TAX & BUSINESS LAW CONSULTING

RETT IN CASE OF SHARE DEALS: AMENDMENT OF THE REAL ESTATE TRANSFER TAX ACT

On 15 April 2021, the financial advisory committee of the German Federal Parliament published an amended version of the draft bill of the amendment of the Real Estate Transfer Tax (RETT) Act. The draft bill has been passed on 21 April 2021.
The new rules are supposed to apply to all transactions from 1 July 2021.

REGARDING PARTNERSHIPS, THE FOLLOWING REGULATIONS APPLY:

- Decrease of the detrimental shareholding-threshold, above which RETT is triggered, from 95% to 90% (so-called “change of ownership”).
- Extension of the period during which shares may not be transferred to new shareholders from five to ten years.
- Extension of the holding periods prior to and after tax-privileged transfers from a partner to its partnership or vice versa or between two partnerships with identical partners from five to ten years.
- Extension of the pre-holding period to 15 years in case of a timely-spread acquisition of partnership interest that is structured in a way that initially an interest below the detrimental shareholding-threshold is acquired and acquisition of the remaining interest is carried out upon expiry of the holding period of five years (from 1 July 2021 onwards: 10 years).
  To draw a conclusion, timely-spread acquisitions of partnerships will be less favorable in the future due to the new rules. Under the current regulations, RETT is levied on 6% of the partnership interest in case of an acquisition of 94% and a subsequent acquisition of the remaining 6% after expiry of the five-year holding period. According to the new rules, an acquisition of 89% and a subsequent acquisition of the remaining 11% upon expiry of the 15 years pre-holding period is possible. In such case, RETT would be levied on 11% of the partnership interest.

FOR CORPORATIONS, THE FOLLOWING REGULATIONS APPLY:

- According to the new rules, the transfer of 90% or more of the shares in a corporation to new shareholders within a period of ten years will trigger RETT, whereas under the current regulations, a transfer of all shares in a corporation to new shareholders is subject to RETT only if the transfer leads to a direct or indirect unification of 95% or more of the shares in the hand of one shareholder.
- In this case, the respective corporation will be the tax payer under the new rules. Previously the tax payer was the acquiring shareholder in those scenarios.
- Furthermore, the detrimental shareholding threshold for the unification of shares in corporations in the hand of one shareholder will be decreased from 95% to 90%.

EXEMPTION FOR LISTED CORPORATIONS:

- Transfers of shares in corporations that are listed on a German, an EU or an EU-acknowledged stock exchange and which are performed via that stock exchange are not considered for the 90% thresholds of a transfer to new shareholders.

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APPLICABILITY OF THE NEW RULES:

- The new rules generally apply to all transactions that are realized from 1 July 2021.
- However, due to transitional provisions, the current rules partially remain applicable, e.g.:
  - If a shareholding is increased subsequent to an acquisition of at least 90% but less than 95% of the shares (that did not trigger RETT under the current regulations), the current regulations will continue to be applicable. Other than in previous amendments to the law that contained reductions of detrimental shareholding thresholds, this provision covers such acquisitions of (additional) shares that would not be taxable under the new rules because the detrimental threshold had already been exceeded before the (additional) acquisition.

Overall, the new rules constitute a considerable restriction to the possibilities to carry out tax-privileged acquisitions of shares or partnership interest in German real-estate owning entities.

Anyone who has the opportunity to structure until the end of June 2021, thus, under the current regulations, should make use of this option.