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European Regulations of Exit Taxation

Exit Taxation
September 16th, 2017
Malta

Workshop Agenda

9:00 to 10:30 am	Welcome Introduction Target Workshop Overview retrospective and current developments Discussion
10:30 to 11:00 am	Coffee break
11:00 to 12:30 pm	Presentation participants and discussion – Part I
12:30 to 13:30 pm	Lunch
13:30 to 15:00 pm	Presentation participants and discussion – Part II
15:00 to 15:30 pm	Coffee break
15:30 to 17:00 pm	Presentation participants and discussion – Part III Practical issues / experiences / Conclusion

Exit Taxation – General

The 2017 Global Wealth Migration Review

https://www.researchandmarkets.com/reports/4176844/the-2017-global-wealth-migration-review

Key Highlights

- Global wealth migration is accelerating. Approximately 82,000 millionaires (HNWIs) migrated in 2016, compared to just 64,000 in 2015. About 4.000 left Germany and 12.000 France.
- For the second straight year Australia is the top country worldwide for millionaire inflows, beating out traditional destinations such as the US and the UK.
- Like Australia, Canada also performed well in 2016, boosted by large scale HNWI migration from China into Vancouver. There were also significant HNWI inflows from Europe into Toronto and Montreal (Quebec).
- Millionaire outflows from Nigeria and Turkey are expected to increase over the next few years. Both of these countries are suffering from serious political and economic problems. They are also both being negatively impacted by terrorism and religious violence.

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Exit Taxation – General

- Uneven regulations in the EU until first ECJ Jurisdiction in 2001/2002
- Hughes de Lasteyrie du Saillant C-09/02
  - The French taxpayer Mr. Hughes de Lasteyrie du Saillant, owner of shares of a French corporation, moved its fiscal residence to Belgium.
  - French Exit Taxation was against freedom of establishment within the EU
- Infringements proceedings against countries like Germany with similar regulations.
- As result implementation of an EU standard to save the freedom of establishment .

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Exit Taxation – General European approach

- Exit taxation in the EU is regulated by the Anti-Tax-Avoidance-Directive
  - Only minimum level of protection - has to be converted to individual national law
  - http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016L1164

- Applies to all taxpayers that are <u>subject to corporate tax liability</u> in one or more member states to the EU
  - Including permanent establishments in a member state, if the tax seat is located in a third country

- Has to be translated to national law by the end of 2019 (Art 11 (5))

- Not applicable to individual tax payers

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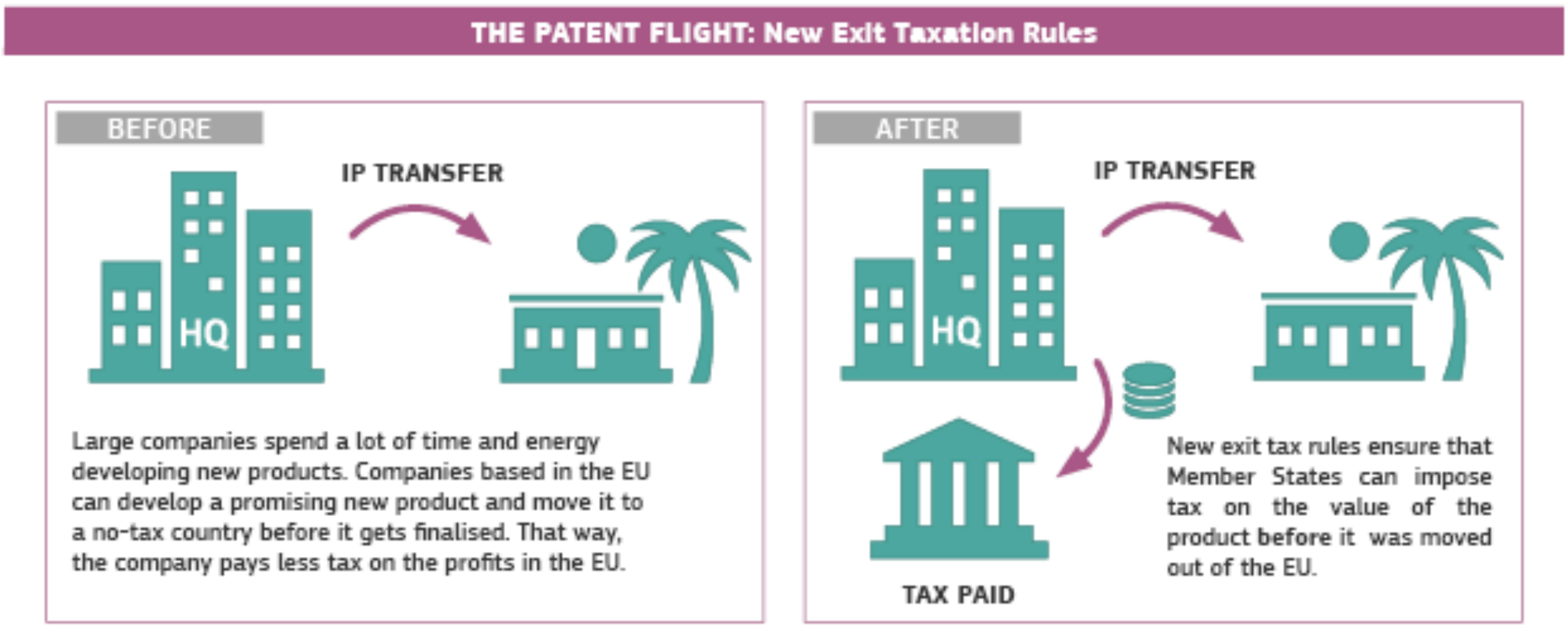
Exit Taxation – General European approach

Exit taxation: to prevent companies from avoiding tax when re-locating assets.



EU - Exit Taxation – Private Individuals

- No general regulations in the EU – but national rules in some countries and jurisdiction

- ECJ-jurisdiction (Lasteyrie du Saillant C-9/02)
  - Taxation of silent reserves of assets hold by a natural person who is leaving a member state violates freedom of establishment (Art 49 AEUV)
  - Taxation procrastination is only allowed if the person moves to a member state of the EU or a third country having assigned a treaty of comprehensive administrative and enforcement aid according to the EU-Council-Directive (2010/24/EU)
  - No taxation procrastination has to be granted in all other cases

- ECJ-jurisdiction (DMC Beteiligungs GmbH C-164/12)
  - Payments of installments spread over 5 years without interest rate are permissible

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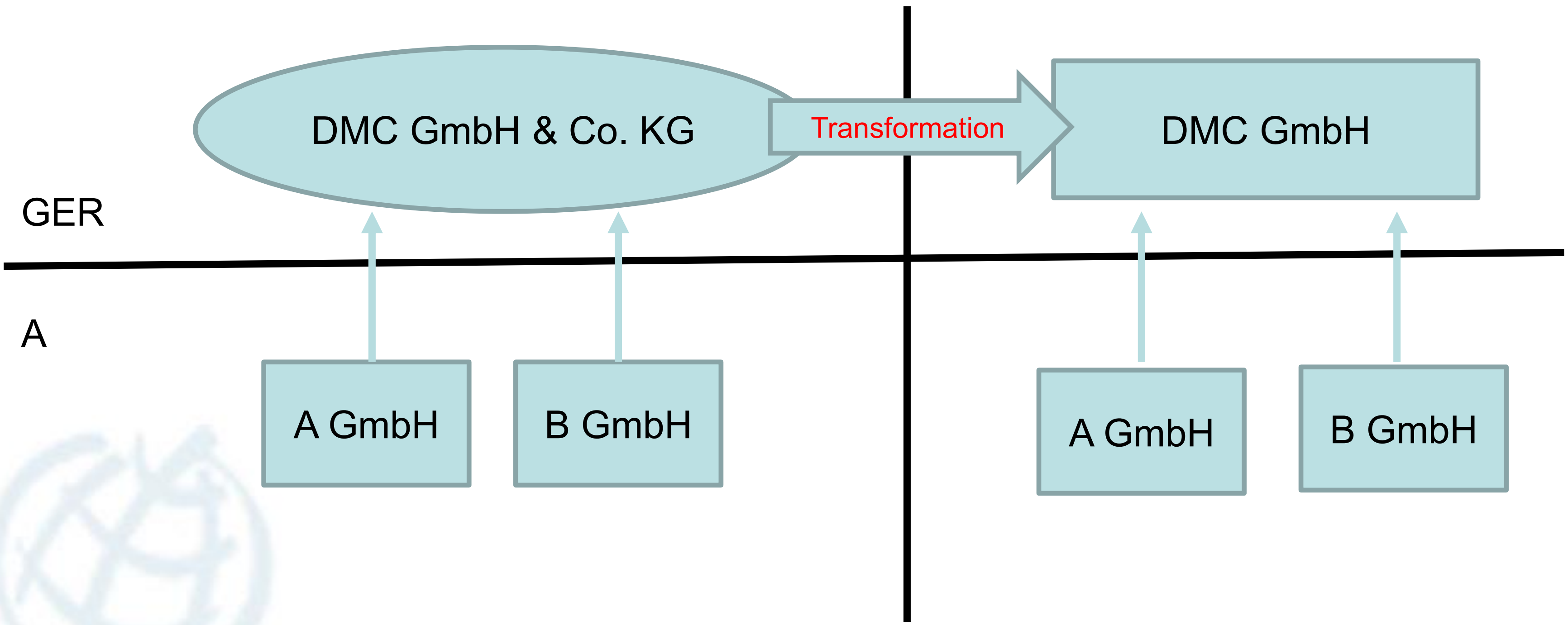
EU - Exit Taxation

- ECJ-jurisdiction (DMC Beteiligungs GmbH C-164/12)



EU - Exit Taxation

- Questions and problem – consequences in exit and entry country

GER

- Assessment basis for taxation
- Valuation of the assets
- Tax burden

A

- Valuation of the shares after transformation
- Tax payments creditable or deductible as expenses
- Future sale with double taxation

EU – Exit Taxation - Corporations

- Requirements for exit taxation:
  - Relocation of assets form the domestic headquarter to a permanent establishment in a foreign country
  - Relocation of assets from a domestic permanent establishment to a foreign permanent establishment or a foreign headquarter.
  - Relocation of business activities of a domestic permanent establishment to a foreign country
  - Relocation of the tax residence to a foreign country (shall not apply to business assets staying behind) – according to the wording, the loss of taxation right of the leaving country is not necessary

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EU – Exit Taxation - Corporations

- Requirements for exit taxation – P A S S I V E

Does the exit taxation comes up in case the taxpayer is not active?

