

## **German Real Estate Transfer Tax Reform: A Brief Overview**

July 25, 2023

The German Federal Ministry of Finance has published a discussion draft on the amendment of the German real estate transfer tax. This amendment is in response to the reform of the German Act to Modernize the Law on Partnerships (Gesetz zur Modernisierung des Personengesellschaftsrechts (MoPeG)), which will fundamentally change the legal treatment of partnerships as of January 1, 2024, and thus will also have consequences under German tax law, specifically German real estate transfer tax. In particular, the discussion draft will address the taxation of share acquisitions in real estate (holding) companies, and specifically, it is about the so-called share deals. Whether the amendment of the real estate transfer tax proposed in the discussion draft properly addresses these issues, or if it misses the mark, remains to be seen.

In this **beinformed**, we wish to understand the draft to reform the German real estate transfer tax in general terms; we will have to shed light on the details later in an upcoming newsletter when the discussion draft is further developed in the legislative process.

### **New approach to the transfer of shares in real estate companies**

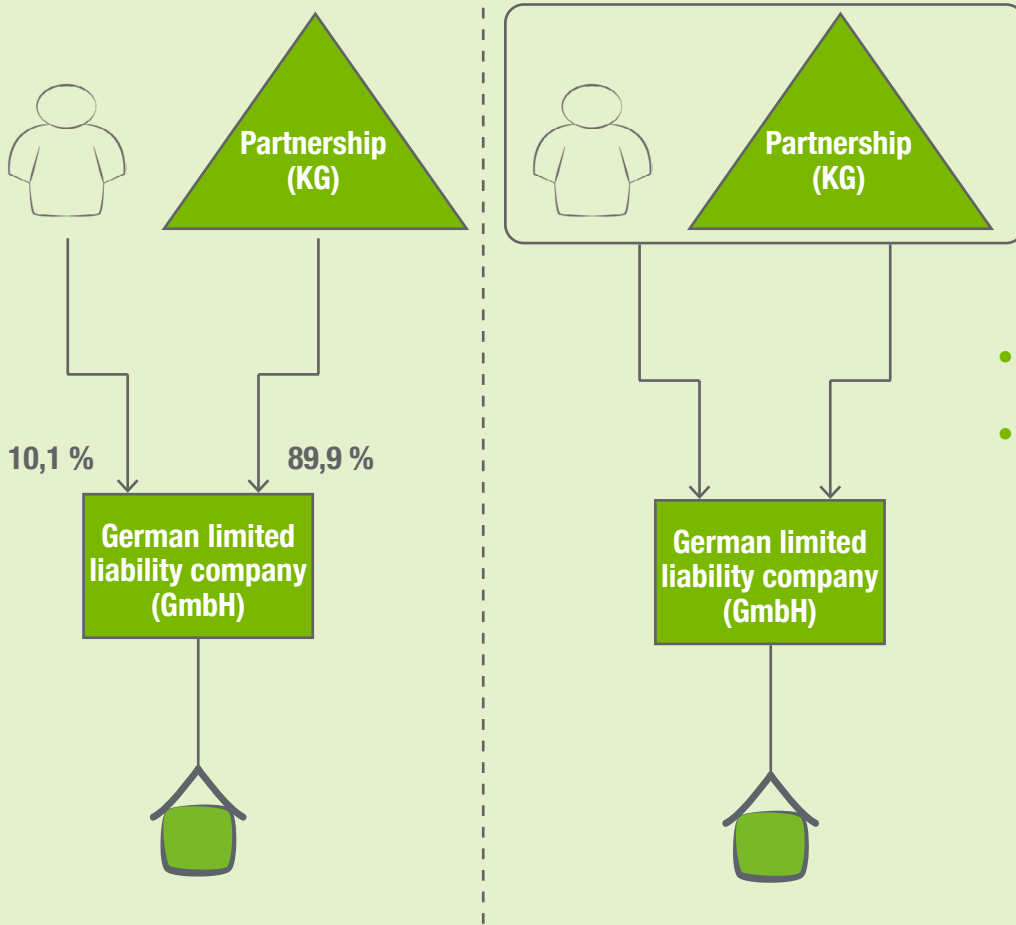
Under the current law there are fixed limits at which the transfer of shares in real estate companies is taxed as if the real estate itself had been transferred. A transfer of shares without triggering real estate transfer tax was generally possible, provided less than 90 % of the shares in the real estate company were transferred.

Now, under the new draft, real estate transfer tax is triggered if all shares (100 %) of a real estate company are transferred. Please note that in cases in which a small number of shares are retained and “serve the interest“ of the acquiring party, these retained shares will be disregarded and the share transfer will be treated like an acquisition of 100 % of the shares. The real estate transfer tax will apply in such case.

The draft also introduces the concept of an “acquisition group”. This includes co-investor arrangements, in which different parties have coordinated their acquisition of the shares both temporally (timing) and factually (objective). In such case, these co-investors will be treated as one person and subject to real estate transfer tax.



