In wake of ECJ ruling, EU member states amend exit tax regimes

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Following the decision of the European Court of Justice (ECJ) in the case of National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond C-371/10 (National Grid Indus), several EU member states have amended their exit tax regimes. In addition, the EU Commission has issued formal requests to a number of member states to revise their existing exit tax regimes.

The countries that have issued new decrees or legislation after the National Grid Indus case include France, the Netherlands, Italy, Norway and Portugal, while a handful of other member states, such as Ireland and the UK, either have already issued draft legislation or are anticipated to issue draft legislation in the very near future.

This article briefly summarizes the National Grid Indus case and compares the changes made by those countries that have amended their legislation (or have announced that they will amend it) following the case.

Do exit taxes restrain businesses' right to freedom of establishment?

The key issue behind National Grid Indus is whether imposing exit taxes restrains businesses from exercising their right to freedom of establishment within the EU and therefore is non-compliant with EU law. National Grid Indus BV (the Company) was incorporated and effectively managed in the Netherlands until December 2000. The Company subsequently transferred its place of effective management to the UK. At the time of the transfer, the Company held an unrealized gain relating to a UK-denominated receivable owed to its UK parent company. Dutch tax authorities attempted to charge tax on the amount of this unrealized gain, as was required under Dutch tax law. The Company, however, appealed to the Amsterdam Regional Court of Appeal, which referred the case to the ECJ.

The Company challenged the tax assessment on the basis that the imposition of this exit tax was a restriction of the freedom of establishment under Article 43 of the TFEU (Treaty on the Functioning of the European Union). The perceived restriction was the cash-flow disadvantage that the exit tax placed on the Company in comparison with non-migrating Dutch entities; the Company also argued that the immediate imposition of an exit tax without deferral or regard for any future fall in the value of the asset was not justified or proportionate.

Disproportionality

In November 2011, the ECJ ruled in the National Grid Indus case, concluding that a tax charge by EU member states (in this case, the Netherlands) on unrealized capital gains upon migration to another member state is not precluded by the freedom of establishment. The ECJ, however, held that denying the option to defer payment may result in disproportionality, because businesses often lack sufficient cash to immediately pay for the tax assessment when there has been no actual disposal of an asset. The ECJ suggested that a taxpayer should be
given options to pay the tax immediately or to defer such payments.

**Member states issue new legislation**

Following the ECJ judgment, four EU member states have issued new legislation seeking to address the disproportionality question. Other countries are working on draft legislation, while the EU Commission has asked others to amend their exit tax regimes in order to comply with the EU law. In addition, several countries, including Denmark and Spain, still have pending cases on exit taxation.

Visit this page for a table summarizing the key changes recently introduced (or to be introduced) by EU member states. It shows how each EU country has chosen, once more, to follow the instructions of the EU Commission in its own particular way: one Europe maybe, but when it comes to direct taxation, let me think about it.

For more information about exit tax issues in the EU, please contact Ágata Uceda and Sirathorn B.J. Dechsakulthorn.

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