Active = any activities of the taxpayer themselves

Passive = circumstances reduces or terminates the taxation right of a country

- New / first-time DTT
- Modified DTT
- Change national tax law

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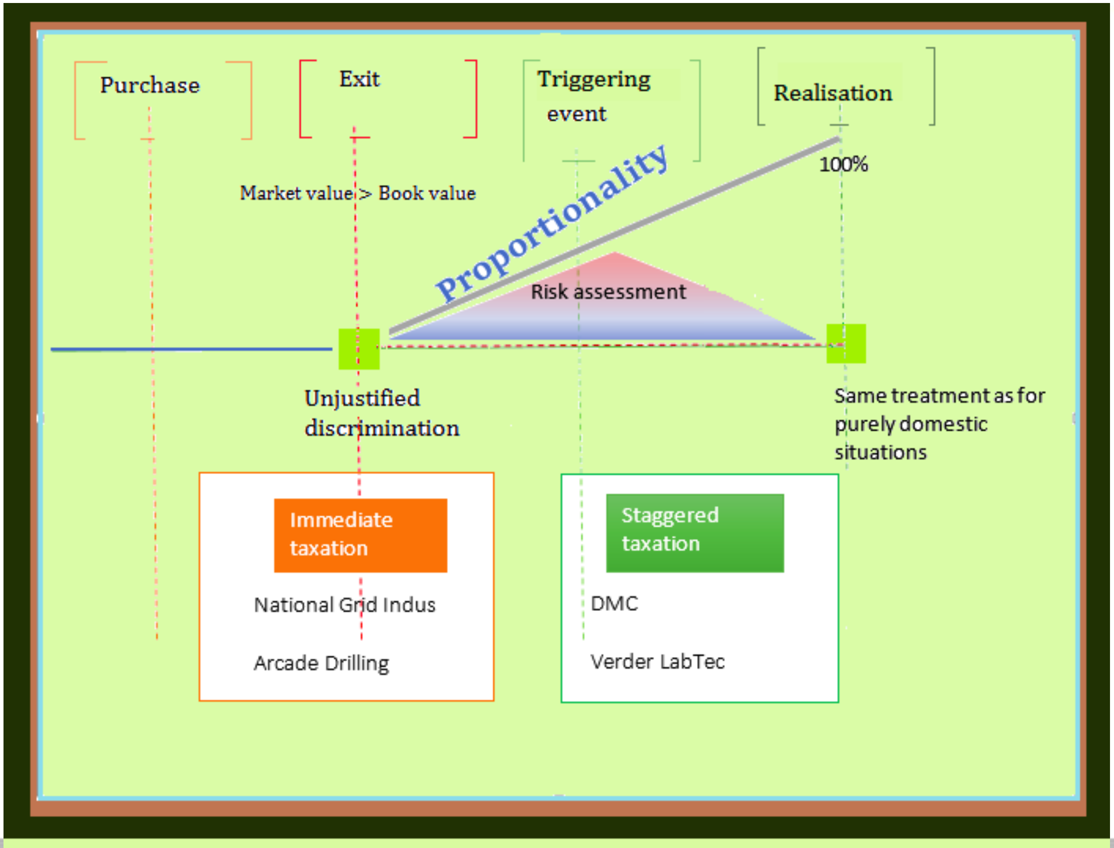
ECJ C-371/10 National Grid Indus BV



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EU – Exit Taxation - Corporations

- Recommend payment concept (Art 5 (2))

➢ Taxpayer can chose whether or not to do payments of installments spread over 5 years
  - ECJ (C371/10) Taxation of hidden reserves in connection with special payments isn´t disproportionately

- If exiting to a member state of the EU payments of installments are always possible

- If exiting to a non EU but an EEA member – it depends on an agreement guaranteeing comprehensive administrative and enforcement assistance, comparable to the “EU Recovery Directive”

EU – Exit Taxation - Corporations

- Recommend payment concept (Art 5 (3))
- Interest rate of payments of installments is permissible (ECJ C-371/10)
  - Has to be ruled by national law
- If there is a proven and actual risk of tax dept recovery, national law may stipulate the deposit of security services
- To require an abstract bank guarantee is permissible (ECJ C-371/10)

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EU – Exit Taxation - Corporations

- Instant Taxation (Art 5 (4))
- Art 5 (4) requires a instant taxation if one of the following requirements is fulfilled:
  - The transmitted asset gets sold
  - The transmitted asset gets shifted to a third country
  - The tax-sitting of the corporation is moved to a third country
  - Insolvency application or completion of the corporation
  - Arrears of the payments of installments and no rectification within appropriate time (according to national tax law, no longer than 12 month)

EU – Exit Taxation - Corporations

Art 5 has some basic statements about the value approach of exit taxation:

- The determination of value at the time of exiting is final and is not effected by future changes in value
- Art 5 stipulates a “market value”
- The Host State shall accept the value established by the other Member State

→ Problem of “right” value approach

→ Application of the value calculation of the “OECD Transfer Pricing Principles” and the proposal of “BEPS 2015”

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EU – Exit Taxation - Corporations

The methods of the OECD have been completed by methods of the BEPS-Action Plan in 2015 for the value approach of intangibles

OECD	BEPS
Price Comparison Method	Multi Period Excess Earnings Method
Resale Price Method	Relief from Royalty Method
Cost Plus Method	Incremental Cash Flow Method
Transactional Profit Split Method	Direct Cashflow Method
Transactional Net Margin Method	

In addition to the above mentioned methods, opportunities and risks have to be taken into account to receive a “market value” as recommended by the Directive.

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EU – Exit Taxation - Corporations

Questions and problems of the Anti-Tax-Avoidance-Directive

- Applicable only for EU members
- For third countries as member of EEA (European Economic Area)
- Definition of market value
- Only for entities which are subject to CIT. What about transparent entities like partnerships? Ltd liable partnership in Spain is subject to CIT but not in GER or A.
- No clear definition which transfers are subject to exit taxation. Risk of different understanding for exemptions.
- Risk of double taxation in case of not working credit method
- Does any similar regulations exit in third countries like Asia and America?

Exit Taxation – OECD Model Convention

- Two kinds of exit taxation
  - “Immediate exit taxation” (levied on an unrealized gain)
  - “Capital gains taxes on former residents” (charged on the effective and realized gains)

→ Art 13 OECD-model only applies on capital gains taxes on former residents (according to paragraph 9 of the OECD-commentaries on Art 13)

→ It only applies on alienation transactions (= wording of Art 13 – different interpretation of states is inadmissible)

→ It doesn´t apply on capital appreciation (→ general distributive rules are applicable)

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• Exit Taxation – OECD Model Convention

Art 13 OECD Model Convention:

- The taxing right of the gain of the alienation of moveable property forming par of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment is given to the State of the location of the moveable property.

→ Gains may be taxed in the State assets are located. The other state may also tax that income, taking into account the rules of avoidance of double taxation.

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OECD – Capital Gains Of Former Residents

Main Problem of Art 13:

- After emigration there will be two states claiming the status of residence
- Since there is no indication by the OECD-model-convention nor the OECD-commentaries only current status of residence matters to grant the right of taxation to the residence state

→ „Tie breaker rule“ of Art 4 will attribute the status of state of residence exclusivly to the state where the person moved

→ coupled with Art 13 this results in an obstacle for the former state of residence to tax

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OECD – Capital Gains Of Former Residents

→ **Solution**:

- The former state of residence has to reserve its right to tax former residents under the tax treaty

- Contracting states have to introduce such a provision to reserve the former states right for taxing gains of alienation of any property derived by an individual who is no longer tax resident

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OECD – Immediate Taxation

Immediate Taxation means an exit tax on unrealized gains at the last moment before moving to another country and beeing a resident there.

Problem:

- No cross border situation → treaty is not applicable
- If treaty is not applicable this constitutes a treaty override
- OECD-report doesn´t give a straight answer to that question
- Immediate exit taxation doesn´t characterize per se a breach of the tax treaty obligation

→ **Risk of occurence of double taxation**

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OECD – Immediate Taxation

- Based on Art 13 (5) the resident state has the exclusive right to tax at the time of alienation
- Double taxation will only arise if the residence state at the time of alienation takes the original cost of aquisition and doesn´t apply the ordinary credit method
- If immediate taxation leads to double taxation, it is contentious whether Art 23 should be applicable or not. The OECD hasn´t given a clear comment on that issue by now .

Exit Taxation

How to get information about relevant investments?

- National investments
- Foreign investments

- Automatic exchange of information
- US FATCA
- International tax audits by two tax departments

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Austria

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Exit Taxation – Austrian Approach – corporations, permanent establishments

- Until Dec 31st 2015 the determination of the tax liablity has been made at the time of alienation of the asset, transfered to another country. The alienation of assets hold for more than 10 years is tax free.

- Prerequiste for the application of the rules of „Exit Taxation“ is an agreement guaranteeing comprehensive administrative and enforcement assistance between Austria and the foreign country.

