

## AMENDMENT OF SHARE DEAL TAXATION ACCORDING TO DRAFT PROPOSAL OF THE FEDERAL MINISTRY OF FINANCE FOR A REAL ESTATE TRANSFER TAX AMENDMENT ACT

Starting on 1 January 2024, the Real Estate Transfer Tax Act (*Gründerwerbsteuergesetz – GrEStG*) is to be comprehensively amended. The official trigger for the draft proposal sent by the Federal Ministry of Finance to the associations is the Act on the Modernisation of Partnership Law (*Gesetz zur Modernisierung des Personengesellschaftsrechts – MoPeG*) as of 10 August 2021, which shall come into effect on 1 January 2024. Through section 713 German Civil Code (*Bürgerliches Gesetzbuch – BGB*), this act shall redefine that German partnerships, from that point forward, shall no longer have what is called joint property (*Gesamthandsvermögen*).

However, it also aims to clarify the supplementary rules (*Ergänzungstatbestände*) applicable to share deals, which entail considerable legal uncertainties for both taxpayers and tax authorities. In particular, it is unclear how the supplementary rules relate to each other and how properties are attributed to companies in participation chains.

### Summary of key changes:

The draft proposal includes the following measures:

- The existing share deal provisions (section 1 para 2a to 3a GrEStG) shall be repealed (abolishing the previous deadlines and shareholding quotas, particularly the 90% thresholds).
- Acquisitions of shares shall only be taxed when the entirety of shares (100%) is consolidated in one hand, whereby
  - multiple acquisitions are aggregated if the share acquisitions are coordinated, and
  - shares held or acquired by third parties in the interest of serving the acquirer(s) shall be disregarded when determining the 100% quota (i.e., these shares would not prevent the imposition of real estate transfer tax (RETT)).

### Key points:

- Following the entry into effect of MoPeG, the taxation of share deals and the exemption provisions relating to companies are to be completely reformed, with a particular emphasis on being neutral in terms of legal form.
- Post retention periods that have not yet expired as of 31 December 2023/1 January 2024, as defined in section 5 para 3, section 6 para 3 sentence 2 GrEStG will continue to apply. Therefore, the entry into effect of MoPeG on 1 January 2024 does not in itself constitute a violation of the blocking period.

### Key changes are as follows:

- Removal of ten-year periods and the 90% thresholds;
- Instead, the consolidation of shares is not only possible through a single acquirer but also through a group of acquirers, whereby shares held by shareholders not belonging to such group of acquirers in the interest of serving the acquirer(s) shall be disregarded just like treasury shares.

- Contractual-type investment funds based on the trust solution and sub-funds (both domestic and foreign) shall be deemed as real estate companies under the new share deal rules; at the same time, the real estate shall be attributed to the management company as before, or in the case of company-type (umbrella) investment funds (e.g., investment limited partnership (*InvKG*) or Luxembourg SICAV SIF or RAIF), they shall be attributed to the company.
- The existing tax benefits (sections 5, 6, 6a and 7 para 2 GrEStG) shall be repealed and replaced with benefits that are neutral in terms of legal form:
  - instead of section 6a GrEStG, an exemption from RETT shall apply to all acquisitions within a 100% group (however, only within a 100% group with a parent at the group's top without the elimination of shares held by third parties in the interest of serving the acquirer(s) and not within a group of acquirers),
  - a new exemption that is neutral in terms of legal form shall be introduced for transfers of real estate from a shareholder to its subsidiary (downstream), which, as the case may be, requires that the real estate had been attributed to the transferring shareholder for a continuous period of at least five consecutive years before its transfer to the subsidiary (without any post-retention period),
  - a new exemption that is neutral in terms of legal form shall be introduced for transfers of real estate from a subsidiary to its shareholders (upstream), which requires a subsequent attribution of the real estate to the shareholders for at least five years (without any prior retention period).
- To promote the acquisition of owner-occupied residential properties, the federal states are granted the authority to subject the acquisition of such properties by individuals to a reduced tax rate (potentially even introducing a tax rate of 0% - further details can be determined by the federal states, including a maximum property value threshold).

