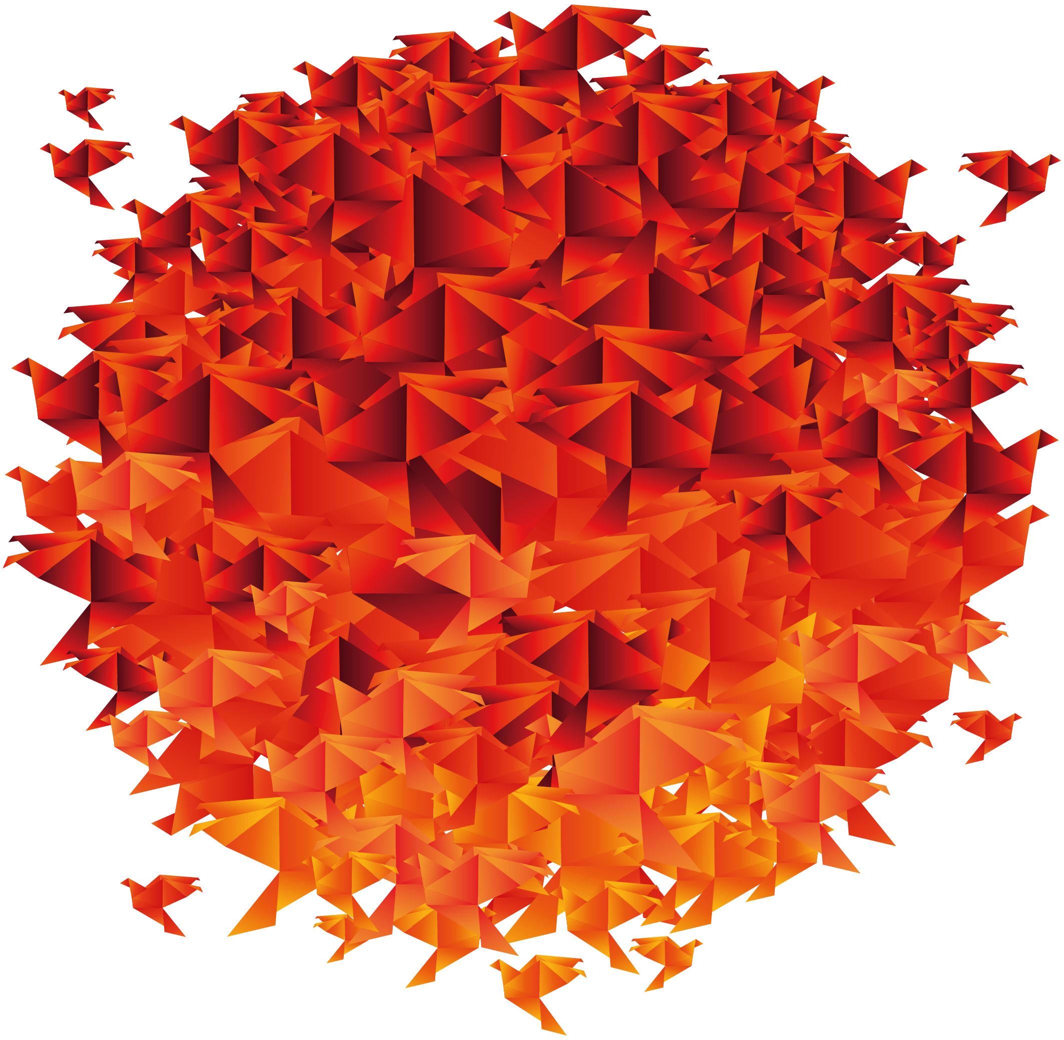

German change-in-ownership rules

Introduction to the basics of German change-in-ownership rules highlighting key conditions, impacts and exemptions

Background

Since the introduction of the German change-in-ownership rules in 2007 with effect as from 1 January 2008, the rules have been highly debated in German tax matters. The application of the rules has encountered various uncertainties, and several cases were opened before German Lower Tax Courts and the Federal Tax Court.

The German Federal Constitutional Court ruled in March 2017 that German change-in-ownership rules for the acquisition of more than 25 percent up to 50 percent of shares, voting rights, etc., are not in line with the German constitution. Regarding the acquisition of more than 50 percent of shares, voting rights, etc., a case is pending with the German Federal Constitutional Court as to whether such rule is in line with the German constitution.

The following overview presents a summary on the current German change-in-ownership rules.

General rules

If more than 50 percent of shares, voting rights, etc., in a corporation are transferred, either directly or indirectly to an acquirer, related parties or a group of acquirers with convergent interests, within a five-year period, all of this corporation's existing German tax losses should generally be forfeited under German change-in-ownership rules and thus should not be available to offset the corporation's taxable profits after such harmful share transfer.

The term 'tax losses' refers to current year tax losses incurred until the harmful share transfer as well as to tax loss carry forwards from prior periods. In addition, specific other tax losses and also interest carry-forwards (collectively referred to as "tax attributes" in the following) should be caught by the German change-in-ownership rules based on guidance from the German Federal Ministry of Finance.

Unconstitutionality of the rules?

The Federal Constitutional Court of Germany ruled in 2017 that the German change-in-ownership rules regarding share transfers of more than 25 percent up to 50 percent are unconstitutional for the period from 1 January 2008 through 31 December 2015. For periods after 31 December 2015, the court considered it necessary to make a separate assessment to take into account the new business continuation exemption (see below).

In reaction to the aforementioned court decision, the German legislator completely abolished the disputed rules without substitution with retroactive effect from 1 January 2008.

Currently, an additional court case is pending before the Federal Constitutional Court as to whether German change-in-ownership rules for share transfers of more than 50 percent are unconstitutional as well. The outcome of this court case cannot be predicted.

Exemption rules

There are exemption rules from the above-outlined general tax attribute forfeiture provisions. The table below shows an overview and brief descriptions of.[1]

Fig. 1 – Exemption from the general tax attribute forfeiture under German change-in-ownership rules

Exemption rule	Brief description
Group exemption rule	Share transfers within a group of companies may benefit from the group exemption rule resulting in safeguarding the respective tax attributes of the corporation. Transactions between third parties should generally not benefit from the group exemption rule.
Built-in gains exemption rule	A corporation's tax attributes should be safeguarded despite a harmful share transfer if and to the extent that so-called qualifying "built-in gains" are available at this corporation. A fair market valuation report (on a stand-alone basis; with a potential additional cost factor) may be required.
Business continuation exemption rule	The application of this rule with the result of safeguarding the corporation's tax attributes basically requires continuous business operations of the respective corporation in the past (at least for the last 3 calendar years and the current one) and in the future as well as a timely and duly filed application by the corporation. Strict structure-based limitations and applicability exclusions will, though, apply.
Restructuring exemption rule	If the share acquisition was part of a rescue operation performed with the goal of corporate recovery, the corporation's tax attributes may be safeguarded under the restructuring exemption. In June 2018, the European Court of Justice annulled the European Commission's decision from 2011 that the restructuring exemption rule is a prohibited state aid. On the basis of this court decision, the German legislator has reinstated the exemption rule with retroactive effect from 1 January 2008 onwards.

[1] This description of the exemption rules only serves as an initial, non-exhaustive overview, while details and applicability of these rules would need to be thoroughly analyzed on a case-by-case basis.

Contacts

Do you have any more questions?
We are looking forward to your call or email to discuss opportunities and requirements in more detail tailored to your needs and your expectations.

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