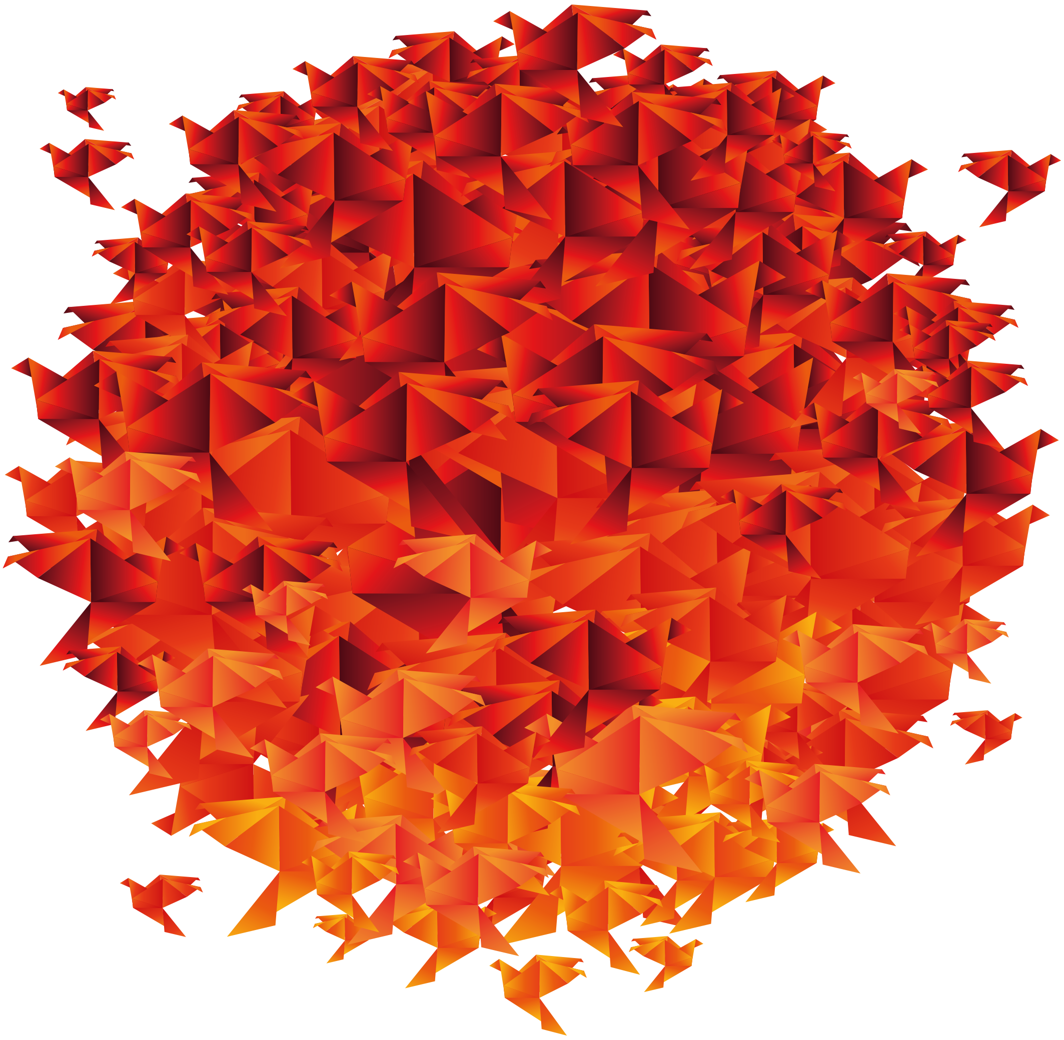


Comparison Asset Deal and Share Deal

Overview on key differences between an asset deal and a share deal from a German tax perspective

Background

The acquisition of a German corporation and its business can generally be structured as an asset deal acquiring the specific business considered to be acquired, or as a share deal by acquiring shares in a legal entity and thus such legal entity's entire business. In order to decide whether pursuing an acquisition of a business via an asset deal or a share deal various aspects, advantages and disadvantages from different perspectives should upfront be taken into consideration. In the following overview key differences between an asset deal and a share deal regarding the acquisition of a German business from a German tax perspective are summarized.

Asset Deal

In an asset deal the purchaser acquires selected or all assets (incl.non-capitalized ones, e.g. goodwill)/liabilities of the target business from the seller.

The selling German corporation is generally subject to income taxation regarding built-in gains inherent in the sold business. The combined German income tax rate, consisting of corporate income tax, solidarity surcharge thereon, and trade tax, generally ranges between 28 percent–34 percent (lower/ higher rates possible depending on in which municipality the business is located).

Tax losses of the selling German corporation may be (partly) utilized to offset an arising capital gain; a capital loss should be tax deductible (exceptions may though apply and would need to be considered on a case-by-case basis).

Tax attributes (e.g. tax losses) of the seller should not be transferred to the purchaser.