- Assets resold to a third country are subject to immediate taxation

- Since Dec 1st 2016 all circumstances leading to a loss of the Austrian taxation right effect an immediate tax assessment

- Since 2016 only transfers to EU/EEA-members can benefit of the rules of exit taxation – no third countries with an administrative and enforcement assistance agreement

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Exit Taxation – Austrian Approach

The ECJ clariefied, that this non-determination concept ist not required by European Law and that it is sufficient to extend the tax payment over an appropriate period (C-164/12 and C-547/13)

→ New regulation of § 6 sec 6 EStG: non-determination concept is replaced by a payments-by-installment concept

→ Now taxpayers of an EU or EEA member state can opt for payments by installments if there is an agreement guaranteeing comprehensive administrative and enforcement assistance to Austria

→ The application of payments by installment has to be made with the tax declaration

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Exit Taxation – Austrian Approach – Fixed Assets

- Has to be reported within 3 month
- Payments of installment over 7 years
- First rate has to be paid 1 month after announcment of the tax assessment
- Following Rates have to be paid by the 30th of September of the following years
- No interest for installments
- Limitation period for the collection starts with the due date of the respective rate
- On departure or transfer to a third country → all outstanding installments are payable in this year (has to be reportet by the taxpayer within 3 month)

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Exit Taxation – Austrian Approach – Current Assets

- Has to be reported within 3 month
- Payments of installment over 2 years
- In case of premature maturity → No due date of the outstanding installments
- The time period of only 2 years might be in conflict with European Law. The EJC requires a reasonable deadline to avoid creating a liquidity disadvantage for the taxpayer

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Exit Taxation – Austrian Approach – Import Taxation

Import:

- Valuation of the assets according to the „arms length principle“
- Same procedure for determining the price as for transfer pricing issues (depending on the treaty)
- No tax for imported assets

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Exit Taxation – Austrian Approach – Import Taxation

Re-Import:

- No cancellation of the installment
- Accounting of revaluated book value in case of non-determination at time of exiting (only if exiting before 2016)
- Changes in value subsequently made abroad are not taken into account (EJC C-371/10)
- Not considered as retroactive event
  - → Accounting of the original purchase costs, but at most the fair value
  - → In case of proof of value increases in the EU/EEA the sales proceeds can be reduced by these increases

Exit Taxation – Austrian Approach - Problems

- According to § 6 N6 lit a of the Austrian ITC the OECD Transfer Pricing Guidlines are applicable for the determination of the value of an asset (ECJ C-123/11)

→ Same problems as general Transfer Pricing issues

- If an asset is not transferd to another related party, but a change in a double taxation agreement effects a change of taxation rights

→ Exit taxation? – no clear answer → risk for taxpayer

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Exit Taxation – Austrian Approach – Individuals

No taxation of profits in shares and participations if:

- Move away of a physical person into an EU/EWR country
- Free transfer of capital assets to another physical person within the EU/EWR

→ Payments of installment (if applied) or immediate payment in all other cases ie transfer to foreign private foundations

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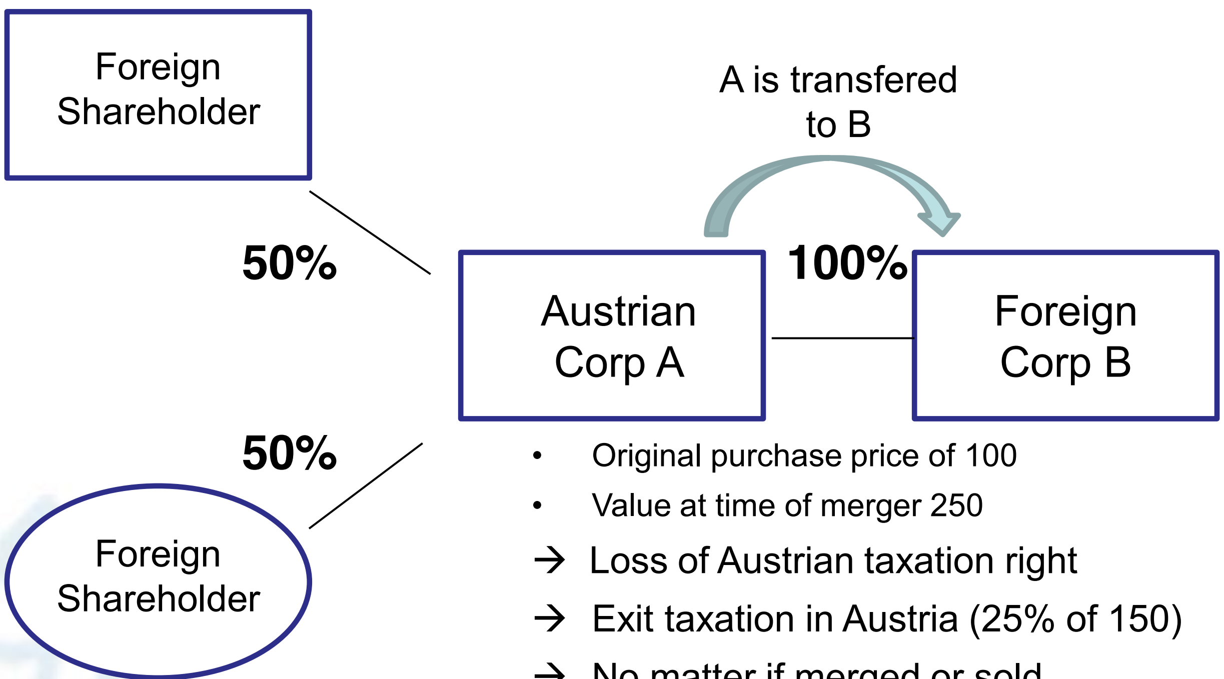
Exit Taxation – Austrian Approach – Example Export



- Original purchase price of 100
- Value at time of merger 250

→ Loss of Austrian taxation right

→ Exit taxation in Austria (25% of 150)

→ No matter if merged or sold

Exit Taxation – Austrian Approach – Example Reimport

Transfer of goods to a foreign country

→ taxation of silent reserves
→ payments in installments

Austria

Foreign Country

Reimportation of goods

→ no change in payments of installments
→ foreign change in value not accounted

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Exit Taxation - Belgium
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Country specifics – *Belgium*

Exit Tax for individuals

- Discontinuation gains on the assets immediately taxable (one exception)
- Fixed assets plus value taxable @ 16,5 %
- Intangible fixed assets
  - Plus value taxable @ 33%
    - 4 x 4 rule: profit of the last 4 years previous to realization is lower then the plus value
  - Plus value taxable @ 16,5 %
    - 4 x 4 rule
    - AND individual is 60 years or older
    - Discontinuation due to decease
    - Forced discontinuation
      - Illness or Handicap
      - Expropriation
  - Exceedance of 4 x 4 rule is taxable @ progressive rate of income taxes

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Country specifics – *Belgium*

Exit Tax for corporation

- At the end of 2016, Belgium introduced new legislation, giving all companies that are engaged in the cross-border relocation of assets, migration or restructuring the right to elect for the deferred payment of exit taxation (whenever triggered by such transactions). Under Article 5 (the provision on exit taxation) of the ATAD, such deferred payment regimes must be available to the companies of any EU member state.
- Under the ATAD, choosing the deferral option implies that the exit tax can be paid in instalments over **<u>five years</u>**. Although ATAD provides that its exit taxation rules must apply in the member states from January 1 2020, Belgium already offers this deferred payment regime for transactions carried-out from December 8 2016 (the date when the law was published in the Belgian Official Gazette).

Country specifics – *Belgium*

Exit Tax for corporation

The option for the deferred payment of the exit tax is available for the following types of transfers and reorganisations:

- The transfer (relocation) of assets/business from a Belgian PE to the company's head office, or to another PE of the company, in another jurisdiction. To qualify, the head office or the transferee PE must be established/located in another European Economic Area (EEA) member state (not including Liechtenstein).
  - Liechtenstein's exclusion is because Belgium has no treaty with Liechtenstein on mutual assistance for the recovery of tax claims
- The transfer by a Belgian company of its place of effective management (real seat) and/or its registered office to another EEA member state (not including Liechtenstein).

Country specifics – *Belgium*

Exit Tax for corporation

The option for the deferred payment of the exit tax is available for the following types of transfers and reorganisations:

- An outbound cross-border merger or (partial) division resulting in a Belgian company's assets being transferred to an absorbing/receiving company established in another EEA member state (not including Liechtenstein).

No deferred payment regime has been provided for the situation in which a Belgian company transfers (relocates) assets from its head office in Belgium to a PE in another EEA member state. This

can be explained by the fact that it is, in principle, accepted (by the tax authorities and ruling commission) that such transfers are not assimilated to a taxable realisation of the assets and, therefore, are not subject to exit taxation.

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Country specifics – *Belgium*

Exit Tax for corporation

The Belgian tax authorities seem to take the view that the capital gain to be realised later, on actual disposal of the asset, does not qualify for treaty exemption to the extent that the gain had accrued prior to the intra-company relocation. As a result, Belgium, in principle, retains the right to tax the transferred (relocated) asset and, therefore, arguably, is not required under Article 5(1)(a) of the ATAD to impose exit taxation upon the intracompany relocation.

Country specifics – *Belgium*

Modalities of the deferred payment regime

- The exit tax resulting from a **qualified transaction** can be paid in five annual instalments
- Does not result in a late payment interest being due, provided the annual instalments are paid on time
- Outstanding balance becomes immediately recoverable in certain events:
  - in the event that all or part of the assets are disposed of, or transferred outside the EEA

By adding that even disposal/transfer of part of the assets (potentially a minor part) could have this effect, Belgian legislation seems to go further than the ATAD. If interpreted strictly, then arguably, this rule has a disproportionate effect.

Country specifics – *Belgium*

Explain current developments in your country related to the topic

- The individual can benefit from the 5 year payment of exit tax in the case of an input of his field of activity into an EEA company in exchange of shares in that company

Finally, it is important to note that the new provisions only deal with outbound transactions, meaning that the existing rules for inbound relocation of assets, migration and reorganisation remain unchanged. As these provisions generally provide that the assets enter the Belgian tax jurisdiction at their pre-transaction foreign book-value, i.e. without a step-up in the tax base being granted, Belgian legislation is still not ATAD-proof for inbound situations.

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Exit Taxation - Canada
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Country specifics – *CANADA*  *INDIVIDUALS*

Main and special facts for EXIT taxation of individuals

- Form to complete to determine if an individual has left Canada (NR73). Canadian government will then give an official decision if exited or not.
- Generally, considered to have emigrated from Canada if living in another country and cut residential ties with Canada. There are clues that the Canadian government looks at where an individual has or has not left Canada (i.e. sold or renting out house, family leaving, close bank accounts).

