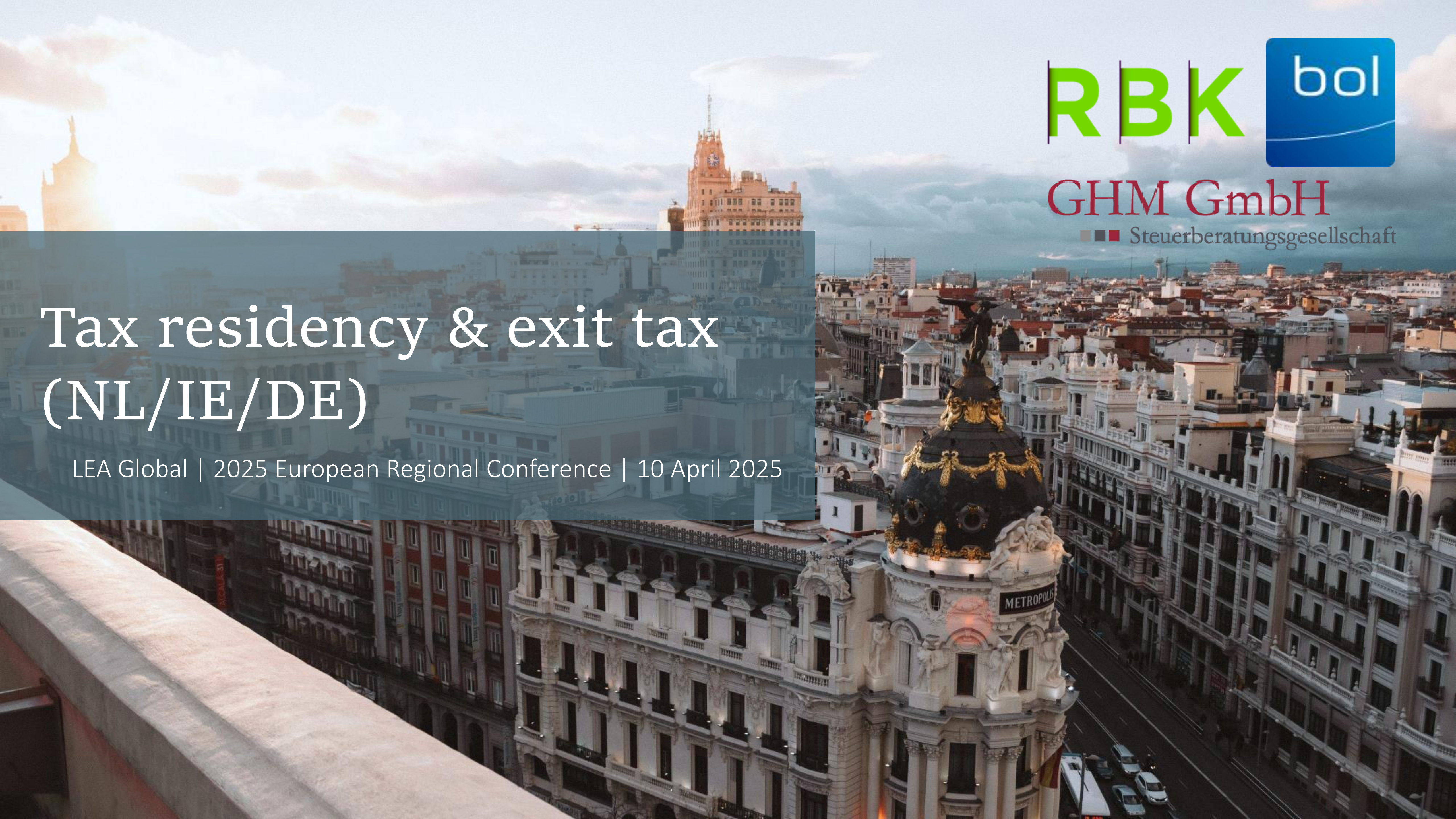

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Tax residency & exit tax (NL/IE/DE)

LEA Global | 2025 European Regional Conference | 10 April 2025

Introduction

Hot topic

- Changing economy; digital
- Remote working / return to the office
- More wealth; retirement plans
- Tax optimization, tax avoidance (high profile cases)

Today's presentation

- Discussing domestic tax frameworks
- Identifying similarities and differences

Private individuals (i)

Dutch framework

Criterion residency: *"a person who lives in the Netherlands"*

According to the facts and circumstances

Decisive:
- Durable bond of a personal nature between the person and the Netherlands (HR 12-4-2013, nr. 12/02980)
- Centre of vital interest does not have to be in the Netherlands (!)

