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Lower House Adopts Bill on Deferral Of Exit Taxes

by Anton Louwinger

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COUNTRY DIGEST

Lower House Adopts Bill on Deferral Of Exit Taxes

The lower house of the Dutch parliament on December 4 approved a bill[1] on the deferral of payment of exit charges that would bring Dutch legislation in line with EU law and, unlike the temporary rules, apply to exit charges resulting from cross-border mergers and demergers and conversions. (For prior coverage, see *Tax Notes Int'l*, June 11, 2012, p. 998, *Doc 2012-11974*, or *2012 WTD 108-2*.)

The bill was sent to the parliament on May 15 following the decision of the European Court of Justice in *National Grid Indus* (C-371/10). The case concerned Dutch exit tax imposed on a company that relocated its place of effective management from the Netherlands to the United Kingdom. The ECJ deemed the immediate taxation of unrealized (foreign exchange) gains, under certain circumstances, to be in breach of the principle of freedom of establishment as provided for in the Treaty on the Functioning of the European Union. After approval by the higher house (which is expected in early 2013), the new rules would take effect from November 29, 2011 (the date of the ECJ decision). (For the ECJ decision in *National Grid Indus* (C-371/10), see *Doc 2011-24891* or *2011 WTD 230-22*; for related analysis, see *Doc 2011-26317* or *2011 WTD 244-2*; see also *Tax Notes Int'l*, Jan. 30, 2012, p. 371, *Doc 2012-1269*, or *2012 WTD 19-18*; and *Tax Notes Int'l*, Jan. 16, 2012, p. 201, *Doc 2012-28*, or *2012 WTD 10-17*.)

Currently, the deferral of payment is ruled by a policy statement. The proposed rules will have a broader application than the temporary ones. The new rules will also apply to exit charges that result from cross-border mergers and demergers and conversions. The deferral rules will also apply if a nonresident taxpayer, with residence in the European Economic Area or the EU, with a permanent establishment in the Netherlands transfers assets or liabilities from this Dutch PE to a location outside the Netherlands.

It should be emphasized that the scope of the deferral rules will be limited to EEA and EU situations. For example, if Dutch tax liability ceased as a result of a move of the place of effective management to a non-EEA or non-EU country, the possibility of deferral would not be available under the proposed rules. Deferral would also be unavailable as soon as the taxpayer is no longer a resident of the EU or EEA.

If a company transfers its place of effective management outside the Netherlands to a member state of the EU or EEA that has concluded a tax treaty with the Netherlands, then, generally, it is deemed to have alienated its assets and liabilities at fair market value and to have released its reserves and provisions, unless and to the extent that such assets and liabilities remain attributable to a Dutch PE. The proposed new rules provide that the related tax liability (tax charge) does not need to be paid immediately. Instead, upon the taxpayer's election, the payment of the exit tax can either be postponed until the moment the relevant hidden reserves and goodwill are realized or be paid in 10 equal annual installments.

Without election, the exit tax remains immediately payable. Taxpayers are offered two alternatives to immediately paying the tax because monitoring whether and to what extent hidden reserves and goodwill are realized in the years after the exit from the Netherlands may be a burdensome administrative task. The deferral is not limited in time, and the determination whether a realization needs to be assumed occurs on the basis of the Dutch tax rules. This means that during the entire deferral period, an additional set of financial statements is to be prepared applying Dutch tax principles. Any transaction that would qualify as a realization if the relevant entity would still have been subject to Dutch tax triggers a partial termination of the deferral (to the extent that hidden reserves and goodwill were attributable to the relevant asset). If under Dutch tax law, a facility would have been available to avoid taxation of the relevant transaction, then such facility may also be applied here (resulting in a continued deferral). A (partial) realization of hidden reserves may also occur through future depreciations. Any decrease in value

[1] Bill of law concerning the Change of the Tax Collection Act 1990 (Law on the deferral of payment exit charges) (Wijziging van de Invorderingswet 1990) (Wet uitstel van betaling exitheffingen).

of the assets and liabilities following the departure from the Netherlands is not taken into account and therefore does not reduce the amount of the exit charge.

To be eligible for deferral, the taxpayer must provide sufficient collateral for the unpaid tax. Usually this will be by means of a bank guarantee or a mortgage. If the collateral is insufficient, the deferral is terminated. Also, the Dutch tax collector will charge (noncumulative) collecting interest until the entire amount of the exit charge has been paid.

If a taxpayer elects the second option (10 installments), it will not need to prepare a separate set of financial statements. The actual realization of the transferred reserves and the goodwill during this period is irrelevant.

Finally, the state secretary for finance announced on December 6 that the European Commission has initiated proceedings before the ECJ against the Netherlands regarding the still existing exit taxes. This decision is a result of the Netherlands not timely implementing the new rules. Consequently, Dutch taxpayers can rely only on the policy statement rules. It remains to be seen whether the proposed rules are entirely EU-proof, since they do not seem to allow deferral in all situations in which a taxpayer exercises the right of free establishment. ◆

♦ *Anton Louwinger, tax partner, Hogan Lovells International LLP, Amsterdam*