General rule:

- Pay tax on world wide income up to date of departure.
- Departure tax – deemed to dispose of (and reacquire immediately before ceasing Canadian residence) all your property at fair market value. This may cause a capital gain to be reported and taxed.

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Country specifics – *CANADA*  *INDIVIDUALS*

Main and special facts for EXIT taxation of individuals (continued)

Exception:

- Registered investments and real property in Canada are exempted from deemed dispositions and thus tax.

Exception to the exception:

- Can elect to dispose of real property if it results in a loss that could offset gains and thus less tax.

Other:

- Able to post security in lieu of tax. Security remains in place until property is disposed of or until the individual returns to Canada and unwinds the tax.
- Special rules for short-term residents and returning non-residents.

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Country specifics – *CANADA*  *CORPORATIONS*

Main and special facts for EXIT taxation of corporations

- Considered to have emigrated from Canada if the corporation's central management and control is no longer in Canada, regardless if initially incorporated in Canada or not. Therefore, when a business owner moves, so does the business.

- Deemed year end and deemed disposition of its property. Gain or loss on deemed disposition reported on deemed year end tax return and thus taxed.

Country specifics – *CANADA*  ***CORPORATIONS***

Main and special facts for <u>EXIT</u> taxation of <u>corporations</u> (continued)

- **<u>Additional</u>** departure tax of 25% on top of the deemed disposition. Tax is charged on the corporation’s surplus (i.e. the cumulative earnings since inception of the corporation less dividends paid out to shareholders to date).

- 25% departure tax cannot be reduced by any tax treaty as the corporation was only considered a resident of Canada in the deemed year end.

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Country specifics – *CANADA*  *INDIVIDUALS*

Main and special facts for Entry taxation for individuals

- Assets are valued at current fair market value, except for real property in Canada, certain shares of private corporations that are residence in Canada and certain shares of public corporations.

- Employment income is taxed upon receipt date so all income related to employment outside of Canada should be received before entry or else also taxed in Canada.

- Any foreign rental income earned after entry into Canada is taxed in Canada.

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Country specifics – *CANADA*

CORPORATIONS

Main and special facts for Entry taxation for corporations

- Business assets are valued at current fair market value, except for 'TAXABLE CANADIAN PROPERTY' (i.e. real property, inventory of a business carried on in Canada, shares of a Canadian resident corporation).
- Paid-up capital is adjusted to reflect the new tax cost of its property.
- New taxation year starts immediately after immigration.
- No tax on entry, just on tax on exit.

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Country specifics – *CANADA*

Tax risks and important strategy to avoid disadvantages

<u>Example</u>

If a corporation has a surplus of $100,000, it pays 25% departure tax ($25,000). Leaving a company value of $75,000.

The individual owing the corporation will then pay tax on the gain resulting from the deemed disposition of shares (assume purchased the shares for $100). ($75,000 - $100) x 50% = $37,450 gain x 33%* = $12,359 in taxes owing

Combined total taxes of $37,359.

If a dividend of $100,000 was declared to the individual first before departure, the company would have no surplus so no departure tax. The individual would have no gain as the company has $0 value, but would pay taxes on dividend income of $100,000 x 33%* = $33,000. Saving $4,359 in taxes.

*33% is top federal tax rate used for illustrative purposes only.

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Country specifics – *CANADA*

Current developments in Canada related to Exit/Entry Taxation

- Continue to identify when people have entered and exited Canada. Canada’s border agency sharing information with US Homeland Security.

- Ongoing updates to tax treaties
  - Currently 93 tax treaties in force.
  - 4 tax treaties signed but not yet in force and 7 tax treaties under negotiation/re-negotiation.
  - 22 status agreements in force.
  - 2 status agreements signed but not yet in force and 6 status agreements under negotiation.

- Reporting and sharing of financial account information with other jurisdictions (RC521 Declaration of Tax Residence for Entities).

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EXIT TAXATION OF INDIVIDUALS IN FRANCE

Country specifics – *FRANCE*

- Principle = article 167 of the CGI : all the incomes until the date of transfer are subject to income tax
- Principle = article 167 bis of the CGI : all the capital gains are subject to taxation
- In which circumstances ? The taxpayer who is resident of France for at least 6 of the 10 years preceding the transfer of his tax residence out of France

EXIT TAXATION OF INDIVIDUALS IN FRANCE

Country specifics – *FRANCE*

- When ? at the date of transfer

- What is taxed ? Assets : unrealised capital gains recorded on shares and all kind of securities, detained directly or indirectly by the members of the taxpayer's residency at the date of transfer :
  - When the ownership of shares or securities for at least 50% of the company,
  - Or when the value of the shares or securities exceeds 800 000 € at the date of transfer.

  & outstanding receivables born because of an earnout clause

Country specifics – *FRANCE*

- Calculation of capital gains : difference between the value of the shares and securities at the time of transfer of tax residence out of France, and their purchase price.

- Calculation of capital gains taxation : difference between the tax liability as a result of the combination of the sources of revenues generated in France and out of France plus capital gains and outstanding receivables, and the tax liability as a result of the combination of the sources of revenues generated in France and out of France without capital gains and outstanding receivables.

- Calculation of the tax rate : ratio between capital gains taxation and total of the capital gains and outstanding receivables.

Country specifics – *FRANCE*

Example of calculation :

- Shares valued 6 000 K€, purchase price 600K€
- Capital gains of around 5 400 K€ of which net capital gains subject to taxation are 3 800 K€
- Income 200 K€ of which an income tax of 50 K€ is due
- Income tax calculated on the total amount of income (3 800 K€ + 200 K€ = 4 000 K€) is 1100 K€
- Capital gains taxation / exit tax = 1 100 – 50 = 1 050 K€
- Tax rate = 1 050 / 3 800 K€

Country specifics – *FRANCE*

Suspension of payment of the tax on capital gains and outstanding receivables :

- automatic in the case of a transfer out of France but in EU (European Union) or EEA (European Economic Area : Norway, Iceland).
- expressly requested in the case of a transfer out of France and out of EU-EEA or in Liechtenstein, and qualifiying conditions have then to be fullfilled :
  - To declare the amount of taxable capital gains and outstanding receivables,
  - To designate a French representative,
  - To establish guaranties for the Public accountant involved equal to 30% of the total amount of capital gains and outstanding receivables.

Country specifics – *FRANCE*

Expiration of the suspension of payment :

- Concerning unrealised capital gains and deferred capital gains :

  - Transfer of shares,
  - Buyback of its own shares by a company,
  - Bond redemption,
  - Cancellation of shares,
  - Donation of shares.

- Concerning outstanding receivables born because of an earnout clause :

  - Collection of the earnout,
  - Inflow or sale of the outstanding receivables born because of an earnout clause,
  - Donation of the outstanding receivables born because of an earnout clause.

Country specifics – *FRANCE*

Paperwork :

- Deposit of the 2074-ET form 30 days before the transfer (in both automatic or requested cases). The suspension is asked on such a form.
- Deposit of the 2042, the annex 2042-C and the 2074-ET forms, and each year until the end of the suspension of the payment.

Country specifics – *FRANCE*

- Principle = When a company liable to corporation tax transfers abroad its headquarter and its assets, unrealised capital gains and deferred capital gains are taxed.

- What is transferred ? corporate headquarter, or effective management headquarter, or establishment

  & assets.

- Assets ?
  - Current capital assets,
  - Shares and outstanding receivables linked with shares,
  - Other financial assets.

Country specifics – *FRANCE*

- Transfer of assets ?
  - Derecognition of the balance sheet assets of a company or of an establishment for intangible personal properties and buildings, properties or lands and financial assets,
  - Physical transfer of goods to another state (EU EEA),
  - Derecognition of the balance sheet for the good.

❖ In case of a <u>transfer out of EU or out of EEA</u>, if there is no mutual assistance convention, the corporation loses its legal entity.

- Corporation considered as dissolved → fiscally discontinuance of business
- Immediate taxation of profits and capital gains.

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EXIT TAXATION OF CORPORATIONS IN FRANCE

Country specifics – *FRANCE*

- In case of a transfer in EU or in EEA if there is a mutual assistance convention :

  - In case of a transfer of all the assets :

    Taxation of unrealised capital gains and deferred capital gains

    Option: 5 years fractioned payment

    Taxation of untaxed operating income and recorded provisions + Declaration of these elements + Payment of the corporation tax in the 3 coming months after the transfer

  - In case of a transfer of a part of the assets :

