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1 Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in your jurisdiction?

As of 1 January 2017, income tax treaties with 95 countries were in force. Moreover, negotiations on first-time treaties are taking place with a further 14 countries. 35 treaties are going to be amended in the near future and further agreements exist in respect of cooperation and information sharing.

1.2 Do they generally follow the OECD Model Convention or another model?

Germany's tax treaties are usually based on the OECD model. Therefore, the official commentary to the OECD model may be used for the interpretation of most provisions in German treaties; this includes the 2003 Real Estate clause of Art 13 (4), introduced recently from the German side into treaties with Great Britain, Luxembourg, Spain and the Netherlands. However, some of the treaties, especially those with developing countries, incorporate elements of the UN model treaty. The treaty between Germany and the United States reflects many peculiarities of United States treaty policy.

1.3 Do treaties have to be incorporated into domestic law before they take effect?

According to German constitutional law, treaties must be incorporated into national law by the federal legislator. This requires the consent of both chambers of the parliament in the form of a federal law. Therefore, the federal law implementing tax treaties must be approved by the *Bundestag* and the *Bundesrat* and is finally signed by the Federal President (*Bundespräsident*) and promulgated in the Federal Law Gazette (*Bundesgesetzblatt*).

This legislative procedure has to be distinguished from the process of ratification of the treaty by exchanging documents in which (in the case of Germany) the Federal President declares that the requirements for the internal applicability of the treaty have been met. Only upon such ratification does the treaty become binding under international law.

1.4 Do they generally incorporate anti-treaty shopping rules (or "limitation on benefits" articles)?

In general, Germany's tax treaties did not include anti-treaty shopping rules. However, such rules have been adopted, in particular in many of the more recent treaties. Several treaties contain general anti-abuse clauses that may be interpreted in such a way as to permit the application of domestic anti-abuse rules within the scope of the treaty provisions. If the application of such anti-abuse clauses leads to double taxation, some of the treaties oblige the countries to open the mutual agreement procedure.

Upon consultation between the parties, several treaties allow the application of the tax credit method, instead of the exemption method, to avoid a double tax exemption of income or to counter arrangements that lead to an abuse of the treaty. Furthermore, some treaties exclude the application of reduced withholding tax rates for dividends, royalties or interest payments if such treaty benefits are claimed without reasonable economic justification.

A detailed and very complex limitation-on-benefits clause is part of the treaty between Germany and the United States. This clause has become even more rigid as of 2008, when the new protocol amending the U.S./Germany treaty became effective.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

In principle, tax treaties incorporated into German law prevail over statutory law, as provided for in the German General Tax Code. However, this conflict rule, like tax treaties after their implementation, has the status of ordinary statutory law and competes against the general *lex specialis* and *lex posterior* rules. Tax treaties are not superior to ordinary law and, therefore, domestic legislation may override a tax treaty that was concluded previously if it is expressly aimed at abrogating the treaty provision by establishing a deviating rule. Treaty overrides have been used by the German tax legislator for about 20 years, mainly in order to combat tax structures and schemes that it suspects of being abusive. Notwithstanding the effective priority, constitutional admissibility and legality of such a *lex posterior* under domestic German law, treaty-overriding by the legislator constitutes an infringement of international law, which can only be invoked by the other treaty state.

The legislator, for example, introduced in section 50d paragraph 3 of the German Income Tax Act, a rule under which a foreign corporation may not claim exemption from, or a refund of, German withholding tax under a double tax treaty or the EU Parent-Subsidiary Directive as far as its shareholders would not be entitled to claim treaty benefits in case of a direct holding of the German entity and where certain comprehensive substance requirements are not met.

In its judgment of 15 December 2015, the Federal Constitutional Court (*Bundesverfassungsgericht*) ruled that a domestic law provision overriding a double tax treaty is permissible under the

Constitution. Otherwise, a general treaty override ban would contradict the basic constitutional principles, according to which the later legislator is entitled to amend the decisions of the previous ones.

