



It's coming after all: German real estate transfer tax reform on so called “share deals” adopted today

7 May 2021

After much back and forth, the legislature (with the approval of the German Federal Council today) decided on the real estate transfer tax reform with effect from **1^o July 2021**.

1. Background

Already in **June 2018**, the German Federal States agreed in their Finance Minister Conference to considerably tighten the real estate transfer tax (**RETT**) treatment of **share deals**. The main purpose was to encounter the transfer of 100% of the shares in a real estate holding corporation (so called “Share Deal”) which under the current rules is generally possible without triggering RETT. In practice, RETT could be avoided in this case if two independent and unrelated purchasers (legally and economically) have each acquired more than 5% of the shares (e.g. with a split of 94.9% and 5.1%, as customary in the market).

After the implementation of the reform, which had initially been planned as part of the **Annual Tax**

Act 2019 (so called *Jahressteuergesetz 2019*, technically implemented as “*Gesetz zur weiteren steuerlichen Förderung der Elektromobilität und zur Änderung weiterer steuerlicher Vorschriften*”), had been halted shortly before completion of the legislative procedure due to the need for consultation between the coalition parties, market participants hardly expected that the project would be implemented at all in view of the upcoming parliamentary elections. It then came quite as a surprise that a “package deal” was agreed by the coalition parties at last, which also included the RETT reform. The corresponding bill has now been passed at very short notice by the German Federal Parliament (21 April 2021) and the German Federal Council (7 May 2021), and thus the RETT reform will enter into force on 1 July 2021.

2. Major contemplated changes

The fundamental concept of the legislative changes corresponds to the draft bill discussed in 2019.

In practice, the **most important changes** are as follows:

- i. Decrease of the RETT relevant threshold from currently **95% to 90%**;
- ii. Extension of the RETT relevant observation periods from currently 5 years to (generally) **10 years**. The holding period for purposes of the RETT exemption under Sec. 6 German RETT Act will even be extended to **15 years** to disallow current structuring with “option models” where acquirers so far regularly purchased 94.9% of the interests in a real estate holding partnership and, additionally, option rights to purchase the remaining 5.1% of the interests after expiry of a 5-year period. The current five year observation period will only remain in place for purposes of the intra-group exemption under Sec. 6a German RETT Act.
- iii. Introduction of a new RETT provision (**future Sec. 1 para. 2b German RETT Act**) according to which the current “transfer rule” for real estate holding partnerships pursuant to Sec. 1 para. 2a German RETT Act is now also applied to real estate holding corporations. This results in RETT being triggered if in the future at least 90% of the shares in a corporation are transferred to new shareholders within a period of 10 years. Similar to the current partnership rules, such RETT would then be owed by the real estate holding corporation which was (directly or indirectly) transferred.
- iv. Introduction of a so-called “listing exemption” according to which transfers of shares traded on an EU/EEA stock exchange or a third-country stock market which has been recognised as being

equivalent by the EU Commission will not be considered a relevant transfer within the meaning of the transfer provisions of the future Sec. 1 para. 2a and Sec. 1 para. 2b German RETT Act;

- v. Application of the “regular” value determination rules for transfers of real estate within the retroactivity period of reorganisations under the German Reorganisation Tax Act (*Umwandlungssteuergesetz*) as opposed to the technical application of the purchase price. Under current rules, disposals of real estate could be structured RETT efficient in these circumstances.

The abolishment of the cap for late filing charges (*Verspätungszuschlag*) with respect to any non-filing of RETT events to the German tax authorities (originally EUR 25,000), which had been foreseen in the original legislative procedure, was already implemented in the Annual Tax Act 2020.

3. Transitional provisions

The transitional provisions for the RETT reform provide that the new rules will generally apply to any (RETT relevant) transactions after 30 June 2021, i.e. as from **1 July 2021**.

