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Removing uncertainty with specific RETT insurance

The recent developments around the RETT structure used in connection with the acquisition of a residential portfolio in Berlin have created significant uncertainty among real estate investors. In this case, a member of the German Parliament has filed a criminal complaint against the investor alleging that the particular RETT planning was too aggressive. The investor used a foreign minority investor and chose a 89.9%/10.1% structure to protect against any impending legislative changes. However, it now is alleged that the minority investor is – for a number of reasons – not independent from the majority purchaser. Both, the RETT planning itself, but also the personal or corporate ties are not unusual in real estate transactions in Germany. In particular, with the increased use of so-called Unit Deals and similar structures where the analysis relies strictly on the legal independence of the co-owning parties, such issues may arise as well.

As an immediate result of this, several clients have started discussions concerning the availability of specific tax insurance for historical transactions to mitigate their risk in similar cases. Generally, insurers will want to see independent legal opinions describing the structure in question and confirming its legal permissibility. Despite the recent developments, no additional requirements are needed to obtain insurance covering RETT structuring and insurers specialising in specific tax insurance have confirmed that they remain keen to provide insurance solutions where possible and that there would be no additional burden from an underwriting perspective (i.e. the focus would still be the transaction documentation and any contemporaneous tax advice received). Furthermore, where there was no specific advice sought on the structure during the transaction, insurers may be able to look into this during underwriting, thus, eliminating the client's need to obtain an independent tax opinion. It must be noted, however, that this will lead to increased underwriting fees as well as an increase of the execution risk itself in the event of a negative opinion obtained during underwriting. Contingent tax cover does not necessarily need to be put in place at the time of the transaction and can be implemented retrospectively in most circumstances.

If you have concerns that a previous RETT structuring you have undertaken may also be subject to scrutiny or heightened interest from the German tax authorities in terms of its permissibility, please feel free to reach out to discuss potential specific tax insurance solutions.

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