Deloitte.

URL: http://www.deloitte-tax-news.de/german-tax-legal-news/real-estate-transfer-tax-exemption-for-intragroup-restructurings-clarified.html

16.12.2010

German Tax and Legal News

Real Estate Transfer Tax exemption for intragroup restructurings clarified

On 1 December 2010, the German tax authorities issued a long-awaited decree on the Real Estate Transfer Tax ("RETT") that clarifies the exemption from RETT for certain restructurings.

Restructurings leading to a direct or indirect transfer of shares or capital interest in an entity holding German real estate may trigger RETT. According to the relief granted as from 2010 (section 6a RETT Act), a direct transfer of real estate, a change in partners in a partnership or a unification of shares are exempt from RETT if they are part of restructurings specified in the Reorganization Act. Such restructurings include mergers, demergers, spinoffs and hive-downs. By contrast, intragroup restructurings involving mere transfers (e.g. sales), exchanges of shares or contributions in kind do not qualify for the exemption. Restructurings under comparable rules in other EU/EEA member states will qualify for the RETT exemption, but relief is not available for intragroup restructurings in non-EU/EEA member states (e.g. Switzerland and the U.S.).

Further, to qualify for the relief, the intragroup restructurings must involve a "controlling enterprise" and one or several "controlled companies". A controlled company for these purposes means an entity that was consolidated with at least 95% of the share capital held directly and/or indirectly by the controlling enterprise for five years before the restructuring (holding period) and that will remain consolidated with at least 95% of the share capital held directly and/or indirectly by the same entity for five years following the restructuring (retention period).

The new decree on section 6a RETT Act clarifies which entities qualify as "controlling enterprises" and "controlled companies" and how the holding and retention period should be determined. In most of the cases mentioned in the decree, the tax authorities have taken a rather strict view, and the authorities implicitly state that only the top entity in the 95% ownership chain should qualify as the controlling enterprise. A mere holding company cannot be a controlling enterprise because the authorities have deduced from the word "enterprise" in the law that only entrepreneurs within the meaning of the German VAT Act should be accepted.

On a positive note, however, partnerships will qualify as controlled companies. Moreover, the tax authorities are willing to accept certain cases in which either the holding or the retention period cannot be met, either because the controlled company is newly formed (e.g. by way of hiving down the real estate) or – more importantly – because it is dissolved by way of a merger.

If you have any questions, please contact the authors of this article at gtln@deloitte.de or your regular Deloitte contact.

www.deloitte-tax-news.de