

# Germany

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## TAXATION - GENERAL

### 1. When does the tax year start and finish in your jurisdiction and what are the tax payment dates/deadlines?

The tax year runs from 1 January to 31 December.

Taxpayers must file a yearly tax return by 31 May in the year following the tax year. Taxpayers can apply to extend this deadline.

Taxpayers must pay income tax within a month after the tax authorities have assessed their liability. Taxpayers whose income is not predominantly subject to a withholding tax (withholding taxes apply, for example, to employment and investment income) must make advance payments every three months.

## TAXES ON GAINS AND INCOME

### 2. How are gains on property/assets owned by a foreign national taxed? What are the capital gains tax rates?

Non-residents pay tax on the following:

- Capital gains on business assets (including commercial property and interests in companies) if the assets are “effectively connected” with a permanent establishment in Germany.
- Capital gains on privately held immovable property situated in Germany that has been held for less than ten years.
- Capital gains on privately held shares in German corporations, if these form a substantial shareholding of at least 1%.

Taxpayers pay differing rates of capital gains tax at income tax rates ranging from 15% to 45%, depending on their individual tax bracket (see *Question 3*).

Generally, non-residents do not pay tax on other capital gains. For the meaning of non-resident in the context of this chapter, see *Question 15*.

### 3. How is income received by a foreign national taxed? Is there a withholding tax? What are the income tax rates?

Non-residents pay tax on income from a German source, for example:

- Income effectively connected with a permanent establishment in Germany.
- Income from employment in Germany (including self-employment).
- Income from German real estate.
- Dividends from German companies.

Non-residents do not pay tax on non-business interest income.

Non-residents pay withholding tax at a minimum of 20% (plus the solidarity surcharge of 5.5% of the relevant tax amount) on German capital income and income from employment. The solidarity surcharge is an extra amount payable to finance the German reunification.

From 2009:

- There will be a flat tax of 25% (plus the solidarity surcharge) on capital income. This will take the form of a withholding tax.
- Non-residents receiving income from German sources will be subject to the progressive tax rate (15% to 45%, plus the solidarity surcharge).
- Non-residents will not benefit from the annual tax-free allowance of EUR7,664 (about US\$10,955).

## INHERITANCE TAXES

### 4. What is the basis of the inheritance tax or gift tax regime? Please explain whether the rate of tax depends on:

- How much the beneficiary receives.
- Who the beneficiary is.
- How wealthy the beneficiary is.

Each beneficiary is liable for inheritance tax (IHT) or gift tax on the value of the share of the estate received, regardless of his personal wealth.

Generally, there are personal allowances for relatives (see *Question 6*).

## 5. Does the inheritance tax or gift tax regime apply to foreign owners of property/assets?

If neither the transferor nor the beneficiaries are residents, IHT and gift tax is due on transferred property situated in Germany (for example, real estate and business property). However, they are eligible for a tax-free allowance of EUR1,100 (about US\$1,570).

The transfer of a bank account does not give rise to IHT or gift tax.

## 6. What are the inheritance tax or gift tax rates? Please consider the following:

- **Tax-free allowances.**
- **Exemptions (for example, for inheritances by spouses).**
- **Techniques to reduce liability (for example, gifting assets during the testator's lifetime, selling assets but retaining a life interest, establishing a trust or purchasing through an offshore company).**
- **Any other ways to reduce liability.**

Individuals pay IHT and gift tax at a rate of 7% to 50%, depending on the relationship between the transferor and the beneficiary, and the value of the share of the estate received.

Spouses and descendants pay IHT and gift tax at a rate of 7% to 30%, depending on the value of the share of the estate received.

The following tax-free allowances apply:

- **Spouses.** They receive a personal allowance of EUR307,000 (about US\$438,840) and a maintenance allowance of up to a maximum of EUR256,000 (about US\$365,940).
- **Descendants.** They receive a personal allowance of EUR205,000 (about US\$293,040) and an age-dependent maintenance allowance.

There is no tax on a lifetime transfer of the family home to a spouse, or on redistribution between the spouses of gains made during the course of marriage.

Liability for IHT can be reduced by:

- Transferring business property and real estate, particularly where assets have a high leverage. Leverage is the ratio of bank debt to the amount of equity investment in the company. A highly leveraged transaction will involve a proportionately large amount of bank debt.
- Making several lifetime gifts (as beneficiaries are granted the gift tax allowances every ten years).

