



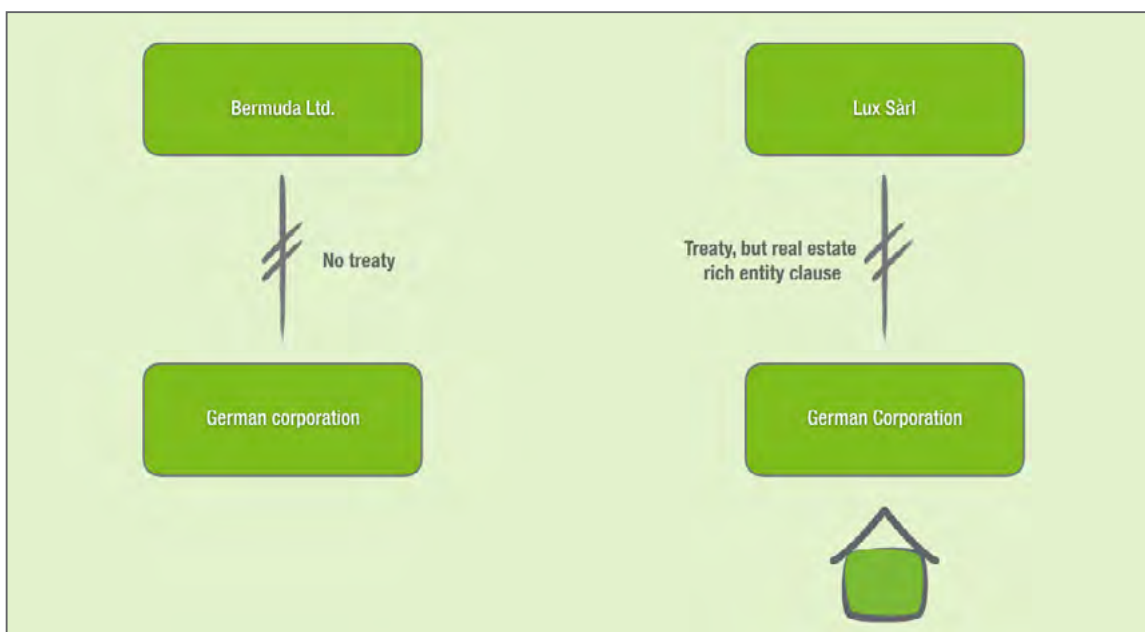
## German Federal Tax Court decides against 5 per cent add-back for non-resident corporate selling shares in German corporation

November 14, 2017

Exiting a German inbound structure via a sale of shares in a German corporation subjects the non-resident seller to a capital gains tax under German domestic law. If, however, the seller is a corporation, it will benefit from the domestic participation exemption privilege. Unlike to the tax situation of a German corporate seller, the non-resident corporate seller will not suffer a 5 per cent add-back – the German Federal Tax Court held: it will benefit from a 100 per cent tax exemption.

The German Federal Tax Court decided against the German Fiscal Authority that a non-resident corporation is entitled to 100 per cent tax exempt capital gain on the alienation of shares in a German corporation. The facts were that a Bermuda Ltd held shares in a German stock corporation via a tax transparent Bermuda Limited Partnership. Neither the Bermuda Ltd nor the Bermuda Limited Partnership had a permanent establishment in Germany. German tax rules for non-residents provide that the profit from the sale of shares in a company that has either its legal seat or place of management in Germany may be taxed in Germany but such tax is limited to the capital gain out of this transaction. That is different in a tax treaty context, where the sole right of taxation generally rests with the jurisdiction of the non-resident seller. However, some German treaties (e.g. German-Luxembourg treaty) contain a clause for real estate rich companies where the real estate is located in Germany; in such a case the situation would be comparable to the situation of the Bermuda Ltd. in the case at hand.

As for German corporate sellers of shares in a German corporation domestic corporate law grants a tax exemption under the German Corporate Tax Act. However, such exemption results only in a tax exemption of 95 per cent of the capital gain with the remaining 5 per cent being subject to corpo-





rate tax at a rate of 15 per cent. This is because of an add-back of 5 per cent as so-called deemed business expense.

The Federal Tax Court now ruled that even the deemed add-back requests that, as the wording asks for, in principle a business expense may be deductible by the seller. A non-resident seller would not be able to claim for business expenses in relation to its German share holding in general without having a permanent establishment in Germany. Therefore, the non-resident seller cannot be subject to the 5 per cent deemed business expense either.



### Documents to be informed:

- [Federal Tax Court May 31, 2017](#)

As simple as the argument of the Federal Tax Court is, it was not only held by the German Fiscal Authorities but by many tax advisors in Germany, that a non-resident shareholder

would suffer the 5 per cent add-back. Therefore, non-resident corporates with a recent or coming exit of a German inbound structure should verify how their sale was or is treated in their tax returns and tax assessments. As bepartners is not only offering tax structuring advice but tax compliance also, we are happy to assist.



**be in touch: Any questions? Please do not hesitate to contact us!**



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