Same weight given to the various factors

<u>Deemed residency</u>
- In-and-out
- Gift tax and inheritance tax (less treaties):
  - National: 10 years tracking period
  - Foreigner: 1 year for gift tax purposes

Indicators

Published policy Dutch tax authorities:
- Availability of a permanent home
- Where the family resides
- Where the taxpayer resides
- Social ties
- Employment / business ties
- Financial interests
- Spending habit
- Intention
- Registration
- Nationality
- Circumstances abroad irrelevant (?)

Numerous tax audits

Private individuals (ii)

Double tax treaties

OECD Model Convention article 4, par. 2:

a. *he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);*

b. *if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;*

c. *if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;*

d. *if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.*

Exit tax

Change of residency

Taxable events

Category	Tax profile	Tax rate (2025)
Sole proprietorship (box 1)	Exit tax	Top rate 49.5% (income > EUR 73.031)
Substantial shareholding (box 2)	Deemed transfer of shares	Top rate 31% (income > EUR 67.804)

Payment?

- Pension: protective assessment (10 years)
- Substantial shareholdings: protective assessment (indefinite)
- Sole proprietorship:
    - immediate payment
    - deferment (security to be provided)
    - payment in 10 yearly installments

Companies (i)

Dutch framework

According to the facts and circumstances

Decisive: Place of effective management

Deemed residency

- Incorporated under Dutch law
- After changing residency

Indicators

- place of where board meetings are held
- place where the headquarter is located
- residency of the directors
- other circumstance such as statutory seat
- where the activities are being carried out
- where the general meeting of shareholders are held
- place where the administration is being maintained
- registration in the business register, etc.

Companies (ii)

Double tax treaties

OECD Model Convention article 4, par. 3 until 2017:

- Place of effective management

Case law: Supreme Court 19 January 2018 "Singapore"

- Treaty Singapore – Netherlands (1971), Article 3 par. 4: "Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both States, then it shall be deemed to be a resident of the State in which it is managed and controlled."

Managed and controlled:

- where the key decisions regarding the entity's activities are taken
- where the final responsibility for these decisions is borne and
- where, if appropriate, instruction is given to personnel of the entity

Who is in charge of the day-to-day management is not relevant (!)

Case law: Supreme Court 2 July 2021
Managed and controlled = place of effective management

Companies (iii)

OECD Model Convention article 4, par. 3 as of 2017:

- Mutual Agreement Procedure

Article 4, par. 3
[…] the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors.

OECD Commentary on article 4, par. 3 (24.1):

- where the meetings of the person's board of directors or equivalent body are usually held
- where the chief executive officer and other senior executives usually carry on their activities
- where the senior day-to-day management of the person is carried on
- where the person's headquarters are located
- which country's laws govern the legal status of the person
- where its accounting records are kept

MAP in relation to Principal Purpose Test?

Exit tax

Change of residency

Taxable event

- Deemed alienation against fair market value
- Top rate 25.8% (income > EUR 200,000; lower rate 19%)

Payment?

- No immediate payment
- Payment schedule 5 years (upon request):
    - Anti-Tax Avoidance Directive 1 (“ATAD”); 1 January 2019
    - Security to be provided, but only in specific cases

Residency Framework
Irish Perspective
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Private Individual

Residence / Ordinary Residence / Domicile

The Irish taxation of income will depend on a number of factors:

- The individual's tax residence and domicile status and
- The source of the income.

Ordinary Residence

- If an individual is tax resident in Ireland for three consecutive tax years, they are regarded as ordinarily resident in Ireland from the beginning of the fourth tax year.
- Once an individual becomes ordinarily resident in Ireland, they do not cease to be ordinarily resident until they have been non-resident for three consecutive tax years.

Private Individual

Domicile

- Generally a person is domiciled in a country of which they are a national and in which they spends their life. A person can only have one domicile at any one time, and is not based on a "days counting" test, which is applicable for tax residence.
- When an individual is born they acquire a "domicile of origin" i.e. generally a child born in wedlock takes the domicile of their father at the date of their birth.
- It is possible to change your domicile and acquire a "domicile of choice", however this requires an active intention to change domicile.
- It is a very different concept to residence. An individual can very easily change tax residence, however it is much harder to change domicile.
- A person must always have a domicile for Irish tax purposes and where an individual acquires a domicile of choice but then abandons that domicile of choice without reacquiring another domicile of choice, they then revert to their domicile of origin, until such time as they reacquire another domicile of choice.