## 7. Are there any other taxes on death or on lifetime gifts?

Generally, no other taxes are due on death or on lifetime gifts. However, if business assets are converted into private assets in the course of the transfer, capital gains may be taxed.

## BUYING PROPERTY

## 8. Are there any other taxes that a foreign national needs to consider when buying assets/property in your jurisdiction? For example:

- **Purchase and gift taxes.**
- **Annual rates.**
- **Wealth taxes that apply to foreign nationals with assets above a certain value in your jurisdiction.**

A transfer tax of 3.5% applies on:

- The acquisition of real estate.
- The acquisition of a substantial shareholding (at least 95%) in a company holding real estate.

At the discretion of the relevant local authority, an annual property tax of 1% to 4% may be due on the value of real estate (as assessed by the tax authorities).

There is no wealth tax.

## 9. What property holding structures are available in your jurisdiction?

The following property holding structures are available in Germany:

- Corporations.
- Fiscally transparent partnerships (that is, tax is levied on the individual investors rather than the fund itself).
- Foundations (where the relevant property is used for charitable causes).

## INTERNATIONAL AGREEMENTS

## 10. Has your jurisdiction entered into one or more double taxation treaty(ies) with other jurisdictions, so that tax suffered in your country is deducted from the other jurisdiction's tax liability and vice versa?

In relation to income and wealth taxes, Germany has entered into double taxation treaties with about 90 countries, including the US.

In relation to IHT and gift tax, Germany has entered into double taxation treaties with the following states:

- Denmark.
- Greece.
- Austria (this treaty has been ineffective since 1 August 2008 and no longer applies).
- Sweden.
- Switzerland.
- US.
- France (not yet ratified).

## SUCCESSION REGIMES

### 11. What is the succession regime in your jurisdiction (for example, is there a forced heirship regime)?

If there is no will, the intestacy rules apply (see *Question 36*).

By making a will an individual can choose his heirs and determine what share each heir receives. He can also give to a person the right to make a claim against the heirs, without making that person an heir. This claim can be for an amount of money, a share of the deceased's estate, an item or anything else.

There is a forced heirship regime, under which the following categories of relatives are entitled to make a claim for a compulsory share (*Pflichtteil*) of the deceased's estate, if they are excluded from the testator's will or if the share granted to them is less than their compulsory share:

- Descendants.
- Spouse.
- Civil partner.
- Parents.

A relative's compulsory share generally amounts to 50% of the value of that relative's share on intestacy. It is a monetary claim and not a claim for a share of the estate.

If the deceased is not survived by any of these individuals, he can freely distribute his whole estate. Otherwise, he can freely distribute 50% of his estate.

### 12. If there is a forced heirship regime in your jurisdiction, please state whether:

- It can be avoided (for example, by buying assets through an offshore or other entity and/or holding assets in joint names).

- It takes into account assets received by beneficiaries in other jurisdictions.
- The forced heirship rights are mandatory on the forced heir or whether the forced heir can agree to a different distribution during the testator's lifetime.
- There are any other ways for a foreign owner of assets to avoid the forced heirship regime.

The compulsory share comprises all assets governed by German succession law (regardless of the beneficiary's residence). The forced heirship regime can therefore be avoided by buying assets that are situated abroad (for example, foreign real estate) and that German succession law does not govern.

A forced heir can renounce his right to his compulsory share. He can do this during the testator's lifetime by signing a contract with the testator before a notary public. If the testator has died, a forced heir can refrain from claiming his compulsory share.

A foreign owner of assets can avoid the forced heirship regime by avoiding German succession law (for example, by holding German real estate through a company).

### 13. Are property/assets owned by a foreign national subject to your succession laws or the laws of their original country?

Under German conflict of law rules, the applicable succession law is that of the deceased's nationality.

If the deceased was a foreign national, German succession law applies if the law of the deceased's nationality provides for a reference back to Germany (*renvoi*). This may be the case, if one of the following criteria is met:

- The deceased was domiciled in Germany at the date of his death.
- The deceased's habitual abode was in Germany at the date of his death.
- The deceased held property or assets in Germany at the date of his death.

### 14. Do your courts accept a reference back to your jurisdiction where your laws have referred the succession question back to the foreign national's home country and that country's courts have refused jurisdiction because the question concerns immovable property?