1.6 What is the test in domestic law for determining the residence of a company?

For German tax purposes, the residence of a company is determined by the legal seat or the place of management of a corporation. If either of those is located in Germany, the corporation is subject to German unlimited tax liability. The place of management is the centre of the top management of a corporation. It is located where commercial matters of some importance for the corporation are effectively decided, usually at the directors' office. The legal seat of a corporation, on the other hand, is determined by the by-laws of the corporation.

2 Transaction Taxes

2.1 Are there any documentary taxes in your jurisdiction?

Germany does not levy any stamp duties on transactions and has abolished the capital transfer tax.

2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

The German Value Added Tax Act is based on EC Directive 2006/112/EC, i.e. on the common system of Value Added Tax (the former Sixth EC Directive). The standard rate of VAT is currently 19% (as of 2007); a reduced rate of 7% applies to a limited number of supplies of goods or services.

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

There are several VAT exemptions for certain supplies of goods or services. The most relevant of these exemptions apply to:

- financial services by banks or other financial institutions (waiver of tax exemption is possible);
- the transfer of shares in a corporation or interest in a partnership (waiver possible);
- the transfer of real property (waiver possible); and
- the lease of real property (waiver possible under certain conditions).

The waiver of a tax exemption is allowed only if the respective services are rendered to a taxable party ("entrepreneur") for its respective business. The transfer of a business as a going concern, however, is not only tax-exempt – it is not a taxable event at all. The sale of a real property that is leased out generally constitutes a transfer of a business as a going concern that is not taxable.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

Input VAT on supplies is fully recoverable by an "entrepreneur" if the respective supplies are wholly used to render taxable supplies that are not tax-exempt. Input VAT on supplies that are used to render tax-exempt supplies is, in principle, not deductible. However, especially for several cases of tax-exempt cross-border supplies, the deduction of input VAT is allowed. If an "entrepreneur" renders both taxable and tax-exempt services, input VAT on supplies for both has to be split up according to the respective percentage of taxable supplies to determine the deductible part of input VAT.

The most notable restriction concerns the letting of real property; on such a supply, a waiver of the tax exemption is permitted only if the lessee uses (or intends to use) the property exclusively for supplies subject to tax on its part. This rule results in a loss of input VAT to lessors letting real property, e.g. to banks, insurance companies or doctors, or for residential purposes.

2.5 Does your jurisdiction permit "establishment only" VAT grouping, such as that applied by Sweden in the *Skandia* case?

Germany does not permit "establishment only" VAT grouping.

2.6 Are there any other transaction taxes payable by companies?

The transfer of German real property is subject to German Real Estate Transfer Tax (RETT) at a rate of 3.5% up to 6.5% of the purchase price, or – in case there is no consideration – of the property's value. The basic tax rate is 3.5%, but has been increased by most German states in recent years. Real Estate Transfer Tax also becomes due if 95% or more of the interests in a partnership owning German real property are transferred within a period of five years or if 95% or more of the shares in a corporation owning German real property are acquired, or united for the first time, by the same party (or affiliates of such party).

An exemption from Real Estate Transfer Tax for intra-group reorganisations with each five-year minimum 95% shareholding pre- and post-reorganisation (introduced as of 2010) is rather restrictively applied by the tax administration. A rule has been introduced in 2013 under which the so-called RETT-Blocker structures will no longer be possible, by which an economic participation of more than 95% in a German real property could be achieved without triggering Real Estate Transfer Tax.

2.7 Are there any other indirect taxes of which we should be aware?

German Insurance Tax applies at a standard rate of 19% on the payment of insurance premiums for several types of insurance contract. Excise duties are levied on certain kinds of goods, e.g. on fuel.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

The general withholding tax rate for dividends paid by a German corporation to non-resident shareholders is 26.375%. Non-resident corporations, however, may generally apply for a refund of 40% of the tax withheld on the dividends received. Thus, their effective withholding tax rate will equal the general Corporate Income Tax rate in Germany (15.825%). Moreover, a further refund or total relief from the withholding tax on dividends may be available according to a tax treaty or the EU Parent-Subsidiary Directive. However, such refund or relief is subject to Germany's anti-treaty shopping rules, which provide for certain substance requirements.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Royalty payments by a local company to non-residents are, in principle, unilaterally subject to a 15% withholding tax on the gross amount. Under most German tax treaties, the withholding tax on royalty payments is reduced to between 0% (in particular, in treaties with OECD countries) and 10%. Within the European Union, no withholding tax is due on royalties paid by a German company (or a European company that has a German branch) to an associated company in another Member State of the EU, according to the EC Interest and Royalties Directive 2003/49/EC, as incorporated into German law. A so-called licence barrier rule will come into force as of 1 January 2018 (see question 10.1).

