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German Tax and Legal News

BFH rules on RETT on share deals

BFH rules RETT should be triggered only at the time an SPA is signed, not where contractual rights are assigned in a share deal.

Germany's Federal Tax Court (BFH) issued a decision on May 12, 2016, ruling that neither the assignment of rights under an agreement to purchase the shares of a company that owns real estate nor the transfer of the shares to a designated assignee at closing triggers a Real Estate Transfer Tax (RETT) liability. The BFH reversed the decision of the lower court of Cologne.

Under German law, RETT may be triggered where 95% or more of the shares in a German real estate-owning company are directly or indirectly transferred to a new acquirer or where 95% or more of such shares are combined for the first time in the hands of a single shareholder. RETT is triggered upon the signing of the share purchase agreement (SPA) and not upon the transfer in rem to the purchaser at closing.

In the case before the BFH, the purchaser of 100% of the shares of a real estate holding company was allowed, under the terms of an SPA, to assign its contractual rights to a related party (directly or indirectly controlled by the purchaser) before closing. The purchaser assigned its rights under the SPA to its wholly-owned subsidiary and, at closing, the seller transferred the shares directly to the designated assignee.

The German tax authorities issued two RETT assessments for the transaction, one to the original purchaser as of the date the SPA was signed and a second to the subsidiary with respect to the transfer of the rights under the SPA, as of the closing date. The latter assessment was upheld by the local tax court in Cologne in 2014 and was subsequently further appealed, ultimately to the BFH. The BFH concluded that, while the RETT applied to the initial purchase of the shares of the real estate holding company, the transfer of rights under an SPA to acquire the shares does not create a RETT liability.

The Federal Ministry of Finance is expected to publish the BFH decision in the Federal Tax Gazette in the near future, at which time the German tax authorities will be bound to follow the decision in similar cases. The tax authorities historically have taken the position that the transfer of rights under an SPA to related parties is a taxable event for RETT purposes.

However, it should be noted that it is important that the purchaser's acquisition structure already be in existence at the time the SPA is signed. Any changes in the purchaser's affiliated group structure, such as the formation of new companies, after signing may result in RETT being triggered multiple times.

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