

# Contents

About the authors .....	IV
Foreword .....	V
<b>Chapter 1: Introduction .....</b>	<b>1</b>
A. Purpose of this book .....	1
B. Benefits for readers .....	1
C. Peculiarities of German tax law .....	2
D. Good to know – Useful information and recommendations for foreign investors .....	9
<b>Chapter 2: Overview of the German tax system .....</b>	<b>19</b>
A. Tax subjects; tax liability .....	19
B. Taxpayer .....	20
C. Taxable income .....	22
D. Corporate Income Tax .....	24
E. Trade Tax .....	25
F. Financial statements, accounting and reporting .....	25
G. Electronic tax balance sheet .....	26
H. Group taxation .....	27
I. Tax losses .....	27
J. Value-added Tax .....	28
K. Real Estate Tax .....	31
L. Real Estate Transfer Tax .....	33
M. Customs and excise duties when importing goods to Germany .....	34
N. Tax Incentives for Organisation of General Interest – charitable Organisations .....	34
O. EU Law .....	36
P. Tax Treaties .....	40
Q. Anti-treaty / Directive-shopping rule .....	41
R. CFC regulations .....	41
S. Assessment procedure .....	43
T. Filing and payment .....	44
U. Objection to tax assessment .....	45
V. Statute of limitation .....	45
W. German tax authorities .....	45
X. Tax audits .....	46
Y. Rulings .....	47
<b>Chapter 3: Investment through German corporation .....</b>	<b>48</b>
A. Establishment of a corporation .....	48
B. Forms of corporations .....	49
C. Taxation of corporations .....	52
D. Taxation of the shareholder .....	53
E. Thin capitalisation rules .....	54
F. Dividend taxation .....	57
G. Capital gains .....	57
H. Held for trading shares .....	58

I. Change in ownership rule .....	58
J. Trade taxable income .....	61
K. Tax group .....	64
L. Tax assessment period .....	67
M. Electronic Tax Declaration .....	68
<b>Chapter 4: Investments through German partnerships .....</b>	<b>69</b>
A. Overview .....	69
B. Available classes of partnerships .....	70
C. General taxation principles .....	72
D. Procedural aspects of income determination .....	85
E. Application of tax treaties .....	86
F. Inbound tax planning with partnerships – Examples .....	92
<b>Chapter 5: Investments through German permanent establishments .....</b>	<b>110</b>
A. General .....	110
B. Taxation rules .....	116
C. Profit allocation .....	117
D. Inbound tax planning with permanent establishments – Examples .....	129
<b>Chapter 6: Taxation of direct business activities .....</b>	<b>138</b>
A. Introduction .....	138
B. Limited German tax liability .....	138
<b>Chapter 7: Special tax problems of cross-border investments .....</b>	<b>153</b>
A. VAT refund problems .....	153
B. German trade tax system .....	154
C. Thin capitalisation rules .....	157
D. Cross-border aspects of German tax groups .....	160
E. Dual consolidated loss rules .....	161
F. Bookkeeping abroad .....	162
G. Taxation of cross-border dividends .....	162
H. Taxation of royalty payments .....	168
I. Anti-abuse Regulations .....	169
J. Hybrid entities .....	176
<b>Chapter 8: Tax problems of special industries/business sectors .....</b>	<b>195</b>
A. Investment funds .....	195
B. Real estate sector .....	199
C. Shipping industry .....	209
D. Distribution models: Principal structures .....	214
E. M&A/Private Equity – cross-border reorganizations .....	217
F. Non-profit organizations .....	219
G. E-commerce .....	222
H. Leasing .....	224
<b>Chapter 9: Holding companies in Germany .....</b>	<b>230</b>
A. General .....	230
B. Acquisition .....	231

C. Financing .....	231
D. Comparison of corporation and partnership as holding company . . .	232
E. VAT – entrepreneur status .....	233
F. Limited tax liability .....	234
G. Taxation of partnership .....	235
H. Participation exemption for corporations .....	237
I. Withholding taxes .....	239
J. Exit taxation .....	240
K. Reorganisations .....	242
L. CFC regulations .....	252
<b>Chapter 10: Transfer pricing from a German perspective .....</b>	<b>259</b>
A. Introduction .....	259
B. General provisions governing profit allocation between related parties .....	260
C. General principles for the allocation of income .....	264
D. Business restructurings: Relocation of functions .....	276
<b>Index .....</b>	<b>284</b>