However, any reduction, exemption or refund (by treaty or EC Directive) is granted only upon application.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Principally, no withholding tax on interest payments to non-residents is levied. However, withholding tax may be levied for certain instruments, e.g. instruments where the amount of the interest depends on the profits of the borrower or instrument, which qualify as a *jouissance* right (*Genussrecht*), or where the terms and conditions of the loan are not at arm's length and, therefore, result in treatment of the interest as constructive dividends.

3.4 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

As of 2008, a general limitation on the deduction of interest payments was introduced regarding both shareholder loans and all third-party loans. According to the so-called interest limitation rule (*Zinsschranke*), interest expenses exceeding interest earned (net interest) will only be deductible up to an amount equal to 30% of the corporation's earnings before interest, taxes, depreciation and amortisation (EBITDA). The interest limitation rule will apply:

(a) if the overall net interest exceeds €3m; and

(b) in case the corporation does not belong to a group of companies (*Konzern*):

- if "harmful debt financing" occurs, i.e. debt financing by shareholders, related parties or third-party lenders with recourse to such shareholders, and interest paid/owed for such debt exceeds 10% of the overall net interest; or

(c) in case the corporation belongs to a group of companies (*Konzern*):

- if "harmful debt financing" occurs in any group company and the financing shareholder, related party and/or third party who has recourse to a shareholder or related party is not part of the group; or
- the equity ratio of the tax-paying company is lower than that of the consolidated group.

Net interest that is not deductible under these rules becomes deductible, however, up to the amount of EBITDA carried forward from the preceding five years. The remainder of the non-deductible net interest is carried forward into the following years.

3.5 If so, is there a "safe harbour" by reference to which tax relief is assured?

The interest limitation rule is only applied (and then to all interest) if the overall net interest charge of the borrowing corporation exceeds €3m. To the extent that the net interest charge does not exceed 30% of the corporation's EBITDA, the interest limitation rule does not apply and interest expenses are fully deductible.

3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

The interest limitation rule extends to loans granted by third parties anyway. A guarantee given by a parent company with respect to a third-party loan may have an additional negative effect insofar as it may be considered as "harmful debt financing" and therefore prevent the application of an "escape clause" (see question 3.4 above).

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

There are no such restrictions (except treatment as a constructive dividend or for certain instruments, as mentioned in question 3.3 above).

3.8 Is there any withholding tax on property rental payments made to non-residents?

Germany does not levy withholding tax on property rental payments made to non-residents. However, non-residents are subject to German limited tax liability regarding rental payments in the case that the real estate is situated in Germany.

3.9 Does your jurisdiction have transfer pricing rules?

Generally, transactions between related parties with German corporations involved must comply with the dealing-at-arm's-length principle. Apart from tax treaties, this principle is also part of domestic German law, which provides much more detailed rules according to which an "acceptable" market price has to be computed for tax purposes. Also, more detailed documentation requirements have been and will be introduced over the years with regard to cross-border transactions.

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

The aggregate tax burden of corporations was reduced from almost 40% to only around 30% by the Corporate Tax Reform 2008.

The German Corporate Income Tax rate is 15%. In addition, the Solidarity Surcharge of 5.5% is levied on the amount of Corporate Income Tax due, resulting in an aggregate tax rate of 15.825%.

German corporations are also subject to Trade Tax. The basic Trade Tax rate is 3.5%; it is supplemented by the application of a multiplier fixed by the respective municipality which varies from a minimum rate of 200% (prescribed by federal law), up to around 490% in the large cities. Therefore, the effective Trade Tax rate ranges from 7% to around 17.15%.

