Real Estate Tax Services News
Keeping you informed

Germany – August 2019

German Federal Government issues draft legislation regarding the RETT regime for share deals

In brief

On 31 July 2019, the Cabinet of the German Federal Government approved draft legislation (Gesetzesentwurf) in respect of the German Real Estate Transfer Tax (RETT) Act. The draft incorporates the amendments which were proposed previously and have been discussed in depth in our earlier NewsAlerts circulated in December 2018 and May 2019.

In comparison to the draft bill (Referentenentwurf), which the German Federal Ministry of Finance (Bundesfinanzministerium) had circulated for consultation in May 2019, the current draft legislation contains only minor changes in wording. However, one significant change has been made as regards one of the rules on entry into force.

Draft legislation proposing upcoming changes to the German RETT regime

Following previous discussions on proposed changes to the German RETT Act (please refer to our previous NewsAlerts as of December 2018 as well as May 2019), the Federal Government has now approved draft legislation in respect of the German RETT Act that will go through the normal legislative process involving the two Chambers of Parliament.

The proposed changes are the following:

- the lengthening of the monitoring period for transfers of interests in partnerships to 10 years (currently being five years);
- the introduction of a new RETT triggering event for 90% transfers of shares in corporations within a period of 10 years;
- the lowering of the hurdles from 95% to 90%; and
- the lengthening of the clawback periods for certain privileges applicable to partnerships only.

The new regulations are supposed to become applicable to transactions which are signed (relevant for unification of shares/ interests) or closed (relevant for transfers of shares/ interests) after 31 December 2019.

Overall, the draft legislation of 31 July 2019 contains only minor changes in wording as compared to the draft bill (Referentenentwurf) of the German Federal Ministry of Finance (Bundesfinanz-ministerium) and the draft legislation of May 2019.

However, one significant change as regards the rules on entry into force has been made.

Application and transitional arrangements

The transitional provisions regarding the rules concerning transfers of shares and interests are complex due to the different structure of the RETT provisions and the fact that the Ministry wishes to avoid situations where non-taxable situations as loopholes arise.

A brief overview is as follows:

As a basic principle, the new rules apply from 1 January 2020. Therefore, and as regards the unification rules, the new unification threshold of 90% applies from then on. If, however, before that date a share quota of at least 90%, but less than 95% was reached, then the old 95% threshold continues to apply for an indefinite time.

For the other rules, i.e., the old 95% partnership rule as well as the new one for transfers of shares in corporations, the relevant transfers are determined by the date of the closing event, i.e., the effective transfer of shares or interests, not by signing the purchase agreement. In addition, there is a specific transition rule for the partnership rule that allows the application of the old 95% threshold for five years where the sum of changes had reached a quota of at least 90%, but less than 95%.

For the new corporation rule (transfer of 90% within 10 years), the shares transferred after 31 December 2019 would be caught.

For the partnership rule as well as for the new corporation rule, additional grandfathering will be available for transfers signed prior to the submission of the draft law to the Federal Council (Bundesrat) if closing will occur within one year.

Our view

Since the draft law may be submitted to the Federal Council at very short notice, it is recommended that the following transactions are signed as soon as possible, in order to benefit from the rules currently in force:

i. transactions that are expected to be closed in 2019; or

ii. transactions which will be signed before the submission of the legislation to the Federal Council, and are expected to be closed within one year after the submission to the Federal Council.

Real estate investors should continue to monitor the legislative process closely as the proposed changes to the RETT regime draw closer to enactment.

Although the implications of this new regime will be far-reaching and not limited to the real estate industry, they will have a substantial impact on corporate real estate owners, as there is no restriction for listed corporations or widely held funds.

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