In this context and unlike provided for in the original draft bill in 2019, a specific clarification has now been included regarding the issue of the specific application of the new transfer rule to corporations (future Sec. 1 para. 2b German RETT Act) – undoubtedly the most important issue arising in practice – which states that share transfers effected before 1 July 2021 will be disregarded (future Sec. 23 para. 23 German RETT Act). This is, of course, a very favourable development, in particular for the transaction practice.

Another provision relevant in practice is, however, no longer included in the final version of the Act: for transactions which have been signed but not yet closed (which is relevant in practice in particular for “forward sales”) a grace rule was originally foreseen if closing took place within a specific

period after the initialization of the legislative procedure. The fact that this provision was deleted from the original draft bill primarily affects transactions which are signed before 1 July 2021 but closed after this date. These transactions will now fall, as a rule, under the new RETT provisions.

Apart from that the new rules also aim to prevent majority shareholders from increasing their stake (in a current 94.9% / 5.1% structure) to 100% without triggering RETT. Technically this will be achieved in a way that the current 95% threshold for RETT purposes shall continue to apply simultaneously to the new 90% threshold, at least for a transitional period in relation to Sec. 1 para. 2a German RETT Act and indefinitely in relation to Sec. 1 para. 3 and 3a German RETT Act. For the extension of the holding period under Sec. 6 para. 4 German RETT Act to 15 years, the implications for existing structures depends on whether the participation has already been held for at least 5 years until 1 July 2021 (future Sec. 23 para. 24 German RETT Act).

4. Outlook

From a practical point of view, it is to be welcomed that the legislature, probably also due to numerous constitutional law-related concerns, decided against retroactively applying the RETT reform. Even though many transactions have already been carried out on the basis of the reduced RETT relevant threshold of 90% for some time now for reasons of caution, this nevertheless provides a high level of certainty for purchase transactions concluded on the basis of the current rules which will be closed before 1 July 2021. In this regard, the “strict” application of the future Sec. 1 para. 2b German RETT Act only as from 1 July 2021 puts an end to the sometimes almost philosophical debates about the relevance of share transfers carried out before 1 July 2021 with regard to the new provisions.

It is also to be welcomed that a listing clause is introduced which will now resolve, at least to some extent, the practical problems of avoiding or tracing uncontrollable transfers of shareholdings currently

existing with respect to exchange-traded interests in real estate holding partnerships, and which is also to apply for real estate holding corporations. The very restrictive inclusion of stock exchanges outside the EU/EEA should, of course, be reconsidered, and further stock exchanges should be included.

It is also unsatisfactory that existing “option models” with regard to partnership interests will effectively be taxed retroactively under the new rules; such option agreements will therefore have to be very closely analysed for potential adjustments necessities. Further need for advice and structuring will also exist relating to any current transactions expected to close after 1 July 2021 (including forward sales which have already been signed).

Also the window of opportunity for a possible RETT “stabilisation” of existing real estate holding structures will naturally get smaller and action will thus have to be taken at very short notice in this regard, if necessary.

Overall, the new provisions will have a major impact on the transaction and structuring practice and will certainly form an important part in the related tax planning. This also applies to the banking sector, since the RETT issues resulting from the tax liability of real estate holding corporations under the new “transfer rule” will now become relevant both in connection with a “lender due diligence” as well as with regard to a possible enforcement scenario.

1 minute read

With today's consent of the German Federal Council, the German real estate transfer tax (**RETT**) reform was passed with effect **as of 1 July 2021**. This will have a major impact on the transaction and structuring practice in the real estate sector. In addition to the decrease of the RETT relevant threshold from 95% to 90% and the increase of the RETT relevant observation periods from 5 years to (mainly) 10 years, the central point is primarily the introduction of a "transfer rule" also for real estate holding corporations. Under this rule, a 100% sale by a real estate holding corporation will in future, irrespective of the number of purchasers, be generally subject to RETT. Also for the banking sector, the RETT reform will lead to increased due diligence requirements for project financing and potential tax implications in an enforcement scenario.

In order to avoid RETT risks for companies of the relevant holding structure listed on a stock exchange, a "listing exemption" was fortunately introduced.

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