Corporate Income and Trade Tax due are not treated as a business expense and, therefore, cannot be deducted from the Corporate Income Tax base, as well as the Trade Tax base itself. As a result, corporations are subject to Corporate Income Tax (including Solidarity Surcharge) and Trade Tax at a combined rate of at least 22.825% and up to 32.975%.

4.2 Is the tax base accounting profit subject to adjustments, or something else?

In principle, the corporation's net income determined according to German commercial accounting principles is also the Corporate Income Tax base. However, tax law provides for several adjustments for tax purposes, e.g. restrictions on the deduction of certain business expenses or 95% exemptions for dividends (provided a minimum shareholding is met) or capital gains derived from the sale of shares in other corporations (for which the possible introduction of a minimum shareholding is under discussion).

The corporation's net income for Corporate Income Tax purposes also serves for the computation of the Trade Tax base, which is, however, subject to further specific adjustments. There are several add-backs and also exclusions for Trade Tax purposes exclusively, e.g. the add-back of 25% of interest payments on debt, the add-back of 12.5% of lease payments for immovable fixed assets, 5% for movable fixed assets and 6.25% for royalties.

4.3 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

For tax purposes, the commercial accounting principles are overruled by several tax accounting provisions, mainly to restrict accounting options allowed by commercial law to prevent taxpayers from influencing their tax base. For example, tax rules with regard to the valuation and depreciation of assets or the accumulation of accruals have been tightened and restricted repeatedly in recent years.

Tax accounting options may be exercised independently from the commercial balance sheet. As a consequence, assessments in the tax balance sheet may deviate from those in the commercial balance sheet.

4.4 Are there any tax grouping rules? Do these allow for relief in your jurisdiction for losses of overseas subsidiaries?

German tax grouping rules for Corporate Income Tax and Trade Tax purposes (*Organschaft*) require a more than 50% shareholding in a subsidiary and a profit and loss absorption agreement, according to German commercial law, concluded by the group parent company and the subsidiary and executed for a period of at least five years. As a result, the subsidiary's net income is attributed to the group parent company for Corporate Income Tax and Trade Tax purposes. Subsidiaries with their seat in Germany or in a Member State of the EU/EEA in the legal form of a German limited corporation (*GmbH*), a stock corporation (*AG*), a partnership limited by shares (*KGaA*), a European Stock Corporation (*SE*) or a foreign corporation can be members of a tax group, provided the subsidiary's place of management is in Germany. The group parent company needs to have a permanent establishment in Germany, to which the shareholding in the subsidiary is allocated for the duration of the tax group. Relief for losses incurred by foreign subsidiaries is usually not available in Germany.

4.5 Do tax losses survive a change of ownership?

Tax losses carried forward and tax losses of the current year may be forfeited by direct share transfers as well as by indirect share transfers one or several tiers above the corporation which has the tax losses. This rule applies as well for measures comparable to transfers of shares, e.g. transfer of voting rights and various reorganisation measures. The forfeiture applies in the following situation:

For transfers (or comparable measures) of more than 25% within five years to one acquirer (or related persons), the tax losses carried forward and the tax losses of the current year are forfeited *pro rata*. For transfers (or comparable measures) of more than 50% within five years, the tax losses carried forward and the tax losses of the current year are fully forfeited.

A direct or indirect transfer of shares in a corporation does not result in forfeiture of the losses carried forward and the tax losses of the current year if certain requirements are met which qualify the transfer as a privileged intra-group transfer. Initially, certain restructuring measures were privileged; however, the European Commission declared that this violated European law and therefore must not be applied by the German tax authorities. Under a further rule, tax losses are not forfeited to the extent that hidden reserves exist which would be taxable in Germany. Hidden reserves in shares in a corporation (where a disposal of such shares would be non-taxable) are not taken into account for the determination of such hidden reserves.

