New Guidance on attribution of properties for German RETT purposes

Tax Zoom

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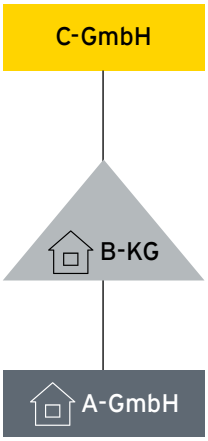
For real estate transfer tax ("RETT") purposes, real estate can also be attributed to a direct or indirect parent company in addition to the property-holding company under certain conditions (so-called double attribution). This attribution is of enormous relevance for triggering the RETT supplementary facts ("Ergänzungstatbestände") in the context of share deals and intra-group restructurings.

After the Federal Fiscal Court ("FFC") has ruled several times in the recent past in connection with the attribution of real estate under RETT law, the German tax authorities have now set out their view in their so-called "identical fiscal decrees" ("Gleich lautende Erlasse"). The fiscal decrees are applicable in all open cases. Insofar as statements to the contrary are contained in fiscal decrees that were published prior to the current decree, these are no longer applicable. It can therefore be assumed that, from the point of view of the German tax authorities, there will be a need in the future to (re)examine past cases regarding their RETT notification. There is a need for action on share deals and restructuring of groups of companies with property-holding companies, especially since there is a risk of genuine double taxation on the basis of the new fiscal decree of the tax authorities due to the possible double attribution.

Background

Attribution of property



▲ Fictitious real estate
■ Real estate under civil law

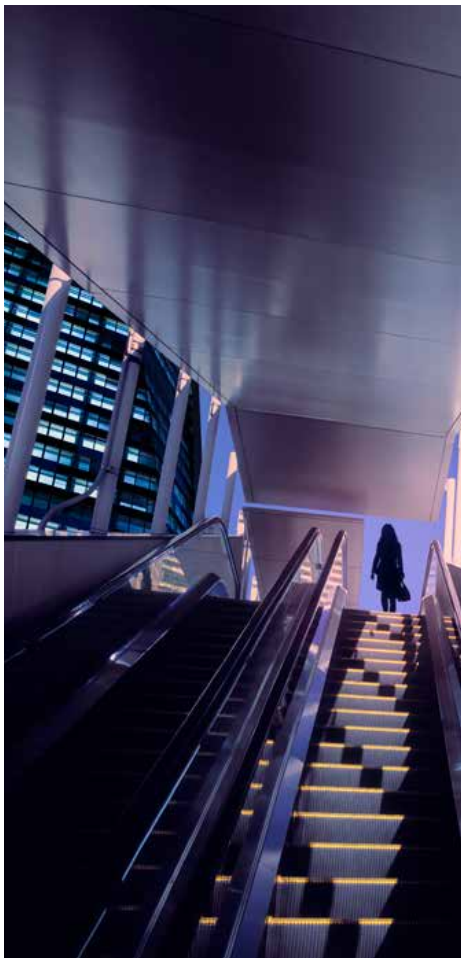
A factual requirement of the supplementary facts according to Sec. 1 para. 2a to 3a German Real Estate Transfer Tax Act ("German RETT Act") is the "belonging" of a real estate property located in Germany to the assets of the company. The criterion of "belonging" and its interpretation for RETT purposes are therefore of central importance in practice. Whether a property belongs to the assets of a company is determined neither solely by civil law nor by the economical ownership in terms of Sec. 39 of the General Fiscal Code ("GFC"). The decisive factor is the attribution for RETT purposes (i.e., the attribution under the applicable RETT law). In addition to the attribution of the property to the owner under civil law (so-called "civil-law real estate"), the property can thus also be "owned" or attributed to other companies in the chain of shareholdings for the purposes of the supplementary facts, even though they are not the owners of the property under civil law (so-called "fictitious real estate"). The attribution of fictitious real estate to other companies in the event of a share deal could result in the multiple triggering of supplementary provisions (i.e., Sec. 1 para. 2a to 3a German RETT Act) at different levels of participation and thus multiple taxation. Such multiple taxation has already been repeatedly advocated by the German tax authorities in the past.

