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URL: http://www.deloitte-tax-news.de/german-tax-legal-news/change-in-ownership-rule-unconstitutional.html

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German Tax and Legal News

Change-in-ownership rule unconstitutional?

In a recently published decision (case reference: 2 K 33/10), the local tax court of Hamburg submitted the question of whether the German change-in-ownership rule is in compliance with the German constitution to the Federal Constitutional Court. Under the German change-in-ownership rule applicable as from 1 January 2008, a direct or indirect share transfer of more than 25 % (and up to 50 %) of the shares in a company that has loss carryforwards results in a pro rata forfeiture of those carryforwards. A share transfer of more than 50 % will result in the forfeiture of all of the available tax loss carryforwards.

The case concerns the rule as it was in place in FY2008 (i.e. before the exception for certain intra-group transfers and the built-in gains exception were enacted, see Deloitte Tax-News). In its decision, the tax court of Hamburg held that the change-in-ownership rule in the year under review constituted an infringement of the principles of the German constitution. As the Federal Constitutional Court has the sole authority to determine whether a rule violates the principles in the Constitution, the tax court of Hamburg referred the case to the Federal Constitutional Court. Should the Court decide that the rule is unconstitutional, this should have effect for all open cases.

If you have any questions, please contact the authors of the article at gtln@deloitte.de or your regular Deloitte contact.