The German courts generally accept a reference back, particularly in relation to immovable property located in Germany (see *Question 13*).

**DOMICILE AND RESIDENCE****15. Does your jurisdiction have concepts of residence and domicile? In what context(s) are they relevant and how do they impact on a taxpayer?**

An individual is a German resident if he has a permanent home or habitual abode in Germany. Residence is assessed using objective criteria and triggers income, IHT and gift tax liability on the resident individual's worldwide income and assets.

**16. Does your jurisdiction impose any tax when a person leaves (for example, an exit tax)? Are there any other consequences of leaving (particularly with regard to individuals domiciled in your jurisdiction)?**

Those who have been resident in Germany for ten years or more must pay an exit tax on capital gains on substantial shareholdings (a shareholding amounting to at least 1% of the company's total shares). If a German citizen emigrates to a tax haven he is subject to an extended tax liability on income from German sources for ten years after emigration.

German citizens are generally subject to German IHT and gift tax for five years after emigration (ten years if they emigrate to the US). If a German citizen emigrates to a tax haven he is subject to an extended IHT and gift tax liability on assets located in Germany for ten years after emigration.

**17. Does your jurisdiction have any particular rules affecting temporary residents?**

Temporary residents are treated as residents if they have a permanent home or habitual abode in Germany (*see Question 15*).

**OVERSEAS PROPERTY****18. How are residents in your jurisdiction with property/assets overseas taxed?**

Generally, German residents pay tax on income from foreign property and assets. The provisions of double tax treaties will generally prevent double taxation.

**TRUSTS****19. Are trusts (or an equivalent structure) recognised in your jurisdiction? Please describe the trust (or equivalent structure), including:**

- **How it is taxed.**
- **How its residence status is established.**

Trusts are generally not recognised in Germany (*see Question 20*).

However, the following can trigger IHT and gift tax:

- Trusts created by residents.
- Trusts comprising assets located in Germany.
- Distributions to beneficiaries during the trust period or on the trust's dissolution, if the beneficiary is a German resident.

German corporation tax may be due on:

- Income received by a foreign trust from German sources.
- The worldwide income of a foreign trust, if its place of management is in Germany and if certain other conditions are met.

Income received by a foreign trust can be attributed to the settlor or the beneficiaries if they are German residents.

**20. Does your jurisdiction recognise trusts created for foreign persons that are governed by the law of another jurisdiction?**

Trusts are generally not recognised in Germany, as Germany does not recognise the HCCH Convention on the Law Applicable to Trusts and on their Recognition 1985 (*see Question 19*). Therefore, German property law does not recognise the transfer of assets located in Germany to a trust. In these circumstances, for civil law and tax purposes, the terms of the trust are interpreted in accordance with German law.

**21. What are the tax consequences of importing/exporting a trust to/from your jurisdiction?**

A trust can be imported into Germany by transferring its effective place of management to Germany. In that case, an imported trust can be subject to unlimited corporation tax liability in Germany.

Trusts cannot be exported, as German law does not provide for the creation of trusts (*see Questions 19 and 20*).

**WILLS AND ESTATE ADMINISTRATION****22. Is it essential for an owner of assets in your jurisdiction to make a will in your jurisdiction? Does the will need to be governed by the laws of your jurisdiction?**

If an individual is happy for his estate to pass in accordance with the intestacy rules, it is unnecessary to make a will. Under the intestacy rules, the deceased's estate is distributed among his relatives and spouse or civil partner (*see Question 36*). If an individual is not content with the intestacy rules, he should make a will.

Germany recognises the HCCH Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions 1961. A will is valid if it complies with the law of any of the following:

- The state where the testator made the will.
- The testator's nationality.

- The testator's domicile or habitual abode (*see Question 15*).
- The location of the assets (in the case of real estate).

**23. What are the formalities for making a will in your jurisdiction? Do they vary depending on the nationality, residence and/or domicile of the testator?**

Under German law, there are two valid forms of will:

- **Holographic.** This is completely handwritten, dated and signed by the testator.
- **Public will.** This is signed before, and certified by, a notary public.

Neither form of will requires a witness.

A testator can also enter into a contract of succession with another person or a joint will with his spouse or civil partner. A contract of succession must be signed before, and certified by, a notary public (a handwritten contract does not meet the formal requirements).

