

On 21 April 2021, the lower house of German parliament (Bundestag) passed the draft amendment to the German Real Estate Transfer Tax Act (Gründerwerbsteuergesetz). The upper house of German parliament (Bundesrat) is expected to pass the bill soon. As a result, the German government's bill of 23 September 2019 to tighten the real estate transfer tax rules for so-called "share deals" will now be implemented quickly after all.

The tighter real estate transfer tax rules for share deals include the following amendments:

- Lowering the detrimental thresholds for incurring real estate transfer tax for all additional circumstances from 95% to 90%.
- General extension of the five-year periods in the German Real Estate Transfer Tax Act (GrEStG) to 10 years and an extension to 15 years in the case of the prior holding period under the revised version of Section 6 GrEStG.
- Introduction of a new supplementary rule for changes in ownership of at least 90% for corporations, analogous to the existing rule for partnerships.
- Application of a substitute assessment basis for real estate transfer tax for real estate sales in the retroactive period of conversion cases.

The amendments to the law should enter into force as early as 1 July 2021. In principle, there is to be no retroactive application. The changes to the shareholding thresholds and the extensions of the deadlines have been implemented in principle. The thresholds of 95% and the five-year deadlines should continue to apply only in the context of the regulation concerning corporate groups under Section 6a GrEStG.

Lowering of Participation Limits and Longer Retention Periods

Real estate investors must be prepared for the fact that a transfer of 90% of shares will already trigger real estate transfer tax in the future, and the previous retention period of five years will be extended to 10 years. With regard to the increase of shares in partnerships, the period is to be extended to 15 years.

Therefore, the amendments result in a significantly longer period of consideration for changes of ownership in property-owning companies, i.e. in principle, only a maximum of 89.9% of the shares in corporations and partnerships can be transferred within 10 years without incurring real estate transfer tax. In the case of partnerships, the previously possible (tax-privileged) increase to 100% requires that the remaining 10.1% be transferred to the new shareholder only after 15 years have elapsed.



Change of Shareholders in Property-owning Corporations

As in the case of property-owning partnerships, changes in the shareholder structure of property-owning corporations are also to be covered in the future, i.e. a direct or indirect change in the shareholder structure that leads to the transfer of at least 90% of the shares to new shareholders within 10 years will fall under real estate transfer tax laws. It will not be decisive whether an individual shareholder exceeds a certain shareholding level, i.e. an immediate tax-free acquisition of all shares with the participation of a co-investor (e.g. with 10.1%) will also no longer be possible in the case of property-holding corporations.

However, a so-called "stock exchange clause" is intended to prevent minor transfers from triggering real estate transfer tax in the case of listed companies.

Transitional Provisions

The legislator has protected legitimate expectations to the extent that a change in shareholders is not to be taken into account prior to 30 June 2021 if the transfer of shares in rem (i.e. "closing") has already taken place by this date. Thus, this protection does not apply for contractual obligations (i.e. "signing"). If, for example, the purchase agreement for the shares was concluded before 1 July 2021, but the closing does not take place until, for example, 1 September 2021, the new regulations apply. All shareholders as of 1 July 2021 are

so-called “existing shareholders”. For the new regulations on the change of shareholders in corporations, shares that have already been transferred before 1 July 2021 should not be taken into account for the 90% limit.

The previous law continues to apply in all cases not covered by the new law. Shareholders who, for example, held at least 90% but less than 95% of the shares on 1 July 2021, will, thus, continue to be subject to the old rules in the event of an increase in their shareholdings even after the new rules have become effective. Therefore, these shareholders cannot benefit from the new regulation and increase their shares from, for example, 93% to 100% tax-free after 1 July 2021. However, members of partnerships who were already considered “existing partners” on 1 July 2021 because the previous five-year period had expired at that time are not affected, i.e. they enjoy the protection of legitimate expectations.

Conclusion

Since 2019, many real estate investors have already anticipated the tightening of the regulations on real estate transfer tax for share deals that has now been adopted and have often already complied with the 90% limit. In the future, typical structures for the reduction of real estate transfer tax in the case of share deals will become significantly less attractive. The frequently used structure for immediately transferring 100% of the shares in a GmbH holding real estate to a main investor and a co-investor will no longer be possible in the future without incurring real estate transfer tax. Overall, the effects of arrangements must be examined not only in legal terms on the basis of the new regulations but also in terms of their economic viability. In old cases and ongoing real estate transactions, it must also be examined whether the new regulations already apply or whether deadlines still have to be monitored in accordance with the old regulations.

Contacts



Dr. Christian Bleschke

Partner, Berlin
T +49 30 72616 8220
E christian.bleschke@squirepb.com



Markus Schmucker

Partner, Berlin
T +49 30 72616 8112
E markus.schmucker@squirepb.com