Principles on the attribution for RETT purposes in accordance with the jurisdiction of the FFC

In the recent past, several cases have already been ruled by the FFC in connection with the attribution of property for RETT purposes.

In its judgment of 1 December 2021 (II R 44/18), the FFC ruled, as far as can be seen, for the first time in a case relating to Sec. 1 para. 2a German RETT Act that a property of the subsidiary is only attributable to the parent company if it is attributable to it for RETT purposes at the time the tax arises due to an acquisition process, that has been realized according to Sec. 1 para. 1 to 3a German RETT Act. Accordingly, real estate does not (yet) belong to the company if it is not attributable to it for RETT purposes at the time of the transfer of shares. This means that the pure acquisition of the real estate by the subsidiary does not automatically lead to the attribution of the real estate to the parent company. Nor does the fact of holding shares in the subsidiary justifies the attribution of the property to the parent company.

In two further decisions, the FFC substantiated this case law to the effect that a property "belongs" to the company within the meaning of Sec. 1 para. 3 German RETT Act, if it is attributable to the company for RETT purposes, at the time the tax arises on the transaction subject to RETT according to Sec. 1 para. 3 RETT Act due to an acquisition process according to Sec. 1 para. 1, 2, 3 or 3a German RETT Act (judgement of 14 December 2022, II R 40/20; in the case of a foreign parent company, judgement of 14 December 2022, II R 33/20, NV). In contrast to its previous judgement (II R 44/18), the FFC now explicitly excludes the supplementary provisions according to Sec. 1 para. 2a and 2b German RETT Act. The background to this is that Sec. 1 para. 2a and 2b German RETT Act only simulate the transfer of the property to a "new" company (fictious company). In this respect, the transfer of the real estate to the "new" fictitious company imagined by the realization of these provisions do not result in a change in the attribution for RETT purposes. ››



Thus, as a result, no deviating attribution can result from the realization of the supplementary provisions according to Sec. 1 para. 2a or 2b German RETT Act. It follows from this that a property is only attributable to a company at the time when the tax arises for the acquisition process subject to RETT according to Sec. 1 para. 3 German RETT Act (with regard of the shares in this company) if it has previously realized a (fictitious) acquisition transaction falling within the scope of Sec. 1 para. 3 or 3a German RETT Act with regard of this property.

According to these principles, real estate does not (or no longer) "belong" to the company's assets if it is still owned by the company but has been subject to a sale transaction within the meaning of Sec. 1 para. 1 to 3a German RETT Act prior to the transfer of shares (judgement of 1 December 2022, II R 44/18). In its subsequent decisions, the FFC also substantiated this to the effect that the property is no longer attributable to a company if

1. a third party has realized an acquisition process with respect to this property according to Sec. 1 para. 1 German RETT Act (and including the realization right) or an acquisition process according to Sec. 1 para. 2 German RETT Act (double attribution in cases of Sec. 1 para. 2 German RETT Act, as advocated by the tax authorities, is therefore excluded according to the principles of the FFC),

2. a third party has realized an acquisition process with respect to this property according to Sec. 1 para. 3 or 3a German RETT Act

3. or the shares in the property-holding company falls below 95 percent or, according to the current legal situation, below 90 percent, or the property is no longer attributable to the property-holding company. These principles also apply to multi-level shareholdings.

Fiscal decrees of the federal states ("Gleich lautende Ländererlasse")

General Principles on the Question of „Belonging"
By issuing the fiscal decrees of the supreme tax authorities of the German federal states dated 16 October 2023, the German tax authorities have now responded to the judgements of the FFC and recognizes these in principle; the judgments II R 44/18 and II R 40/20 will shortly be published in the Federal Tax Gazette and will therefore be applicable beyond the individual case decided.[1]