**Repeal of the existing so-called movement rules (*Bewegungstatbestände*) (section 1 para 2a and 2b GrEStG) and amendment of the rules on consolidation of shares (previously section 1 para 3, 3a, 4) in section 1a GrEStG in draft form:**

The current share deal rules in section 1 para 2a to 4 GrEStG, which are tied to relatively strict conditions such as the 90% threshold and the ten-year period in section 1 para 2a, 2b GrEStG, are intended to be repealed.

New – more extensive – share consolidation rules (*Anteilsvereinigungstatbestände*) (section 1a para 1 no 1 and 2 GrEStG in draft form) shall be introduced, which, although based on the direct and/or indirect consolidation of the entirety of shares (in essence 100% threshold) of a real estate company, provide for an expansion (through extensive aggregations or non-inclusion of third-party shares) pursuant to which a consolidation of shares can be realised

- not only by a single acquirer (individual, association of persons within the meaning of section 14a German Fiscal Code draft (*Abgabenordnung-Entwurf* – AO-draft), corporation, association of persons, or asset pool under the German Corporate Income Tax Act (*Körperschaftsteuergesetz* – KStG) respectively foreign asset pools,

**Taxation of share acquisitions by co-investors:**

- Aggregating several share buyers into a group of acquirers that can achieve a consolidation of shares through coordinated legal transactions or coordinated transfers, specifically
  - through joint planning,
  - through consent to the planning,
  - through seeking common control of the real estate company,
  - but also (rebuttable) when there is a substantive **or** temporal connection between the share acquisitions.
- Shares held by other shareholders in the interest of serving the acquirer(s) shall be disregarded.

- but also by a **group of acquirers**;

those acquirers who acquire shares "in coordination" are considered part of the group, meaning that there is a rebuttable presumption of coordination if there is a substantive or even just a temporal connection between the legal transactions or transfers. The draft proposal, including the reasoning, does not provide details on when a temporal connection shall be deemed to exist.

Furthermore, shares held by other **shareholders (third parties) in the interest of serving** the acquirer or at least one member of the group of acquirers (as well as any treasury shares) shall be disregarded when determining the entirety of shares. The circumstances under which a shareholder holds its shares in the interest of serving the acquirer(s) are described in section 1a para 8 no 2 GrEStG in draft form in the form of illustrative examples being rebuttable presumptions. Pursuant to the draft, a shareholder is presumed to hold shares in the interest of serving in cases where

- a) the combined fair market value of the shares held by the shareholder not belonging to the group of acquirers (i.e., a third party) is lower than the RETT that would arise from consolidating the shares in the hands of the acquirer or the group of acquirers,
- b) the shareholder rights of the shareholder are restricted by the articles of association or other contractual agreements; if a shareholder's rights are subsequently restricted, their stake shall be disregarded starting at that point in time,
- c) a fixed remuneration or minimum remuneration is agreed upon with the shareholder due to its shareholder status, or such remunerations are paid to it, which is not agreed upon or paid to all shareholders, and provided that it does not involve compensation payments under a profit and loss transfer agreement (*Gewinnabführungsvertrag* - section 291 para 1 German Stock Corporation Act (*Aktiengesetz – AktG*)); in the event of subsequent agreements or payments of such remunerations, the shares held by the respective shareholder shall be disregarded from that point onwards, or
- d) a co-determining influence can be exerted on the shareholder, who must not be a corporation, association of persons, or asset pool in terms of the KStG or a foreign entity qualifying as intermediary company, by
  - aa) the acquirer, at least one member of the group of acquirers, or a representative appointed by them, or
  - bb) at least one person who can also exert a co-determining influence over the acquirer or at least one member of the group of acquirers.

If a co-determining influence arises subsequently, the respective stake shall be disregarded from that point onwards.

#### Rebuttable presumption of interest of serving the acquirer(s):

- When the fair market value of the shares is lower than the otherwise applicable RETT,
- In case of restriction of shareholder rights,
- In case of fixed or minimum remuneration,
- In case of co-determining influence over the third party.

### **Right to exploit the share in a real estate company**

In the future, not only the contractual establishment of claims for the assignment of shares in a real estate company and their transfer in rem shall be covered, but also the acquisition of "rights that enable another person, legally or economically, to exploit a share in a real estate company or an intermediary company for their own account." This primarily covers cases of so-called disenfranchised "old" shareholders.

