

in 17 jurisdictions worldwide

2013

Published by
Getting the Deal Through
in association with:

Alrud

Anderson Mōri & Tomotsune

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Private Client 2013

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Private Client 2013

Published by
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ISSN 2051-5472

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Although the information provided is
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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Germany

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P+P Pöllath + Partners

Tax

1 How does an individual become taxable in your jurisdiction?

Tax liability in Germany is determined by the concept of residence. An individual is a German resident if he or she has either a permanent home or a habitual abode in Germany. Residence is assessed using objective criteria. The resident individual's worldwide income and assets are subject to:

- income tax (see questions 2 and 3); and
- inheritance tax (IHT) and gift tax (see questions 4 and 5).

The concept of domicile, however, is not recognised in Germany.

2 What, if any, taxes apply to an individual's income?

An individual's income is subject to income tax. Income tax covers income from seven sources:

- income from agriculture or forestry;
- income from trade or business;
- income from self-employment;
- income from employment (salaries and wages);
- income from capital investments;
- income from rent, especially real property or groups of assets; and
- other items of income, for example income from leases of moveable assets.

Income is generally taxed at a progressive tax rate, ranging from 14 to 45 per cent. In addition, a solidarity surcharge of 5.5 per cent of the tax due, which is payable to finance German reunification, is levied.

Income from capital investments is subject to withholding tax at a flat rate of 25 per cent plus the solidarity surcharge.

3 What, if any, taxes apply to an individual's capital gains?

An individual's capital gains are subject to income tax (see question 2).

4 What, if any, taxes apply if an individual makes lifetime gifts?

Lifetime gifts are taxable in accordance to transfers on death under the German Inheritance and Gift Tax Act (see question 5).

5 What, if any, taxes apply to an individual's transfers on death and to his or her estate following death?

IHT or gift tax applies to an individual's lifetime gifts (see question 4) and transfers on death pursuant to the Inheritance and Gift Tax Act.

Each beneficiary is liable for IHT or gift tax on the value of his or her share of the estate received, regardless of his or her personal wealth. The tax rates range from 7 to 50 per cent, 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 per cent. Transfers between most other relatives are taxed at a rate of 15 to 43 per cent. Between unrelated persons, the applicable tax rate is 30 or 50 per cent (for more than €13 million).

The following tax-free allowances apply if either the transferor or the beneficiary is a resident:

- spouses receive a personal allowance of €500,000 and a maintenance allowance of up to a maximum of €256,000;
- descendants receive a personal allowance of €400,000 and an age-dependent maintenance allowance of up to €52,000.

In addition, there is no IHT or gift tax on a lifetime transfer of the family home to a spouse and on an equalisation of the accrued gains made during the course of a marriage, where the statutory matrimonial property regime of the community of surplus (as provided for by the German matrimonial regime or a similar foreign regime) applies.

6 What, if any, taxes apply to an individual's real property?

A transfer tax with differing regional rates ranging from 3.5 to 5 per cent applies to:

- the acquisition of real property; and
- the acquisition of a substantial shareholding (at least 95 per cent) in a company holding real property.

In addition, an annual property tax ranging from 1 to 4 per cent may be due on the value of real property (on the basis of an assessed uniform value) at the discretion of the relevant local authority. Though the assessed uniform value is quite low, the property tax is becoming more and more significant because of continuously rising rates of assessment.

Income from real property is subject to income tax at the standard rates (see question 2).

7 What, if any, taxes apply on the import or export, for personal use and enjoyment, of assets other than cash by an individual to your jurisdiction?

The import of assets to Germany may trigger VAT. There are different rules for transactions within the European Union and transactions to or from non-EU states.

The import of goods from non-EU states into Germany triggers import turnover tax. The import turnover tax rate equals the VAT rates of 19 per cent or 7 per cent and has to be paid to the customs authority. The import turnover tax can be refunded as input tax if

the company proves the payment with the originals of the invoices and import documents. The export of goods to countries outside the EU is tax-free as the other state in accordance with the German VAT-rules levies an import turnover tax on the goods imported.

In addition, acquisition tax is levied upon the movement of goods into Germany from another part of the EU. Acquisition tax rates correspond with the VAT tax rates of the country where the recipient of the goods is located. The export of goods to other EU countries correspondingly is a tax-free intra-Community delivery.