Regarding the question of "belonging" of the property within the meaning of the supplementary facts, the German tax authorities, in accordance with the judgements of the FFC, also advocates the recognized principle that the attribution is based solely for RETT purposes and is therefore not governed only by civil law or sec. 39 GFC. For the beginning and end of the attribution for RETT purposes, only the realization of the provisions according to Sec. 1 para. 1, 2, 3 and 3a German RETT Act is decisive. Thus, the realization of the supplementary facts according to Sec. 1 para. 2a and 2b German RETT Act, which simulates the transfer to a "new" fictious company, does not change the attribution for RETT purposes. This means that the attribution of a property only changes, if one of the supplementary provisions according to Sec. 1 para. 3 or 3a German RETT Act has been realized. »

[1] *Anwendung neuer BFH-Entscheidungen (bundesfinanzministerium.de)*

Individual attribution

In principle, a property is attributable to a company for an acquisition process subject to RETT according to Sec. 1 para. 2a to 3a German RETT Act only if the company has previously realized an acquisition process according to Sec. 1 para. 1 RETT Act with respect to this property at the time the tax arises. With the attribution, this company (owner under civil law) is also a property-holding company within the meaning of the German RETT Act. However, for the purposes of the supplementary facts according to Sec. 1 para. 2a to 3a German RETT Act, a property is no longer to be attributed to a company if a third party has realized an acquisition transaction with respect of that property according to Sec. 1 para. 1 German RETT Act, i.e., the property was the subject of a sale transaction (cf. judgments II R 44/18 and II R 40/20). The same applies if realizing an acquisition process according to Sec. 1 para. 2 German RETT Act. In this case, the property is to be attributed to the company that acquired the realization right.

Multiple attribution

However, in addition to the property-holding company the property may also be attributed to another company at the time the tax arises according to Sec. 1 para. 2a to 3a German RETT Act (so-called multiple attribution). According to the fiscal decrees, this is the case if this company has previously realized an acquisition process with respect to this property according to Sec. 1 para. 3 or 3a German RETT Act. According to the fiscal decrees, the mere holding of a certain amount of shares is not sufficient for attribution (cf. II R 44/18).

However, in the opinion of the German tax authorities, in accordance with the aforementioned FFC judgements, the property is no longer to be attributed to this other company for the supplementary provisions according to Sec. 1 para. 2a to 3a German RETT Act, if

1. a third party realizes an acquisition process that falls within the scope of Sec. 1 para. 3 or 3a German RETT Act with respect to this property,
2. their shareholding in the property-owning company falls below the shareholding threshold relevant for Sec. 1 para. 3 and 3a German RETT Act, or
3. the property is no longer attributable to the property-owning company.

For the question of attribution through the realization of a transaction in accordance with Sec. 1 para. 3 or 3a German RETT Act, the applicable legal situation must be observed (until the end of 30 June 2021: 95 percent limit; from 1 July 2021: 90 percent limit). According to the fiscal decrees, the (lower) participation threshold of 90 percent must always be observed for transactions from 1 July 2021 for the question of ending the attribution of the property due to falling below the relevant participation threshold according to Sec. 1 para. 3 and 3a German RETT Act. Pursuant to the German tax authorities, it is irrelevant when the acquisition process was triggered and when the attribution began. »

