

TAX INFO

Aktuelle Entwicklungen im deutschen Unternehmenssteuerrecht

Recent Developments in German Business Taxation



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RETT: Reentry of partner in property owning partnership

Transfer of interests leads to loss of qualification as a former partner within the meaning of Sec. 1 para 2a RETTA.

The Federal Financial Court of Germany recently decided that real estate transfer tax (RETT) is due following a change of partners in a real estate owning partnership under Sec. 1 para 2a Real Estate Transfer Tax (RETTA) despite a former partner (qualifying as a former partner in terms of Sec. 1 para 2a RETTA) reentering the partnership within five years. Pursuant to the provision, RETT is triggered if at least 95 % of the partners of a partnership owning real estate change within a period of five years.

The facts of the case were as follows: Initially, A and B were partners of a real estate owning partnership in Germany, A holding a participation of one third and B of two thirds. In a first step, A transferred his interests in the partnership to A-GmbH (a German limited liability company). In a second step, which was completed within a period of less than five years, B transferred one half of his interests to A and the other half to A-GmbH. As a result, A held one third and A-GmbH two thirds of the partnership interests in the company.

The court of first instance (Financial Court of Düsseldorf, judgment of 27 October 2010, 7 K 3319/08) came to the conclusion that the transfer of partnership interests was not subject to RETT, arguing that Sec. 1 para 2a RETTA required a time-related consideration.

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Should further analysis or explanation of the subject matter be required, please contact a member of our Tax team or the lawyer with whom you normally consult.

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Therefore, the essential question for the court was whether at any moment within the period of five years prior to the decisive transfer of interests, the partners of the partnership differed at least by 95 % compared to any other moment within the five-year-period. At the same time, the Financial Court held that A as a reentering partner did not count as a “new partner” but still as a qualifying former partner in this context.

Consistent with its previous tendency to apply a rather narrow, wording-related interpretation of real estate transfer tax law, the Federal Financial Court now overruled the Financial Court’s judgment and rejected the first instance’s opinion primarily in two respects:

- First, the Senate held that for the purposes of Sec. 1 para. 2a RETTA, the qualification as a former partner is lost by means and at the time of the effectively performed transfer of interests under civil law. The reentry of a former partner cannot revive his position as a former qualifying partner but is considered as “regular” transfer of interests to a new partner. According to the court, a RETT-neutral buyback of interests or shares can only be performed within the framework of Sec. 16 para 2 RETTA if and as far as the requirements are met. Otherwise, this provision would be redundant.
- Second, the Federal Financial Court dismissed the time-related consideration of Sec. 1 para. 2a RETTA. If the change of partners resulted from several steps, the question whether the threshold of 95 % was exceeded had to be assessed separately for each step. According to the court, the five year period’s sole purpose in the context of Sec. 1 para. 2a RETTA is to set a temporal limit to the consideration of changes in the holding of the partnership’s interests.

As a result, the decision of the Federal Financial Court is well founded. The court continues its recent practice of an interpretation that is based more on the wording and system of real estate transfer tax law than on excessive teleological considerations. Furthermore the judgment confirms that the interpretation of Sec. 1 para. 2a RETTA is independent from the construction of the preferential tax regime set out in Sec. 5 et. seq. RETTA. This should be taken into account when arguing systematically in the field of the taxation of real estate owning partnerships.

Moreover, according to the court’s decision, retransfers of interests or shares to former qualifying partners shall be performed under Sec. 16 RETTA if and as far as the section’s requirements can be met.