Real Estate Tax Services News

Keeping you informed

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New legislation on German RETT filing obligations to mitigate double RETT hit on share deals and update on applicable RETT rates in 2023

In brief

The German real estate transfer tax (RETT) regime has been amended by the legislator regarding the procedural provisions for RETT filings in case of share transfers. These procedural provisions allow for a correction of double RETT assessments by the Germany tax authority on the same share transfer only if the respective transfer has been properly notified by the taxpayer within a period of two to four weeks. RETT compliance therefore becomes even more important for real estate investors.

The city state Hamburg had already decided in March 2022 to increase the state-specific RETT rate on transactions as of 1 January 2023 from 4.5% to 5.5%. The Free State of Saxony followed suit and decided shortly before the turn of the year on 20 December 2022 to increase the RETT rate to 5.5% for all transactions that will be effected after 31 December 2022.

In detail

Under the German RETT regime in effect as of 2021, the signing of the purchase agreement as well as the closing (ie, the legal transfer of the shares) can constitute a taxable event if the acquired vehicle directly or indirectly holds German real estate. In a nutshell, German RETT can be triggered in case of share transfers under two sets of rules.

- Under the **transfer rules,** RETT is triggered if at least 90% of the interest in a partnership or shares in a company with German real estate is directly or indirectly transferred to new shareholders within a period of ten years (“monitoring period”). The triggering event is the legal transfer (closing) and the tax is payble by the transferred entity itself.
- Under the **unification rules**, RETT is triggered if at least 90% of the shares in a company or the interest in a partnership with German real estate is directly or indirectly unified in one hand. The triggering event is the signing of a respective transfer agreement or (if no transfer agreement has been concluded) the legal transfer of the shares (closing). The tax is generally payble by the share purchaser.

Generally, the unification rules only apply if no RETT is triggered under the transfer rules such that a share deal transaction is subject to RETT only once.

The German tax administration have taken the very controversial view that the signing and closing of a share deal transaction each constitute two separate sets of circumstances and, unless these two events occur at the same time, trigger two separate RETTable events. As the unification rules are triggered upon signing and the transfer rules are triggered only upon closing the German tax authorities consider themselves entitled to assess RETT on both events.

The German legislator has now introduced a new procedural provision (Section 16 (4a) RETTA) that comprises a provision with the aim of hindering such a double taxation. The provision enables the tax authorities to revoke a RETT assessment that was issued under the unification rules upon signing at the level of the purchaser once the tax is assessed under the transfer rules at the level of the transferred vehicle upon closing. However, this new correction provision is only available if both events (signing and closing) have each been duly notified to the competent tax office, that means a complete filing within a deadline of two weeks each (one month for non-resident taxpayers). In case of incomplete or late tax fillings the taxpayer faces the risk of a double RETT charge for a single transaction.

The applicable tax rate for German RETT is generally 3.5% of the assessment basis. However, the federal states are entitled to determine deviating tax rates. Most federal states have made use of this option and the applicable rates vary between 3.5% and 6.5%. As per 1 January 2023, the federal states of Hamburg and Saxony have increased their respective tax rates to 5.5%. Prior to the increase, the tax rate in Saxony was amongst the lowest in Germany at 3.5%. This drastic increase of 57% significantly increases the additional costs when buying a property in Saxony. Only the federal state of Bavaria is still resisting the trend to increase the real estate transfer tax rate and remains the only federal state with a tax rate of 3.5%.

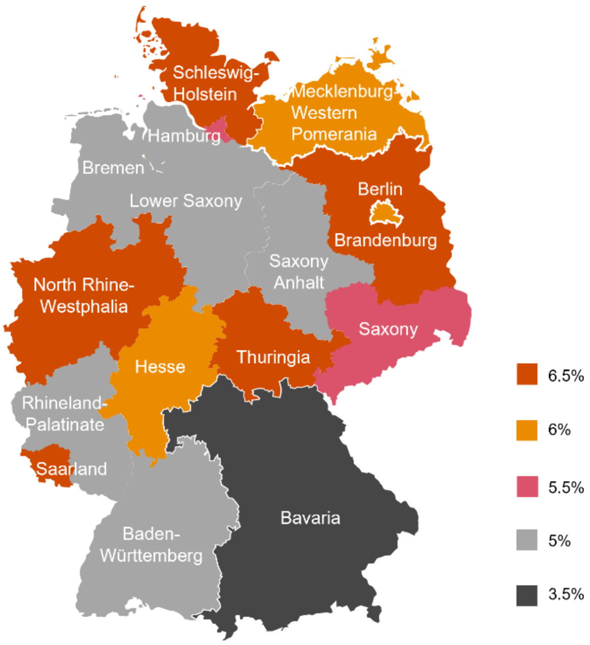
Our view

The new legislation on the RETT correction provision emphasises the importance of correct and timely RETT fillings to be able to benefit from the correction provision. In practice, the parties of a share deal transaction will have to agree on draft RETT filings as part of the pre-signing negotiation process to ensure that both parties have all the information required to file the RETT notification within two weeks after signing (one month for non-residents).

If the tax authorities assess RETT under the unification rules upon signing for share deal transactions that are sure to trigger RETT under the transfer rules upon closing, an objection against the assessment should be filed, even if the tax office has been correctly notified. Based on the current interpretation of the German tax authorities, investors could run the risk of having to finance RETT twice, with one of the tax charges being refunded later, unless suspension of payment is granted within the objection proceedings.

Note the new tax rates for Hamburg and Saxony of 5.5% and see also the overview of RETT rates per 1 January 2023 below.

Overview RETT rates as per 1 January 2023



Federal state	Rate
Baden-Württemberg	5%
Bavaria	3.5%
Berlin	6%
Brandenburg	6.5%
Bremen	5%
Hamburg	5.5%
Hesse	6%
Lower Saxony	5%
Mecklenburg-Western Pomerania	6%
Nordrhein-Westfalen	6.5%
Rhineland-Palatinate	5%
Saarland	6.5%
Saxony	5.5%
Saxony-Anhalt	5%
Schleswig-Holstein	6.5%
Thuringia	6.5%

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