News International
SPECIAL EDITION

E-MAIL NEWSLETTER 2019

Dear Sir or Madam,

Shareholders who hold at least 1% of the capital in a German or foreign corporation must observe the provision of Sec. 6 German Foreign Transaction Tax Act (AStG), in particular when relocating from Germany and when donating the shares in question to persons residing abroad. The so-called exit tax regulated therein can result in the taxation of the hidden reserves in the shares, although no sale takes place at all. In the absence of the inflow of sales proceeds, this may have a significant negative impact on liquidity depending on the market value of the shares.

In the EU/EEA area, however, the exit tax has lost its fear factor. Under certain conditions, the tax on the fictitious sales proceeds is indeed fixed, but deferred without interest and without collateral. As Switzerland is neither an EU Member State nor an EEA State, this rule did not apply to Switzerland. However, with the judgement of 26.02.2019, C-581/17 in the case Wächtler, the ECJ has now decided that the exit tax can be deferred when relocating to Switzerland. This results from the protective effect of the Agreement on the Free Movement of Persons (AFMP) between the EU and Switzerland, which is comparable to the European fundamental freedoms.

As always, the devil is in the detail and thus an all-clear signal cannot be given. In early 2018, in a decision in the context of France - Switzerland (judgement of 15.03.2018, C-355/16, case Picart), the ECJ found that the personal scope of the AFMP does not apply since the taxpayer did not meet the definition of a self-employed person.

For example, the effects are also unclear if shares resulting from restructurings realized long ago are affected ("tainted shares"). In addition, collateral may well be required in Switzerland cases and, of course, exit tax is in principle still applied to third countries.

It is encouraging to learn that the discussion on replacing the unlimited EU/EEA deferral with partial payments limited to five years is now likely to be over. In view of the recent case law of the ECJ, such a possibility was seen for the German legislator to be the case. However, the ECJ has now judged a stretched payment as being insufficient and has demanded a deferral until the actual sale.

Hope is also emerging for relocation cases in the United Kingdom after Brexit. While the all-clear signal was in principle given for the relocations that had already taken place, a deferral may be possible in future if an agreement similar to the AFMP is concluded after Brexit.

We are impatiently waiting for the reaction of the German legislator. Of course, it is clearly necessary to keep official decisions in pending cases open. Even in cases of relocations that have already taken place, there may still be procedural options for the application of the ECJ ruling. Please feel free to contact us.

Best regards

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The author

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Dr. René Schäfer completed his degree in Business Administration at Saarland University in Saarbrücken in 1999 as a Business Administrator. At the same time, he received the Diploma of the Ecole Supérieure de Commerce, Lyon after one year of study in France.

In 2003, he received a doctorate at the Chair for Business Management Studies, particularly Business Taxation from Univ. Prof. Dr. Heinz Kußmaul on the subject of "Taxation of a German-French company". Dr. Schäfer completed the examination for Tax Advisor in 2005. Since 2008, he has also possessed the title of "Specialist Advisor for International Tax Law".

In mid-February 2005, Dr. Schäfer began working as an employee in the tax department of DORNBACH GmbH, Saarbrücken branch.

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In July 2015, he was made an Honorary Professor in the subject of Business Administration at the Saarland University.

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Company presentation

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