

## European Commission refers The Netherlands, Spain and Denmark to the EU Court over exit taxes

RSM Netherlands International Tax Services is a key service line with dedicated staff who manage solely international inquiries and align both the offshore advice with domestic specialist services. This provides a holistic approach to clients' international needs. This structure is further enhanced by the commitment of RSM Netherlands partners and staff who actively lead international specialist areas and consistently work with their worldwide counterparts on providing solutions to internationally active companies.

*On November 24 2010, the European Commission referred Denmark, The Netherlands and Spain to the EU's Court of Justice for their provisions imposing exit taxes on businesses ceasing to be tax residents of their respective country or transferring assets away from a local permanent establishment of a non-resident company. According to the European Commission, the exit taxes of these countries are incompatible with the freedom of establishment as laid down in article 49 of the Treaty on the Functioning of the European Union (TFEU).*

Under the laws of The Netherlands, Spain and Denmark, businesses are taxed for their unrealised capital gains subsequent to a transfer of the company's residence or a transfer of assets which were situated in a domestic permanent establishment of a non resident company. In contrast, comparable domestic transfers such as a domestic relocation of the company or a transfer of assets between two domestic establishments of the same company, are not taxed for unrealised capital gains. As these rules are likely to dissuade companies from moving within the European Union and similar domestic situations are not subject to tax, the European Commission considers these rules to be a restriction of the freedom of establishment.

Apart from this infringement procedure against The Netherlands, Denmark and Spain, two other cases on company exit taxes are currently pending with the EU Court of Justice: Case C-371/10 *National Grid Indus BV* and Case C-38/10 *Commission v. Portugal*. Other procedures have been started against Belgium and Norway by the EFTA Surveillance Authority.

## Our observations

Although EU case law in the field of company law, such as Case C-81/87 *Daily Mail* and Case C-210/06 *Cartesio* may provide arguments against the position taken by the European Commission, we believe that the case law in the field of exit taxation of individuals such as Case C-9/02 *Lasteyrie du Saillant* and Case C-470/04 *N.* provides stronger arguments in favour of the proceedings against The Netherlands, Denmark and Spain.

Consequently, we share the view of the European Commission that the current exit tax legislation in these three countries is incompatible with EU law. As most infringement procedures started by the European Commission in the past have proved to be successful, we recommend companies that have reorganized their businesses and have been confronted with exit taxation, to file a letter of objection with the local tax authorities in order to eliminate any immediate levy of exit taxes.

If the infringement procedures against Denmark, The Netherlands and Spain prove to be successful for the European Commission, these countries will normally change their legislation to make it EU proof. In that case, EU law still allows countries to levy exit tax on the capital gains accrued under the “domestic period”, but only upon the realization of the capital gain at a later moment in time, such as in the event of a later sale or liquidation.

Regardless of these EU law developments, we always recommend contacting us in the event of a business reorganisation, especially considering the new OECD Transfer Pricing Guidelines as published on July 22, 2010 which now deal explicitly with business restructurings and exit taxes.

For more detailed information, please do not hesitate to contact a member of the RSM Netherlands International Tax Services team

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