However, the German Constitutional Court has ruled in its decision dated 29 March 2017 that the tax loss forfeiture rule for ownership changes greater than 25% and up to 50% is unconstitutional irrespective of the aforementioned escape clauses for intra-group transfers or hidden reserves and therefore not applicable for the years 2008 through 2015. With regard to 2016 and subsequent years the Constitutional Court did not deal with the question of constitutional conformity due to the introduction of the new continuity of business rule which could also prevent tax loss forfeiture and thus may mitigate the unconstitutionality of the tax loss forfeiture provisions.

The German Constitutional Court has not yet explicitly commented on whether ownership changes of more than 50% are constitutional or not. This legal question has recently been submitted to the German Constitutional Court by a German finance court, but there is not yet a ruling.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

Under the rules of the shareholder relief system (in force since 2002), the corporation's Corporate Income Tax and Trade Tax rate is not reduced in case of profit distributions.

4.7 Are companies subject to any significant taxes not covered elsewhere in this chapter – e.g. tax on the occupation of property?

The German Property Tax (Net Worth Tax) has not been levied since 1997 for constitutional reasons. However, from time to time there are political discussions about reintroducing Property Tax in Germany.

Real Estate Tax is levied on German real estate; the respective tax rate is fixed by the municipalities and is applied to the value of the real property.

The transfer of property, including business assets and participations in partnerships and corporations by way of succession or donation, is subject to German Inheritance and Gift Tax. Although the valuation rules have been completely revised by the recent reform of the Inheritance and Gift Tax Act, business assets are still subject to favourable valuation rules if certain conditions are met. The German Federal Constitutional Court held certain provisions of the German Inheritance and Gift Tax Law to be unconstitutional, which relate to favourable rules applying to the transfer of businesses. These rules were replaced by new rules as of 1 July 2016.

5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

In principle, capital gains are included in the tax base of Corporate Income Tax and Trade Tax. However, the German Corporate Income Tax Act provides for a 95% tax exemption for capital gains received by corporations on the disposition of shares in German or foreign corporations. The tax exemption applies irrespective of a minimum shareholding or a minimum holding period. In return, losses from the sale of such shares are disregarded for tax purposes and not deductible from the tax base. A legislative initiative to introduce a minimum shareholding of 10% (as for dividends) is currently not pursued further.

Capital gains received by individuals on the sale of shares in corporations are taxable if the shares belonged to a business or if the individual's participation in the corporation was at least 1% of the capital at any time within the preceding five years. In these situations, 40% of such capital gains are tax-exempt. Capital gains received by individuals from the sale of shares (<1%) which were held as private assets, are subject to a flat tax of 26.375%, irrespective of the holding period (unless the shares were acquired before 2009, in which case capital gains are tax-free).

For certain shareholders, including financial enterprises (*Finanz-unternehmen*) within the meaning of the German Banking Act (*Kreditwesengesetz*) the exemption of 95% (or 40% as applicable) does not apply. Although the tax exemption may not apply under German domestic tax law, foreign shareholders which are protected by a double tax treaty are, as a rule, not affected.

5.2 Is there a participation exemption for capital gains?

The 95% tax exemption for capital gains (see also question 5.1) also applies to dividends received by a corporation. While a minimum holding period is not normally required (see question 5.1), a minimum direct shareholding of at least 10% as of the beginning of the calendar year is required for the 95% exemption relating to dividends for Corporate Income Tax purposes, whereas for Trade Tax purposes, the 95% tax exemption of dividends (not that of capital gains) requires a minimum shareholding of 15% from the beginning of the respective calendar year (a 10% shareholding may be sufficient in case the parent-subsidiary directive applies). In addition, the participation exemption requires that payments on dividends have not been tax-deductible at the level of the distributing corporation.

5.3 Is there any special relief for reinvestment?

A rollover relief is available if capital gains from the disposition of certain assets (especially real property) are reinvested in the acquisition of similar assets within a period of four years (Germany is being sued by the EU Commission, as the present restriction on German assets is in violation of the EU freedom of capital). Due to the extensive capital gains exemption (see question 5.1), no rollover relief is available upon the disposition of shares by corporations. Economically, a relief for reinvestment may be achieved under the German Reconstruction Tax Act (*Umwandlungsteuergesetz*).