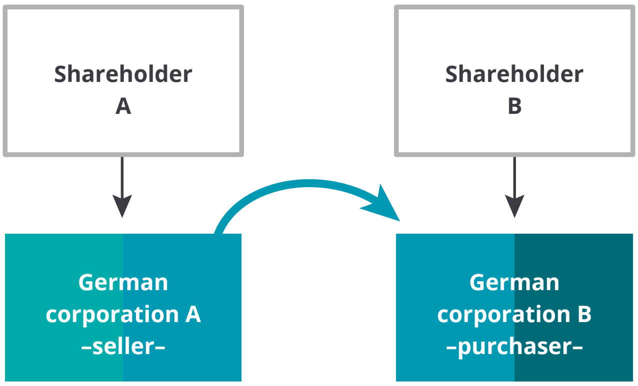
At the acquiring German corporation the acquired assets/ liabilities should be accounted for at acquisition costs (valuation/ purchase price allocation may be required), increased depreciation/ amortization potential (i.e., built-in gains realized and taxed at the level of seller) may lower the income tax burden postasset deal for the purchaser.

Specific tax rules may apply for both, seller and purchaser, regarding socalled tax restricted liabilities/ accruals, e.g. pension accruals, accruals for contingent losses, which need to be considered case-by-case. The primary tax liability for pre-asset deal and asset deal related taxes should generally remain with the seller, however, the purchaser may face a secondary liability for specific taxes of the seller for specific periods if acquiring an entire business or a separate business line.

If the asset deal qualifies as a socalled transfer of a going concern, German VAT should not arise on the asset deal and the purchaser should inherit the seller's input VAT correction obligations; otherwise the asset deal may be subject to VAT (unless and to the extent qualifying as VAT-exempt).

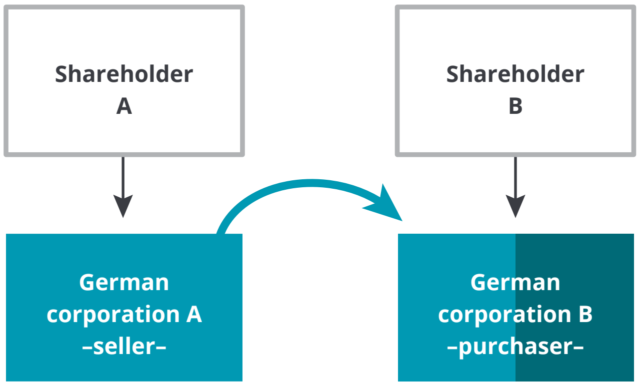
If German real estate (incl. similar rights) is part of the asset deal, German real estate transfer tax should arise.[1]

Fig. 1a – Acquisition of a part of a business



Transfer of a part of a corporation's business to an existing or new German corporation

Fig. 1b – Acquisition of entire business



Transfer of an entire business to an existing or new German corporation

[1] Separate brochures on German real estate transfer tax and German change-in-ownership are also available. Our high-level comments herein are referring to a straight-forward asset deal or share deal (i.e. no transaction under specific provisions such as e.g. the Reorganization (Tax) Act), in which the seller, acquirer and target company are German tax resident corporations, the purchase price is equal to the fair market value and this can be documented accordingly.
If non-German entities/operations are involved, non-German taximplications should be considered as well.

Share Deal

A share deal is an acquisition of all or part of the shares in a corporation.

At the selling German corporation an arising capital gain from selling shares in a German corporate subsidiary should generally be 95 percent income tax exempt (i.e., effective income tax rate of approx. 1.5%). An arising capital loss should generally be income tax nondeductible for the selling German corporation.

Individuals and foreign, non-German tax resident corporations may be subject to different tax implications.

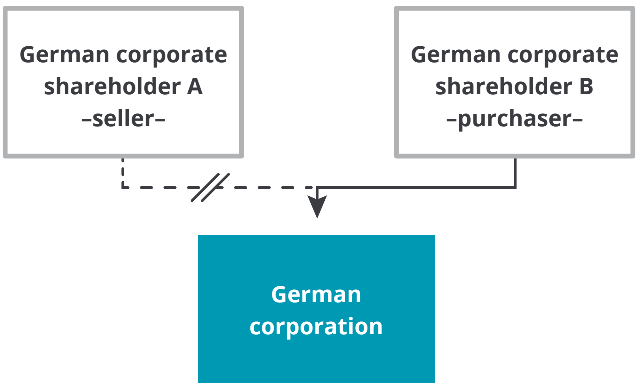
Economically, the purchaser acquires part of or the entire target corporation together with all its historic (tax) liabilities.

Tax attributes of the target corporation may face restrictions under German change-in-ownership rules1 and may not survive the acquisition and may thus not be available to offset taxable income post-acquisition.

A share transfer should generally be VAT exempt but could be elected be treated like a VATable transaction under certain preconditions.

If the target corporation owns German real estate (incl. similar rights), German real estate transfer tax may arise; purchaser and seller should face notification obligations towards the German tax authorities.[1]

Fig. 2 – Share Deal



Acquisition of shares in a German corporation

[1] Separate brochures on German real estate transfer tax and German change-in-ownership are also available. Our high-level comments herein are referring to a straight-forward asset deal or share deal (i.e. no transaction under specific provisions such as e.g. the Reorganization (Tax) Act), in which the seller, acquirer and target company are German tax resident corporations, the purchase price is equal to the fair market value and this can be documented accordingly.
If non-German entities/operations are involved, non-German taximplications should be considered as well.

Additional Remarks

The decision for an asset deal or a share deal should be taken from a holistic perspective considering tax as well as non-tax aspects. To get a better understanding on the target's business' historic tax position in an asset deal or a share deal and potential inherent tax risks, conducting a Tax Due Diligence is recommendable. Furthermore, of relevance in a transaction context is generally also analyzing upfront the underlying draft asset respectively share purchase agreements from a tax perspective and considering to include proper tax guarantees and indemnifications for pre-transaction periods.

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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