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Germany

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GERMANY

1. INTRODUCTION

Germany is a civil law, democratic-parliamentary republic, founded in 1949, and reunified with eastern parts in 1990. Consisting of 16 federal states, Germany is a member of the United Nations, G8 nations and European Union (EU).

The currency is the euro (EUR).

2. TRUSTS

Germany has not ratified the *Hague Convention on the Law Applicable to Trusts and on their Recognition*, 1 July 1985. There is no move to do so. As a civil law country, Germany does not recognise split ownership. Trusts cannot be registered in the land or commercial register. For tax purposes, trusts are treated like comparable civil law instruments and taxed like foundations or corporations. Gift or inheritance tax of up to 50 per cent arises on funds or assets donated to trusts. Distributions may be taxable both as gifts to and income of the beneficiaries.

If the trust fulfils the qualifications of a family foundation (i.e. more than half of the distributions to beneficiaries may be directed to family members), and at least one beneficiary is taxed as a German resident, trust income is assigned to the beneficiaries pro rata. As a result, beneficiaries may be liable for gift tax without receiving distributions. The aforementioned rules do not apply to family foundations with domicile or place of management in the EU or in the EEA, if the founder or the beneficiaries are not free to dispose of the foundation's property and if Germany and the state, where the foundation has its domicile or its place of management, entered into an agreement (based on Rule 77/799/EEC) in order to exchange the respective information necessary for taxation.

The main criteria for German taxation to be levied are German residence of settlor, beneficiaries or trustee; German nationality of settlor or beneficiaries; or previous residence in Germany during the last decade.

3. PROPERTY, ESTATE AND PROBATE

The test for applicability of the German law of succession for movable and immovable property is nationality, not residence or domicile. Thus, the estate of German citizens is generally subject to the German law of succession, which also governs distribution. Forced heirship rules apply to testate succession. Forced heirs are the surviving spouse, the testator's descendants or the testator's parents (if the testator leaves no descendants). Forced heirs are entitled to a sum depending on the value of the estate.

Heirs are vested with possession, management and distribution of the estate, but testators are free to appoint an executor. If the executor accepts office, the executor takes possession of the assets and has to manage and dispose of the estate. Execution can be ordered by the testator to last for decades.

Acceptance of inheritance is presumed, unless heirs repudiate inheritance within six weeks (six months for heirs residing abroad). Heirs

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NEW DEVELOPMENTS

Changes in the amended inheritance and gift tax law that were resolved in the course of 2009, have led to higher benefits for certain business property and a higher tax burden for other assets.

PRACTICE TRENDS

Following the German government's purchase of information about the foreign banking activities of German tax payers, and owing to increasingly severe punishments for tax fraud, more and more German tax payers are filing corrected returns in order to avoid criminal prosecution. Tax payers are also encouraged to correct returns by the new tax regime on capital gains from privately held property, which are subject to 25 per cent flat tax. There is, however, a recent move among government MPs to tighten the rules on corrected returns.

are personally answerable for the decedent's worldwide liabilities. If the estate is left to a majority of heirs they acquire assets and debts jointly until they distribute the estate.

Certificates of inheritance prove right of succession, and letters testamentary prove right of administration of estate. These certificates are often required by banks and other debtors.

4. TAXATION

a. Introduction

Tax legislation and collection in Germany operate only at the federal level.

b. Tax system: general concepts of tax regime

i. Inheritance and gift tax

German inheritance and gift tax is imposed on any transfer of property at death or by gift. The recipient of the bequest is liable for inheritance tax, whereas both the donor and the donee are liable for gift tax.

Tax rates differ depending on the relationship between decedent/donor and beneficiaries. For close relatives (e.g. children, spouses), they vary between 7 per cent and 30 per cent, for other relatives between 15 and 43 per cent and for unrelated persons, rates of 30 and 50 per cent apply. EUR500,000 received by a spouse and EUR400,000 received by a child are tax-free. Under certain circumstances, exemptions from inheritance tax also apply for a further EUR256,000 for a spouse and up to EUR52,000 for a child. Under certain circumstances, family homes used by spouses or children are tax exempt if personally used for ten years after the transfer.

The inheritance and gift tax law provides further exemptions for the transfer of business assets if at least half of the taxable value relates to assets that are treated as productive assets under the act. A tax credit of 85 per cent on the taxable base is granted if the transferee keeps the assets for five years, during which period the amount paid out to employees must reach 400 per cent of the yearly average of the five years before the transfer. The same treatment applies for the transfer of shares if the transferor, personally or together with associates, owns more than 25 per cent of all shares of a German or EU/EEC corporation. The transferee of business assets or shares

may opt for a full tax exemption leading to further requirements.

ii. Income tax

Residents are taxable on the basis of worldwide income, whereas non-residents are liable to tax on source income. Individuals are resident if Germany is their home, place of dwelling or habitual place of abode (i.e. a presence in Germany for more than 183 days in a year). An entity is resident if either its legal seat or place of management is in Germany.

The German *Corporate Tax Act* lists various types of entities. Partnerships are treated as transparent and are not taxed as separate entities, with partners taxed individually. German thin capitalisation rules are being changed. An Interest Deduction Limitation system is being implemented to apply to all business units.

Individuals are subject to income tax, which applies to income of seven different categories, less allowable personal deductions. Exempt income includes payments from health, accident and disability insurances, statutory pension plans, social security distributions and scholarships for scientific research.

