

TAX INFO

Aktuelle Entwicklungen im deutschen Unternehmenssteuerrecht

Recent Developments in German Business Taxation



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New circular letter on transfer of assets and partnership interests

Federal Ministry of Finance directs non-application of recent rulings by the Federal Fiscal Court.

With its circular letter dated 12 September 2013, the Federal Ministry of Finance comments on three rulings by the Federal Fiscal Court dealing with the transfer of assets and partnership interests. According to the circular letter, the Federal Fiscal Court's rulings shall not be generally applied by the tax administration. Rather, the Federal Ministry of Finance will await the rulings of the Federal Fiscal Court in further pending cases.

The circular letter addresses the following issues:

- The Federal Fiscal Court had ruled that the transfer of an asset belonging to the so-called special business assets (*Sonderbetriebsvermögen*) of a partner to the assets of the partnership (*Gesamthandsvermögen*) against partial consideration (*Teilentgelt*) does not lead to a taxable realization of profits if such consideration does not exceed the book value of the asset (File No. IV R 11/12). If the partial consideration does not exceed the book value, the transfer is deemed to have been carried out without consideration.
- A transfer against partial consideration had also been dealt with by the Federal Fiscal Court in a further ruling. The Federal Fiscal Court had to decide on the application of Section 6 para. 5 of the German Income Tax Act (*Einkommensteuergesetz*) to the transfer of real estate from the

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Should further analysis or explanation of the subject matter be required, please contact a member of our Tax team or the lawyer with whom you normally consult.

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special business assets of a partner to the assets of an affiliated partnership (File No. IV R 1/08). According to the Federal Fiscal Court, such transfer lead to the realisation of all built-in gains of the real estate. However, as the value of the consideration did not exceed the book value of the real estate, no taxable profit resulted from such transfer against consideration. As far as the real estate was transferred without consideration, such transfer lead to a taxable withdrawal profit (*Entnahmegewinn*), though.

- At last, the Federal Fiscal Court had ruled that a partner could transfer his partnership interest in a tax-neutral manner even if such partner simultaneously transferred an asset from his special business assets of such partnership to a second – newly established – partnership in a tax neutral manner (File No. IV R 41/11). The Court argued that it would not be contradictory to the purpose of the law if Section 6 para. 3 and Section 6 para. 5 of the German Income Tax Act were applied simultaneously.

The Federal Ministry of Finance now commented on the Court's rulings as follows:

- According to the Federal Ministry of Finance, the provisions of the circular letter dated 8 December 2011 and the so-called division theory (*Trennungstheorie*) applying to transfers against partial consideration shall still be applied by the tax administration. Thus, a transfer is deemed a transfer against partial consideration if the value of the consideration does not amount to the market value of the transferred asset. As far as such transfer is deemed a transfer without consideration, the asset is transferred at its book value. As far as such transfer is deemed a transfer against consideration, such transfer leads to the realization of built-in gains.
- A simultaneous application of Section 6 para. 3 and Section 6 para. 5 of the German Income Tax Act shall be excluded. Rather, the tax administration shall apply the provisions of the circular letter dated 3 March 2005. According to the Federal Ministry of Finance, the principles of the Court's judgments on so-called overall plans by the taxpayer (*Gesamtplanrechtsprechung*) shall be applied in order to avoid the gradual tax-neutral transfer of essential business assets to different legal entities.

The German Constitutional Court (*Bundesverfassungsgericht*) will have to deal with part of the above mentioned issues. In a further pending case, the Federal Fiscal Court has brought the question before the German Constitutional Court whether it is unconstitutional that assets cannot be transferred from partnerships to affiliated partnerships in a tax-neutral manner (File No. I R 80/12).

From a tax planning perspective, the circular letter by the Federal Ministry of Finance has to be criticized. The tax administration complicates the restructuring of partnerships which had been facilitated by the Federal Fiscal

Court. This holds true, in particular, for company succession cases. Appeals (*Einsprüche*) by the taxpayer based on the rulings of the Federal Fiscal Court are not further proceeded until the underlying issues are resolved in a final manner. While the requirements of a suspension of execution (*Aussetzung der Vollziehung*) should be met in many cases, a safe tax planning will only be possible if the taxpayer chooses alternative structuring options.