

Newsflash | 06.2021

German real estate transfer tax law reform to take effect on 1 July 2021

Significant tightening of rules for share deals



- Introduction of provisions defining changes of shareholders in real estate corporations as a separate supplementary tax-triggering event (Section 1 (2b) German Real Estate Transfer Tax Act, new version)
- Introduction of a so-called “stock exchange clause” for transfers of shares in listed companies (Section 1 (2c) German Real Estate Transfer Tax Act, new version)
- For previous supplementary tax-triggering events: lowering of the investment thresholds from 95% to 90%, with the aim of lowering these thresholds to 75% in the medium term
- Indirect changes must also be kept in mind
- Extension of the relevant waiting and observation periods from 5 to 10 and 15 years, respectively
- No corresponding adjustments to the “group clause” set out in Section 6a German Real Estate Transfer Tax Act
- For real estate transfers within the period of retroactive effect for transformation tax purposes: application of the provisions of the German Valuation Act

Introduction

Following the formal execution of the Act Amending the Real Estate Transfer Tax Act by the Federal President and the promulgation of the Act in the Federal Law Gazette on 17 May 2021, Federal Law Gazette I p. 986, the real estate transfer tax reform, flanked by numerous application and transitional provisions, will take effect on 1 July 2021.

The avoidance of real estate transfer tax in share deals involving the transfer of shares in companies owning real estate in Germany is a thorn in the side of the German legislator. Accordingly, the reform of real estate transfer tax law, which will take effect on 1 July 2021, includes numerous regulations that are intended to make the alleged avoidance of real estate transfer tax even more difficult in future.

New statutory provisions

1. Introduction of a new Section 1 (2b) German Real Estate Transfer Tax Act, new version (change of shareholders in a corporation as a supplementary tax-triggering event)

For corporations owning real estate in Germany, a supplementary tax-triggering event has been defined based on the existing provisions for partnerships in Section 1 (2a) German Real Estate Transfer Tax Act: real estate transfer tax now becomes payable if at least 90% of the shares are transferred to new shareholders within 10 years. The observation period begins on or after 1 July 2021; share transfers before that date are not taken into account. Unlike in the past, where only the concentration (of at least 95%, in future: 90%) of the shares in a real estate-owning company in the hands of a single shareholder was relevant, all changes in the shareholder structure must be continuously observed and examined in future to determine whether 90% or more of the shares have been transferred to new shareholders within a period of 10 years. Once the 90% threshold is reached, real estate transfer tax becomes payable on the entire domestic real estate, rather than only on a pro rata basis. The notification obligation is incumbent upon the corporation whose shares have been transferred. However, the exemption provisions set out in Sections 3 to 7 German Real Estate Transfer Tax Act, which partly apply to Section 1 (2a) German Real Estate Transfer Tax Act, do not apply to Section 1 (2b) German Real Estate Transfer Tax Act, new version.

2. Introduction of a new Section 1 (2c) German Real Estate Transfer Tax Act (“stock exchange clause”)

Prior concerns about the future treatment of listed companies were at least partially taken into account by introducing a so-called “stock exchange clause”. Pursuant to Section 1 (2c) German Real Estate Transfer Tax Act, transfers of shares in corporations that are traded on a stock exchange within the EU/EEA or in a third country that has been classified by the European Commission as “equivalent” to the aforementioned places (this is currently the case for Australia, the USA and Hong Kong) do not trigger real estate transfer tax, provided the relevant transfer of shares is based on a transaction carried out on the respective stock exchange. In practice, this avoids the need to track and document the often unmanageable share transfers in these cases.

3. Supplementary tax-triggering events under Section 1 (2a), (3) and (3a) German Real Estate Transfer Tax Act (lowering of investment thresholds)

According to the current legal situation, the transfer of interests in partnerships owning real estate in Germany (Section 1 (2a)), the concentration of shares in corporations owning real estate in Germany (Section 1 (3)) and the concentration of economic participations, regardless of the legal form, (Section 1 (3a)) generally trigger real estate transfer tax if an investment threshold of 95% is reached or exceeded. This investment threshold will now be lowered to 90% as of 1 July 2021. If this threshold is reached, the entire real estate (and not just 90%) will again be subject to real estate transfer tax.

In addition, a further lowering of the investment threshold to 75% is aimed at in the medium term. A recommendation to this effect has been made to the German Federal Council by the Committee for Agricultural Policy and Consumer Protection (BR Drs. 320/1/21).

It should be noted in this respect that the old provisions continue to apply in parallel in certain cases in order to close application gaps. This is relevant, for example, if a change of shareholders in relation to at least 90% but less than 95% of the shares has taken place in a company before 1 July 2021. In this case, the old threshold under Section 1 (2a) will continue to apply until 30 June 2026, the old thresholds under Section 1 (3) and (3a) will continue to apply without a time limit.

4. Extension of waiting periods

The relevant observation period for the supplementary tax-triggering event for partnerships defined in Section 1 (2a) German Real Estate Transfer Tax Act has been 5 years to date. For acquisitions realised after 30 June 2021, a period of 10 years will have to be observed.

The all-clear can be given for so-called “old shareholders”, that is, shareholders for whom the hitherto applicable 5-year period has already ended on or before 30 June 2021. Conversely, this means that the 10-year period applicable in future will apply to shareholders for whom this is not the case.

Particular caution is required with indirect holdings: a corporation that (in)directly has an interest in a partnership owning real estate in Germany is also deemed a new partner if at least 90% of the shares in this corporation are transferred to

new shareholders (Section 1 (2a) sentences 3 to 5 German Real Estate Transfer Tax Act, new version). This also applies if the shares were transferred prior to 1 July 2021 (Section 23 (19) sentence 2 German Real Estate Transfer Tax Act, new version).

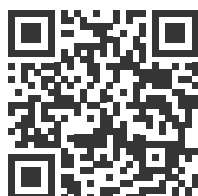
For real estate transfers to (Section 5 German Real Estate Transfer Tax Act) or from (Section 6 German Real Estate Transfer Tax Act) a community of joint owners (partnership), the post-transfer holding periods will also be extended from hitherto 5 to 10 years. The pre-transfer holding period has even been extended to 15 years in order to better counteract the “stretched acquisitions” that have been made in practice up to now (Section 6 (4) sentence 1 no. 3 German Real Estate Transfer Tax Act, new version).

5. No adjustments to the so-called group clause

Section 6a German Real Estate Transfer Tax Act, according to which no real estate transfer tax is payable under certain conditions in the context of intra-group restructurings, has not been changed in the course of the reform. Consequently, the hitherto applicable 5-year pre-transfer and post-transfer holding periods and the relevant investment threshold of 95% will continue to apply.

6. Real estate transfers within the period of retroactive effect for transformation tax purposes

In order to prevent undesirable arrangements in future where the legal entities involved in a transformation sell real estate located in Germany to each other for less than market value within the period of retroactive effect for transformation tax purposes, the assessment basis for real estate transfer tax will be determined in accordance with the German Valuation Act (Section 8 (2) sentence 1 no. 4 German Real Estate Transfer Tax Act, new version).



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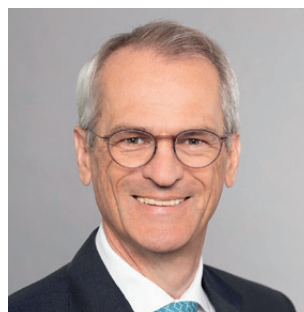


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