5.4 Does your jurisdiction impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

In principle, a withholding tax of 26.375% is imposed on capital gains from the disposition of (less than 1%) shares in any corporation, according to national law. However, most tax treaties restrict the German taxation right (with the exception of special real estate companies) to zero; furthermore, the withholding tax applies only in cases where the shares are sold through a financial institution. No withholding tax is imposed on proceeds of selling an interest in a partnership or in local assets.

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

The formation of a subsidiary is not subject to any special taxes in Germany.

6.2 Is there a difference between the taxation of a local subsidiary and a local branch of a non-resident company (for example, a branch profits tax)?

A locally formed corporate subsidiary, being legally a separate entity, is unlimitedly liable for German Corporate Income and Trade taxation, therefore German tax is charged on the worldwide income of the subsidiary (subject to applicable double tax treaties). In the case of a branch (being legally a dependent part of its parent company), the non-resident company running such German branch is liable to limited taxation in Germany, with the income allocated to and realised by the branch.

Capital gains realised upon the disposal of a locally formed corporate subsidiary are generally tax-exempt under most of the double tax treaties, while capital gains realised by the disposal of a branch are generally taxable in Germany.

The taxable income of a branch is, in principle, computed and taxed according to the same rules, as they are applicable to any other German business taxpayer. There is no branch profits tax in Germany; the remittance of profits by the branch to its head office is irrelevant for German tax purposes.

6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

For tax purposes, a branch located in Germany is treated, according to the so-called Authorized OECD Approach (AOA) as a functionally separate entity, although it is legally a part of the parent company. Thus, the taxable profits of the branch are determined by taking into account the functions performed, assets used and risks assumed by the enterprise through the branch and through the other parts of the enterprise.

Section 1 paragraph 5 of the Foreign Tax Act, which constitutes the transformation of the AOA into German tax law, assumes a "two-step approach" in order to allocate the profits between headquarters and branch.

In the first step, a functional risk analysis needs to be undertaken which determines the allocation of significant personnel functions of the branch. Furthermore, it needs to be identified which assets and liabilities are required in order to perform these functions

and which therefore need to be attributed either to the branch or the headquarters. Based on this, the opportunities and risks can be identified. Further, fictitious so-called third-party relationship dealings are identified. Finally, the capital necessary to perform these functions will be allocated to the branch.

In the second step, profits are allocated between headquarters and branch, in accordance with the functional separate entity approach.

The German branch of a foreign head office in the legal form of a corporation is subject to German Corporate Income Tax and Trade Tax as if it were a German corporation. It is therefore, for example, entitled to the 95% exemption of dividends received from other corporations (provided the minimum shareholding requirement is met) and of capital gains derived from the sale of shares in other corporations, in the same way as a German corporation (see questions 5.1 and 5.3).

6.4 Would a branch benefit from double tax relief in its jurisdiction?

The head office, but not the branch itself, is entitled to treaty benefits because a branch is legally a part of its head office and not a resident for tax treaty purposes. However, non-discrimination clauses in tax treaties usually oblige the contracting states to treat branches like corporations resident in their jurisdiction. For European Union Member States, a discrimination of branches would also be prohibited by the freedom of establishment.

6.5 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

No withholding tax applies to the remittance of profits by a German branch to its head office.

7 Overseas Profits

7.1 Does your jurisdiction tax profits earned in overseas branches?

Profits earned in foreign branches are not subject to German Trade Tax (see question 4.1), but are included in the Corporate Income Tax base of German corporations. However, these profits are usually exempt from German income taxation under Germany's tax treaties or are subject to a credit system provided by a tax treaty or by German national law.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

Foreign dividends received by German companies are subject to the general exemption system for dividends, providing principally for a 95% exemption for dividends received by a corporation (see question 5.3).

7.3 Does your jurisdiction have "controlled foreign company" rules and, if so, when do these apply?

The German "controlled foreign company" rules apply to foreign corporations that are subject to low taxation (an income tax rate below 25%) and controlled by shareholders resident in Germany holding more than 50% of the capital or the vote of the foreign corporation. Then, passive income earned by these foreign corporations is treated as taxable income of the German shareholders. Passive income is all income that is not active income, as defined by the German Foreign Tax Act. The German "controlled foreign company" rules may apply in case of passive capital investment income even in case of a holding of 1% or even below 1%. These rules do not apply to controlled foreign companies resident in EU/EEA Member States if the shareholders provide evidence for economic substance of the foreign corporation in the respective Member State.