Precedence of Sec. 1 para. 2a or 2b German RETT Act

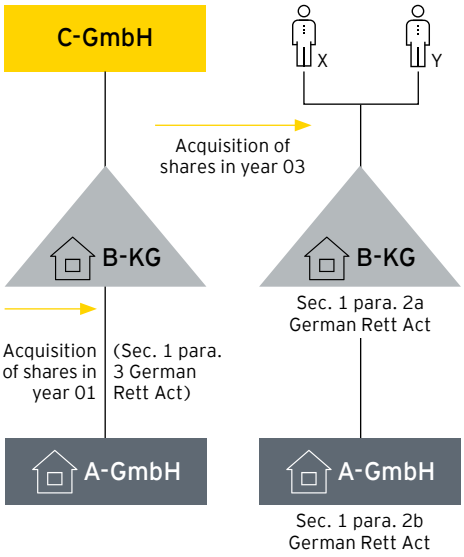
The contractual obligation ("schuldrechtliches Verpflichtungsgeschäft") (Signing) and the legal transaction ("dingliches Rechtsgeschäft"), i.e., the transfer of the shares in rem (Closing) are in the view of the German tax authorities two separate RETT relevant events (fiscal decrees of the German supreme tax authorities of the federal states, dated of 10 May 2022, Federal Tax Gazette I, pp. 801 and 821, cf. 8.1). This is particularly of relevance in cases of a share unification according to Sec. 1 para. 3 no. 1 or 3 or para. 3a German RETT Act and share transfers according to Sec. 1 para. 2a or 2b German RETT Act, where the moment of taxation of both provisions are falling apart and thus, not take place at the same time. While Sec. 1 para. 3 no. 1 or 3 or para. 3a German RETT Act shall be already triggered at Signing and, hence, at the time upon justification of the contractual claim to the transfer of the shares, Sec. 1 para. 2a respectively para. 2b German RETT Act shall only be triggered upon Closing and, hence, upon the actual transfer of the shares. Thus, in the view of the German tax authorities, RETT must be assessed according to Sec. 1 para. 3 no. 1 or no. 3 or para. 3a German RETT Act at the time of Signing and at the time of Closing according to Sec. 1 para. 2a respectively para. 2b German RETT Act. The RETT assessment pursuant to Sec. 1 para. 3 no. 1 or no. 3 or para. 3a German RETT Act shall be annulled or amended according to provisions pursuant to Sec. 16 para. 4a in conjunction with para. 5 sentence 2 German RETT Act.

The fiscal decrees now also comment on the question of attribution the property in cases in which both, Sec. 1 para. 2a or 2b German RETT Act and Sec. 1 para. 3 or 3a RETTA are triggered.

If these provisions are triggered at the same time, Sec. 1 para. 2a or 2b German RETT Act supersedes the application of Sec. 1 para. 3 or 3a German RETT Act, with the consequence that no provisions of Sec. 1 para. 3 or 3a German RETT Act is realized. Therefore, the attribution does not change in these cases. However, according to the fiscal decrees, the situation is different in cases in which the Signing and Closing, and thus the taxation dates of Sec. 1 para. 2a or 2b German RETT Act and Sec. 1 para. 3 or 3a German RETT Act, fall apart in time. The German tax authorities even seem to consider a temporal divergence possible in those cases in which there is a previous legal transaction (i.e., Sec. 1 para. 3 no. 1 and no. 3 German RETT Act), which becomes effective immediately upon signing. In other words, only in cases where the transfer of shares is effected immediately by law Sec. 1 para. 2a or 2b German RETT Act a prior legal transaction according to Sec. 1 para. 3 or 3a German RETT Act can be excluded with certainty. According to the fiscal decrees in all cases of Sec. 1 para. 3 no. 1 and no. 3 German RETT Act, the precedence is implemented by the correction provision of Sec. 16 para. 4a in conjunction with para. 5 sentence 2 German RETT Act, nevertheless Sec. 1 para. 3 or 3a German RETT Act are fulfilled, with the result that the attribution then also changes.

According to the fiscal decrees, this attribution does not end even if the tax assessment is annulled or amended according to Sec. 16 para. 4a German RETT Act. This means that despite the annulment or amendment of the tax assessment, the property is still deemed to be attributed in the view of the German tax authorities. According to these principles, double attribution, and thus double taxation according to Sec. 1 para. 2a and 2b German RETT Act is possible following the view of the German tax authorities. ››

Example 1 (abbreviated presentation of the facts)



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Facts and circumstances

In year 01, the limited partnership B ("B-KG") acquires 100 percent of the shares in the capital of the property-holding limited liability company A ("A-GmbH") through a legal transaction. In year 03, 100 percent of the interest in B-KG are transferred to the new shareholders X and Y, 50 percent each.

Solution in view of the German tax authorities

Year 01: With the conclusion of the legal transaction, B-KG realizes a share unification according to Sec. 1 para. 3 no. 1 or 3 German RETT Act. Furthermore, at the level of the A-GmbH a share transfer according to Sec. 1 para. 2b German RETT Act is triggered. The real estate is therefore now attributable for RETT purposes to both A-GmbH and B-KG. In the view of the German tax authorities, this also applies if the RETT assessment pursuant to Sec. 1 para. 3 no. 1 or 3 German RETT Act are annulled in accordance with Sec. 16 para. 4a German RETT Act. The realization of the supplementary provision according to Sec. 1 para. 2b German RETT Act has no effect on the attribution of the real estate. According to the decree, it remains unclear whether there is no attribution if the share purchase agreement is concluded, and the shares are transferred in rem at the same time. The explanations in the decree are not clear in this regard.

