By PwC Deutschland | 10. April 2026

Exit tax in cross-border cases following changes in law

In a most recently published judgment, the Supreme Tax Court decided that exit taxation - a process in which hidden reserves of assets (built-in gains) are identified and taxed because otherwise Germany would lose its right of taxation - can, in principle, also occur through a mere change in the law (so called „passive“ exit taxation).

Background and decisions

Germany is obliged to tax built-in gains (the hidden reserves), if an asset or a business is transferred to another jurisdiction (i.e., exit taxation) because otherwise Germany would lose its right to tax.

Such a situation may arise, for example, when a taxpayer transfers an asset from a domestic permanent establishment to a foreign permanent establishment. From the outset, it was controversial whether exit taxation could take place even without active involvement on the part of the taxpayer. This question arises in particular where Germany's right for taxation is waived or restricted on the basis of a new double taxation treaty (DTA), under which the right to tax the hidden reserves of the asset no longer belongs to Germany but to the other country, or if Germany undertakes to credit the taxes levied by the other country against its own taxes.

The case in question (**I R 41/22**) concerned a German GmbH, which was a shareholder in a Spanish corporation that owned real estate in Spain. As of 1 January 2012, a new DTA between Germany and Spain had come into effect where Germany undertook to allow taxpayers resident in Germany who sold shares in companies with a "real estate ratio" of at least 50% (value of Spanish real estate relative to total assets), to credit the withholding tax levied by Spain on the capital gain against German tax. The tax office saw the risk of having to credit Spanish withholding tax against German tax in the event of a future sale of the shares by the GmbH as a restriction on German taxing rights within the meaning of Section 4 (1) Sentence 3 Income Tax Act and charged corporate income tax on the built-in gain in the 2012 tax assessment. The lower tax court upheld the GmbH's appeal in the first instance because it rejected, as a matter of principle, the possibility of an exit taxation solely based on a change in the law.

Although the Supreme Tax Court did not accept its line of reasoning - instead maintaining that taxation of the built-in gain to be generally possible even in cases of a change in law - the tax authority's appeal ultimately failed because it had applied the legal consequences of a potential exit taxation to the "wrong" assessment period. These take effect at the very last legal moment before the exclusion or restriction of the right to tax becomes effective. In the case at hand, this would have been during the 2011 assessment period.

In another judgment of 19 November 2025 – **I R 6/23**, which was also published on 9 April 2026, the Supreme Tax Court commented on a similar case regarding the exit tax. The tax office had concluded that a built-in gain was taxable based on a German corporation’s Australian real estate property given that the German right to tax any future capital gains from the Australian real estate had lapsed with the entry into force of a new DTA with Australia as of 1 January 2017. The taxpayer challenged this decision and prevailed before the lower tax court. The Supreme Tax Court upheld the decision of the former tax court because, even under the “old” DTA in effect until 31 December 2016, there had been no German right of taxation on a gain from the sale of the real estate.

But even if it were to be assumed that, following the tax office’s view, there was a limitation on the right to tax due to the applicability of the 2015 DTA with Australia as of 1 January 2017 the appeal would be unfounded for the following reason: The relevant point in time at which the legal consequences of Section 12 (1) Sentence 1 CTA are to take effect is the last second before the event occurs that results in the “exclusion” or “limitation of the right of taxation.” Therefore, the legal consequences of should not have been taken into account in 2017 but rather as early as 2016 because the 2015 DTA with Spain was applicable as of 1 January 2017. Accordingly, the profit should have been recognized one legal instant (“one second”) before the end of 31 December 2016 (contrary to the view of the tax authorities in their circular of 26 October 2018).

In conclusion, the Supreme Tax Court points out that in practice it must be borne in mind that amendments to double taxation treaties (DTA) or other laws in cross-border cases may, in some cases, lead to the premature taxation of hidden reserves in the relevant assets (built-in gains). However, it must be carefully examined on a case-by-case basis whether the respective legal change has resulted in an exclusion or a restriction of German taxation rights. Amendments to DTAs or the conclusion of new agreements typically take place through lengthy procedural processes and thus allow taxpayers to adapt in a timely manner.

Source:

Supreme Tax Court, judgments of 19 November 2025 (I R 41/22 and I R 6/23) published on 26 March 2026.

Schlagwörter

exit tax