

## Updated decree on RETT intragroup restructuring clause published

Updated decree clarifies conditions on RETT intragroup restructuring exemption.

Germany's Ministry of Finance (MOF) issued a decree dated 25 May 2023, which updates the guidance on the real estate transfer tax (RETT) rules. Notably, the updated guidance incorporates the latest jurisprudence of the federal tax court (BFH) regarding the application of the intragroup restructuring exemption. The updated guidance also reflects amendments stemming from the 2021 RETT reform and the new RETT rules applicable as from 1 July 2021. The new decree replaces the previous decree and applies (including to all open cases) as from 24 May 2023.

### Updated guidance on intragroup restructuring exemption

Restructurings resulting in a direct or indirect 90% transfer of shares in a German real estate-owning entity or the unification of at least 90% of such entity's shares in the hands of one shareholder generally triggers RETT (prior to the 2021 RETT reform, the threshold was 95%).

According to the intragroup restructuring exemption (section 6a of the RETT Act), certain direct or indirect share transfers of real estate-owning entities are exempt from RETT. Among other conditions for the exemption to apply, the restructuring transaction must involve one controlling parent entity and one or more controlled entities (i.e., a RETT group), and a direct or an indirect shareholding of at least 95% must exist between the RETT group members for the five years immediately before the transaction (i.e., the minimum holding period) and after the transaction (i.e., the retention period). The 95% threshold for purposes of the exemption was not amended in the 2021 RETT reform.

There has been a long-standing controversy in tax literature as to how the conditions for the exemption must be interpreted; in particular, how a RETT group must be determined and how transactions where the conditions could not be fulfilled because of the nature of the transaction (e.g., where the controlled entity is eliminated by way of a merger transaction or newly created in a demerger or a "hive down" transaction) qualify. Whereas the tax authorities have taken a restrictive view on the application of the RETT intragroup restructuring exemption, the BFH in recent decisions has concluded that the exemption must be interpreted broadly, both with respect to the determination of a RETT group (i.e., which entity is to be considered the controlling parent and which entities are to be considered to be controlled entities in a restructuring transaction) and the requirement of the five-year minimum holding and retention periods. The decree now reflects the position of the BFH and confirms the application of these principles by the tax authorities.

### Comments

The updated guidance from the tax authorities reflecting the latest jurisprudence of the BFH provides long-awaited and welcome clarification of the application of the RETT intragroup restructuring exemption. The updated guidance also illustrates the increased complexity of the amended rules and the increased need for proper diligence and consideration of RETT, including in intragroup restructuring transactions where German real estate-owning entities are involved.

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