8 Taxation of Commercial Real Estate

8.1 Are non-residents taxed on the disposal of commercial real estate in your jurisdiction?

A corporate entity is taxed on the disposal of real estate situated in Germany at a corporate tax rate of 15.825%. An individual (unless it is holding the real estate as a business asset), is only taxed on the disposal of real estate situated in Germany in cases where the period between the date of acquisition and the date of disposal does not exceed 10 years. The individual will be taxed at the individual income tax rate up to approx. 48%.

In addition, German Real Estate Transfer Tax at a tax rate between 3.5% and 6.5% of the sales price of the real estate is levied. The exact rate depends on the federal state where the real estate is located.

8.2 Does your jurisdiction impose tax on the transfer of an indirect interest in commercial real estate in your jurisdiction?

Germany does levy Real Estate Transfer Tax on the transfer of an indirect interest in real estate in several cases:

- A (direct or indirect) transfer of 95% or more of the interest in a partnership, holding real estate situated in Germany within five years, to new partners.
- A (direct or indirect) transfer of 95% or more of the shares/interest in a corporation/partnership holding real estate situated in Germany, to one shareholder/partner or a transfer of shares/interest in a corporation/partnership, by which 95% or more of the shares/interest will be held (directly or indirectly) by one shareholder/partner (or affiliates of such shareholder/partner).
- Under a rule introduced in 2013, German RETT applies as well, in case of a legal transaction, by which economically at least 95% of the shares/interest in a corporation/partnership holding real estate situated in Germany are held (directly or indirectly) by one shareholder/partner. The indirect shareholding/interest is calculated by multiplying the participations in the capital and/or in the assets of the entities involved.

8.3 Does your jurisdiction have a special tax regime for Real Estate Investment Trusts (REITs) or their equivalent?

In cases where a company has opted for the G-REIT status and has been registered as such in the German commercial register, the G-REIT must be a stock corporation (*Aktiengesellschaft*), which is listed on an organised stock market, be tax-resident in Germany, and meet further requirements. G-REITs are exempted from Corporate Income Tax and Trade Tax for all income, irrespective of whether such income derives from real estate or not. This tax

exemption is applicable (retrospectively) from the beginning of the financial year of such company in which it has been registered in the German commercial register. This tax exemption is not applicable to subsidiaries of the G-REIT, i.e. the subsidiaries are subject to general taxation. Dividend distributions from the G-REIT are subject to 26.375% withholding tax. For corporate shareholders and individual shareholders holding at least 1% in the G-REIT, dividends and capital gains derived from the disposal of shares in the G-REIT are fully taxable. In order to avoid a double taxation, the same (partial) tax exemptions apply to distributed dividends, which stem from income which has been pre-taxed with German Corporate Income Tax or a comparable foreign tax, as to ordinary dividends. For individuals with a shareholding of less than 1% in the G-REIT, dividends and capital gains are taxable at a 26.375% tax rate, irrespective of a pre-taxation of the income of the G-REIT.

9 Anti-avoidance and Compliance

9.1 Does your jurisdiction have a general anti-avoidance or anti-abuse rule?

The German General Tax Code provides for a general anti-avoidance rule with respect to all kinds of taxes. This rule allows the German tax authorities to disregard the legal form of a transaction agreed upon among the parties, if such transaction is regarded as an abuse of legal arrangements without valid reasons other than tax savings not intended by the respective Tax Act.

9.2 Is there a requirement to make special disclosure of avoidance schemes?

There is no special disclosure rule for avoidance schemes. However, the burden of proof to demonstrate the above-mentioned valid reasons rests with the taxpayer. In 2007, a legislative initiative by the German government to introduce a disclosure rule that would oblige taxpayers to disclose avoidance schemes in advance to the federal tax authorities failed.