Private Individual

Change of Residency

- There are no formal 'exit tax' charges applicable for individuals leaving Ireland. Flip side is no "step up" in asset values when migrating to Ireland
- Ordinary residence can sometimes be overlooked.
- If an individual is considered ordinary resident and changes tax residence, they will still be considered Irish ordinary resident for a period of three years afterwards and will be subject to Irish income tax on certain sources of income during this period.
- Similarly for CGT purposes if considered non domiciled in Ireland but either resident or ordinary resident, you will still be subject to Irish CGT in respect of Irish gains and other gains remitted to Ireland.
- Careful review of applicable double taxation agreement is required.
- For Capital Acquisitions Tax (CAT) purposes – a non-domiciled individual is considered deemed resident/ordinary resident if they have been tax resident for 5 consecutive years preceding the year of the gift/inheritance.

Company Perspective

Residence

- A company is considered tax resident in Ireland if either:
    - It is incorporated in Ireland – the incorporation test, or
    - The company is managed and controlled in Ireland regardless of where it is incorporated. There are a number of factors indicative of management and control being in Ireland such as majority of Irish resident directors, board meetings held in Ireland

Company Perspective

Change of Residence

- Exit tax charge applied on migration of tax residence or the transfer of assets to another jurisdiction.
- Exclusions - assets that remain within the charge to Irish Capital Gains Tax ("CGT") e.g:
  - Irish real estate
  - minerals or mineral rights, or
  - shares that derive their value or the greater part of their value from such assets.
  - Additionally, the charge will not apply to assets which continue to be used in Ireland by a permanent establishment of the company after the company has migrated
- The company is deemed to have disposed and immediately reacquired its assets/business at market value.
- Any gain arising will be taxable at 12.5% (note not 33% which is standard CGT rate)

COMPANY PERSPECTIVE

CHANGE OF RESIDENCE

- Tax can be paid over a 5 year period if required.
- An anti-avoidance provision is included to ensure that a rate of 33% rather than 12.5% applies if the exit forms part of a transaction to actually dispose of the asset and the purpose of the exit is to ensure that the gain is charged at the lower rate.
- Note - Participation Exemption does not apply in relation to deemed disposal of qualifying shareholdings under the exit charge provisions

Company Perspective

Change of Residence

- Where exit tax is charged in another **Member State** in respect of an asset by virtue of Article 5(1) of the Directive, the value of the asset established under the law of that Member State for the purposes of the exit tax charge will be accepted as the acquisition cost of that asset in Ireland unless that value does not reflect the market value of the assets.
- No step up if migration from other territories

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Thank you

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We're by your side

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Head of Tax

Income tax under German law: unlimited tax liability

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- Pursuant to Section 1 (1) sentence 1 EStG, there is an unlimited income tax liability with the recognition of global income for natural persons who in Germany have
    - a place of residence (§ 8 AO) **or**
    - their habitual residence (§ 9 AO).

      (Habitual residence requires a stay of at least six months).

⇒ "**Global income principle**"

Income tax under German law: unlimited tax liability

- **Residence (§ 8 AO):**

  A person has a place of residence where they occupy a dwelling under circumstances that suggest that they will retain and use the dwelling. According to case law and the opinion of the tax authorities, this is always the case if the following applies (from the Application Decree to the General Tax Code - AO - AEAO):

  – "Anyone who establishes a residence abroad and retains their residence in Germany **also** has a residence in Germany within the meaning of Section 8 AO."

  – "The mere intention to establish or give up a residence or the registration and deregistration with the regulatory authority alone does not have a direct tax effect."

  – "Dwelling means objectively suitable living space. A modest abode is sufficient."

  – "It is sufficient for the apartment to be used regularly twice a year at certain times for a few weeks over a period of years, for example."

  – "A residence within the meaning of § 8 no longer exists if the domestic dwelling(s) is/are given up. This is the case, for example, if a rented apartment is terminated and dissolved, or if the apartment in one's own house or condominium is rented out for more than a short time."

Income tax under German law: unlimited tax liability

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- **Residence (§ 8 AO):**
  Only if the character and location of the home are exclusively for recreational, spa, study or sports purposes and is **demonstrably** used only occasionally and not for the purpose of pursuing economic and professional interests, does this not constitute a permanent residence in Germany despite the residence (negotiation protocol of June 18, 1971 on Art. 4 para. 2 and 3 to the DTA DE-CH).
  - In some cases, this **proof** is likely to be difficult to provide due to a lack of evidence, especially as Germany places the burden of proof on the taxpayer in foreign matters by reversing the burden of proof in accordance with Section 93 (2) AO if the taxpayer wishes to obtain favorable taxation.

Income tax under German law:
Double Tax Treaty!

