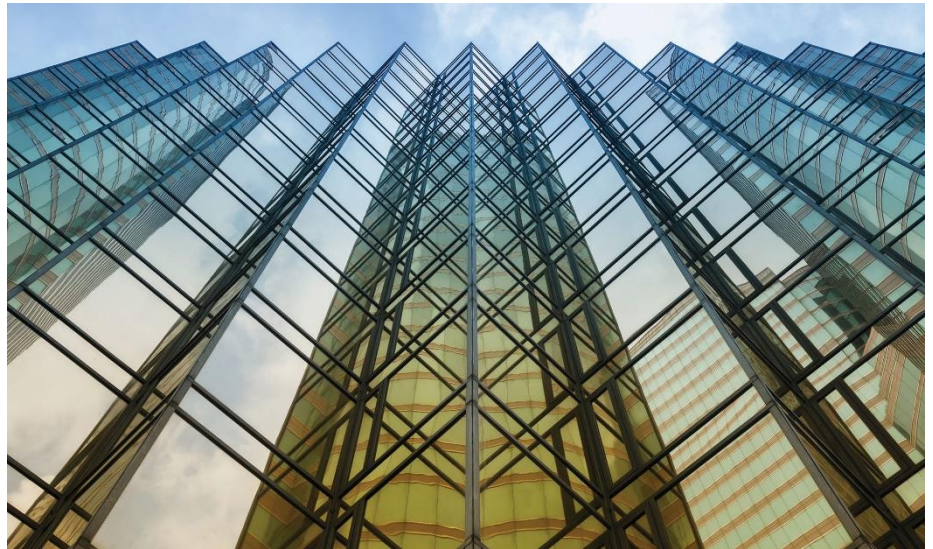


BRIEFING

GERMAN REAL ESTATE TRANSFER TAX
EXEMPTION – NO STATE AID

MARCH 2019

- INTERCOMPANY RESTRUCTURINGS WITH GERMAN REAL ESTATE CAN BE EXEMPT FROM GERMAN REAL ESTATE TRANSFER TAX (GROUP EXEMPTION)



The European Court of Justice (“ECJ”) has held that the German Real Estate Transfer Tax exemption clause for group restructurings does not qualify as unlawful state aid (C-374/17 – *A-Bräuerei./Finanzamt B*). This provides legal certainty for past and potential future intercompany restructurings concerning the transfer of real estate located in Germany. It is worth mentioning that this exemption clause does not apply to every intercompany restructuring due to certain conditions which have to be met. In this context, there are still ongoing legal proceedings at a non-EU level.

Real Estate Transfer Tax (“RETT”) group exemption

The group exemption clause under sec. 6a RETT Act provides for an exemption from German RETT in certain intercompany restructurings concerning the transfer of German real estate. To benefit from this exemption clause the following conditions must be satisfied:

- (i) the transfer is made under the German Reorganisation Act (merger, division, transfer of assets), concerns the contribution of shares or concerns a transfer which is based on an agreement affecting the shareholder’s position in the company or similar proceedings under the laws of EU/EEA Member States; and
- (ii) one controlling company and one or more controlled companies or several companies controlled by one controlling company are involved in the restructuring.

A company is considered to be controlled if the controlling company holds directly, indirectly or both partly directly and partly indirectly, at least 95% of its shares for an uninterrupted period of five years both prior and after the restructuring.

Background and decision of the ECJ

The German Federal Tax Court requested in a preliminary ruling for a decision from the ECJ on whether the RETT group exemption clause under sec. 6a RETT Act qualifies as unlawful state aid according to Art. 107 Treaty on the Functioning of the EU. If the ECJ had held that this was unlawful state aid, Germany would have had to recover the tax exempted under sec. 6a RETT Act leading to additional retroactive tax payments for many taxpayers from past restructurings. This shows the importance of this court's decision for taxpayers.

The ECJ decided (fortunately) that the RETT group exemption clause under sec. 6a RETT Act does not qualify as unlawful state aid and, thus, this clause was and is applicable for past and future reorganisation cases.

“THE REASON FOR THIS DECISION IS DUE TO THE FACT THAT WHILE THE RETT GROUP EXEMPTION CLAUSE MAY BE SEEN AS A *PRIORI* SELECTIVE, IT CAN BE JUSTIFIED SINCE IT FLOWS FROM THE NATURE OR GENERAL STRUCTURE OF THE SYSTEM OF WHICH THE MEASURES FORM PART.”

The reason for this decision is due to the fact that while the RETT group exemption clause may be seen as *a priori* selective, it can be justified since it flows from the nature or general structure of the system of which the measures form part. A selective benefit leading to an instance of unlawful state aid would exist if some taxpayers fell within the exemption clause but others were unable to benefit from the clause due to their business activities or economic background. The ECJ also mentioned that the fact that companies belonging to a group in the sense of sec. 6a RETT Act requiring a 95%-shareholding cannot be seen as selective since the transfer of less than 95% of the shares in a real estate owning company should not be a taxable event for RETT purposes and, thus, this requirement is inherent in the tax system itself. Furthermore, the minimum shareholding period requirement of five years both prior to and after the restructuring can be justified on the ground of the avoidance of abuse. Finally, the ECJ concluded that the RETT group exemption under sec. 6a RETT Act avoids double taxation and may therefore give good grounds for restricting the tax exemption provided to cases which trigger RETT without transferring the property outside a group of companies.

Practical consequences

The decision of the ECJ provides legal certainty for past and potential future intercompany restructurings in terms of RETT in cases where the restructuring concerns a transfer of German real estate. Past intercompany restructurings for which the exemption clause had been lawfully applied can now be seen as finally exempt. Even more important for future intercompany restructurings is that it is possible to avoid RETT on a transfer of German real estate by benefiting from the exemption clause. In respect of certain open questions on the conditions required to fall within the exemption clause, it should be noted that domestic legal proceedings are still ongoing.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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