IN BRIEF CJEU

DENMARK

Exit tax rules for companies to be amended

Following a Court of Justice of the European Union ("CJEU") judgment holding that the present Danish exit tax rules for companies are incompatible with the freedom of establishment in the EU/EEA, a bill has been presented amending the rules. The bill maintains the existing Danish rules, but provides for deferral of the payment of exit taxes. The new rules will apply to income year 2013 and onwards. Taxpayers having suffered exit taxation in income year 2008 and onwards may elect the new rules retroactively.

Danish rules contrary to EU law

Under current Danish tax law, any transfer of assets internally within a company, e.g. to a permanent establishment ("PE") outside Denmark to the effect that the assets are no longer subject to Danish tax, is regarded as a sale and is taxed as if the assets had been sold in the year of transfer. A transfer of assets between a company's different establishments within Denmark is not taxed.

In its judgment of July 18, 2013 (case C-261/11) the CJEU held that the Danish rules are contrary to EU law, cf. Article 49 TFEU on the freedom of establishment, reaffirming its position in e.g. National Grid Indus (case C-371/10).

According to the CJEU, Denmark is allowed to tax capital gains attributable to the period of time when the assets were subject to Danish tax jurisdiction and to fix the amount of tax at the time of the transfer. However, the immediate recovery of tax on unrealised capital gains on assets transferred is disproportionate. This applies irrespective of whether the assets are actually realised after the transfer or not.

Deferral of payment of exit taxes added to Danish rules

The proposal maintains the existing Danish rules, but adds to them an option for deferral of the payment of exit taxes arising at the following events.

- Transfer of assets and liabilities from a Danish resident company to a PE in the EU/EEA.
- Transfer of assets and liabilities from a Danish PE to the head office of a company resident in the EU/EEA.
- Transfer of assets and liabilities from a Danish PE to another PE in the EU/EEA.
- Migration of a Danish resident company to another country in the EU/EEA.
- Transfer of the corporate seat of a SE company or a SCE company.

No bank guarantee or other security is required, but election to defer payment of exit tax means that an "exit tax balance" must be established, equalling the amount of the deferred exit tax. Penalty interest at the higher of 3 percent per annum and the Danish National Bank's discount rate plus 1 applies to the balance.

The exit tax balance must be settled by annual installments being the higher of:

- 1/7th of the original exit tax balance; and
- the applicable Danish corporate tax rate of any actual or deemed income from the exit assets.

Accordingly, deferred exit taxes will have to be paid in full within a maximum of seven years.

Retroactive application

A company having suffered exit taxation in 2008-2012 on transfers, etc. comprised by the new rules may apply the new rules retroactively. Applications for retroactive effect must be submitted to the Danish tax authority no later than June 30, 2014.

Retroactive application requires:

- that the company still owns the exit assets/liabilities; and
- that the exit assets/liabilities have not been transferred out of the EU/EEA.

The retroactive deferral is available for the exit tax originally determined less payments that would have applied had the new rules been in force for the historical years. Any resulting tax refund is made without interest.

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GERMANY

CJEU judgment on inheritance allowance for Swiss residents: Welte case

On October 17, 2013, the Court of Justice of the European Union ("CJEU") ruled in *Yvon Welte v. Finanzamt Velbert* (C-181/12) that a German inheritance tax provision according to which the tax allowance for non-residents is smaller than that for residents is in breach of the free movement of capital (Article 63 TFEU). The CJEU confirmed Advocate General Mengozzi's opinion. After the death of his wife in 2009, a Swiss resident, Mr. Welte, inherited land located in Germany as well as accounts with two German banks. As a non-resident, Mr. Welte was granted an inheritance tax allowance of only EUR 2,000, while the tax allowance for residents amounts to EUR 500.000.

In its 2010 judgment in Mattner (C-510/08), the CJEU decided that such differential treatment constitutes a restriction of the free movement of capital in the case of a donee who is resident in another EU Member State. The CJEU now ruled in Welte that the same applies to the case of an heir being resident in a third state (in this case Switzerland). The standstill clause of Article 64 TFEU does not apply as the inheritance of private immovable property is unconnected with the exercise of an economic activity and, thus, does not qualify as "direct investment – including in real estate". The German inheritance provision could neither be justified by the need to safeguard the cohesion of the tax system, nor by the need to ensure the effectiveness of fiscal supervision.

As a reaction to the Mattner case, Germany did not change the tax allowance provision, but now grants taxpayers who are resident in another EU/EEA Member State the opportunity to opt for taxation as residents. The option, however, is dependent of the inclusion of all worldwide donations/inheritance received from the same person 10 years before and 10 years after the respective donation/inheritance. The Commission takes the view that the new rules are still in breach of EU Law and has started an infringement procedure against Germany which is currently pending with the CJEU (C-211/13). It is yet unclear how Germany will react to the Welte judgment.

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