    Taxation of unrealised capital gains

    Option: 5 years fractioned payment

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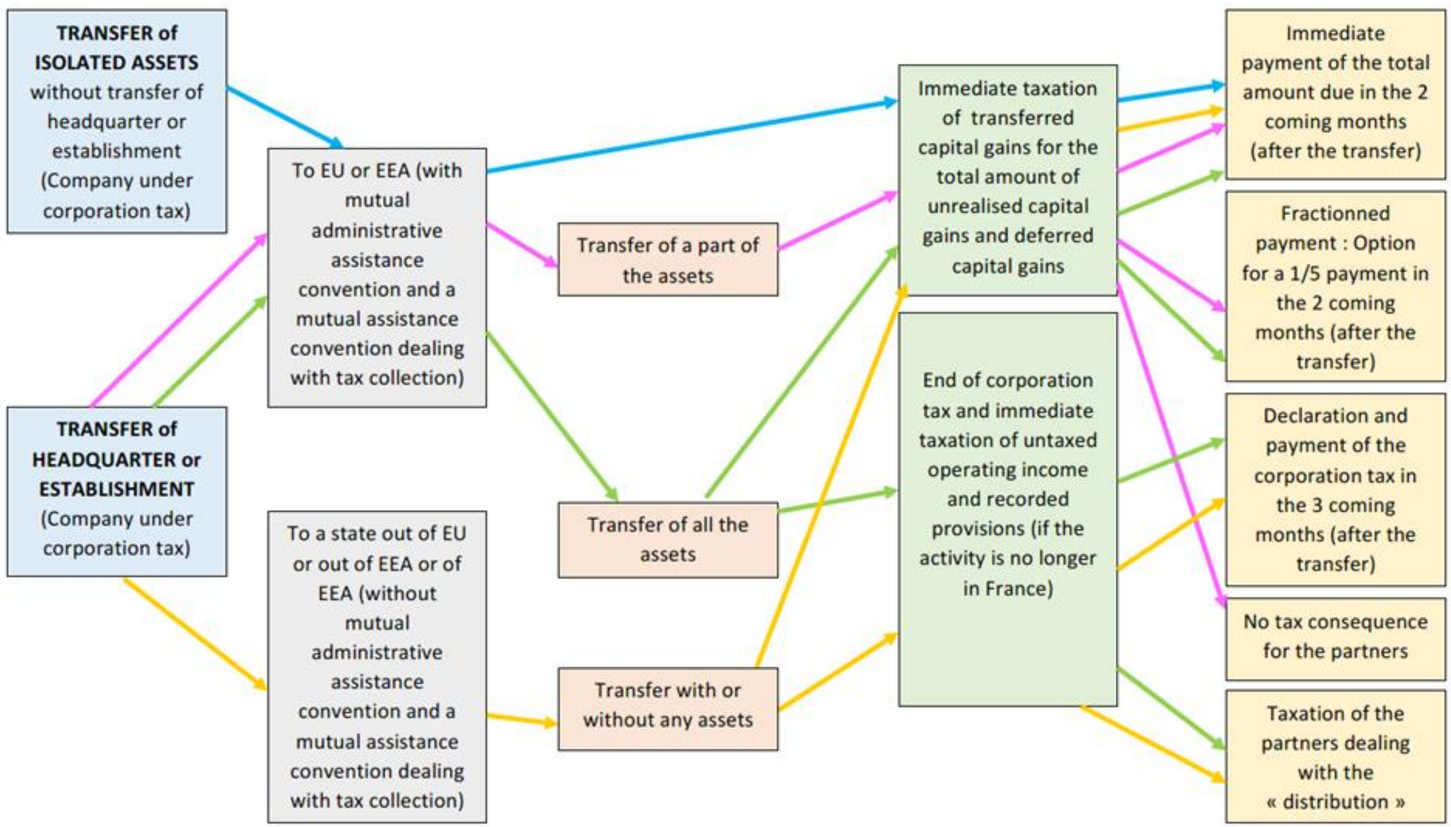
EXIT TAXATION OF CORPORATIONS IN FRANCE

Country specifics – *FRANCE*



Country specifics – *FRANCE*

- Paperwork :
  - Principle : payment of the total amount,
  - Option : payment of 1/5 of the total amount :
    - Deposit of a special document at the Tax Office in the 2 coming months after the transfer + payment of 1/5 of the total amount of corporation tax due because of unrealised capital gains and deferred capital gains.
    - The difference can be payed each year by equal amounts or in one time for the total of the difference.
  - Possibly : declaration of the result of the year in which the company is no longer subject to corporation tax.

Country specifics – *FRANCE*

- Partners side (Cf: see previous board) :
  - Distribution,
  - Neutral.

- Expiration of the 1/5 collection :
  - immediate taxation when :
    - The assets are sold in the 5 years following the transfer ,
    - The assets are transferred out of EU,
    - The company is dissolved.

Country specifics – *FRANCE*

Valuation of business assets = value of the company → effective value of the shares (classical calculation and methods) → but tax administration recommands preferential methods which are composed with the combination of (examples) :

- Mathematical value and market value of the shares in small corporations,
- Mathematical value and performance value or productivity value of the shares in bigger corporations (cash flow, goodwill, …).

Does the value for exit taxation correspond with the value in entry country ? Not determined by French law → entry country determines such a value

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Country specifics – *FRANCE*

How to avoid double taxation in country ? Treaties and tax credit or tax deductibility mechanisms such as:

- Automatic exemptions in order to avoid double taxation (but payment of social charges) under certain conditions.
- Cut of French social charges and cut of French income tax (linked with unrealised capital gains).

Country specifics – *FRANCE*

- Concerning individuals :
  - penalties for not declaring and not filing the 2074-ET form when required or the failures of disclosure or incomplete disclosures
  - immediate taxation of the tax for which the payment has been suspended

- Concerning corporations :
  - penalties for failures of disclosure or incomplete disclosures in the case of 1/5 payment
  - immediate taxation in case of non-observance of one of the expiries ends in immediate taxation

Country specifics – *FRANCE*

- Having an activity in France
- Developping this activity abroad for many years
- Transferring

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EVOLUTIONS IN FRANCE

Country specifics – *FRANCE*

Withholding tax called flat tax :

- At the moment : capital income taxation is the following :

1) taxation at a rate of 15.5%,

2) taxation at the income taxe at a progressive rate (after a deduction of 40% for dividends and other distributions to shareholders).

Total = 15,5% to 46,5% (depending on the effective tax rate of the taxpayer)

- Project : Withholding tax on capital income at a rate of 30%, social contributions included. Deduction for the duration of ownership would no longer exist under the flat tax.

Total = 30% ?

Country specifics – *FRANCE*

Goals: to avoid double taxation and to prevent tax evasion concerning income tax and wealth tax → mechanisms of tax credit or tax deductibility

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Exit Taxation - Germany
September 16, 2017
Malta

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Country specifics – *Germany - Individuals*

Main requirements

- Individual with at least 10 years unlimited tax liability
- Direct or indirect ownership of shares of a corporation
  - with at least 1% participation
  - Local and foreign corporation
- Finishing the unlimited tax liability in Germany
  - Move fiscal residence to abroad
  - Transfer shares to a shareholder abroad through a GIFT or INHERITANCE
  - Double fiscal residence with main fiscal residence abroad (tie breaker rules)
  - Limitation or termination of the taxation rights for Germany (first time of modified DTT)

  - ……
  -

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Country specifics – *Germany - Individuals*

Main effects

- Exit tax with 60% of the individual tax rate
  - Progressive tax rate up to 45% plus surcharges
- No exit tax in case of temporary absence (max. 5 years + 5 years)
- Instalment payments over 5 years
  - but with securities
  - Interest rate 6%
- For citizens of the EU and EEA interest and security free deferral until final sale, if
  - Unlimited tax liability in EU or EEA country
  - Similar taxes like in Germany
  - Country with administrative cooperation
  - BREXIT ?!

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Country specifics – *Germany - Individuals*

High risk of economical double taxation

- Valuation of the shares with market value including
  - Capital reserves
  - Retained earnings
- Later dividends and/or liquidation of the corporation triggers WHT
- WHT independently of an existing DTT
- Application procedure for exemption or deduction possible but complicated
- Crediting of German WHT in country of fiscal residence usually with the deducted amount in acc. to the relevant treaty

- Losses are not covered by Exit Taxation
- Tax burden in Germany can be reduced in case of losses realized by a sale if these losses are not excepted in country of fiscal residence

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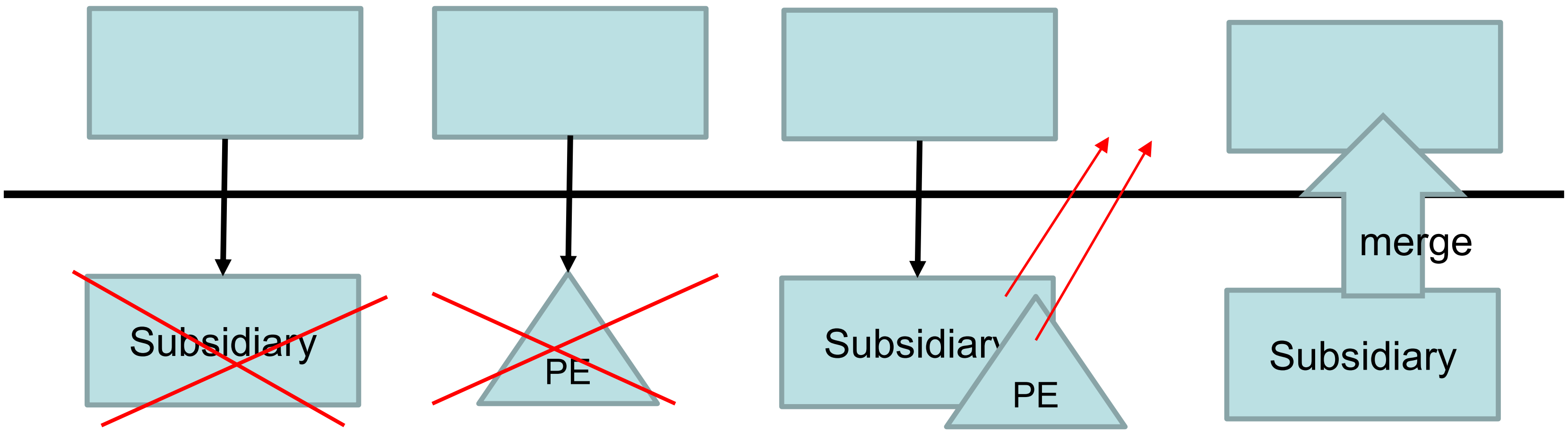
Country specifics – *Germany - Corporation*



Liquidation with market value for whole business or per single asset.
CIT
No trade tax

Transfer single asset.
CIT
Trade tax
VAT

Merge
Differ EU / third country

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Country specifics – *Germany*

Entry taxation

- Individuals
  - Shares with at least 1% participation
  - Value of foreign Exit Taxation if the Exit Taxation is similar with German regulations. Problem of existing and excepted evidences. If the requirements are not met, historical acquisition-costs (double taxation)
  - Not more than market value
- Corporations / entrepreneurs
  - Transfer of assets to a German branch with market value, independently of an exit taxation abroad (realized AOA)
  - information of German to the foreign tax authorities planned to save exit taxation abroad

