The International Comparative Legal Guide to:
Private Client 2012

A practical cross-border insight into private client work

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1 Pre-entry Tax Planning

1.1 In Germany, what pre-entry estate and gift tax planning can be undertaken?

As German inheritance tax (IHT) and gift tax applies if either the transferor or the beneficiary is resident in Germany (see section 3), any gifts should be made before any of the individuals involved becomes resident in Germany. Moreover, as the transfer of assets to an irrevocable and discretionary trust (or private foundation) is treated as a taxable gift (see question 6.2), such transfers should also become effective before the settlor becomes resident in Germany.

1.2 In Germany, what pre-entry income tax planning can be undertaken?

As an individual becomes subject to German income tax with his worldwide income after his entry into Germany (see question 2.3), any income (in particular capital gains) should be realised before becoming resident in Germany in cases where the individual finds himself in a more advantageous tax situation before his relocation. However, with regard to business assets or real estate, gains from the sale of these assets will, in many cases, not become taxable in Germany where a tax treaty with the state in which such property is situated is applicable. Due care should be taken where trusts or private foundations are set up before a relocation to Germany, as German tax law provides for special rules which allow the allocation of such trust's or foundation's income to the settlor or the beneficiaries if these individuals are resident in Germany. However, certain "escape rules" apply where the relevant entity is situated in another Member State of the EU or EEC.

1.3 In Germany, can pre-entry planning be undertaken for any other taxes?

This is not applicable in Germany.

2 Connection Factors

2.1 To what extent is domicile relevant in determining liability to taxation in Germany?

German law does not recognise the concept of domicile.

2.2 If domicile is relevant, how is it defined for taxation purposes?

See question 2.1.

2.3 To what extent is residence relevant in determining liability to taxation in Germany?

In Germany, tax liability is determined by the concept of residence. The resident individual's worldwide income and assets are subject to:

- Income tax.
- IHT and gift tax.

2.4 If residence is relevant, how is it defined for taxation purposes?

Residence is assessed using objective criteria. An individual is a German resident if he has either a permanent home or his habitual abode in Germany. Basically, a person is deemed to have his habitual abode in Germany if he spends more than six months in Germany without any significant gaps.

2.5 To what extent is nationality relevant in determining liability to taxation in Germany?

Basically, German nationality does not trigger any tax liability in Germany. However, German citizens may be liable to extended tax liabilities after emigration (see question 7.4).

2.6 If nationality is relevant, how is it defined for taxation purposes?

See question 2.5.

3 General Taxation Regime

3.1 What gift or estate taxes apply that are relevant to persons becoming established in Germany?

Persons becoming established in Germany are treated as residents if they have a permanent home or habitual abode in Germany. German IHT or gift tax applies if either the transferor or the beneficiary is resident in Germany.

IHT and gift tax rates range from 7% to 50% depending on the relationship between the transferor and the beneficiary and the value of the gift or the share of the estate. Spouses and descendants pay IHT at a rate of 7% to 30%.

3.2 How and to what extent are persons who become established in Germany liable to income tax?

Persons becoming established in Germany are treated as residents if they have a permanent home or habitual abode in Germany. The resident individual's worldwide income is subject to income tax.

There are seven types of income:

- Income from agriculture and forestry.
- Income from trade or business.
- Income from self employment.
- Income from employment.
- Income from capital and capital gains.
- Rental income.
- Other income (e.g. income from a pension).

The tax rate ranges from 14% progressively to 45%. A basic personal allowance of the taxable income is not subject to taxation (€8,004 for single and €16,008 for married taxpayers). Income from capital and capital gains are generally taxed at a flat rate of 26.375% (including a solidarity surcharge). With regard to capital gains, this basically applies to all privately held shares or bonds acquired on or after 1 January 2009. For privately held shares or bonds acquired before 1 January 2009, capital gains are only taxable if the shares form a substantial shareholding of at least 1%. In these circumstances, 60% of the capital gains are taxed at a rate ranging from 15% to 45%, depending on the taxpayer's individual tax bracket.

3.3 What other direct taxes (if any) apply to persons who become established in Germany?

Any business is liable to trade tax, as far as it is operated through a permanent establishment in Germany, save for freelance professions or any other independent personal services. The tax rate is determined by the municipality; it ranges from 7% to 17.15%. However, trade tax may generally be credited against the individual's personal income tax.

At the discretion of the relevant local authority, an annual property tax ranging from 1% to 4% may be due on the value of real estate (a standardised value which does not reflect the property's fair value).

3.4 What indirect taxes (sales taxes/VAT and customs & excise duties) apply to persons becoming established in Germany?

Generally, all goods and services provided by an entrepreneur in Germany are subject to VAT, unless they are tax-free. The general VAT rate is 19%. There is also a reduced VAT rate of 7% which applies in particular to the supply of nearly all food – except beverages and restaurant dishes.

