

V. GERMANY, SPAIN, POLAND – NEW DEVELOPMENTS

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Taxand Real Estate Tax Seminar

> Dealing with distress and recovery from the downturn



AGENDA

- ❖ Economic Growth Acceleration Act passed legislative process on Dec. 22, 2009 with effect from 2010 onwards
 - ❖ Corporate Tax – loss carry-forward in case of share transfer
 - ❖ Interest Ceiling Rules
 - ❖ Real Estate Transfer Tax
 - ❖ VAT

- ❖ Introduction of German regulated real estate investment fund regime
 - ❖ Market position during and after the financial crisis of German regulated real estate investment funds
 - ❖ Legal concept and regulatory aspects
 - ❖ Tax aspects



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- ❖ Economic Growth Acceleration Act passed legislative process on Dec. 22, 2009 with effect from 2010 onwards



Economic Growth Acceleration Act (EGAA) – Loss Deductions

❖ Corporate Tax – treatment of tax losses in case of share transfer, Sec. 8c Corporate Income Tax Act

❖ General Rule

- ❖ 50 to 100 % share transfer – 100 % of tax loss-carry forwards and current year tax losses get lost
- ❖ 25 to 49,99 % share transfer – partially loose of tax losses in proportion to the shares transferred

❖ Restructuring Privilege

No restrictions in very limited cases if shares are acquired for restructuring the acquired corporation to prevent or abolish the company's illiquidity or overindebteness which it is required – in each case – to prevent material parts of the company's business organiation

- temporary implemented for 2008 and 2009

❖ Amendment by EGAA

Unlimited extension of the Restructuring Privilege for years 2010 onwards



Economic Growth Acceleration Act (EGAA) – Loss Deductions

❖ Corporate Tax – treatment of tax losses in case of share transfer, Sec. 8c Corporate Income Tax Act

– **Preservation of tax losses in case of inter-company restructurings / Amendment by EGAA**

Acquisition of shares will no longer result in the (partial) loss of accrued tax losses if the same taxpayer indirectly or directly holds 100 % of the shares in both the transferring and the acquiring entity.

- ❖ Thus, in case of consolidated group (headed by a single individual or a company) restructurings loss carry-forwards will survive!
- ❖ Consolidated group relief will not be granted if new shareholders join or third party shareholders participate in the transaction!

Economic Growth Acceleration Act (EGAA) – Loss Deductions

❖ Corporate Tax – treatment of tax losses in case of share transfer, Sec. 8c Corporate Income Tax Act

- **Preservation of tax losses to the extent hidden reserves are built in the business assets / Amendment by EGAA**

Independent from the application of the Consolidated Group Case (see previous slide) tax losses are preserved in the amount of built in hidden reserves on German based business assets:

- ❖ 50 to 100 % share transfer – 100 % of hidden reserves to be taken into account
- ❖ 25 to 49,99 % share transfer – hidden reserves in proportion to the shares transferred are to be taken into account

❖ Interest Ceiling Rules

- ❖ permanent increase of the tax deductible interest threshold of 3 million Euro as of 2010
- ❖ increase of percentage by which the equity ratio of a group company may fall short behind the equity ratio of the consolidated group from 1 to 2 %
- ❖ introduction of a so-called “EBITDA carry-forward” for so far not “used” (30%) EBITDA amounts for five years. Such EBITDA carry-forward would increase the EBITA of the following year and thus allowing an increasing interest deduction

- ❖ **Real Estate Transfer Tax (3,5 % / 4,5 % for Berlin) relief is granted as of 2010 in case of company reorganizations for transfer of real estate or shares in a real estate owning company if**
 - ❖ it is part of a reorganization transaction such as a merger, split-up, spin-off, hive down or transfer of property;
 - ❖ the company being reorganized has not acquired the real property within five years prior to the reorganization by way of a transfer of real estate, a transfer of shares or a consolidation of shares, and
 - ❖ within five years following the reorganization, the acquirer neither effects a transfer of real estate, a transfer or consolidation of shares with respect to the acquired real estate nor does he reduce his share in the real estate owning company.

