

Local Tax Court rules on RETT intragroup restructuring exemption

The Local Tax Court of München has ruled that the RETT intragroup restructuring exemption does not apply where the mandatory five-year pre-reorganization holding period is not satisfied because the relevant subsidiary was acquired from a third party less than five years ago.

The Local Tax Court of München ruled on 22 October 2014 that the real estate transfer tax (RETT) intragroup restructuring exemption does not apply where the mandatory five-year pre-reorganization holding period is not satisfied because the relevant subsidiary was acquired from a third party less than five years ago.

RETT is inter alia 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 of the real estate-owning entity into another entity. RETT also is triggered by intragroup mergers.

Certain intragroup restructurings, however, 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. 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 München involved the five-year pre-reorganization holding period. GmbH A was the 100% shareholder of two other GmbHs (GmbH B and GmbH C). GmbH B, which owned real estate, was merged into GmbH C. Although GmbH B had been held for more than five years, the shares in GmbH C were acquired by GmbH A from a third party less than five years before the reorganization.

The taxpayer argued that the merger was covered by the RETT intragroup restructuring exemption because the pre-reorganization holding period was satisfied with respect to the entity that owned the real estate (i.e. GmbH B); the pre-reorganization period did not have to be met with respect to GmbH C because it did not own the real estate before the merger.

The tax court rejected the taxpayer's argument and confirmed that, based on the wording of the law, the RETT intragroup restructuring exemption is applicable only where the five-year pre-holding period is met with respect to all entities involved in the restructuring, regardless whether an entity owns the relevant real estate. Since shares in GmbH C were held for less than five years at the time of the merger, RETT was correctly assessed by the tax authorities.

The decision is one in a series of decisions by several tax courts (Deloitte Tax News: [Local tax court rules on RETT intragroup restructuring exemption rule](#) and [Local Tax Court rules on tax authorities interpretation of RETT intragroup restructuring exemption](#)) that illustrate the complexity of interpreting the RETT intragroup restructuring exemption rule. Potentially affected taxpayers should carefully review their fact patterns before applying the exemption.

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