

Local tax court confirms conditions for RETT intragroup restructuring exception

Five-year pre-restructuring period not required for newly set up companies

The Local Tax Court of Duesseldorf ruled on 4 November 2015 that the real estate transfer tax (RETT) intragroup restructuring exemption does apply where the mandatory five-year pre-reorganization holding period is not satisfied because the relevant subsidiary has been set up during the five-year period.

RETT can be triggered with respect to real estate owned by a corporation or partnership if the property is transferred to another entity either by way of a sale or through a merger/spin-off/hive down of the real estate-owning entity into another entity. RETT also generally is triggered by intragroup transactions, although certain intragroup restructurings can benefit from an exemption from RETT if the following conditions are satisfied:

- The transaction is carried out under specific provisions in the Reorganization Tax Code (e.g. mergers, demergers, spinoffs) or under comparable rules in other EU/EEA countries, or if the transaction is based on company law (e.g. a contribution of shares) or similar rules in other EU/EEA countries. Other transactions (e.g. straightforward intragroup sales of shares) do not qualify;
- The reorganization involves a controlling entity and subsidiaries in which the controlling entity holds, directly or indirectly, at least a 95% interest; and
- At the time the reorganization is carried out, the direct or indirect 95% shareholding was held for the previous five years and will continue to be held for five years after the reorganization.

As a result of the five-year pre- and post-reorganization holding periods and the German tax authorities' restrictive interpretation of the applicability of the intragroup exemption, the exemption is applied only in rare instances.

The case before the Local Tax Court of Duesseldorf involved the five-year pre-reorganization holding period. A GmbH spun off the shares in a real estate-owning subsidiary into a newly established company against the issuance of new shares to the parent company of the GmbH. The parent company of the GmbH was the sole shareholder of the newly established company both before and after the spin-off. The German tax authorities determined that the five-year pre-reorganization holding period was not satisfied because the new company was established only in the course of the restructuring.

The tax court rejected the tax authorities' restrictive interpretation and ruled that the five-year pre-reorganization holding period need not be satisfied if the company was established during the restructuring. The decision is in line with a previous decision of the [Local Tax Court of Nuremberg](#), in which the court also questioned the tax authorities' restrictive application of the RETT intragroup exemption rule, as well as a 2014 decision of the [Local Tax Court of Duesseldorf](#), in which that court decided that in the case of a spinoff where the real estate is indirectly transferred into a newly established subsidiary of the indirect former owner of the real estate, the conditions for the application of the intragroup restructuring rule can be met even if the subsidiary was not in existence for five years.

The decision of the Lower Tax Court is another step into the right direction and is a welcome clarification of the intragroup restructuring exemption rule and may provide for more flexibility in restructurings. However, the tax authorities are expected to appeal the decision to the Federal Tax Court.

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