9.3 Does your jurisdiction have rules which target not only taxpayers engaging in tax avoidance but also anyone who promotes, enables or facilitates the tax avoidance?

Germany does not have rules which target anyone other than the taxpayer to enable or facilitate tax avoidance. With respect to the proposal of the amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements Germany will eventually introduce such rules.

9.4 Does your jurisdiction encourage "co-operative compliance" and, if so, does this provide procedural benefits only or result in a reduction of tax?

German jurisdiction does not encourage "co-operative compliance". However, in order to differentiate a voluntary self-disclosure from a simple representation of amendments, the German tax authorities should indicatively exclude the initial suspicion of a criminal offence, if the taxpayer has properly set-up an internal control system which serves the fulfilment of tax obligations. However, no procedural benefits or reductions of tax result from this.

10 BEPS and Tax Competition

10.1 Has your jurisdiction introduced any legislation in response to the OECD's project targeting Base Erosion and Profit Shifting (BEPS)?

At the end of 2016, the so-called "BEPS 1 – Implementation Act" passed the German legislation process. This was the first step to implement the recommendation of the BEPS process into domestic law. The BEPS 1 – Implementation Act leads to an extension of cooperation obligations in cross-border situations which is based on BEPS action point 13 "Transfer Pricing Documentation and Country-by-Country-Reporting". As a result the transfer pricing documentation will consist of a Master File, a country-specific and company-related Local File and a country-specific Country-by-Country-Report. Furthermore, the minimum standards and reporting obligations resulting from the changes to the EU Mutual Administrative Cooperation Directive were also implemented. All changes shall be applicable for the first time to fiscal years starting after 31 December 2016, except the Country-by-Country-Report which has to be prepared for fiscal years starting after 31 December 2015.

In addition, tax rulings (i.e. advanced cross-border rulings and advanced pricing arrangements) issued, reached, amended or renewed after 31 December 2016 have to be automatically exchanged. Further amendments were introduced for tax rulings issued, reached, amended or renewed in the year 2012 and subsequent years. These amendments take into account BEPS action point 5 "Measures to counter harmful tax practices".

Furthermore, the BEPS 1 – Implementation Act introduced a new regulation into domestic law in order to prevent double taxation of business expenses (i.e. double deduction) for partnerships effective from 1 January 2017.

Germany will also introduce a so-called licence barrier with legal effect as of 1 January 2018. This introduction shall limit the tax deductibility of licence fees or royalty payments to foreign-related parties that benefit from preferential tax regimes (such as IP, Licence or Patent boxes) which are incompatible with the OECD nexus approach of BEPS action point 5 "Measures to counter harmful tax practices".

Germany also signed the OECD Multilateral Instrument in June 2017. As a first step, Germany would like to amend 30 of its 100 double tax treaties, if the other countries agree. Ratification shall be made in the upcoming legislative period (elections will be in September 2017), first amendments of double tax treaties are expected for 2019.

Further required legislative procedure is foreseen in the second half of 2017.

10.2 Does your jurisdiction intend to adopt any legislation to tackle BEPS which goes beyond what is recommended in the OECD's BEPS reports?

Germany has published an *Action Plan against Tax Fraud, Tax Avoidance Schemes and Money Laundering – 10 next steps for a fair international tax system and a more effective fight against money laundering*. For instance, Germany introduced a transparency register, where any beneficial owner of a company is published in order to make the backers behind company structures more transparent. Further transparency rules are expected.

10.3 Does your jurisdiction support public Country-by-Country Reporting (CBCR)?

In General, German's jurisdiction does support public CbCR. Thus, according to a recommendation of a committee of the Federal Council, public CbCR represents an effective measure to prevent base erosion and profit shifting. Furthermore, a public CbCR complements the non-public CbCR in a reasonable way regarding the reputation of a company. Thus, the public confidence in transparency and fairness of tax systems should also be improved with a public CbCR. However, the protection of business secrets must be ensured and the reporting obligations shall be reasonable and grantable.

10.4 Does your jurisdiction maintain any preferential tax regimes such as a patent box?

Germany does not maintain any preferential tax regimes.

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