The share in a real estate company or an intermediary company shall be attributed to both the party authorised for the exploitation of the share and the legal owner (subject to the non-consideration of the share due to an interest of serving the acquirer(s)).

Similarly, real estate shall be attributed to both the company holding the civil law ownership and the company authorised to exploit the property within the meaning of section 1 para 2 GrEStG.

### **Relation between the consolidation rules**

The relationship between the different consolidation rules in section 1a para 1 no 1 and 2 GrEStG in draft form is regulated in section 1a GrEStG in draft form in such a way that, after 2023, taxation of the signing of a share purchase agreement excludes taxation of closing (except when signing took place before 2024 and closing occurs after 2023). Together with section 1 para 2a and 2b GrEStG, the new provisions in section 16 para 4a and 5 sentence 2 GrEStG inserted by the Annual Tax Act 2022 (*Jahressteuergesetz 2022 – JStG*) with effect from 21 December 2022 are also intended to be repealed.

### **Legal regulation of property attribution**

The new provisions on consolidation shall apply to all shares in a real estate company. A real estate company is any company to which a domestic real estate is attributable at the time of an acquisition within the meaning of section 1a GrEStG in draft form. This real estate attribution requires that the company acquired the real estate through an acquisition under section 1 para 1 GrEStG and did not sell it subject to RETT under section 1 para 1 GrEStG, or that it holds the right to exploit the real estate within the meaning of section 1 para 2 GrEStG. A consolidation under section 1a GrEStG in draft form does not result in a change in real estate attribution for subsequent consolidations within the meaning of section 1a GrEStG in draft form.

### **Legal regulation of tax liability in the case of consolidation under section 1a GrEStG in draft form**

In participation chains, the taxation shall always occur at the top legal person that does neither directly nor indirectly convey the entirety of the shares in the real estate company to any other person, or at the members of a group of acquirers that does not indirectly convey or enhance the membership in a group of acquirers to any other person, and at intermediary companies involved in the transaction. This significantly expands the group of taxpayers responsible for paying the RETT.

The real estate company itself shall be personally liable for RETT if the taxpayers fail to timely and fully report the consolidation in all its aspects (sections 13a para 1, 19 and 20 GrEStG in draft form). This places even greater importance on the notification process in the future.

#### **Attribution of real estate to a company:**

- In the case of an acquisition subject to RETT under section 1 para 1 GrEStG as long as it is not subsequently sold subject to RETT under section 1 para 1 GrEStG (even if another person has the right to exploit the property within the meaning of section 1 para 2 GrEStG),
- In the case of holding the right to exploit the property within the meaning of section 1 para 2 GrEStG.

#### **Attribution of shares in a real estate company or an intermediary company:**

- In the case of the establishment of a claim for the assignment of a share and the acquisition of the share in rem,
- In the case of the right to exploit the share.

RETT shall be imposed in rem as a public charge on the respective real estate attributed to the company at the time of the acquisition (section 13a para 2 GrEStG in draft form).

### Calculation base offset in case of consolidations

In the case of successive consolidations that are taxable according to section 1a GrEStG in draft form, the draft provides for some softening of the requirements for calculation base offset under section 1 para 4 GrEStG in draft form (previously section 1 para 6 GrEStG). In an acquisition under section 1a para 1 GrEStG in draft form, the identity of the acquirer shall be deemed given if (1) a member of the group of acquirers of the previous acquisition is the acquirer in the subsequent acquisition, or (2) exclusively members of the group of acquirers of the previous acquisition are members of the acquirer group of the subsequent acquisition. A softening of the criteria relevant for the calculation base offset, specifically the acquirer identity, is also provided for transitional causes or certain realisations of section 1 para 2a or 2b GrEStG.

### Changes to exemptions related to companies

The existing provisions for non-imposition of RETT in section 5 to 6a, section 7 para 2 GrEStG shall be repealed. New provisions are proposed in a new section 5 GrEStG in draft form, that are partially more favourable, and overall neutral in terms of legal form exemption and non-imposition.

