

## **Local tax court rules on RETT intragroup restructuring exemption rule**

The Local Tax Court of Duesseldorf ruled on 7 May 2014 (7 K 281/14 GE) that the RETT intragroup restructuring exemption rule applies where the mandatory five-year pre-reorganization holding period is not satisfied because the relevant subsidiary was established in the course of the restructuring.

Real estate transfer tax (RETT) generally is triggered with respect to real estate owned by a corporation or partnership if one party either acquires or, for the first time, consolidates ownership into a direct or indirect interest of at least 95% in the real estate-owning corporation/partnership. RETT also is triggered by intragroup share transfers/restructurings.

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 Germany's Reorganization Tax Code (e.g. mergers, de-mergers, spin-offs) or comparable rules in other EU/EEA countries, or the transaction is based on company law (e.g. a contribution of shares) or comparable rules in other EU/EEA countries. Other transactions (e.g. a straightforward intragroup sale of shares) do not qualify;
- The reorganization involves a controlling entity (entrepreneur) and subsidiaries in which the controlling entity holds, directly or indirectly, at least a 95% interest;
- At the time the reorganization is carried out, the direct or indirect 95% shareholding has been 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 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 a business unit, including real estate, into a newly established subsidiary that issued new shares to the GmbH. The tax authorities determined that the five-year pre-reorganization holding period was not satisfied because the subsidiary was established 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 subsidiary 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 questioned the tax authorities' restrictive application of the RETT intragroup exemption rule, although that case involved a situation where the subsidiary was established by the controlling entity in the course of the five-year pre-reorganization holding period.

The decision of the Lower Tax Court 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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