- If someone is also subject to unlimited tax liability in both treaty countries, this is known as dual residency.
- In the case of dual residency, the DTT assigns the primary right of taxation to one of the two countries (tie-breaker rule according to Art. 4 para. 2 DTT) in the order of the following criteria:

Permanent residence
↓
Center of life interests
↓
Ordinary stay
↓
Nationality
↓
Tax authorities regulate residency

Main features of German inheritance tax law

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- Inheritances and gifts are governed by the same law, the Inheritance Tax and Gift Tax Act (ErbStG).
- The aim is to tax the enrichment of the recipient ("enrichment tax"), similar to income tax.
  - The recipient is then taxed because he has an increase in assets and an element of the ErbStG is fulfilled.
  - The U.S. and the UK, on the other hand, have an estate tax where only the estate is taxed (gift tax is considered an avoidance offense).

Exemption amounts and tax rates in case of unlimited tax liability in Germany

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Inheritance tax/ gift tax: Exemption amounts and tax rates since 2010		Class I			Class II	Class III
Transferee		Spouse, life-partner	Child, stepchild, adoptive child	Grandchild	Sibling, parent, nephew, uncle, aunt,...	Unrelated person
Exemption amount to be granted once in a 10 year period		500.000 €	400.000 €	200.000 €	20.000 €	20.000 €
Value donated or bequeathed after deduction of liabilities bequests and exemption amount	Up to 75.000 €	7 %			15 %	30 %
	From 75.001 to 300.000 €	11 %			20 %	30 %
	From 300.001 to 600.000 €	15 %			25 %	30 %
	From 600.001 to 6.000.000 €	19 %			30 %	30 %
	From 6.000.001 to 13.000.000 €	23 %			35 %	50 %
	From 13.000.001 to 26.000.000 €	27 %			40 %	50 %
	Above 26.000.000 €	30 %			43 %	50 %

German Inheritance Tax/Gift Tax on taxable Transfers

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	Heir/donee residence and/or habitual abode in Germany	Heir /donee **abroad**
Deceased/donor residence and/or habitual abode in Germany	1. Unlimited tax liability	2. Unlimited tax liability
Deceased/donor **abroad**	3. Unlimited tax liability	4. Limited tax liability, when **German assets** are transferred

- In **Cases 1. to 3.** the **worldwide-asset-principle** (similar to the worldwide-income-principle) applies:
  - All assets transferred from German deceased or donors are taxable in Germany and all assets received by German heirs or donees are taxable in Germany
  - The tax exemption amounts next page apply.
- In **Case 4.** (limited tax liability) only certain **German assets** are taxable.

German Residency of Companies

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- A company is considered tax resident in Germany if either:
  1. It is incorporated in Germany (entry into the commercial registry), **or**
  2. The company is managed and controlled in Germany regardless of where it is incorporated,
     There are a number of factors indicative of management and control being in Germany
     - The management is the center of the business management.
     - This is the place where, according to the overall picture of the actual circumstances, depending on the structure and nature of the company, the most important place in organizational and economic terms is located, where the measures necessary for the ongoing management of some importance are ordered.
     - The actual and legal actions of the ordinary course of the commercial business, as well as the organizational measures (daily business) associated with the ordinary administration, are part of the ongoing management.
     - Day to day business is decisive
     - Supervisory board meetings or the technical management are irrelevant
- There are different concepts where a company is located if Germany has entered into a DTT

Selection of most important Taxable Exit Events in Germany

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	Item taxed	Triggering Event	Tax Consequences	Taxes	No consideration in case of transfer
Individual	Trade or business	Transfer or change of residency	Deemed sale	Individual Tax Rate (up to 51%)	Gift tax (up to 50%)
	Shares in a German or corporation ≥ 1%	Transfer or change of residency	Deemed sale	Individual Tax Rate (up to 51%)	Gift tax (up to 50%)
	Trade or Business and intangible assets	Function	Deemed sale	Individual Tax Rate (up to 51%)	Gift tax (up to 50%)
Corporation	Place of Management	Change of place of effective management **or** legal seat	Deemed liquidation	Corporate income tax rate (∅ 30%)	
	Legal Seat				
	Function	Transfer	Deemed sale	Corporate income tax rate (∅ 30%)	
	Transfer from Permanent establishment (inbound) abroad	Liquidation	Deemed liquidation	Corporate income tax rate (∅ 30%)	
	Permanent establishment (outbound) from one country to another foreign county	Change from credit method to exemption method (and vice versa)	Deemed sale	Corporate income tax rate (∅ 30%)	

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Case - DE/NL

Fact pattern

- Dutch national
- Moved to Germany several years ago not having anything
- Established a German OpCo via foreign HoldCo
- Migration from Germany to the Netherlands in 2017
- Sold OpCo in 2022
- Liquidation HoldCo in 2023

Tax implications

- Exit tax in Germany 2017? Calculated valuation
- Immigration to the Netherlands;
    - Income from substantial shareholdings (box 2)
    - Step up in the Netherlands; against fair market value (!)
- 2023: Liquidation as deemed alienation = proceeds -/- acquisition price
- Loss realized (discount)