**24. Is it possible to make a post-death variation (that is, are there any special rules which apply if testamentary provisions or the provisions of intestacy rules are varied after the date of death by the agreement of the beneficiaries, or are such variations treated as lifetime dispositions by the beneficiaries)?**

It is not possible to make a post-death variation.

An heir can sell his share in the estate after the death of the testator by entering into a contract before a notary public.

If a beneficiary does not want to receive his portion of the estate, he must disclaim his right within six weeks after he receives notice of the death of the deceased and the inheritance. If the deceased had his habitual abode in a country other than Germany or the heir was abroad when the period began to run, the time limit is six months. The beneficiary must disclaim his right before the probate court or a notary public.

**25. Please describe how/to what extent wills made in another jurisdiction are recognised as valid/enforced in your jurisdiction. Does your jurisdiction recognise a foreign grant of probate (or its equivalent) or are further formalities required?**

Wills made in another jurisdiction are recognised in Germany (*see Question 22*). However, foreign grants of probate are not recognised. An heir must ask the competent probate court to issue a German certificate of inheritance.

**26. Are there any particular practical issues that are relevant where individuals from another jurisdiction die in your jurisdiction?**

German probate courts only have jurisdiction over an estate if German law governs the succession. However, if the law of another country governs the succession, they will issue a certificate of inheritance limited to assets and property located in Germany.

**27. What is the extent of the role of the executor(s) and what powers does he have? Who is responsible for the administration of the estate or does it vest in the heirs without vesting initially in the personal representatives?**

A testator can appoint an executor (*Testamentsvollstrecker*) if he wishes. German law gives broad powers to executors, but the testator can limit these powers. For example, an executor can be given the power to:

- Distribute the estate.
- Administer a single bequest.
- Administer the estate for a defined period of time (for example, up to the date of the death of the executor or until naming a successor executor who may be appointed within 30 years of the testator's death).

The estate automatically vests in the heirs on the deceased's death. If there is no executor, the heirs administer the estate.

**28. What is the procedure on death in your jurisdiction for tax and other purposes in terms of:**

- Establishing title and gathering in assets (including any particular considerations for non-resident executors)?
- Paying taxes?
- Distributing?

The deceased's will, and other dispositions taking effect on death, must be filed with the probate court (unless they are already in its custody).

The probate court will officially read the will and disclose its contents to the heirs. After the will has been read (or, in the case of intestacy, immediately) the heirs can ask the probate court for a certificate of inheritance. This names the heirs, their share in the inheritance and the executor (if the testator has appointed one; *see Question 27*). If German law governs the succession, the probate court will issue a certificate. If the law of a foreign jurisdiction governs the succession, the probate court will issue a certificate relating only to assets and property located in Germany (*see Question 26*). The certificate of inheritance gives the heirs (or the executor) the right to gather the assets.

If an executor is appointed, the executor can ask the probate court for a certificate of executorship. This gives the executor the right to carry out his duties.

The beneficiaries (or executor) must file a notice of inheritance with the competent tax authority within three months of receiving notice of the succession.

The estate is distributed by agreement between the heirs. There is no time limit for distribution. Until distribution, the estate is the joint property of the heirs.

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### 29. Are there any time limits/restrictions/valuation issues that are particularly relevant to an estate with a foreign element?

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The time limit for disclaiming an inheritance is six months if either:

- The deceased had his habitual abode in a country other than Germany.
- The heir was abroad when the notice period began to run.

(See Question 24.)

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### 30. Is it possible for a beneficiary to challenge a will/the executor/the administrators? If so, how?

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A beneficiary or potential beneficiary can challenge the validity of a will before a civil court. If the court sets the will aside, the intestacy rules apply (if there is no other valid will in existence) (see Question 36).

Executors must report regularly to the heirs. In the case of misconduct or breach of duty, the heirs can ask the probate court to appoint an alternative executor.

## CO-OWNERSHIP

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### 31. What are the laws regarding co-ownership and how do they impact on taxes, succession and estate administration?

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German law recognises co-ownership but this has no impact on taxes, succession or estate administration.

## FAMILIAL RELATIONSHIPS

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### 32. What is the relevance of matrimonial regimes in trust or succession law (that is, what regimes, if any, are there)? Are the rights of cohabitants/civil partners (whether in same-sex couples or otherwise) in property or other assets protected by law?