Economic Growth Acceleration Act (EGAA) – VAT

- ❖ General VAT rate of 19 % is reduced to 7 % for short – term accommodation services as of 2010

- ❖ Based on press releases Hotels will use the benefit from the reduction (about 1 billion Euro) to

- ❖ reduce accommodation rates - about 21 %*

- ❖ invest in Hotel renovation and redecoration – about 57 %*

- ❖ “invest” into their employees – about 22 %*

* Data published by the German association of hotels and restaurants (DEHOGA) in 2009



AGENDA

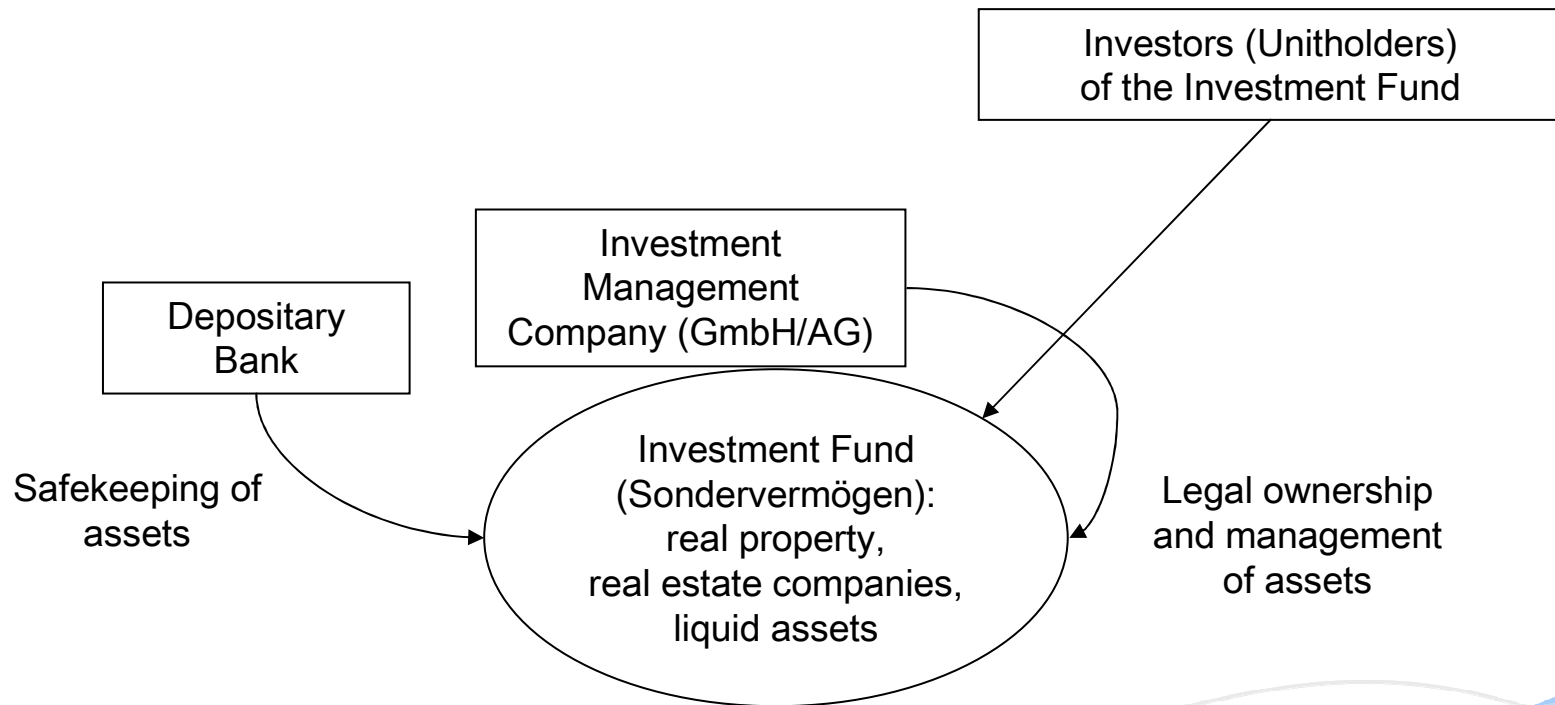
- ❖ Introduction of German regulated real estate investment fund regime



