



# Global Tax Update

Germany

Deloitte Tohmatsu Tax Co.

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## MOF releases draft bill with postponed measures from 2015 tax bill

The MOF has released a draft bill that includes certain measures that were not approved as part of the 2015 budget.

On 20 February 2015, Germany's Ministry of Finance (MOF) issued a draft bill that contains several measures that originally were part of the 2015 budget but that were postponed, but it does not include other deferred measures, such as the introduction of an anti-hybrid and anti-double dip rule.

### (1) The draft bill includes the following:

- 1) A broadening of the intragroup restructuring exception to the change-in-ownership rules:

Under the change-in-ownership rules, net operating loss carryforwards, interest carryforwards and current year losses are forfeited if there is a "harmful change in ownership." The intragroup restructuring exception introduced in 2010 provides relief from loss forfeiture; under this rule, a harmful change in ownership will be deemed not to take place if there is a sole (100%) direct or indirect shareholder in both the transferring and the receiving entity.

Based on the wording of the existing rule and the interpretation of the German tax authorities, the intragroup restructuring exemption does not

apply where the ultimate parent company is involved in a transaction, since the ultimate parent typically has more than one shareholder (e.g. in the case of a listed company).

The MOF proposal would extend the intragroup restructuring exception to transfers where the 100% ultimate shareholder is involved and would broaden the application of the rule to transactions where the ultimate shareholder is a partnership or an individual. The content of the proposed rule is identical to the proposal that was discussed in 2014.

The amended rule would apply retroactively to share transfers that took place after 31 December 2009.

- 2) Real Estate Transfer Tax (RETT) rules for real estate held by partnerships:

RETT is triggered if 95% or more of the interest in a real estate-owning partnership is transferred directly or indirectly to new partners within a five year period. In such a case, the real estate-owning partnership is deemed to have transferred the real estate to a fictitious new partnership.

In a decision issued in 2013, the federal tax court (BFH) held that an "economic" approach should be used to determine whether there has been an

indirect change in the ownership of a real estate-owning partnership, under which both partnerships and corporations should be treated as transparent.

The BFH went a step further by holding that only a 100% direct or indirect change in ownership of the direct partners in the real estate-owning partnership would qualify as an indirect change in ownership under the applicable provisions of the RETT Act (introduction of an “ultimate ownership test”).

The proposed rule would codify the position of the tax authorities and abolish the BFH approach. According to the tax authorities and the wording of the proposal, separate tests would apply for corporate partners and for partnerships that are a partner of the real estate-owning partnership. For a corporate partner, an indirect ownership transfer would be deemed to take place if at least 95% of the shares in the corporation are transferred directly or indirectly to a new shareholder. For a partnership that is a partner, a harmful ownership transfer would be deemed to occur based on the partner’s pro rata indirect interest in the real estate-owning partnership.

While the wording of the proposal is identical to the 2014 proposal, the amended rule would apply prospectively, i.e. to share transfers taking place after the rule enters into force.

### 3) Reorganizations with “boot”:

Similar to the 2014 proposal, the draft bill includes a limitation regarding boot (i.e. nonshare consideration, such as cash or loan receivables) that a receiving entity provides to the transferor in certain tax-neutral reorganizations. The amendment would limit the boot to 25% of the book value of the contributed assets or a maximum amount of EUR 300,000 in a tax-neutral reorganization. To the extent the boot exceeds this threshold, the transaction would be treated as a taxable event.

The rule would apply retroactively to transactions taking place after 31 December 2014.

## **(2) The draft bill does not include the following:**

### 1) Introduction of an anti-hybrid and anti-double-dip rule:

As originally proposed, the federal government has appointed a task force to discuss the results of the final BEPS reports to be published in 2015 and to come up with a proposal on how to implement the final recommendations into German law. Legislative action is expected in late 2015 or in 2016.

### 2) Introduction of a 10% minimum shareholding requirement to qualify for the 95% participation exemption on gains from the sale of shares:

A proposal can be expected in the second quarter of 2015 as part of an initiative to reform the investment taxation.

### 3) Centralization of the competency for certain withholding tax reclaims based on EU law in the Federal Tax Office:

A task force has been appointed to discuss this point.

The federal government decided to move forward with this initiative and the draft bill was entered into the formal legislative process on March 25 .

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