# Detailed Table of Contents

About the authors .....	IV
Foreword .....	V
<b>Chapter 1: Introduction .....</b>	<b>1</b>
A. Purpose of this book .....	1
B. Benefits for readers .....	1
C. Peculiarities of German tax law .....	2
I. High degree of codification .....	2
II. Tax Court system and "tax climate" in Germany .....	3
III. European Union Law and its influence .....	5
IV. German Constitutional Court .....	6
V. Tax treaties and treaty overrides .....	7
VI. Trade tax .....	8
D. Good to know – Useful information and recommendations for foreign investors .....	9
I. Ruling practice/APA practice .....	9
II. VAT for foreign entrepreneurs – practical issues .....	10
1. General information .....	10
2. Contact details .....	11
3. Application process .....	11
4. Tax representative .....	12
III. Cooperation duties in international tax cases .....	13
IV. Transfer pricing documentation requirements .....	14
V. Disclosure duties for international payments .....	15
VI. Estimation of taxable income .....	16
VII. Voluntary disclosure procedure .....	16
VIII. General rules for keeping books and records .....	17
<b>Chapter 2: Overview of the German tax system .....</b>	<b>19</b>
A. Tax subjects; tax liability .....	19
B. Taxpayer .....	20
C. Taxable income .....	22
I. Depreciation .....	22
II. Thin capitalisation rules .....	23
D. Corporate Income Tax .....	24
I. Corporate Income Tax for Corporations .....	24
II. Income Tax for Partnerships .....	24
E. Trade Tax .....	25
F. Financial statements, accounting and reporting .....	25
G. Electronic tax balance sheet .....	26
H. Group taxation .....	27
I. Tax losses .....	27
J. Value-added Tax .....	28
K. Real Estate Tax .....	31
L. Real Estate Transfer Tax .....	32
I. Indirect transfer of real estate property .....	32
II. Tax exempt transfers .....	32

M.	Customs and excise duties when importing goods to Germany . . . . .	33
N.	Tax Incentives for Organisation of General Interest – charitable Organisations . . . . .	34
O.	EU Law . . . . .	36
	I. EU – Indirect Tax Directives . . . . .	36
	II. Merger Directive . . . . .	36
	1. The substantive scope of the Reorganisation Tax Act with respect to the Merger Directive . . . . .	37
	2. The personal scope of the Reorganisation Tax Act . . . . .	37
	III. Parent-Subsidiary Directive . . . . .	37
	1. The personal scope of the Parent-Subsidiary Directive implemented in German tax law . . . . .	38
	2. The substantive scope of the Parent-Subsidiary Directive implemented in German tax law . . . . .	38
	IV. Interest and Royalties Directive . . . . .	39
	1. The personal scope of the Interest and Royalty Directive as implemented in German tax law . . . . .	39
	2. The substantive scope of the Interest and Royalty Directive as implemented in German tax law . . . . .	39
P.	Tax Treaties . . . . .	40
	I. General . . . . .	40
	II. Subject to tax clauses . . . . .	40
Q.	Anti-treaty/Directive-shopping rule . . . . .	41
R.	CFC regulations . . . . .	41
S.	Assessment procedure . . . . .	43
T.	Filing and payment . . . . .	44
U.	Objection to tax assessment . . . . .	45
V.	Statute of limitation . . . . .	45
W.	German tax authorities . . . . .	45
X.	Tax audits . . . . .	46
Y.	Rulings . . . . .	47
	<b>Chapter 3: Investment through German corporation . . . . .</b>	<b>48</b>
A.	Establishment of a corporation . . . . .	48
B.	Forms of corporations . . . . .	49
	I. Stock Corporation . . . . .	49
	II. Limited Liability Company . . . . .	49
	III. Societas Europaea . . . . .	50
	IV. Commercial Register . . . . .	50
C.	Taxation of corporations . . . . .	52
D.	Taxation of the shareholder . . . . .	53
E.	Thin capitalisation rules . . . . .	54
	I. Escape Clauses . . . . .	54
	II. Exemption from Escape Clauses . . . . .	55
	III. Definitions . . . . .	56
	IV. Interest expense carry-forward . . . . .	56
	V. EBITDA carry-forward . . . . .	57
F.	Dividend taxation . . . . .	57
G.	Capital gains . . . . .	57
H.	Held for trading shares . . . . .	58
I.	Change in ownership rule . . . . .	58
	I. General . . . . .	58