Market position of German regulated real estate funds

- ❖ German regulated real estate funds (open-ended funds) are very important market participants in the real estate investment business
 - ❖ Asset under management per year-end 2008 : 107 billion Euro
 - ❖ 44 Retail Funds: about 84 billion Euro
 - ❖ 121 Special (Institutional) Funds: about 23 billion Euro
- ❖ Open-ended funds do have a strong equity position given the regulatory regime they have to follow
 - ❖ Good credit rating in case of bank financing
 - ❖ Equity strength and ongoing capital contributions of private and institutional investors force the funds to invest as cash within a real estate fund waters down the real estate yield
 - ❖ As real estate funds cannot invest in credit products (e.g. structured bonds, ABS, CLN, MBS etc.) they were only slightly impacted by the last years' credit crunch on real estate financings

Legal concept of real estate funds under German Investment Act



Retail funds and special funds – regulatory aspects

- ❖ Retail funds and so-called “special funds”
- ❖ Retail funds: strict regulation under German Investment Act (“GIA”) with regard to investments, leverage, valuation etc.
- ❖ Special funds: most restrictions can be waived, e.g.
 - ❖ no 49% limitation for indirect investments via real estate companies (100% participations do not qualify as indirect investments!)
 - ❖ no 20 % limitation for development projects
 - ❖ no 50% limitation of leverage (but 50 % limitation of encumbrance remains valid!)
 - ❖ Risk diversification rules are limited to more than 3 real estate assets only (no 10/15/50 limits)
- ❖ Special fund status requires that all the investors are non-natural persons (for special fund tax status: number of investors has to be limited to 100)
- ❖ Any fund which does not obtain special fund status is deemed to be a retail fund

Tax Regime of German regulated investment funds

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Germany – NEW DEVELOPEMTS IN GERMANY

- **A German regulated investment fund** („Sondervermögen“) is treated as a corporate body for tax purposes according to German tax laws, but is exempt from corporate income and trade tax
- **Fund investors** are taxed on certain distributed and deemed distributed profits of the investment fund (no transparency concept as for partnerships; proceeds from a fund investment are taxed in the hands of its German investors depending on the details provided by the fund, e.g. dividend or DTT exempt component)
- From a German perspective the **investment fund** is a person entitled to treaty benefits under the OECD model convention
- Some countries have issued special guidance (e.g. France) how the fund is to be treated from their point of view
- Based on practical experience the Netherlands should accept the fund as a person under the Dutch/German treaty



Investment of Dutch tax resident investors into German real estate via a German regulated fund

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Germany – NEW DEVELOPEMETS IN GERMANY

Retail Fund	Special Fund
No limited tax liability for foreign fund investors	Limited tax liability resulting in -15,825 % corporate income tax rate including solidarity surcharge for corporate investors
No withholding tax on distributions to non-residents	26.375 % withholding tax on distributions of current profits, creditable against tax liability, refund of overpayment after filing of tax returns
No tax on alienation of fund unit	No tax on alienation of fund unit
No obligation of filing a tax return, no tax assessment	Obligation of filing a tax return

Use of „hybrid fund“ structures: special fund for regulatory purposes and retail fund for tax purposes investing into German real estate assets – careful structuring required due to anti-avoidance rules issued by German Fiscal Authorities in August 2009