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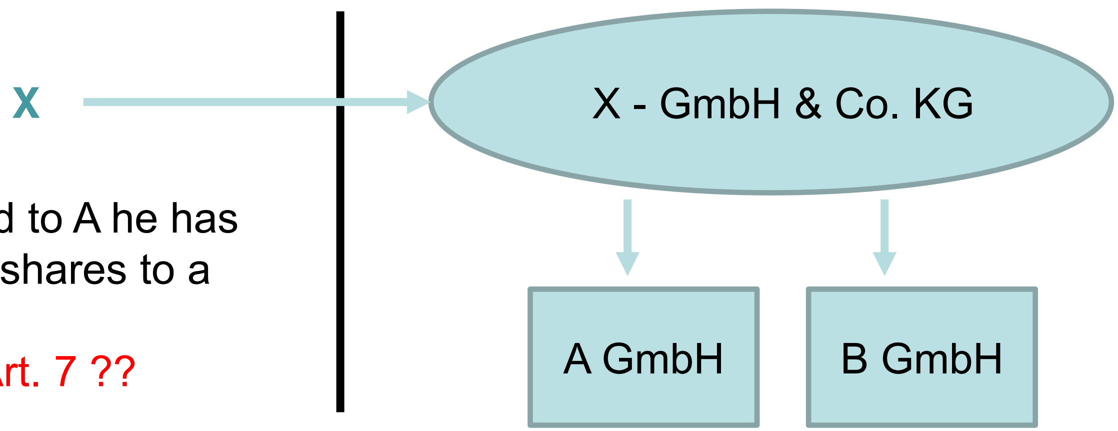
Country specifics – *Germany*

Avoidance Exit Taxation

- Contribution into a German based business
- Gift to an unlimited tax liable person in Germany
- Transformation into limited liable partnership if the participation is excepted as branch in Germany

A

GER



Before X moved to A he has transferred the shares to a partnership.
Branch under Art. 7 ??

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Exit Taxation - Italy
September 16, 2017
Malta

Country specifics – *ITALY*

Current Exit and Entry Taxation Regulation in Italy came into force starting from Fiscal Year 2015; it derives from the European Court of Justice decision in National Grid Indus (Case C-371/10).

Exit Tax Regulation passes through the introduction in Italian Income Tax Law of specific rules:

- **for individuals and partnerships carrying out a commercial activity (ref. Art. 17, par. 1, letters G and L, Presidential Decree no. 917/1986);**
- **for corporations and entities with commercial activity (ref. Art. 166 Presidential Decree no. 917/1986).**

Entry Tax Regulation for companies and individuals carrying our a commercial activity is included in art. 166bis Presidential Decree no. 917/1986

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Country specifics – *ITALY*

EXIT taxation of individuals (and partnerships)

Capital gain taxation of commercial activities **under transfer** of the activity from Italy to abroad.

Possibility to **opt** for **separate taxation** (in this case tax rate is the average rate of the last 3 fiscal years):

- For individuals performing a commercial activity for at least 5 years;
- For partners holding participations in partnerships for more than 5 years.

Exit tax applies to the **capital gains on assets**: difference between normal value and (fiscal) cost.

No extension for payments is foreseen.

No regulation in case of a return within a defined period.

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Country specifics – *ITALY*

Main and special facts for EXIT taxation of corporations (1)

No taxation until assets (and capital gains) **remain in Italy** or are destined to a **PE in Italy**. The loss of Italian residence (or the destination abroad of the assets of the PE) implies the application of Exit Tax regulation.

Losses carried forward can offset tax burden.

In case of tax residence transfer from Italy to another EU or SEE (Iceland or Norway) Member State, an **optional** favorable **regime** foresees:

- Taxation of **Intangibles** following their amortization period (max. 10 years);

-Taxation of **Financial assets** when dividends are distributed (max. 10 years)

-Taxation of **Other** capital gains under actual realization (max. 10 years);

- as an alternative, possibility to opt for the extension of **payment by 6 installments** (+ interest 4% rate) starting from the year of transfer abroad.

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Country specifics – *ITALY*

Main and special facts for EXIT taxation of corporations (2)

Optional regime foreseen for transfers in UE or SEE:

- applies to all capital gains as a whole (no possibility to opt only for some of the capital gains);
- not applicable to: (i) higher or lower value of items in stock; (ii) eventual suspended funds not re-established in the Italian PE; (iii) revenues/costs taxable for the last taxable period in Italy.

The above options are subjected to monitoring of Tax agency under presentation of request and later in the yearly income tax return; in the event of a risk of collection, a security may be required.

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Country specifics – *ITALY*

Main and special facts for <u>Entry taxation</u> for <u>corporations and individuals</u>

-In case the Country of origin permits an exchange of info with Italy, the **arm’s length value** of all assets is **accepted as fiscal value** in Italy;

-In case of **no exchange of info**: (i) the fiscal value of **assets** is **<u>the lower</u>** between purchase cost, accounting cost and arm’s length value; (ii) on the contrary, the fiscal value of **liabilities** is **<u>the higher</u>**.

Register and cadastral taxes are due in a fixed amount of 200€.

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Country specifics – *ITALY*

Tax risks and important strategy to avoid disadvantages

Once the corporation has been transferred abroad, it is important to demonstrate the effective transfer abroad of decisional processes. Italian Tax Agency could object that what has been transferred is a shell company and re-determine foreign income as national.

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Country specifics – *ITALY*

Current developments in Italy

The 7° June 2017 Italy subscribed in Paris "Multilateral convention to implement tax treaty related measures to prevent BEPS".

Italy has 84 covered tax agreements (77 out of the actual 94 DTTs + 7 treaties completing the ratification procedure)

Italian tax system largely complies with most of Anti tax Avoidance (ATA) standards; concerning exit tax, as already seen, the Italian tax system has incorporated the principles set out in the *National Grid Indus case for years.*

->The ATA Directive extends the deferred exit tax payment to transfers of assets to and from a PE/headquarter company and shortens the deferral period to 5 years, compared to the 10 years provided in current Italian tax law.

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Country specifics – *Japan*

Exit Taxation - Japan
September 16, 2017
Malta

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Country specifics – *Japan*

Overview

1. Outline of Japan Exit Tax
2. Individuals subject to Japan Exit Tax
3. Assets subject to Japan Exit Tax
4. Tax rate, Filing tax return and tax payment
5. Grace period for tax payment
6. Special measures

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Country specifics – *Japan*

1. Outline of Japan Exit tax

When “certain resident of Japan ” who hold the certain financial assets with total value of JPY 100 million or more meet a following situation. Japan will impose income tax(Exit Tax) on unrealized capital gains on the financial assets at the time of following situation.

The tax rules takes effect on or after July 1,2015

- When the individual leave Japan

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Country specifics – *Japan*

2. Individuals subject to Japan Exit-tax

(1) Japanese nationals

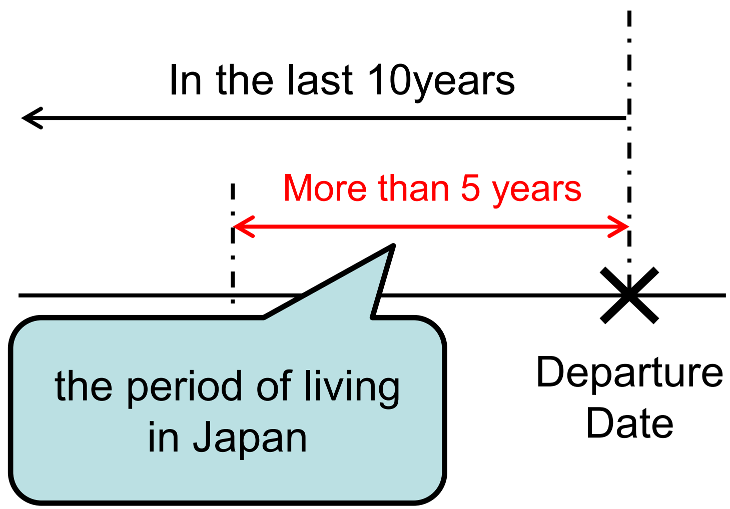
An individual who meets both of the following conditions at the time of you leave Japan.

① When You hold….

Financial Assets
(Subject to exit tax)

≧ JPY100 million (FMV)

② You have lived in Japan…



Country specifics – *Japan*

2. Individuals subject to Japan Exit-tax

(2) Foreign nationals

Judgment method is same as Japanese national, but the period of living in Japan excludes the period of staying Japan with the status of following Visa(Table 1). Furthermore, the period of staying in Japan before July 1 2015 with the status of residence under Table 2 of below Visa is also excluded from the period of living in Japan.