Year 03: Since, in the view of the German tax authorities, the property is attributed to both B-KG and A-GmbH, Sec. 1 para. 2a German RETT Act is directly triggered at the level of B-KG and Sec. 1 para. 2b German RETT Act is indirectly realized at the level of A-GmbH. The fulfilment of these requirements does not change the attribution.

Comment on the solution

Apparently, in the view of the German tax authorities, the initial fulfilment of Sec. 1 para. 3 no. 1 German RETT Act at the time of Signing should not result in a "sale of the property" at the level of the property company (A-GmbH) to the acquirer (B-KG) in year 01 and thus a double attribution when the acquisition transaction is realized in year 03. This does not appear consistent with the attribution principles set out above according to the FFC jurisprudence, especially since the German tax authorities quote the FFC to the effect that the attribution should end with the realization of Sec. 1 para. 3 German RETT Act by a third party. However, the German tax authorities only apply this principle of attribution at the indirect level. Therefore, if, contrary from the chart of the example, the shares were sold to a single acquirer by a legal transaction in year 03 (subject to RETT according to Sec. 1 para. 3 no. 3 German RETT Act) the attribution to the B-KG should end in the view of the German tax authorities. A subsequent taxability (at the time of Closing) according to Sec. 1 para. 2a German RETT Act at the level of B-KG should therefore be excluded. However, it remains unclear, whether only an indirect share unification is triggered with regard to the property of A-GmbH and whether a direct share unification should also take place with respect to the property (fictitiously) attributed to the B-KG for RETT purposes.

Reversal of an acquisition process and reacquisition

In addition, the fiscal decrees also comment on the reversal of an acquisition process pursuant to Sec. 16 para. 1 German RETT Act and the reacquisition pursuant to Sec. 16 para. 2 German RETT Act. According to the fiscal decrees, a reversal of an acquisition process does not result in a retroactive cancellation of an attribution. This means that the property is still attributable to the company despite reversal of an acquisition process until the attribution has ended. This is only the case at the time at which the claim for annulment of the RETT assessment or RETT determination pursuant to Sec. 17 German RETT Act arises. In cases of reacquisition according to Sec. 16 para. 2 German RETT Act, the attribution only ends as soon as the tax-triggering legal transaction for the reacquisition is concluded.

Summary and outlook

The fiscal decrees can be summarized in the following key statements:

- The attribution is made solely based on RETT purposes.
- Pursuant to Sec. 1 para. 3 and 3a German RETT Act, an attribution to a company other than the owner under civil law can be made in accordance with the applicable legal situation (until the end of 30 June 2021: 95 percent; from 1 July 2021: 90 percent).
- This does not apply if Sec. 1 para 2a respectively para. 2b German RETT Act applies directly prioritized.
- An attribution according to Sec. 1 para. 3 and 3a German RETT Act may nevertheless be made if Sec. 1 para. 3 and 3a German RETT Act are subsequently annulled or amended in accordance with Sec. 16 para. 4a and 5 sentence 2 German RETT Act.
- Reversal of an acquisition process and reacquisition according to Sec. 16 German RETT Act do not result in a retroactive cancellation of an attribution.

Ongoing or planned restructurings or acquisitions of shares in groups that hold property-owning companies in their shareholding chains should be reviewed immediately with regard to the above principles. On the basis of the fiscal decrees, it can be assumed that the German tax authorities will maintain their previously described view on multiple taxation and, if necessary, assess RETT several times for the same acquisition process. In any case, it is recommended to appeal against base tax assessment that establish multiple attribution and taxation. In addition, it is also necessary to check whether past RETT notifications were also complete according to the standards of the new view of the German tax authorities or whether new or corrected RETT notifications must be made.

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