8 What, if any, other taxes may be particularly relevant to an individual?

Wealth tax has not been levied in Germany since 1997 due to it being declared unconstitutional by the German Federal Constitutional Court. However, its reintroduction is being discussed among politicians (see 'Update and trends').

VAT applies to the net turnover of the entrepreneur at a tax rate of 19 per cent or 7 per cent (for certain tax-privileged turnovers, eg, food).

9 What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed?

Trusts – domestic as well as foreign – are not recognised in Germany, which has not ratified the HCCH Convention on the Law Applicable to Trusts and on their Recognition 1985. However, the following can trigger IHT and gift tax:

- foreign trusts created by residents;
- the transfer of assets located in Germany to a trust; and
- distribution to beneficiaries during the trust period or on the trust's dissolution if the beneficiary is a German resident.

German corporation tax can apply to:

- income received by a foreign trust from German sources; and
- 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.

Instead of trusts, corporations, fiscally transparent partnerships and foundations (see question 10) are used as asset-holding vehicles in Germany.

Corporations and non-charitable foundations are subject to corporation tax at a tax rate of 15 per cent. An additional trade tax of about 15 per cent is due for all corporations. Foundations are subject to trade tax only to the extent that they are engaged in trade or business. Partnerships are treated as fiscally transparent; the income is attributed to the partners according to their interest in the partnership and subject to income tax at their level. The partnership itself may be subject to trade tax; the partners will receive a tax credit for their personal income tax for any trade tax levied at the partnership's level. IHT or gift tax is levied if a non-charitable foundation is created or endowed with assets.

10 How are charities taxed in your jurisdiction?

Charities are tax-privileged in Germany. Recognition as a charitable foundation requires that the charity's activities be dedicated to the altruistic advancement of the general public in material, spiritual or moral respects. These purposes must be pursued altruistically, exclusively and directly. The formation of a charity does not trigger inheritance or gift tax, nor does it trigger a transfer tax if real property is transferred gratuitously to the charity. A charity is exempt from almost every current form of taxation, especially corporate tax and trade tax.

Special rules apply for charitable foundations: For example, a charitable foundation may use one-third of its income for the

maintenance of the founder and his or her family. In addition, an endowment of up to €1 million made to increase the capital stock of the foundation may be deducted from the assessment basis for income tax purposes in addition to the deductions that can be made for gifts to other charities.

Succession

11 What property constitutes an individual's estate for succession purposes?

For succession purposes, an individual's estate is constituted by his or her property as a whole (universal succession). Legal ownership determines whether an asset belongs to the estate. Debts and other liabilities as well as the individual's interest, for example in the co-ownership of an asset are part of the estate to the extent the individual was their legal owner.

12 To what extent do individuals have freedom of disposition over their estate during their lifetime?

Generally, an individual can dispose of his or her estate during his or her lifetime without restrictions.

However, there are narrow exemptions from this rule: a spouse may enter into a contract on his or her property as a whole or on household articles only if the other spouse agrees to the contract.

In addition, an unsatisfied creditor may reclaim property:

- within 10 years if the property was gifted to harm the creditor's interest;
- within four years if the property was gifted to a non-related person;
- within two years if the property was gifted to a related person.

13 To what extent do individuals have freedom of disposition over their estate on death?

Generally, individuals can dispose freely of their estate by will or by a contract of succession. Thereby, an individual can:

- choose his or her heirs and provide what share each heir receives;
- empower a person 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.

However, if spouses have entered into a contract of succession and one of them dies, the surviving spouse may not rescind the contract to change dispositions unless the changes correspond to the intention the spouses have originally agreed in the contract.

There is a forced heirship regime, under which the following categories of relatives are entitled to make a claim for a compulsory share 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; and
- parents.

A relative's compulsory share under a will generally amounts to 50 per cent 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 or she can freely distribute his or her whole estate. Otherwise, he or she can freely distribute 50 per cent of his or her estate.

- 14** If an individual dies in your jurisdiction without leaving valid instructions for the disposition of the estate, to whom does the estate pass and in what shares?

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 (succession 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 per cent of the inheritance if relatives in the first category (see above) survive;
- 75 per cent 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 per cent of the inheritance if relatives in the first category survive;
- 50 per cent 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 in equal shares.