With regard to certain goods, excise duties can also apply. This includes energy tax, electricity tax and taxes on alcohol, tobacco and coffee.

4 Taxation Issues on Inward Investment

4.1 What liabilities are there to direct taxes on the remittance of assets or funds into Germany?

This is not applicable in Germany.

4.2 What taxes are there on the importation of assets into Germany, including excise taxes?

There is generally no tax on the importation of private assets. However, the importation of goods into Germany from non-EU States for commercial reasons or the importation of goods (in excess of certain amounts) which have just been acquired in non-EU States may give rise to German VAT (so-called "import turnover tax").

5 Succession Planning

5.1 What are the relevant private international law (conflict of law) rules on succession and wills, including tests of essential validity and formal validity in Germany?

Under German conflict of law rules, succession is governed by the law of the state whose nationality the deceased possessed on the date of his death. This applies generally for the whole worldwide estate, irrespective of whether the estate contains movable or immovable property.

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

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

- The state of the testator's nationality.
- The state where the testator made the will.
- The state of the testator's residence.
- The state where the assets are situated (in the case of real estate).

5.2 Are there particular rules that apply to real estate held in Germany or elsewhere?

German law is determined by the concept of the entity of successions. Therefore, the applicable law generally covers the whole worldwide estate, irrespective of whether the estate contains movable or immovable property. However, foreign testators may choose German law as applicable law for the succession with regard to their German real estate. This choice of law has to be made in the form of a will.

6 Trusts and Foundations

6.1 Are trusts recognised in Germany?

Trusts are generally not recognised in Germany as Germany did not ratify the HCCH Convention on the Law Applicable to Trusts and on their Recognition 1985. Therefore German property law does not recognise the transfer of assets located in Germany to a trust itself.

6.2 If trusts are recognised in Germany, how are they taxed in Germany?

Although trusts are generally not recognised in Germany, in particular the following can trigger IHT:

- Setting up a trust by a German resident.
- The settlor's share in a trust which is transparent for tax purposes (generally, this applies to grantor's trusts) may be subject to German IHT where either the settlor or his heir is a German resident, or if neither of them is a German resident, as far as the trust holds certain German situs assets.
- Distributions to beneficiaries during the trust period or upon the trust's dissolution if the beneficiary is a German resident.

German corporation tax may apply to:

- 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 may be attributed to the settlor or the beneficiaries if they are German residents.

6.3 If trusts are recognised, how are trusts affected by succession and forced heirship rules in Germany?

As trusts are generally not recognised in Germany, a German citizen cannot form a testamentary trust. However, the creation of an irrevocable *inter vivos* trust may effectively hinder a claim under the German forced heirship rules after several years.

Principally, the person entitled to a compulsory share portion is entitled to an augmentation of his claim if assets have been transferred to a trust during a period of ten years prior to the event of succession (so-called "Claim for Augmentation of the Compulsory Portion"). However, the value of the transferred asset is considered completely only within the first year before the succession. The claim for augmentation decreases by ten percent for each year between the transfer and the succession that has passed. After ten years, the asset transferred to the trust is not taken into account when calculating the compulsory share.

6.4 Are foundations recognised in Germany?

German law recognises two types of civil foundations:

- charitable foundations; and
- family foundations.

Charitable foundations are tax-privileged. Recognition as a charitable foundation requires that the foundation's activity is dedicated to the altruistic advancement of the general public in material, spiritual or moral respects. These purposes shall be pursued altruistically, exclusively and directly. However, a charitable foundation may use one third of its income for the maintenance of the founder and his family.

A family foundation is not tax-privileged. It is conducive to the maintenance and the advancement of one or more families.

6.5 If foundations are recognised, how are they taxed in Germany?

The formation of a charitable foundation neither triggers any IHT nor gift tax, nor real property acquisition tax if real property is transferred gratuitously to the foundation. A charitable foundation is released from almost every current form of taxation, especially corporate tax and trade tax. The liquidation of a charitable foundation leads to an acquisition of assets on the level of the beneficiaries. This acquisition is treated as a lifetime gift. Therefore, it is liable to IHT and gift tax. The classification of the tax bracket depends on the degree of relationship between the founder and the beneficiary.

The formation of a family foundation and later donations generally trigger IHT and gift tax. The current taxation of a family foundation complies with the taxation of other legal persons. In addition, only family foundations are liable to a substitute IHT. This special tax accrues every 30 years. The liquidation of a family foundation can trigger IHT and gift tax.

In contrast to German family foundations, foreign family foundations are not liable to substitute IHT. However, the property and income of a foreign family foundation may be added to the personal income of the founder or the beneficiaries if they are liable to German tax on an unlimited basis. This does not apply to family foundations which are resident in a Member State of the EU or the European Economic Area if the following is assured:

- the foundation's property is separated legally and actually from the beneficiaries; and
- a treaty regarding mutual administrative assistance exists between Germany and the state in which the foundation has its residence.