II. New change-in-ownership rule since 1 January 2008 .....	59
III. Exceptions .....	60
J. Trade taxable income .....	61
I. Add-backs .....	61
II. Deductions .....	61
K. Tax group .....	64
I. General .....	64
II. Legal conditions .....	64
III. Advantages .....	65
IV. Risks .....	65
V. Consolidated return – tax group .....	66
VI. Future of German fiscal unity rules .....	66
L. Tax assessment period .....	67
M. Electronic Tax Declaration .....	68
<b>Chapter 4: Investments through German partnerships .....</b>	<b>69</b>
A. Overview .....	69
B. Available classes of partnerships .....	70
I. Legal classification .....	70
1. General .....	70
2. Short explanations .....	70
II. Tax law classification .....	71
C. General taxation principles .....	72
I. Different classes of partnership in German tax law .....	72
1. Commercial partnerships .....	72
2. Deemed-commercial partnerships .....	76
3. Non-commercial partnerships .....	77
II. Relationship between partners and “their” partnership .....	78
1. Special remuneration .....	78
2. Special business assets .....	79
III. Special issues .....	80
1. Transfer of assets between partnerships and partners .....	80
2. Sale of partnership interest and winding-up .....	82
3. Fictitious “split of business” .....	83
IV. Tax rates/earnings retention .....	83
D. Procedural aspects of income determination .....	85
I. General .....	85
II. Restrictions due to section 15a Income Tax Act regarding losses .....	85
III. Uniform determination of profits .....	86
E. Application of tax treaties .....	86
I. Commercial partnerships .....	86
1. General .....	86
2. Special Remuneration .....	88
II. Deemed-commercial partnerships .....	89
III. Non-commercial partnership .....	90
IV. Inbound-Investment through foreign partnerships .....	90
F. Inbound tax planning with partnerships – Examples .....	92
I. Using partnerships to avoid the German interest barrier rule ...	92
1. Structure chart .....	92
2. Explanation .....	93
II. Double dip strategies with partnerships .....	94
1. Structure chart .....	94

2. Explanation .....	94
III. Outbound investments with partnerships .....	96
1. Structure chart .....	96
2. Explanation .....	96
IV. Simplification of structures with partnerships .....	98
1. Structure chart .....	98
2. Explanation .....	98
V. Step-up planning with partnerships .....	99
1. Structure chart .....	99
2. Explanation .....	100
VI. Avoiding RETT with partnerships .....	100
1. Structure Chart .....	100
2. Explanations .....	101
VII. US/German Financing Structure .....	103
1. Structure chart .....	103
2. Explanation .....	104
VIII. Tax planning with non-EU/non-treaty countries .....	105
1. Structure chart .....	105
2. Explanation .....	105
IX. Creation of divisions for reorganization purposes .....	106
1. Structure chart .....	106
2. Explanation .....	107
X. Immediate loss utilization through partnerships .....	108
1. Structure chart .....	108
2. Explanation .....	108
<b>Chapter 5: Investments through German permanent establishments .....</b>	<b>110</b>
A. General .....	110
I. Introduction .....	110
1. Legal perspective .....	110
2. Allocation of taxation rights between States .....	110
II. What constitutes a permanent establishment? .....	111
1. National tax law versus OECD Model Convention .....	111
2. Section 12 German Federal Fiscal Code .....	111
III. Permanent representative .....	116
B. Taxation rules .....	116
C. Profit allocation .....	117
I. Basic problems .....	117
II. Profit determination: eligible methods .....	119
1. Direct method .....	119
2. Indirect method .....	120
III. Allocation of assets and profits and other problems .....	121
1. Attribution of assets .....	121
2. Attribution of business expenditures and business income .....	122
3. Funding of the permanent establishment .....	124
4. Transfer of assets .....	125
5. Currency exchange rate problems .....	127
6. Bookkeeping of the permanent establishment .....	128
D. Inbound tax planning with permanent establishments – Examples .....	129
I. Double dip strategies with a PE in an acquisition process .....	129
1. Structure chart .....	129
2. Explanation .....	129

