the non-existence of a provision that would have allowed a retroactive cancellation of the original RETT assessment that was caused by the signing event, there was a risk that RETT was going to be triggered twice in these transactions.

Amended RETT rules

The amended RETT rules approved by the lower house of parliament would introduce a mechanism where the original RETT assessment for the signing event would be cancelled upon application of the taxpayer once closing takes place to the extent the closing event qualifies as a RETT triggering event. However, this result could be achieved only if the first RETT notification for the signing event was filed on time within the two-week or one-month notification period. Only in this case the original assessment for the signing event would be cancelled and RETT effectively assessed just for the closing event of the transaction.

If the RETT notification for the signing event is not filed on time or not filed at all, the subsequent closing of the transaction would not affect the RETT that was already triggered and assessed for the signing event, and it would not be possible to rely on the closing event for purposes of the original RETT assessment. This would result in RETT being triggered twice, the first time at signing and the second time at closing. Instead of triggering RETT once, the same transaction would trigger RETT twice.

The amended RETT rules would be applicable in all open cases, i.e., without any grandfathering effect. It is unclear how the amended rules would interact with the guidance provided by the tax authorities in their 10 May 2022 decree and whether taxpayers can still rely on this guidance.

Comments

The amended RETT rules highlight the requirement to file all RETT notifications on time, as otherwise the same transaction might trigger RETT twice. In particular, this could be challenging where shares in companies owning German real estate are transferred indirectly and the parties that are concluding the SPA are foreign parties not familiar with the particularities of the German RETT provisions. The one-month notification period that applies in such a situation can be rather short as the information that must be provided to the German tax authorities together with the notification requires, among other things, detailed information about the German real estate.

Compliance with the amended RETT rules and timely filing of all required notifications would become increasingly important in order to avoid additional RETT charges.

The amended RETT rules must still be approved by the upper house of parliament (Bundesrat) and then signed by the president and published in the federal gazette to become effective. It is expected that this will happen before the end of 2022 without any additional changes.

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