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By PwC Deutschland | 10 July 2023

Discussion draft for a law amending the Real Estate Transfer Tax Act in coordination between the Federal Government and the Federal States

The Federal Ministry of Finance has sent the Federal States (“the Länder”) a draft bill to amend the Real Estate Transfer Tax Act for discussion. The main points of this bill are set out below: However, the draft may still be subject to changes in the discussion process or may even fail altogether.

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The draft includes a comprehensive reorientation of the taxation of share deals as well as fundamental adjustments and improvements vis-à-vis the granting of tax relief for group restructurings as well as for real estate transfers between entities and their members.

A large part of the bill is based upon a proposal for the modernisation of real estate transfer tax law, prepared by a real estate transfer tax law working group from the Institute for Tax Law at the University of Leipzig. This proposal has been the subject of discussions amongst experts for some time.

In addition, the draft gives the Länder the power to introduce a reduced tax rate for the acquisition of property by natural persons for their own residential purposes.

It is planned to bring the law is into force from 1 January 2024.

Taxation of share deals

Under a new Section 1a RETTA the taxation of share deals is to be regulated uniformly and without regard to legal form. The section provides for a taxation of share acquisitions where there is a unification of all (i.e. 100%) membership interests/shares in a real estate owning entity (i.e. corporation or partnership hereinafter “real estate company”). Supplementary provisions previously regulated in Section 1 (2a) to (3a) RETTA as well as Section 16 (4a) RETTA recently introduced by the Finance Act 2022 to eliminate a potential double RETT burden in so-called "signing/closing" cases are to be repealed.

Not included in Section 1a RETTA are monitoring periods and fixed participation quotas (currently at 90 %). Tax avoidance is to be prevented by regulations on so-called "acquirer groups" acting in concert and "serving interests". Instead of a single purchaser of shares, a group of purchasers consisting of several persons may be taxed if they acquire the all the shares through coordinated purchases. The bar for the definition of “coordinated” is relatively low as it will be assumed where there is a factual or temporal connection in the transfers of the shares.

In determining the unification of shares, in addition to own shares held by the company, shares held by third persons on behalf of the acquirer, or a group of acquirers are to be disregarded. In relation to the meaning of "serving interests of a person", the draft contains several standard examples (e.g., limited membership rights or the agreement of fixed or minimum remuneration).

If several acquirers participate in the performance of the same acquisition transaction (chain of ownership), only the acquirer at the top of the chain of ownership will be relevant. The same applies where several groups of acquirers participate in the performance of the same acquisition transaction. Where both an acquirer and an acquirer group participate the same acquisition transaction, the former is decisive.

For the first time, the draft provides statutory provisions on the question - often fraught with problems in practice - as to which company the relevant real estate is to be attributed. In principle, this should only be the company which last acquired the real estate in the context of an acquisition transaction within the meaning of Section 1 (1) RETTA, whereby an attribution is also to be made to a company that holds the power to exploit the real estate pursuant to Section 1 (2) RETTA (this is a case of double attribution).

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In addition, for the first time, the draft also contains provisions in a new Section 1b RETTA on investment funds within the meaning of Section 1 (10) Capital Investment Act and comparable investment funds under foreign law. In future, these are to be regarded as real estate companies and can thus be taxed where real estate is attributable to them at the time of the performance of the acquisition transaction. Real estate is also to be attributed to an investment fund where the real estate is held on its behalf by, for example, a management company which is the legal owner of the real estate (double attribution). The draft also includes special regulations corresponding to the regulations for investment funds in relation to sub-funds that are separate from each other in terms of liability and assets.

The person liable to real estate transfer tax is the relevant purchaser or the members of the relevant group of purchasers as well as – if applicable - any intermediary (i.e., interposed) companies. To secure the tax revenue, a secondary liability of the real estate company itself and a liability in rem of the real estate will be introduced in a new Section 13a RETTA: The real estate company itself can be held liable in the event of incomplete or untimely notification of the acquisition transaction. The real estate transfer tax will be registered as a public charge on real estate attributable to the real estate company at the time of the acquisition transaction.

The tax debtor will be obliged to give notice the transaction under Section 19 (1) RETTA, whereby the notification period will now be one month uniformly. If one of the above-mentioned tax debtors provides notice of the transaction, the other tax debtors are released from the notification obligation. The notifications pursuant to Section 19 RETTA are to be transmitted electronically on an officially prescribed (electronic) form. To avoid undue hardship, however, they may also be submitted in individual cases on officially prescribed paper forms.

Tax relief in connection with companies and partnerships

The so-called group clause for real estate transfer tax (currently contained in Section 6a RETTA) as well as the tax relief for transfers into a joint holding (currently contained in Section 5 RETTA) and for transfers from a joint holding (currently contained in Section 6 RETTA) are to be replaced by a newly drafted Section 5 RETTA, which contains relief for three separate situations. The provisions of the new Section 5 (2) and (3) RETTA should address the problem that the current Sections 5 and 6 of the RETTA (transfers of real estate to or from a joint holding) will to a greater extent become meaningless with effect from 1 January 2024 due to the extensive elimination of the concept of a joint holding through the Act to Modernise the Law on Partnerships of 10 August 2021.

According to the newly worded Section 5 (1) RETTA (successor regulation to Section 6a RETTA - restructuring within a group), acquisition transactions are exempt from tax if the person with decisive influence over the real estate does not change as a result of the acquisition transaction. “Decisive influence” will be considered to exist where the real estate is attributable to the person or where all of the shares in the real estate company are united in the person – the ultimate shareholder in the chain of shareholdings. Thus, in the future, all transfers within a 100 % group would benefit, regardless of the type of transfer (asset or share deal, purchase agreement or conversion), of the applicable legal system (EU/EEA

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law or third-country law) or of pre- or post-retention periods.

The newly worded Section 5 (2) RETTA (successor provision to Section 5 RETTA - transfers to joint ownership) provides for a (partial) tax exemption on transfers of real estate from several co-owners or a sole owner to an entity in which the transferor(s) hold(s) an interest. A five-year claw-back period will apply. Whether the entity is a partnership or a corporation is irrelevant.

Alternatively, Section 5 (3) RETTA (successor regulation to Section 6 RETTA - transfers from a joint ownership) is intended to regulate a partial tax exemption for transfers of real estate from an entity into the co-ownership of its members or the sole ownership of a member. Again, a five-year claw-back period will apply. Again, the legal form of the entity is not relevant.

Where relief under the (current) Sections 5, 6 or 6a RETTA was granted prior to 1 January 2024, and retention periods are still running, transitional provisions will be provided for in Sections 23(27) and 28 RETTA to ensure that these periods continue to apply. Rules will also be introduced to ensure that the retention periods contained in Sections 5 and 6 RETTA will not be considered to have been breached merely by the extensive abolition of the concept of “joint total assets” (“Gesamthandsvermögen”) by the Act on the Modernisation of the Law on Partnerships of 10 August 2021.

Keywords

Real Estate, real estate transfer tax, sale of real estate