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There are three matrimonial regimes:

- **Community of surplus.** This is the statutory matrimonial regime. Property is separated, but the spouses share the gains

on the property between them equally, until the community of surplus is terminated.

- **Separation of property.** The spouses agree, by matrimonial agreement, that the property of each spouse is completely separated.
- **Community of property.** The spouses agree, by matrimonial agreement, that most of the property of each spouse becomes joint property. This matrimonial regime is unusual.

Matrimonial regimes are ended by divorce, death or change of matrimonial regime through a matrimonial agreement. IHT and gift tax are not due on the payment of accrued gains in the case of a community of surplus.

The spouse's share on intestacy is influenced by the matrimonial regime and, as a result, the compulsory share is affected (see Questions 11 and 36).

There are comparable property regimes for civil partners.

There are no comparable property regimes for cohabitants.

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### 33. Please describe how the following terms are defined in law:

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- **Divorced.**
- **Married.**
- **Adopted.**
- **Legitimate.**

These terms are not specifically defined in law.

#### Divorced

Divorce is the dissolution of a marriage by decree. A marriage is dissolved on the day the decree obtains legal force.

#### Married

A couple are married if:

- They marry before a registrar.
- The couple are both 18 years or older at the time of marriage. The family court can permit a minor above the age of 16 to marry a person of 18 years or older.
- There is no bar to marriage (for example, neither partner is already married to another person).
- The marriage has not been divorced or annulled.

#### Adopted

An adopted person is a person who has been legally accepted by another person or a couple as his or their child. Under German law there are different rules for the adoption of a minor and the adoption of an adult.



The adoption of a minor must be for the benefit of the child. Generally, the adoptive parents, the natural parents and the child himself (if he is over 14 years of age) must agree to the adoption. The court, on petition of the adoptive parents, decrees the adoption. The adopted child is then treated legally as a natural child of the adoptive parents and his rights in relation to his adoptive parents extend to the families of his adoptive parents. The adopted child ceases to be the child of his natural parents and loses his rights in respect of them.

The adoption of an adult must be morally justified and it must be expected that a parent-child relationship will develop. Both the adopted adult and the adoptive parents must petition the court. The adopted adult is treated as related to the adoptive parents but not to their families. The adopted adult retains his rights in relation to his family of birth.

### Legitimate

A child is legitimate if he was born to married parents.

## MINORITY

### 34. What rules apply during the period when an heir is a minor?

In Germany, children under 18 years are minors.

Parents usually have joint custody of their child. Parents with custody administer the minor's estate, including their inheritance. If the minor and the parents are heirs of the same testator, it may be necessary to appoint a guardian to distribute the estate.

A testator can name in his will a person other than the minor's parents to administer the minor's inheritance. If the testator does not name a person, the court will nominate a guardian.

## CAPACITY

### 35. What happens when a person loses capacity? Does your jurisdiction recognise powers of attorney (or their equivalent) made under the law of other jurisdictions?

When a person loses capacity a guardian is appointed to represent that person in all legal matters, supervised by a court. The applicable law is that of the nationality of the incapacitated person.

A power of attorney is recognised in Germany if it complies with the law of the nationality of the incapacitated person.

## INTESTACY

### 36. What different rules, if any, apply to the intestate?

On intestacy, the order of succession is as follows (each of the following categories precludes the subsequent heirs from receiving a share of the deceased's estate):

- Children of the deceased and their descendants.
- Parents of the deceased and their descendants.
- Grandparents of the deceased and their descendants.
- Great-grandparents of the deceased and their descendants.

Relatives within a particular category inherit in equal shares (*per stirpes*).

The surviving spouse (or civil partner) also has a right of inheritance, determined by the matrimonial regime:

- **Community of surplus.** The surviving spouse is entitled to:
  - 50% of the inheritance if relatives in the first category (*see above*) survive;
  - 75% of the inheritance if there are no surviving relatives in the first category, but relatives in the second category survive.
- **Separation of property or community of property.** The surviving spouse is entitled to:
  - 25% of the inheritance if relatives in the first category survive;
  - 50% of the inheritance if there are no surviving relatives in the first category, but relatives in the second category survive.

If there is a separation of property regime and the surviving spouse is entitled together with one or two children of the deceased, the surviving spouse and each child inherit *per stirpes*.

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