As a result,

Table 1 Visa holder is not subject to Japan Exit tax, but

Table 2 Visa holder will be subject to Japan Exit tax on July1 2020 at the earliest

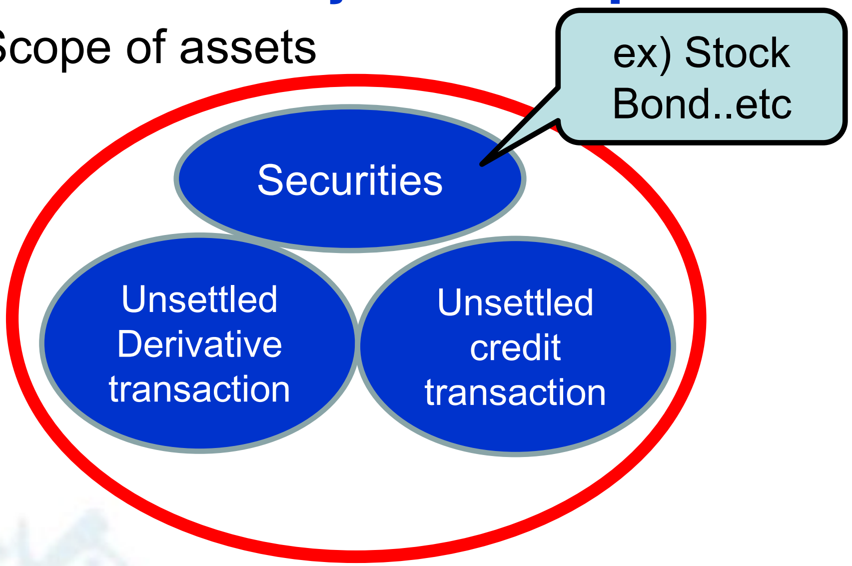
【The immigration Control and Refugee Recognition Act】

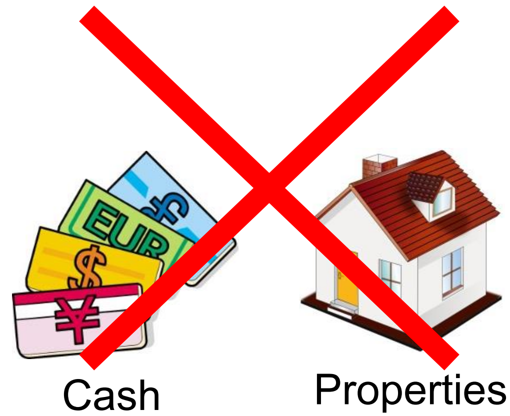
- Table 1：Diplomat、Professor、Artist、Business manager etc
- Table 2：Permanent Resident、Spouse or Child of Permanent Resident
  Spouse or Child of Japanese National、Long-Term Resident

Country specifics – *Japan*

3. Assets subject to Japan Exit-tax

(1)Scope of assets





※1. Assets are considered on a worldwide basis, not just those located in Japan.

※2. cash and non-financial assets such as real estate properties are not to subject to Japan Exit tax.

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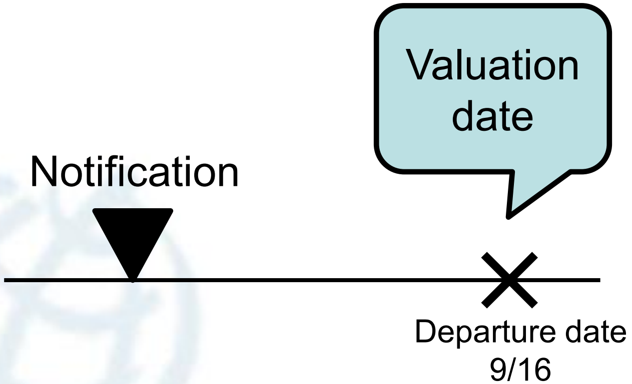
Country specifics – *Japan*

3. Assets subject to Japan Exit-tax

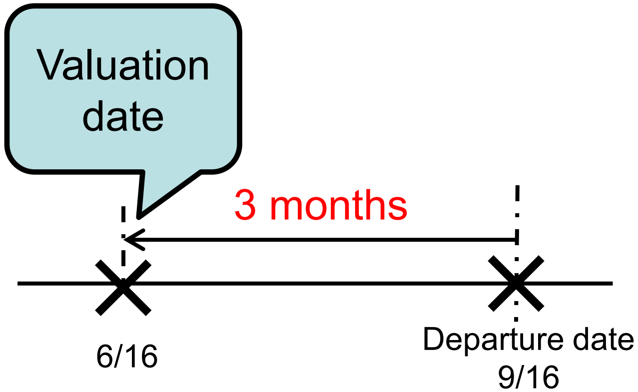
(2)Timing for valuation of the financial assets

The financial assets value is determined if the total value is JPY 100 million or more depending on the case as described below.

① Notification for appointment of tax agent is submitted



② Notification for appointment of tax agent is NOT submitted



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Country specifics – *Japan*

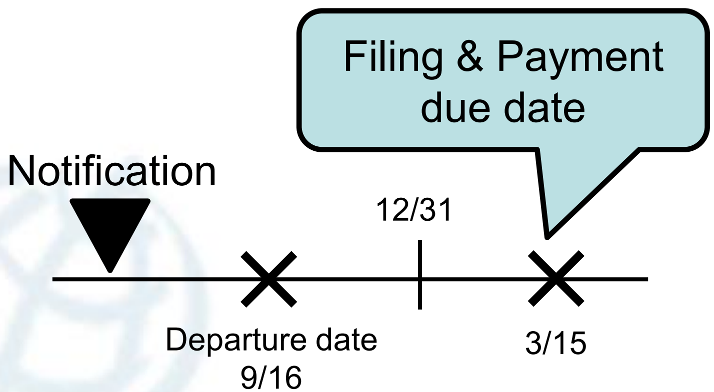
4. Tax rate, filing tax returns and tax payment

(1)Tax rate

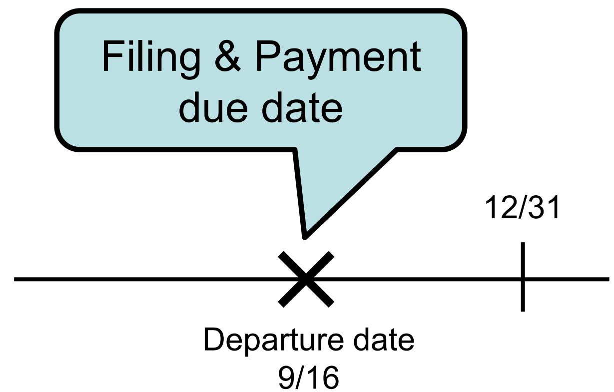
15.315%(including special reconstruction income tax)

(2)Filing tax returns and tax payment

① Notification for appointment of tax agent is submitted



② Notification for appointment of tax agent is NOT submitted



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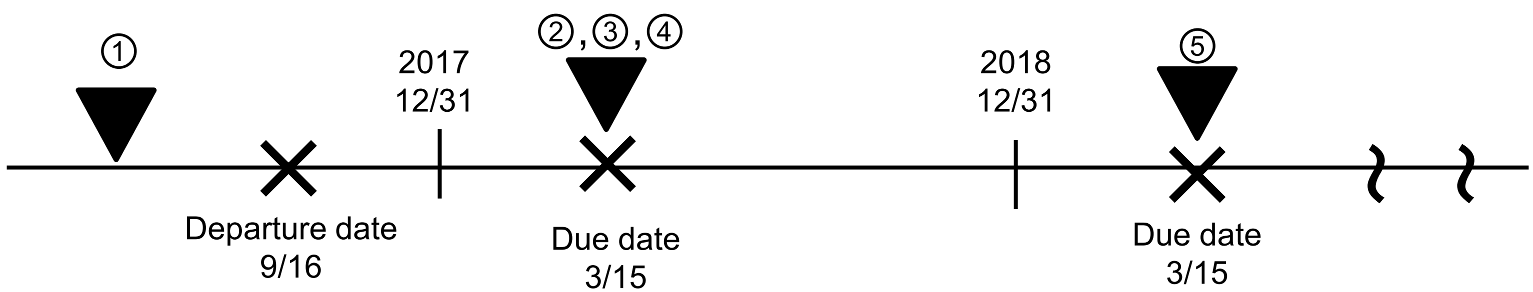
Country specifics – *Japan*

5. Grace period for tax payment

(1)Procedures



Submit or provide….

① A notification for appointment of a tax agent

② An application for the grace period

③ List of financial assets(subject to exit tax)

④ Collateral equivalent to the amount of the exit tax subject to the grace period

⑤ A notification for the financial assets subject to the grace period held as of 31st December of each year

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Country specifics – *Japan*

5. Grace period for tax payment

(2)Special measures

①Extension of tax payment for up to 5 or 10years

②If the selling price of the financial assets falls below the value of the assets as of departure → Japan Exit tax will be reduced

③If the value of the financial assets at the date of termination falls below the value of the assets as of departure.

→ Japan Exit tax of financial assets which is hold by termination of grace period will be reduced

④If capital gains are taxed in the foreign country upon actual disposition of an asset in grace period and the foreign country does not adjust for double taxation.

→ Foreign tax credit is applicable in Japan.

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Country specifics – *Japan*

6. Other special measures

An individuals who was subject to Japan exit tax and returns to Japan within 5 years from the departure, the exit tax on unsold financial assets will be reversed by filling a request for correction.

7. “Exit tax” on inheritance and gift to non-residents

Individuals who meet the conditions for the ″Exit tax” transfer certain financial assets to a non-resident individual by inheritance or gift, Japan will also impose Exit Tax on unrealized capital gains on the financial assets at the time of inheritance or gift, even if donor/decedent does not leave Japan.

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Exit Taxation - Malta
September 16, 2017

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Malta

EXIT taxation of individuals and corporations

- No Maltese exit taxes are payable when companies shift their tax residence or move assets outside Malta
- No Maltese exit taxes are payable when individuals exit the country

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Malta

EXIT taxation of corporations

Post implementation of ATAD

- All EU Member States must adopt laws necessary to comply with Article 5, ATAD – provisions shall apply as from 1 January 2020
- An exit tax will have to be applied in these 4 circumstances:
  - Transfer of assets from head office to permanent establishment in a different Member State (MS) or in a third country, or vice versa
  - Transfer of assets between permanent establishments in different MS or in a third country
  - Transfer of tax residence to another MS or to a third country
  - Transfer of business to another MS or to a third country

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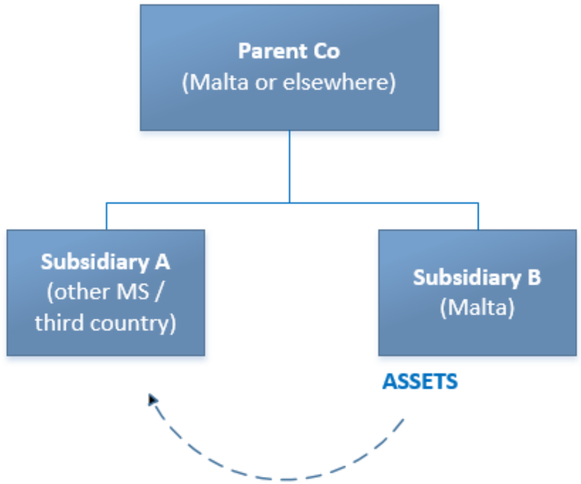
Malta