II. Avoiding the interest barrier rule with a PE .....	130
1. Structure chart .....	130
2. Explanation .....	130
III. Simplification of PE structure .....	132
1. Structure chart .....	132
2. Explanation .....	132
IV. Loss utilization with PE structure .....	134
1. Structure chart .....	134
2. Explanation .....	134
V. Tax credit PE structure for foreign investors .....	135
1. Structure chart .....	135
2. Explanation .....	135
<b>Chapter 6: Taxation of direct business activities .....</b>	<b>138</b>
A. Introduction .....	138
B. Limited German tax liability .....	138
I. "General tax assessment procedure-income" .....	138
II. "WHT-income" .....	139
1. Dividends .....	139
2. Interest income .....	140
3. Salaries .....	141
4. Construction works .....	141
3. Artists, sportsmen and journalists .....	143
4. Exploitation of intellectual property rights .....	148
III. Special refund procedure for WHT .....	150
1. Dividends .....	150
2. Income under section 50a para 4 German Income Tax Act. ...	151
<b>Chapter 7: Special tax problems of cross-border investments .....</b>	<b>153</b>
A. VAT refund problems .....	153
B. German trade tax system .....	154
I. Calculation of the Trade Tax .....	154
II. Trade taxable income .....	155
1. Add-backs .....	155
2. Deductions .....	155
C. Thin capitalisation rules .....	157
I. Exemption from Escape Clauses .....	158
II. Definitions .....	159
III. Interest expense carry-forward .....	159
IV. EBITDA carry-forward .....	160
D. Cross-border aspects of German tax groups .....	160
E. Dual consolidated loss rules .....	161
F. Bookkeeping abroad .....	162
G. Taxation of cross-border dividends .....	162
I. General .....	162
II. Portfolio dividends .....	163
III. Hidden profit distributions .....	164
IV. Hidden equity contribution .....	166
H. Taxation of royalty payments .....	168
I. Anti-abuse Regulations .....	169
I. General .....	169
II. "Old" Anti-abuse rules .....	169

III. "New" anti-abuse rule .....	170
1. Steps of analyses .....	171
2. Timing aspects .....	172
IV. Shareholder test .....	172
V. Business income test .....	173
VI. Business purpose test .....	174
VII. Substance test .....	175
VIII. Exception for listed companies .....	176
IX. De minimis rule .....	176
X. Practical implications .....	176
J. Hybrid entities .....	176
I. Dividends .....	177
1. The personal scope of the Parent-Subsidiary Directive implemented in German tax law .....	177
2. The substantive scope of the Parent-Subsidiary Directive implemented in German tax law .....	178
3. Implementation of Article 4 para 1a of the Parent- Subsidiary Directive .....	178
4. Application of Section 43b of the Income Tax Act with respect to hybrid entities .....	179
II. Royalty Payments .....	181
1. The personal scope of the Interest and Royalty Directive as implemented in German tax law .....	181
2. The substantive scope of the Interest and Royalty Directive as implemented in German tax law .....	181
3. Application of Section 50g Income Tax Act with respect to hybrid entities .....	181
III. Reorganisations .....	183
1. The substantive scope of the Reorganisation Tax Act with respect to the Merger Directive .....	184
2. The personal scope of the Reorganisation Tax Act .....	184
3. Implementation of the Article 4 para 2 of the Merger Directive .....	184
4. Implementation of Article 8 para 3 Merger Directive .....	185
5. Implementation of the Article 10a of the Merger Directive .....	185
IV. Implementation of the OECD approach to hybrid entities in German legislation and tax treaties .....	186
1. Issues arising from the application of different treaty articles to income earned by a hybrid entity .....	191
2. Special remunerations .....	192
<b>Chapter 8: Tax problems of special industries/business sectors .....</b>	<b>195</b>
A. Investment funds .....	195
I. Closed-end funds (KG structures) .....	195
II. Open-ended funds .....	196
B. Real estate sector .....	199
I. VAT .....	199
II. RETT .....	200
1. RETT-Blocker structure for acquisition of shares .....	200
2. Structure for acquisition of partnership interest .....	203