### Allocation at acquisition will be added together



- Several acquiring parties treated as one if acquisition coordinated
- Presumption of coordination if acquisition is related:
  - factually
  - or
  - temporally

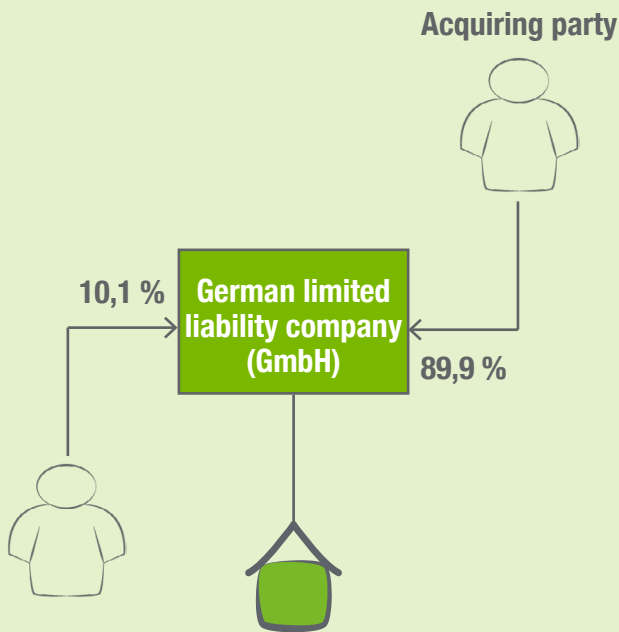
### New draft applies to transfer of units in investment funds

According to the draft, the transfer of units in an investment fund structured as a German Sondervermögen, which is set up as a contractual asset pool and does not have legal personality under German law, a so-called unit deal, is to be treated in the future in the same way as a transfer of shares in real estate companies. The investment fund will be treated as a company (with legal personality) as far as the transfer of units is concerned. However, the investment fund will not become a legal owner of the real estate for the purposes of real estate transfer tax; the real estate will merely be attributed to the investment fund in this case. The capital management company is to remain the legal owner if it is the owner of the property under civil law (held in trust for the investment fund). As a result, the real estate in the investment fund can trigger real estate transfer tax, on the one hand, if the units in the investment fund are transferred and, on the other hand, if the shares in the capital management company are transferred.

Generally, the transfer of the real estate itself (change of legal owner) will continue to be subject to real estate transfer tax. However, a transfer of the real estate to another investment fund managed by the same capital management company would not be a change of legal ownership, since the investment fund is treated like a real estate company only when transferring its own units, but unlike the other companies with legal personality, it does not become a legal owner of the real estate itself. The capital management company continues to be the legal owner in this scenario.



## 100 % acquisition despite retained shares



- Retained shares do not hinder 100 % transferred shares if retained shares serve interest of acquiring party.
- „Serving interest“ if
  - the fair market value of the retained shares is lower than the real estate transfer tax that would have been incurred in the event of a joint transfer
  - rights for retained shares are limited
  - party with the retained shares can exercise influence

A change of the capital management company without triggering real estate transfer tax (in practice of particular interest in the case of so-called service capital management companies) would not be possible. In this case, Section 100a of the German Investment Code (Kapitalanlagegesetzbuch) avoids the double incurrence of real estate transfer tax only if the units in the investment fund are transferred to the depository. The transfer of the management of the investment fund to another capital management company is not covered by the tax relief of Section 100a of the German Investment Code. In our opinion, under the new concept, an extension of the real estate transfer tax relief to these cases would also be systematically appropriate.

### Tax relief in connection with companies

Up to now, there have been special exemptions for partnerships. In this case, an exemption from real estate transfer tax is granted despite a change of legal ownership under civil law between the partners and the partnership, provided that, as calculated through the partnership, the transfer does not result in any shift in the real estate assets.

According to the draft, the tax relief for restructuring companies will be extended to all acquisition transactions and legal forms if the determining influence over the real estate does not change or if a person retains an interest in the real estate before or after an acquisition transaction.

This also means that the transfer of shares in one company (investment fund) to another company (investment fund) will remain exempt from real estate transfer tax if the shareholder (investor) retains its previously controlling influence after the transfer.

### Applicability as of January 1, 2024

The new concept with regard to share deals is to take effect for the first time for acquisition transactions that are realized after December 31, 2023.



## Oh, by the way!

According to the draft, the individual German federal states (Bundesländer) are authorized to introduce a reduced tax rate for the direct acquisition of real estate where the acquiring party of the real estate is a natural person and the acquired real estate is to be used for residential purposes after acquisition.

## What now?

The draft is not suitable as a basis for any structuring considerations at the moment. There is still too long a way to go before the actual legislative process. In a first step, the draft will be discussed at the level of the individual German federal states.

One thing is clear at the moment: If you want to restructure anyway and this does not trigger any real estate transfer tax under the current law, you should still undertake this restructuring by the end of this year. The likelihood that the German Real Estate Transfer Tax Act will change is definitely a given. The only thing we can't say yet is how it will look like in the end.

 **in touch: Any questions? Please do not hesitate to contact us!**



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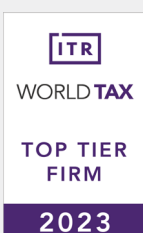
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