

## Tax authorities issue guidance on amended RETT rules

Guidance includes welcome clarification on expansion of rules previously limited to partnerships to apply to corporations.

Through two decrees, both dated 10 May 2022 and published in early June 2022, the German tax authorities issued guidance on the amended German real estate transfer tax (RETT) rules that apply as from 1 July 2021 in cases involving real estate-owning corporations and real estate-owning partnerships. The guidance provides helpful clarification on the application of the amended RETT rules, in particular, on the extension of certain rules that previously were applicable only to partnerships to apply to corporations as well (“partnership rules extended to corporations”).

In addition to the partnership rules extended to corporations, the amended RETT rules that entered into force on 1 July 2021 include, among other things, a reduction of the 95% threshold for a RETT-triggering event to 90% and a significant extension of the monitoring period with respect to certain changes in ownership; the modifications make the RETT rules (which already were complex) even more complex (see [GTLN dated 10 August 2021](#)). “Grandfathering” and transition rules apply to manage the change from the former rules to the amended rules (see [GTLN dated 6 September 2021](#)).

Under the amended rules, RETT may be triggered in the following cases:

- A direct transfer of real estate;
- A direct or indirect transfer of 90% or more of the shares in a German real estate-owning corporation, either to one new owner or to multiple new owners within a 10-year monitoring period;
- The first-time direct or indirect combination of 90% or more of the shares in a German real estate-owning corporation in the hands of a new shareholder; and
- A direct or indirect change of 90% or more of the partners in a German real estate-owning partnership or the shareholders in a German real estate-owning corporation within a 10-year monitoring period.

The long-awaited guidance dated 10 May provides helpful clarification on the interpretation of the amended rules by the tax authorities and answers questions taxpayers had on the application of the rules since 1 July 2021.

### **Treatment of a “shortening of the corporate chain” transaction in German real estate-owning corporations, based on the partnership rules extended to corporations**

Under the former rules that were applicable until 30 June 2021, the direct or indirect “shortening of the corporate chain” above a real estate-owning corporation (e.g., by way of merging or liquidating a direct or indirect shareholder in a German real estate-owning corporation) was not considered a RETT-triggering event, provided the parent corporation already directly or indirectly held at least 95% of the shares in the real estate-owning corporation.

Based on the guidance from the tax authorities on the amended RETT rules applicable as from 1 July 2021, the change of a direct shareholder holding at least 90% of the shares in a German real estate-owning corporation is always considered a RETT-triggering event, even if the shareholder merely is being merged (upstream into its shareholder) or liquidated. The new guidance, however, confirms that a mere shortening of the corporate chain that takes place above the direct shareholder in a German real estate-owning corporation should not be treated as a RETT-triggering event, provided the ownership percentages within any chain that is going to be shortened amount to 90% or more above the direct shareholder.

### **Disclosures and filing obligations as a result of signing and closing of an SPA**

Before 1 July 2021, the signing of a share purchase agreement (SPA) that included an obligation to directly or indirectly transfer at least 95% of the shares in a German real estate-owning corporation generally was considered a RETT-triggering event and, as a

result, a RETT notification had to be filed with the German tax authorities upon signing the SPA. If a taxpayer was assessed for RETT and the transaction did not close or was later rescinded, a RETT refund was able to be claimed from the tax authorities, provided the taxpayer had notified the authorities within the required period counted from the RETT-triggering event (a two-week period in general, extended to one month in a case where both the seller and the buyer are non-German companies).

The partnership rules extended to corporations (in section 1 (2b) of the RETT Act) that are applicable as from 1 July 2021 refer to the closing date as the relevant date for a RETT-triggering event, whereas the general rules that apply for a direct or indirect transfer of at least 90% of the shares in a corporation (in section 1 (3) of the RETT Act) still refer to the signing date as the RETT-triggering event. The guidance provides clarification on the coexistence of the two provisions and confirms that both events (provided closing occurs at a date after signing) trigger a RETT notification obligation to the tax authorities. An actual RETT assessment, however, should be issued only upon closing, provided the closing is expected to occur within one year after the tax authorities gain actual knowledge of the signing of the SPA and no changes in the real estate subject to the transaction occur between the signing and the closing event. In a case where the relevant conditions are not met (e.g., closing does not occur within 12 months after the signing of an SPA), RETT will be assessed as a result of both events, i.e., as of signing and as of closing. In this case, however, the RETT assessment as a result of signing should be canceled once closing occurs, based on the guidance from the tax authorities.

It also should be noted that in such a scenario, the contracting parties to the SPA generally should be liable for the RETT triggered as of signing, whereas the RETT triggered as of closing generally should be a liability of the German RETT-owning corporation itself. Careful consideration should be taken of situations where the signing and closing of an SPA take place on different dates, and the notification obligations and RETT liabilities triggered as of the signing and closing, respectively, would need to be considered by the parties and reflected in the SPA.

The clarification from the tax authorities provides welcome relief for taxpayers coping with the complexities of German RETT in share deal scenarios where signing and closing occur on different dates. However, the requirement to submit two different RETT filings, i.e., one as of signing and one as of closing, remains in place.

#### **Qualification as existing direct shareholders in a real estate-owning corporation**

With respect to existing structures, it had been unclear whether share transfers between existing direct shareholders, i.e., direct shareholders owning shares in a German real estate-owning corporation as of 1 July 2021, are treated as RETT-relevant events under the partnership rules extended to corporations or as transactions that would not need to be considered for purposes of the partnership rules extended to corporations (qualification as transactions between “Altgesellschafter”). The guidance now confirms that transactions between existing direct shareholders in a real estate-owning corporation should not be considered RETT-relevant events, provided certain conditions are met. This should be a helpful clarification for transactions that involve only existing shareholders.

#### **10-year monitoring period**

There had been uncertainty whether the extended 10-year monitoring period applies only to direct shareholders in a real estate-owning corporation, or to indirect shareholders as well. If the 10-year period did not apply to indirect shareholders, this effectively would have resulted in an indefinite monitoring period. The guidance now confirms that the 10-year monitoring period should apply to both direct and indirect shareholders in a German real estate-owning corporation. The guidance also confirms that under the partnership rules extended to corporations (in section 1 (2b) of the RETT Act), transactions before 1 July 2021 do not need to be considered for purposes of the 10-year monitoring period.

#### **Additional comments**

The guidance from the German tax authorities provides long-awaited and welcome clarification of the amended RETT rules. However, the guidance also illustrates the increased complexity of the amended rules and the increased need for proper diligence and consideration of RETT in transactions where German real estate-owning corporations directly or indirectly are involved. RETT compliance obligations should be considered early on in transactions to reduce the likelihood of unpleasant surprises.

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