3. Intra-group reorganizations .....	204
4. Hive-down restructuring using a RETT-Blocker KG.....	205
5. Tax efficient interposition of GmbH.....	207
C. Shipping industry .....	209
I. German tonnage tax system.....	209
II. Article 8 OECD Model Convention and the German approach ..	210
1. General .....	210
2. Reflection of Article 8 in German Tax Treaties .....	210
3. Major practical problems .....	211
D. Distribution models: Principal structures .....	214
E. M&A/Private Equity – cross-border reorganizations .....	217
F. Non-profit organizations .....	219
I. General .....	219
II. Tax-privileged purposes .....	220
1. Public-benefit purposes .....	220
2. Charitable purposes .....	221
3. Religious purposes .....	221
III. General requirements for tax privilege.....	221
G. E-commerce .....	222
I. Difficulties with taxing E-commerce.....	222
II. Main problems of direct taxation .....	222
III. Value added tax .....	223
H. Leasing .....	224
I. General advantages of leasing .....	225
II. Tax balance sheet issues .....	225
III. Relevant category of income .....	227
<b>Chapter 9: Holding companies in Germany .....</b>	<b>230</b>
A. General .....	230
B. Acquisition.....	231
C. Financing .....	231
D. Comparison of corporation and partnership as holding company . . .	232
E. VAT – entrepreneur status .....	233
F. Limited tax liability.....	234
G. Taxation of partnership .....	235
H. Participation exemption for corporations .....	237
I. Dividend Income .....	237
II. Capital Gains .....	237
III. Held for trading shares .....	238
I. Withholding taxes .....	239
J. Exit taxation .....	240
I. General.....	240
II. Exception and EU Law .....	241
K. Reorganisations .....	242
I. General Principles .....	243
II. Qualifying assets .....	243
III. Types of reorganisation.....	244
IV. Conversion from corporation to partnership .....	244
V. Merger of a corporation into a German partnership .....	245
VI. Merger of corporations .....	245
VII. Demerger of corporations.....	247
VIII. Hive-down into corporations.....	248

IX. Share-for-share exchanges .....	249
X. Conversion of partnership into corporation .....	251
XI. Hive-down of single assets into partnership .....	252
L. CFC regulations .....	252
I. Low Taxation .....	254
II. De Minimis Threshold .....	255
III. Lower tier intermediary companies .....	255
IV. Escape for EU Companies .....	256
V. Income amount computation .....	257
VI. Tax Credit .....	258
VII. Capital Gains .....	258
<b>Chapter 10: Transfer pricing from a German perspective .....</b>	<b>259</b>
A. Introduction .....	259
B. General provisions governing profit allocation between related parties .....	260
I. National German tax law .....	260
1. Profit allocation under double tax treaties .....	261
2. Hidden profit distribution and hidden capital contribution ..	262
3. Section 1 German Foreign Tax Act .....	262
II. Business relations to affiliated persons .....	264
C. General principles for the allocation of income .....	264
I. The arm's length test .....	264
II. Standard TP methods .....	266
1. Comparable uncontrolled price method .....	266
2. Resale price method .....	266
3. Cost plus method .....	266
4. General: Set-off of benefits .....	267
5. Application of the methods .....	267
III. Goods and services .....	268
1. Supply of goods and services .....	268
2. Commercial services .....	270
3. Advertising costs .....	271
4. Market penetration costs .....	271
5. Start-up costs .....	271
IV. Interest and similar remuneration .....	272
1. General .....	272
2. Relevant interest rates .....	272
3. Guarantees and similar obligations .....	273
4. Transfer of intangible assets .....	274
5. Administrative services within the group .....	274
D. Business restructurings: Relocation of functions .....	276
I. Introduction .....	276
II. OECD Transfer Pricing Guidelines .....	276
III. German approach to Business Restructurings .....	277
1. General .....	277
2. Special aspects of specific relocations of functions .....	278
<b>Index .....</b>	<b>283</b>