- 15** In relation to the disposition of an individual's estate, are adopted or illegitimate children treated the same as natural legitimate children and, if not, how may they inherit?

Generally, adopted and illegitimate children are treated the same as natural legitimate children.

However, where an individual is adopted after he or she has reached the age of 18, the adopted person is treated as a child of the adopter but not of the adopter's family. This is important for maintenance reasons.

- 16** What law governs the distribution of an individual's estate and does this depend on the type of property within it?

Under German conflict of laws rules, the applicable succession law is that of the deceased's nationality (*lex patriae*). If the deceased was a foreign national, German succession law applies only if the law of the deceased's nationality provides for a reference back to Germany (*renvoi*). This will be the case if the deceased was domiciled in Germany, if the deceased's habitual abode was in Germany or if the deceased held property or assets in Germany at the date of his or her death.

As of 2015, new conflict of laws rules will become effective under the European Union's Succession Regulation. On 8 June 2012 the Council of Ministers of Justice of the EU decided on the proposal for regulation which shall be valid in all EU member states except Denmark, the United Kingdom and Ireland. According to the Regulation, the deceased's last habitual abode instead of his or her nationality is relevant for the question of which succession law is applicable. However, there is the opportunity to opt for the succession law of an individual's nationality by will or by a contract of succession. Nevertheless, if it is obvious that the deceased held a

closer relationship to another state, that state's law must be applicable under certain circumstances.

In addition, provisions on legal jurisdiction, recognition and enforcement of decisions and authentic instruments and on the European Certificate of Succession shall be part of the Regulation. Legal jurisdiction shall be determined by the habitual abode at the time the individual dies. However, under certain requirements the court can be selected by will, contract of succession or legacy.

- 17** What formalities are required for an individual to make a valid will in your jurisdiction?

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

- Holographic will. This is 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 or her 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).

- 18** Are foreign wills recognised in your jurisdiction and how is this achieved?

Germany recognises the HCCH Convention on the Conflicts of Laws 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 where the testator made the will;
- the testator's nationality;
- the testator's residence (see question 2);
- the location of the assets (in the case of real estate).

- 19** Who has the right to administer an estate?

A testator can appoint an executor at his or her own discretion. The executor has to be legally competent. According to the German Federal Civil Court, an executor does not have to be a lawyer, tax adviser, notary public or any other person that has to take out liability insurance.

An executor can ask the probate court for a certificate of executorship, which officially verifies his or her authority to act as executor.

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, until the date of the executor's death or until naming a successor executor who may be appointed within 30 years of the testator's death).

- 20** How does title to a deceased's assets pass to the heirs and successors? What are the rules for administration of the estate?

The estate vests automatically in the heirs on the deceased's death. The heirs also administer the estate if an executor has not been appointed.

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

Update and trends

Since 2009, the new Inheritance and Gift Tax Act has been valid in Germany. The reform was necessary after the German Federal Constitutional Court declared the former Inheritance and Gift Tax Act invalid because of the unequal evaluation of different types of assets. Equality of taxation is constitutionally guaranteed in Germany.

The new law provides wide exemptions for certain types of assets that are considered to be of special value for public welfare. One of the main objectives is to preserve jobs by not taxing business assets. Besides business assets, real estate as well as agricultural and forestry assets may benefit from tax exemptions for other reasons of public welfare. All together, the exemptions lead to a number of tax-effective configurations, which – according to the Federal Fiscal Court of Germany – can be used to achieve a preferential tax treatment for any kind of assets if the transferor chooses an appropriate configuration (Federal Fiscal Court, decision of 5 October 2011 – II R

9/11). The Court has consistently expressed its doubts concerning the constitutionality of the current Inheritance and Gift Tax Act. As the transfer of assets can be exempt from tax by structuring the assets in advance, equality of taxation is not ensured, according to the court.

As a consequence, the Federal Fiscal Court recently requested the Federal Constitutional Court to give a ruling on the constitutionality of the Inheritance and Gift Tax Act. The court will probably come to a decision within the next few years.

The legislative authorities in Germany are now attempting to react to constitutional doubts by restricting the opportunities to exempt property from IHT and gift tax.

Further changes might be agreed upon in 2013, especially if the political opposition in Germany will succeed in the election of the German federal parliament in September 2013. In this case, a wealth tax might be reintroduced for individuals and legal persons.

