



Newsflash

EU Direct Tax Group

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Germany - infringement procedure on "transfer of hidden reserves"

In a press release of 29 September 2011, the Commission reported of its formal request to Germany to amend the provision on the "transfer of hidden reserves" in case of reinvestments abroad.

According to Sec. 6b German Income Tax Act (ITA) the taxation of capital gains from selling German real estate or inland vessels can be deferred by deducting them from the acquisition costs of newly purchased assets, mainly real estate and inland vessels as well. The deduction reduces the base for future write-downs and, thus, the taxation of capital gains is deferred.

In order to obtain a so called "transfer of hidden reserves", several requirements have to be met. One of them is that the newly acquired asset belongs to a German permanent establishment (PE). Assets which belong to a foreign PE, irrespective of whether Germany has a right to tax the profits and capital gains of this PE or not, are not entitled to such a transfer.

The Commission is of the view that this territorial limitation is in breach of the freedom of establishment (Art. 43 TFEU and Art. 31 EEA) as it hinders taxpayers to establish or expand their economical activity abroad.

The request takes the form of a reasoned opinion (second step of an infringement procedure) so that Germany needs to react within two months. Otherwise the Commission can take action before the ECJ.

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