- Instead of the existing non-imposition provisions for corporate restructurings in section 6a GrEStG, a comprehensive exemption for generally all acquisitions under section 1 and section 1a GrEStG in draft form is proposed in section 5 para 1 GrEStG in draft form. This exemption shall apply when the controlling influence over a real estate of the top legal person (i.e., the parent holding 100% of the shares) of a group of companies does not change as a result of the acquisition. The parent has a controlling influence over the real estate if it is attributable to such parent as a result of a taxable acquisition under section 1 para 1 or para 2 GrEStG or if such parent directly or indirectly consolidates all the shares of a real estate company in its hand. For example, the transfer of a real estate owned solely by an individual to a partnership or corporation wholly owned by that individual would be exempt from RETT.
- Instead of the (proportional) exemption for transfers of real estate from a joint owner to the community of joint owners pursuant to the existing section 5 GrEStG, a new exemption neutral in terms of legal form for real estate transfers (section 5 para 2 GrEStG in draft form) without a minimum post-retention period is proposed. This exemption requires that the real estate, at the time of its transfer to the company, had been attributed for at least five consecutive years to the transferring shareholder for RETT purposes. Depending on the specific case, it may be advantageous to wait with planned contributions of real estate acquired at least five years ago into subsidiary companies (e.g., for the purpose of recognising hidden reserves in the financial statements) because the new section 5 para 2 GrEStG in draft form is expected to be more favourable than the current section 5 GrEStG.
- Instead of the (proportional) exemption for transfers of real estate from a community of joint owners to the respective joint owner(s) pursuant to the existing section 6 GrEStG, a new proportional exemption for real estate

### Shares held in the interest of serving the acquirer(s) shall be disregarded, but they can still exclude the application of the new group privilege:

- The triggering of RETT due to the consolidation of shares in one hand can still occur even when shares are retained in the interest of serving the acquirer or at least one member of the group of acquirers.
- In contrast, the new group privilege (section 5 para 1 GrEStG draft) shall only be applicable within a 100% group with a person at the top, without excluding shares held by third parties in the interest of serving.

### Group clause in section 5 para 1 GrEStG draft:

- All acquisitions are generally eligible for the non-imposition of RETT (including real estate purchases as defined in section 1 para 1 no 1 GrEStG).
- However, the RETT exemption only applies within a 100% group with a top legal person at the group's top.
- They do not apply within the same group of acquirers.
- Without excluding shares held by third parties in the interest of serving.

transfers from a company to one or more of its shareholders is proposed, with a minimum post-retention period of five consecutive years (section 5 para 3 GrEStG in draft form).

- Real estate transfers between sister companies (previously potentially favoured under section 6 para 3 GrEStG) can only be favoured under the new section 5 para 1 GrEStG in draft form (i.e., within a 100% group).

#### **Transition provisions**

The mere enactment of the new rules provided for in the draft 1 January 2024 shall not trigger RETT.

The new rules provided for in the draft shall not affect the taxation of transactions realised before 1 January 2024.

However, acquisitions of shares, concluded agreements, or plans made before 2024 can result in the imposition of RETT due to share acquisitions taking place after 2023 (e.g., signing before 1 January 2024, and closing after 31 December 2023). Whether and, if so, how share acquisitions under section 1 para 2a and para 2b GrEStG shall be retrospectively examined for the presence of a coordination as defined in section 1 para 7 GrEStG in draft form is not explained in the draft proposal.

If at least 90% of the shares in a real estate-owning company were directly and/or indirectly consolidated in one hand before 2024, in the case of a subsequent share consolidation pursuant to section 1a GrEStG in draft form, the tax basis relevant to the latter share consolidation (the real estate values to be determined according to the Valuation Act (*Bewertungsgesetz – BewG*) shall be reduced by the tax basis that has been determined and paid for the acquisition of at least 90% of the shares before 2023. This applies even if RETT has been determined and paid for the previous transaction by the property-owning partnership of company itself under section 1 para 2a or para 2b GrEStG.

It is envisaged that, regarding real estate transfers to partnerships made prior to the end of 2023, the post-retention periods under section 5 para 3 and section 6 para 3 sentence 2 GrEStG that are not yet expired or expiring by 31 December 2023/1 January 2024 shall continue to run. This means that the mere enactment of the MoPeG on 1 January 2024 does not constitute a violation of the retention periods. Retention periods under section 6a sentence 4 GrEStG that are still running on 31 December 2023 are also to be observed after 2023.

#### **Lookout**

It is unclear whether – and if so with which changes – the draft proposal will become a government draft and if the Bundesrat will grant its approval.

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