These conditions have to be satisfied cumulatively. With regard to the latest treaties, family foundations based in Liechtenstein may also fulfill these requirements.

6.6 If foundations are recognised, how are foundations affected by succession and forced heirship rules in Germany?

See question 6.3.

7 Immigration Issues

7.1 What restrictions or qualifications does Germany impose for entry into the country?

Germany distinguishes between different kinds of residence titles for specific purposes, subject to the length of stay and intended business activity. In general, EU citizens do not require any settlement title to work or settle in Germany. Non-EU citizens, by contrast, need a visa which enables the holder to enter Germany or allows short stays (up to 90 days per half year) from the date of first entry into Germany. In case of longer stays, a (temporary) residence or (permanent) settlement permit is required. Temporary residence permits are issued for specified purposes (e.g. education or training, gainful employment, humanitarian, political or family reasons). Permanent settlement permits are issued if a foreigner has possessed a residence permit for five years and meets additional requirements (e.g. secure income, no criminal record, adequate command of German language, etc.).

7.2 Does Germany have any investor and other special categories for entry?

The relevant residence title depends on the specific area of business activity intended in Germany. Non-EU citizens managing a company in Germany in a self-employed capacity or taking up a gainful employment in Germany require a temporary residence permit. In general, self-employed persons receive a residence permit if they invest at least 250,000 EUR and create a minimum of five jobs. Where these standard requirements are not met, a residence permit for the purpose of self-employment may nevertheless be granted. As a rule, business activities are accepted if there is an overriding economic or specific regional interest which will be assessed by local authorities. Employees who are from non-EU countries and who are employed in a company in Germany require a residence permit for the purpose of taking up employment. As with a residence permit for self-employment, a residence permit is issued to employees for up to three years. Principally, a residence permit is only awarded to certain occupational groups (e.g. academics or IT professionals) and, additionally, only if it is possible to demonstrate a specific offer of employment. However, persons considered to be "highly qualified foreigners" can be granted a settlement residence from the outset.

7.3 What are the requirements in Germany in order to qualify for nationality?

Foreigners have the right to become naturalised after eight years of habitual residence in Germany provided they meet the relevant conditions. For this, it is necessary to prove adequate knowledge of the German language. A clean record and commitment to the tenets of the Basic Law (Constitution) are further criteria. Moreover, the person to be naturalised must also be able to financially support him/herself. Spouses and children can also be naturalised even if they have not been living in Germany for eight years. In general, those applying for German citizenship must give up their former nationality (exceptions provided).

7.4 Are there any taxation implications in obtaining nationality in Germany?

A German national is subject to extended tax liabilities after giving up his German residence. He remains subject to German IHT for five years after relocation (10 years in case of relocation to the US). Where a German national relocates to a tax haven, he may, under certain conditions, remain subject to German income tax with all income from German sources (including interest) and his assets located in Germany may be subject to German IHT to a wider extent.

8 Taxation of Corporate Vehicles

8.1 What is the test for a corporation to be taxable in Germany?

A corporation is subject to German corporate tax with its worldwide income if its effective place of management or its statutory seat is located in Germany.

8.2 How are branches of foreign corporations taxed in Germany?

If a corporation has a branch in Germany, this branch generally constitutes a permanent establishment of the corporation. The corporation will be subject to German corporate and trade tax with all income effectively connected with this permanent establishment.

9 Tax Treaties

9.1 Has Germany entered into income tax and capital gains tax treaties and, if so, what is their impact?

With regard to income tax and capital gains tax, Germany has entered into tax treaties with more than 90 countries, including the UK and the US. Generally, the impact of the tax treaties is to prevent double taxation by the two contracting states. However, where the treaty's application may lead to the result that none of the states may tax the relevant income, special rules in German domestic law may apply allowing Germany to levy tax without regard for the treaty.

9.2 Do the income tax and capital gains tax treaties generally follow the OECD or another model?

German income tax and capital gains tax treaties generally follow the OECD model. However, some treaties include special provisions differing from the model convention.

9.3 Has Germany entered into estate and gift tax treaties and, if so, what is their impact?

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

- Denmark.
- France.
- Greece.
- Sweden.
- Switzerland (IHT only).
- USA.

These treaties seek to prevent a double taxation of any estate or gift by the contracting states. Where the decedent or donor is a German resident, Germany generally gives a tax credit for foreign IHT or gift tax.

9.4 Do the estate or gift tax treaties generally follow the OECD or another model?

Basically, the German tax treaties in the area of IHT and gift tax are largely based on the OECD Model Tax Convention on Successions, Estates and Gifts (1966/1982). However, the individual tax treaties provide specific variations or amendments of the OECD model to adapt to the specific tax environments and requirements of the contracting states.

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