Richter

Just nine years from its founding in Munich, RICHTER ranks among the leading firms for national and international tax advice, corporate finance, corporate law and private clients. In our offices in Munich, Frankfurt and Stuttgart we currently employ nearly 180 partners, associates and support staff, including 20 partners and 65 specialists.

The firm's philosophy is to be implementation-oriented, with a strong focus on customers' needs. We develop the individual solution that is right for you and implement it together with you. At all levels, our professionals are among the best in their individual specialties. The company's flat hierarchies promote a partner-like mindset of shared responsibility. This leaves scope for individualism and fosters identification with the tasks at hand. Commitment, efficiency and willingness to perform superior work thrive on this approach.

With regard to national and international tax advice and tax compliance we offer our clients the full range of services. The firm's main areas of expertise are advising wealthy private individuals, professionals, wealthy families and their family offices. A particular strength of the firm is to develop excellent and creative solutions for each individual client not only regarding tax issues but also in every other legal matter. Furthermore, RICHTER is one of the leading firms when it comes to succession, funds and trusts. In these specific fields, we provide advice on acquisitions and sales of upscale and larger medium-sized companies.

Moreover, we advise a number of entrepreneurial families and their family offices on succession, tax consulting and structuring, private placements, private-equity investments and trusts, relocation of residence and transition. One substantial focus of our work is advising on and monitoring our clients' asset management issues. Our professionals assist our clients in finding the best portfolio manager. They make clients' assets completely transparent, not only in terms of stocks and bonds but real estate or private equity as well.

To keep pace with the internationalization of the capital markets and cross-border issues, we closely cooperate with our informal network of "best friends" as well as with the members of STEP. During the first two years after the branch's formation RICHTER partner Peter Schulz was the secretary of the Frankfurt branch of STEP Germany.

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Corporations are subject to tax on worldwide business income with capital contributions exempt at the company level. At the shareholder level, capital repayments that do not include any dividend component are tax-exempt.

Partnerships and sole proprietorships are granted a preferential treatment of retained profits. The reduced tax rate of 28.25 per cent (plus solidarity surcharge) will apply upon request by the partner(s).

Individual income tax is imposed at progressive rates. Starting at EUR8,004, the marginal rate rises from 14 per cent to 42 per cent for income over EUR52,882. Income over EUR250,731 is subject to tax of a 45 per cent tax. For jointly assessed spouses, annual taxable income levels are doubled. Employers are required to withhold prepayment of the final income tax ('wage tax') from employees' salaries.

Regarding *capital gains* (from privately held property), irrespective of whether long or short-term, there is a flat tax (*Abgeltungsteuer*) with a uniform rate of 25 per cent. The same flat tax applies to *income from capital investments* (i.e. dividends, interests, certificates/financial innovations (under certain conditions), proceeds from participating loans or silent partnerships). There is an option for individual tax rate treatment. Income-related expenses are not deductible. This tax is deducted at the source. Foreign withholding tax will be credited. The corporate income tax rate for both retained and distributed profits is 15 per cent (plus trade tax, 14 per cent and solidarity surcharge). Dividends and other profit distributions paid by German resident companies are subject to creditable 25 per cent withholding tax. Withholding tax on interest and income from silent partnerships is 25 per cent as well as interest paid by a bank. A 'solidarity' surcharge of 5.5 per cent is levied on computed taxes.

Individuals and corporations are required to file tax returns. Usually, the tax year is the calendar year.

iii. International tax matters

In general, all property is subject to inheritance or gift tax if the decedent, donor or beneficiary (i.e. heir, legatee, or donee) has a residence in Germany. German citizens living abroad are treated as residents for five years after abandoning their residence in Germany. If the decedent or donor was subject to unlimited income taxation as a German citizen for a period of five years within the last ten years before becoming not subject to unlimited income taxation, and this person is afterwards domiciled in a low-tax country, then the person is taxable in Germany on property received from

foreign family foundations or foreign subsidiaries of German companies, but not from foreign companies. If none of the above-mentioned persons is a German resident, tax is limited to received property situated in Germany.

As most German tax treaties do not cover gift and/or inheritance tax, German inheritance tax law grants a foreign tax credit only for foreign inheritance tax (not for gift tax) paid on foreign property, as defined by German law. Even so, the property is included in the German inheritance tax base.

Dividends and capital gains derived by residents are fully exempt from corporate income tax, except that a 5 per cent lump sum of gross dividends and capital gains is added back to corporate taxable income.

Non-residents are subject to German income tax on:

- business profits
- remuneration for services
- dividends or income from silent partnerships
- interest from resident payers
- rent from immovable property, and
- royalties.

Withholding tax on non-residents is final, although tax treaties may provide reduced tax rates.

Non-resident companies are subject to German corporate income tax at the same rates as resident companies if they derive German source income that is not subject to a withholding tax but is calculated as the difference between profits and related expenses.

5. ANTI-MONEY LAUNDERING

Money laundering is a criminal offence. Implementation of *Directives 2005/60/EC* and *2006/70/EC* was completed in 2008. Banks, financial service institutions, insurance companies, investment companies as well as lawyers, tax consultants, auditors, estate agents, etc. must keep records of details of persons, especially when establishing a business relationship and in transactions of at least EUR15,000. If persons are suspected of money laundering, a report must be made to the law enforcement agency.

6. RESOURCES

Federal Ministry of Justice www.bmj.bund.de
English translations of selected statutory acts
www.gesetze-im-internet.de/Teilliste_translations.html

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