

Private Client

Contributing editors

Anthony Thompson and Nicole Aubin-Parvu



2017

GETTING THE
DEAL THROUGH 

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DEAL THROUGH 

Private Client 2017

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Preface

Private Client 2017

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Private Client*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, Brazil, India and Poland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Anthony Thompson and Nicole Aubin-Parvu of Gowling WLG (UK) LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
November 2016

Germany

Andreas Richter and Katharina Hemmen

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 is levied, which is payable to finance German reunification.

Income from capital investments is subject to withholding tax at a flat rate of 25 per cent plus the solidarity surcharge (a total of 26.375 per cent plus church tax, if any).

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 with 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?

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 €6 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; and
- descendants receive a personal allowance of €400,000 and an age-dependent maintenance allowance of up to €52,000.

According to a recent ruling of the European Court of Justice the same tax-free allowances have to apply for the calculation of gift tax if neither the transferor nor the beneficiary is a German resident but citizen of a member state of the EU.

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 gains accrued 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 6.5 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 that is often less than the fair value of the property) 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 for personal use and enjoyment from non-EU states by an individual 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 cannot be refunded as input tax if the imported assets are not used for business but for personal use and enjoyment. The export of such goods to countries outside the EU is generally VAT-tax-free, as the other state, in accordance with the German VAT-rules, levies an import turnover tax on the goods imported.

In contrast, the import of assets for personal use and enjoyment from EU member states by an individual does not trigger German VAT as the other state, in accordance with the German VAT-rules, levies VAT tax on the goods exported. Correspondingly, Germany levies VAT on the goods exported for personal use and enjoyment into EU member states.

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.

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 turnover, 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 (see question 11). 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
- a distribution to beneficiaries during the trust period or on the trust's dissolution if the beneficiary is a German resident or as far as assets located in Germany are distributed.

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 questions 10 and 12) 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 plus solidarity surcharge of 5.5 per cent of the tax. 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 or corporation 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.

Trusts and foundations

11 Does your jurisdiction recognise trusts?

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.

12 Does your jurisdiction recognise private foundations?

German civil law provides for the creation of private foundations, which can be established as a corporate body for any legal purpose. A family foundation can also be set up for the benefit of the settlor and his or her family. The foundation's directors are bound to the foundation's statutes as provided by the settlor. A private foundation resident in Germany is subject to supervision by a local authority under the applicable law of the respective federal state where the foundation's registered seat is. However, such supervision is very limited. Foreign private foundations are recognised as well, provided the structure is comparable to a foundation as provided for in German civil law.

Same-sex marriages and civil unions

13 Does your jurisdiction have any form of legally recognised same-sex relationship?

Since 1 August 2001, same-sex couples can enter into a registered civil partnership. A civil partnership is a recognised form of legal relationship similar to marriage, and provides most of the rights of a married couple. The requirements for a registration are:

- both partners are of the same sex;
- both are at least 18 years old;
- neither of them has entered into another existing civil partnership or marriage; and
- the partners are neither related to each other in the direct ascending line nor siblings.

Following several rulings of the Federal Constitutional Court, registered partnerships are now treated equally to marriages for tax purposes as well as successions (but not with regard to the rules concerning the adoption of children).

14 Does your jurisdiction recognise any form of legal relationship for heterosexual couples other than marriage?

A civil partnership is only recognised for same-sex couples and marriage only for heterosexual couples. Other legal relationships for couples do not exist.

Succession

15 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.

16 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 disposed of in order to harm the creditor's interest;
- within four years if the property was gifted to a non-related person; or
- within two years if the property was transferred to a related person in circumvention of the creditor.

17 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; or
- entitle a person to a legacy without making that person an heir. This legacy 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 or into a joint will and one of them dies, the surviving spouse may not rescind the contract or the will to change dispositions unless the changes correspond to the intention the spouses have originally agreed in the contract or the will.

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.

18 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, subordinated, their descendants;
- parents of the deceased and, subordinated, their descendants;
- grandparents of the deceased and, subordinated, their descendants; and
- great-grandparents of the deceased and, subordinated, 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 applicable 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; or
- 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; or
- 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.

19 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 can be important for maintenance and succession reasons.

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

For successions on and after 17 August 2015, new conflict of laws rules apply according to the European Union's Succession Regulation. They are valid in all EU member states except Denmark, Ireland and the United Kingdom. According to the Regulation, the deceased's habitual residence at the time of his or her death is relevant for the question of which succession law is applicable, instead of his or her nationality. If it is obvious that the deceased had a closer relationship to another state, that state's law will apply under certain circumstances. There is, however, the opportunity to opt for the succession law of an individual's nationality by a will, a joint will or by an agreement as to succession.

In addition, provisions on legal jurisdiction, recognition and enforcement of decisions and authentic instruments and on the European certificate of succession are part of the Regulation. As a general rule, the legal jurisdiction shall be determined by the habitual residence at the time the individual dies.

Update and trends

In December 2014, the Federal Constitutional Court delivered a judgment that certain provisions of the German IHT and Gift Tax Act, stating that the privilege of the gratuitous transfer of business assets, is unconstitutional. However, the German legislator passed the deadline of 30 June 2016 to reform these provisions. It is contentious which provisions are applicable in the meantime until new provisions come into force. At the moment it is still unclear when exactly the reformed Act will be ratified, and it remains to be seen to what extent business assets will be tax-privileged in the future. However, since the reform will presumably apply retroactively from 1 July 2016 on, entrepreneurs wishing to transfer business assets are generally well advised to wait until the final provisions are implemented in order to have a clear legal basis.

For successions before 17 August 2015, pursuant to the German conflict of laws rules, the applicable succession law is that of the deceased's nationality. 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. This may 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.

21 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, which is handwritten, dated and signed by the testator; and
- public will, which 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).

22 Are foreign wills recognised in your jurisdiction and how is this achieved?

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).

According to article 75 of the EU Succession Regulation the HCCH Convention prevails over the provisions of the Regulation with regard to the formal validity of a will.

23 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; or
- administer the estate for a defined period of time (for example, until the date of the executor's death or until the naming of a successor executor who may be appointed within 30 years of the testator's death).

24 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).

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 23).

The certificate of inheritance gives the heirs the legitimacy to administer the estate, provided there is no executor. 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 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.

25 Is there a procedure for disappointed heirs and 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 of receiving 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

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

A minor can own assets (see question 27). 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; and
- 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.

27 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 26). 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.

28 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

29 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 30) in order to enter into and stay in Germany.

30 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 for each period of 180 days. In the event of longer stays, a temporary residence or permanent settlement permit is required.

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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 (eg, a secure income, no criminal record, adequate command of the German language). 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.

31 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.

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

Not applicable.

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

Not applicable.

34 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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