

TAX INFO

Aktuelle Entwicklungen im deutschen Unternehmenssteuerrecht

Recent Developments in German Business Taxation



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RETT: Decrees on anti-RETT-blocker legislation and Federal Tax Court ruling

The German Tax Authorities' interpretation of the recently introduced Sec. 1 para 3a RETTA goes beyond just preventing RETT-blockers.

Within the framework of the Act on the implementation of the Directive on administrative cooperation in the field of taxation of 26 June 2013, the legislator has included a new para 3a into Sec. 1 RETTA, effective from 7 June 2013 (see Tax Info No. 21/2013). This new provision aims at preventing so-called RETT-blocker structures, by means of which purchasers of real estate owning companies could avoid RETT by using intermediary companies of which they held most (if not all) shares. The new Sec.1 para. 3a RETTA stipulates that acquisitions are subject to RETT if, after the acquisition, a legal entity directly or indirectly holds an economic ownership of at least 95% in a real estate owning company. The economic ownership is composed of the direct and indirect ownership in the capital and the assets of the real estate owning company. In determining the indirect ownership the company's participation quotas are multiplied at each level (calculation down the chain). The German Tax Authorities have now published a new decree dealing with numerous questions having arisen in connection with the new provision.

The decree of 9 October 2013 first clarifies that the mere commencement of the new provision does not trigger any taxation for old cases. Also, an economic shareholding of 95% or more in a real estate owning company from before 7 June 2013, which is subsequently increased, is not taxable by virtue of Sec. 1 para 3a RETTA. This does not, however, prevent the taxation of new

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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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acquisitions by the real estate company according to Sec. 1 para 2a or para 3 RETTA.

In general, the administration considers Sec. 1 para 3a RETTA as subordinate to para 2a and para 3, nevertheless as autonomous provision. Hence, an event can only be taxed according to Sec. 1 para 3a RETTA if it is not taxable under para 2a and 3. The application of para 3a is also barred if the taxation pursuant to para 2a or 3 has not taken place only because of tax exemptions or tax privileges.

At the same time, the taxation according to Sec. 1 para 2a and 3 RETTA does not bar para 3a with regard to future taxable events. Thus, a legal transaction following an event already taxed under Sec. 1 para 2a or 3 RETTA can trigger RETT again if an economic share of 95% or more is accumulated for the first time. This has to be seen critically in view of the provision's wording, stating that a taxable event that is covered by Sec. 1 para 3a RETTA is considered "as legal transaction under Sec. 1 para 3 RETTA".

The decree also states that the principles of Secs. 3, 6 and 16 RETTA are to be applied to Sec. 1 para 3 and 3a RETTA likewise. Furthermore, the tax concession of Sec. 6a RETTA is now expressly applicable to taxable events pursuant to Sec. 1 para 3a RETTA.

Contrary to what the initial legislative purpose might suggest, the tax authorities do not limit the scope of the provision to preventing RETT-blocker structures. Therefore, also other transactions such as the shortening of the chain of participations or the transfer of shares to existing shareholders can now give rise to real estate transfer taxation. According to the tax authorities only Sec. 1 para 6 RETTA provides for compensation by crediting formerly paid taxes. However, the application of para 6 requires identity between properties and also between purchasers, with the result that the provision is often without effect.

In summary, it can be stated that the decree construes the new Sec. 1 para 3a RETTA partly to the disadvantage of the taxpayer. At some points, it appears even questionable whether the suggested interpretation is still consistent with the written law. Also, it must be deemed unfortunate that the tax authorities have not taken a (clear) stand on several issues in connection with the new act, e.g. the calculation of a shareholder's participation in equity where there are different classes of shares.

Tax Authorities issue Non-Application Decree

In April 2013 the German Federal Fiscal Court decided in favor of taxpayers that for a RETT triggering change in indirect ownership under Sec. 1 para. 2a RETTA, the same rules of transparency apply, irrespective of the shareholder being a partnership or a corporate entity (judgment of 24 April 2013 – II R 17/10, see Tax Info No. 21/2013). Furthermore, the court ruled that a relevant change in ownership is deemed to occur only if 100% of the shareholding changes.

As expected, the German tax authorities issued a decree stating that the court's decision will not be applied in similar cases. Whether the legislator will clarify this matter remains to be seen.