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. The certificate specifies:

- the heirs' names;
- their share in the inheritance; and
- the executor's name if the testator has appointed one (see question 19).

If German law governs the succession, the probate court issues a certificate. If the law of a foreign jurisdiction governs the succession, the probate court issues a certificate relating only to assets and property located in Germany. The certificate of inheritance gives the heirs (or the executor) the right to gather in assets.

The beneficiaries must file a notice of inheritance with the competent tax authority within three months of receiving the notice of succession. At the request of the tax authority, the beneficiaries (or the executor, if appointed) must file an IHT return.

The estate is distributed in kind among the heirs according to what is agreed and there is no time limit for distribution. Until distribution, the estate remains joint property of the heirs.

- 21** Is there a procedure for disappointed heirs and/or beneficiaries to make a claim against an estate?

Heirs or beneficiaries cannot make a post-death variation.

Heirs or beneficiaries can challenge the validity of a will before a civil court. If the court sets the will aside, then intestacy rules will apply, if there is no other valid will.

Under the intestacy rules, it is not possible for heirs or beneficiaries to challenge the adequacy of their provision.

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

If an heir does not want to receive his or her portion of the estate, he or she must disclaim his or her right within six weeks after he or she receives notice of the death of the deceased and the inheritance. The time limit is extended to six months if either:

- the deceased had his or her habitual abode outside Germany; or
- the heir was abroad when the period began to run.

The disclaimer is made by a declaration to the probate court. The declaration must be made in the presence of, and recorded by, the probate court or in notarially certified form.

Capacity and power of attorney

- 22** What are the rules for holding and managing the property of a minor in your jurisdiction?

A minor can own assets (see question 23). Usually, it is the parents' duty to manage these assets on the minor's behalf. The following rules apply:

- All contracts of substantial economic impact that are entered into by the parents on the minor's behalf and that establish an obligation of the minor (eg, sale or purchase of real property, sale or purchase of a business or of shares in a business entity, and similar transactions) are subject to approval by the family court.
- For specified transactions, particularly for contracts between the minor and his or her parents or other close relatives, the parents must not act on the minor's behalf. Instead, the family court appoints a legal guardian to act on the minor's behalf.

- 23** At what age does an individual attain legal capacity for the purposes of holding and managing property in your jurisdiction?

In Germany, children under 18 years of age are minors. Having legal personality, a minor can hold assets regardless of his or her age. Parents usually have joint custody of their child. Parents with custody administer the minor's estate, including his or her inheritance (see question 22). 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 or her 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.

- 24** If someone loses capacity to manage their affairs in your jurisdiction, what is the procedure for managing them on their behalf?

When a person loses capacity, a guardian is appointed to represent that person in all legal matters, under supervision 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.

Immigration

- 25** Do foreign nationals require a visa to visit your jurisdiction?

EU citizens generally do not require any residence or settlement title to stay, work or settle in Germany.

Non-EU citizens, however, need a visa, a temporary residence permit or a permanent settlement permit (see question 26) in order to enter into and stay in Germany.

26 How long can a foreign national spend in your jurisdiction on a visitors' visa?

A visa enables the holder to entry or short stays in Germany of up to 90 days within half a year from the date of first entry into Germany. In the event of longer stays, a (temporary) residence or (permanent) settlement permit is required.

Temporary residence permits are issued for specified purposes (eg, education or training, gainful employment, humanitarian, political or family reasons). They allow the holder to stay in Germany for at least six months. The permission to work in Germany is not always part of a temporary residence permit.

Permanent settlement permits are issued if a foreign national has possessed a residence permit for five years and meets additional requirements (secure income, no criminal record, adequate command of German language etc). Permanent settlement permits are valid for an unlimited period of time. However, they can be taken back or revoked if the foreign national does not meet the requirements.

27 Is there a visa programme targeted specifically at high net worth individuals?

Germany does not have a visa programme targeted at high net worth individuals.

28 If so, does this programme entitle individuals to bring their family members with them? Give details.

Not applicable.

29 Does such a programme give an individual a right to reside permanently or indefinitely in your jurisdiction and, if so, how?

Not applicable.

30 Does such a programme enable an individual to obtain citizenship or nationality in your jurisdiction and, if so, how?

Not applicable.

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