ARS LEGIS®
INTERNATIONAL

International network of lawyers, patent attorneys, auditors and tax consultants

NEWSLETTER

TAX LAW

Edition 1 / 2018

Index:

ARS LEGIS INTERNATIONAL ®

International network of lawyers, patent attorneys, auditors and tax consultants

Germany
18 May 2018

German gift tax and inheritance tax in transfers between non-residents

The Problem

Not many of those involved are aware of the fact that transfers of assets by gift or inheritance between non-German residents are taxable under the German Erbschaft- und Schenkungsteuergesetz (Inheritance and Gift Act, ErbStG). The parties involved are required to notify the German tax authority of the transfer of assets and to submit relevant tax returns if necessary. Failure to report a transfer or to file tax returns may entail severe sanctions.

Tax liability of German residents

unlimited tax liability

In Germany, unlimited tax liability regarding the total assets transferred without consideration - irrelevant of the fact whether those assets are located in Germany or abroad - applies at all times in case either the transferor/testator or the transferee are "residents" by law, including individuals whose primary (or secondary) residence or whose habitual residence is in Germany. The nationality of the parties involved is irrelevant.

extended unlimited tax liability

In this context it is important to note that German nationals are deemed domestic residents for five years after leaving Germany and, in the case of emigrating to the United States, for ten years (referred to as "extended unlimited tax liability").

limited tax liability

If neither the transferor nor the transferee are German residents, limited tax liability only applies to transferred assets regarded as "domestic assets" pursuant to the exhaustive list stipulated in section 121 of the German Bewertungsgesetz (Valuation Act, BewG). These include in particular immoveable property located in Germany and liabilities collateralised by domestic property, as well as assets of German business premises (including shares in partnerships) and shares held as a silent partner in a domestic trade company or profit participating loans (partiarische Darlehen) granted to domestic debtors. Furthermore, shares in a domestic corporation also constitute domestic assets if the transferor or testator directly or indirectly held a share of at least 10% (on his/her own or jointly with a related party) before the transfer.

extended limited tax liability

Pursuant to section 4 of the Außensteuergesetz (Foreign Tax Act, AStG), the transferor or testator is subject to what is referred to as "extended limited tax liability" for ten years after the emigration if he/she was a German national before leaving, subject to unlimited tax liability in Germany for a minimum of five out of ten years before leaving and if he/she emigrated to a low-tax country. If in this case a minimum degree of taxation under foreign gift or inheritance tax cannot be evidenced, practically all domestic assets not specified in the list of domestic assets in section 121 BewG are subject to taxation in Germany, including without limitation credit balances held at domestic banks, claims against domestic creditors, shares in domestic corporations (independent of the value of the share) and all moveable assets located in Germany.

Conclusion

expert advice should be sought

If the transferor/testator or transferee emigrated within the last ten years before the assets concerned were transferred, a thorough evaluation is required to determine whether the involved party is subject to gift tax or inheritance tax in Germany. Even if none of the parties involved has ever resided in Germany, expert advice should be sought if the assets to be transferred comprise real estate, shares in companies residing or operating in Germany, shares in German corporations or similar domestic assets.

Author:
Stefan Raster
Lawyer, specialising in tax law
FORUM von Seelstrang & Partner mbB Rechtsanwälte Steuerberater Wirtschaftsprüfer
Brienner Straße 55, 80333 München
www.vonseelstrang-partner.de

Austria
15 June 2018

Treatment of losses in Austrian group taxation

The Problem

If corporations (Kapitalgesellschaften under Austrian law: GmbH, AG - roughly comparable to private or public limited companies) incur tax losses, those losses cannot be used for tax purposes by the shareholders in many cases or can be used only to a limited extent. Contrary to partnerships (Personengesellschaften), corporations may only offset their losses against future profits, and those losses do not reduce the tax burden imposed on the shareholders. This often entails dissatisfying overall taxation, especially in the context of the group tax planning.

Offsetting tax losses against profits

unique in Europe

Austrian tax law provides for the option of offsetting losses of a corporation within a group of companies against profits of another group member and thus reducing the total tax burden, which is, according to my knowledge, unique in Europe. This can be done by establishing a tax group.

the group can offset losses vertically and horizontally

The basis for forming a tax group under the Austrian Körperschaftsteuergesetz (Corporate Income Tax Act, KStG) is adequate financial integration (i.e. a share of more than 50% of the capital and a majority of the voting rights) and a group agreement for the purpose of tax loss relief as well as a corresponding application to the tax authority. The company heading the group is referred to as the "group parent" (Gruppenträger). The subsidiaries (group members) with adequate financial integration each determine their taxable incomes, which are subsequently attributed to the group parent, with the total amount forming the group parent's base for calculating corporate income tax. This way, the group can offset losses vertically and horizontally.

subject to subsequent taxation

Group members may be corporations residing within as well as outside of Austria. Companies established in EU Member States are accepted as foreign group members, as are companies established in third countries which have entered into a corresponding agreement on the exchange of information with Austria. In relation to foreign group members, only the attribution of losses is permissible. The losses of foreign group members have to be calculated in accordance with Austrian statute governing the calculation of profits and are subject to specific restrictions. In general, though, foreign losses may be deducted by up to 75% of the domestic profits when determining the group parent's tax base. Foreign losses recognised in Austria in this way are subject to subsequent taxation whenever a tax loss is deductible in the foreign country concerned.

Example

Income of the group parent in Austria in 2018: EUR 200,000, subsidiary A's income (losses) in Austria amounts to EUR -20,000, subsidiary B's income (losses) in Bulgaria amounts to EUR -30,000. In 2018, the group parent pays corporate income tax in the amount of 25% of EUR 150,000 in Austria, which is EUR 37,500. If subsidiary B generates profits of EUR 50,000 in Bulgaria in 2019 and the losses of EUR 30,000 can be deducted in Bulgaria, the losses of EUR 30,000 attributed by the Bulgarian company are subject to subsequent taxation in Austria in 2019.

Conclusion

benefit from favourable taxation schemes in the long term

The intent and purpose of the Austrian corporate taxation system certainly is to offer tax benefits to Austrian companies which expand abroad and incur losses during the startup and initial development phase. In addition, practice in recent years has shown that under specific circumstances and in certain constellations many companies may benefit from favourable taxation schemes in the long term, staying clear of any suspicion of tax avoidance.

Author:
Andreas Horvath
Tax advisor
DIE Wirtschaftstreuhänder – Bauer & Partner Steuerberatung GmbH
Rudolfsplatz 6/5; 1010 Wien
www.diewt.at