Country Specific: Germany

5 March 2020

The German Federal Tax Court (dated 18 September 2019 – XI R 33/18) decided that also a share deal can fulfil the
conditions of a non-taxable transfer of a going concern (TOGC).

In general, the ownership transfer of shares in a corporation such as a German GmbH, in contrast to the ownership
transfer of assets, is not sufficient as such to enable the purchaser to continue an independent economic activity of the
seller, hence to fulfil the conditions of a non-taxable TOGC. However, the situation may be different if the shares in the
GmbH, which is the subsidiary in a fiscal unity according to the VAT rules, are transferred to a purchaser as the new
parent company and who will be maintaining the fiscal unity with the subsidiary..

The Federal Tax Court concluded that a mere transfer of 100% of the shares is not sufficient to constitute a non-taxable
transfer of the entire business as the sole transfer of shares does not enable the purchaser to continue the independent
economic activity of the seller. However, this is a prerequisite for a non-taxable TOGC. Consequently, further
circumstances, apart from the mere holding of shares, must be found to potentially come to a different conclusion. In the
view of the Federal Tax Court, such further circumstances exist if the purchaser continues the fiscal unity with the
acquired company and carries out its own activities “through” the subsidiary (comparable as it was done by the seller).

DLA Piper comment: Viewed from the angle of the CJEU case X (C-651/11) the case decided by the German court can
be differentiated by the existence of the fiscal unity as a special feature. The Federal Tax Court points out under which
circumstances the business of the seller might be regarded as being continued by the purchaser to apply the non-taxable
TOGC rules. In practice it is, therefore, important to analyse the fiscal unity on the seller’s and the purchaser’s side. The
seller and/or the purchaser should be able to prove the existence (or non-existence) of the seller’s and/or the purchaser’s
VAT group if the non-taxable TOGC rules might be viewed differently by the tax authorities. In case that the share transfer
would constitute a non-taxable TOGC, no waiver of the VAT-exemption of the sale and transfer of shares would be
possible and the purchaser would step into various tax attributes of the seller.