Post 1 January 2020 - EXIT taxation of corporations

If Malta had to implement an exit tax within the current domestic law, there may be some cases in which Malta would probably not impose an exit tax

- if a subsidiary of the parent company can be created in another country, it is likely that the transfer of assets / business to the other subsidiary would not trigger an exit tax since the intra-group exemption would apply



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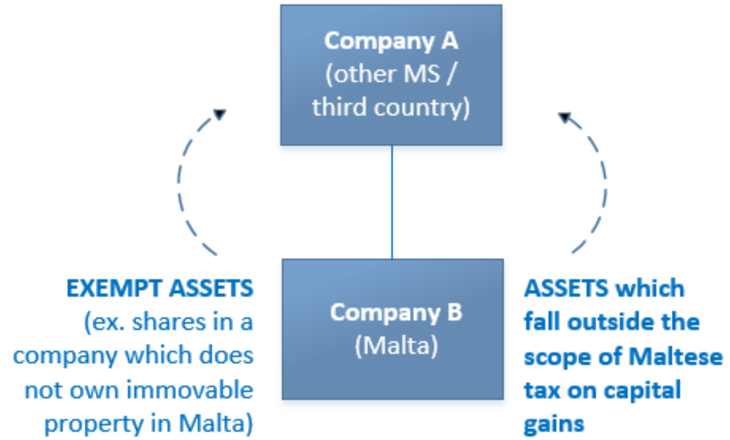
Malta

Post 1 January 2020 - EXIT taxation of corporations

Other cases where Malta might not impose an exit tax

- movement of assets which fall within the scope of a Maltese tax exemption, such as shares in a company which does not own immovable property in Malta

- movement of assets which fall outside the scope of Maltese tax on capital gains, such as receivables and fixed assets excluding immovable property situated in Malta



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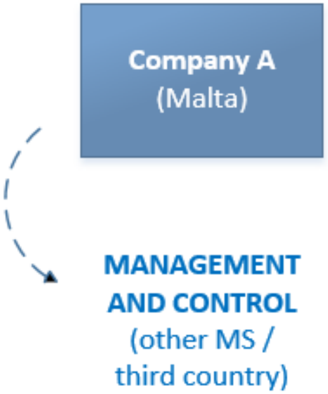
Malta

Post 1 January 2020 - EXIT taxation of corporations

Other cases where Malta might not impose an exit tax (cont.)



- transfer of management and control by a Maltese company incorporated in Malta – unlikely that Malta would impose an exit tax in this case unless Malta would have limitations to tax on a worldwide basis as a result of an existing treaty with the other country involved
- re-domiciliation of a company that has assets situated in Malta where those assets will remain in Malta
- re-domiciliation of a company that owns assets that would fall outside the scope of tax on capital gains in Malta

Malta

Entry taxation for corporations and individuals

- Corporations
  - the re-domiciliation or change of residence of a company to Malta does not trigger any Maltese entry taxes
  - upon re-domiciliation / change of residence to Malta, a company may step-up, to fair market value, the tax base cost of qualifying assets held outside Malta
  - the re-valued cost, which should be notified to the Maltese Tax Authorities, will constitute the new acquisition cost of the assets when calculating any subsequent gain
  - capital allowances available under the Maltese Income Tax Act will be calculated on the stepped-up value of the assets
  - condition that company was not domiciled or resident in Malta prior to the continuation
  - step-up needs to be supported by a third-party valuation of the assets
- Individuals
  - No entry taxes apply when individuals transfer their residence to Malta
  - Step-up to fair market value is also allowed

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Exit Taxation - Netherlands
September 16, 2017
Malta

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Country specifics – *Netherlands*

Main and special facts for EXIT taxation of individuals

- Dutch resident individual A has a substantial (> 5%) shareholding (acquisition price € 18k and FMV € 200k). A also has a pension (FMV € 150k). Individual A migrates to another country. Consequences:
  - a preservative income tax assessment will be imposed; 25% taxation on the difference between the FMV and the acquisition price of the shareholding. Tax due: € 45,500;
  - another preservative income tax assessment will be imposed on the basis of the value of the previously deducted pension premiums taxed up to the maximum amount of the FMV of the pension. Taxation up to 52% (maximum) and additional (penalty) interest of 20%. Total (maximum) tax and interest due 72% of € 150k = € 108,000;
  - Interest-free deferral of payment of the taxable amounts is granted automatically. If A migrates to a non-EU country sufficient security has to be provided for the payment of tax;
  - Distributions of reserves and an actual disposal of the shares at any point of time following emigration are taxed (25%);
  - A redemption of the pension following emigration is taxed 52% + 20%.

Country specifics – *Netherlands*

Main and special facts for EXIT taxation of corporations

- If the effective place of management of a Dutch company is transferred to another country (and the company becomes a non-resident for treaty purposes) any hidden reserve, tax-free reserves and provisions must be included in the taxable base in the year of emigration (20-25% CIT);
- The tax due may be paid immediately after the emigration or, subject to several conditions, the payment may be postponed until the moment of actual realization of the capital gain or in annual instalments during a period of 10 years;
- This exit tax could be prevented by appointing a Dutch resident director (substance is a point of attention).

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Country specifics – *Netherlands*

Main and special facts for Entry taxation for corporations and individuals

- The Netherlands has no entry taxation.
- Individuals are granted a step up to FMV for their substantial shareholdings (not in case of remigration);
- The assets and liabilities of the company must be valued at FMV at the beginning of the first tax year.

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Country specifics – *Netherlands*

Tax risks and important strategy to avoid disadvantages

- No tax risks

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Country specifics – *Netherlands*

Explain current developments in your country related to the topic

- The Netherlands tries to preserve her exit taxation rights in tax treaties for 5, 10 or more years.

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Exit Taxation - Spain
September 16, 2017
Malta

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Country specifics – SPAIN

EXIT taxation of individuals

The ownership of SIGNIFICANT SHARES if:

- ✓ Market value of all entities > than 4 M € or
- ✓ Ownership of one entity > than 25% with market value more than 1M € .

Capital gain: Market value -- acquisition cost. Losses are not compensated.

Tax rate: 19%-23%.

Requirement: Residents in Spain 10 tax years within the last 15 tax years.

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Country specifics – *SPAIN*

EXIT taxation of individuals

Especialities:

- Impatriates tax regime (Beckham law): the 10 tax years requirement mentioned starts when expires this special tax regime.

- Displacement to EU or EEA country with exchange information clause only exit tax when in the following 10 years:
  - the shares are transferred or
  - Next displacement to non EU or EEA country or
  - It is not communicated to the Spanish Tax Administration.

- Tax Haven: Exit tax is required despite being Spanish tax resident during the following 5 years.

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Country specifics – *SPAIN*

EXIT taxation of individuals

Extension of payments when:

- ✓ Secondment to a non tax haven country.
- ✓ Temporary displacement (not for labors reason) to a country with double tax treaty with exchange information clause.

When return to Spain in the following 5 years without transferring shares: debt + interests extinguished.

Extension of the extension: 5 years more (10 years) in case of secondment.

Transfer the shares in this 5 years: the extension will expire two months after the transfer.

Country specifics – *SPAIN*

EXIT taxation of individuals

Double tax treaty avoidance

There are only two double tax treaties:

- Germany-Spain Double Tax Treaty: permits tax credit of Exit Tax paid in Spain in the country of residence.

- Mexico-Spain: permits the exemption of the capital gain in the country of residence (not in force yet).

Mutual agreement procedure between the countries involved can be applied.

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Country specifics – SPAIN

EXIT taxation of corporations

- **Taxable base:** the difference between market value and tax value of the assets.
- **Tax rate**: 25%.
- Posibility to tax loss carryforward **withouth limitation**.
- **Exceptions:**
  - Assets of the entity located in Spain affected through a PE in Spain.
  - An extension of the payment until the next transfer of the assets in case moving to EU or EEA country with exchange information clause (warranties and interest).
  - Exemption on shares that are part of the assets of the company moved.

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Country specifics – SPAIN

Capital gains for shareholders previously subject to the Special Tax Regime of M&A

Shareholders subject to special tax regime of M&A who move their residence out of Spain will pay taxes for the difference between market value of the shares received in M&A and the tax value.

Exceptions:

- ✓ Shares affected through a PE in Spain.
- ✓ Moving to a EU or EEA country with exchange information clause: extension until the next transfer of the shares (warranties and interests).
- ✓ Tax refund when returning to Spain without transferring the shares.

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Country specifics – SPAIN

Entry taxation for corporations and individuals

- Value of the business assets: acquisition value.
- Bookkeeping according Spanish accountancy rules (PGC) but not taxation for the adjustments.
- Taxation involves the whole FY regardless the time of the entry.
- Not possibility to tax loss carryforward pending from abroad.
- International double taxation avoidance for Exit tax paid abroad in case of next transfer of the assets and for rents paid of the period.

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Exit Taxation - UK
September 16, 2017
Malta

Country specifics – *United Kingdom*

EXIT taxation of Individuals

- There have been a great many changes to the taxation of residence and domicile in the last few years.
- Some of these changes depend on the origin of the taxpayer and others on the assets concerned.

- Since 6 April 2013 we have had a statutory residence test HM Revenue & Customs guidance on this known as RDR3, this determines ones residence status and contains 105 pages of guidance.
- In order to become truly not resident in the UK it is necessary to leave the UK for 5 complete tax years. If one returns within this period some income and or capital gains which arose whilst away will become taxable upon return to the UK.

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Country specifics – *United Kingdom*

EXIT taxation of Individuals

- 2013 saw the introduction of a tax on residential properties held by companies. It was primarily aimed at wealthy non-residents who could buy and sell residential property and pay no Stamp Duty Land Tax currently up to 15%
- 2015 saw the extension of the above taxation of non-residents on disposals of residential property.
- 2017 further extended the above rules to include such residential properties in the charge to Inheritance Tax.
- A UK resident and domiciled person will find it hard to shake of both residence and domicile needing to live abroad for more the 7 years in the same country to really stand any chance of success.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/547118/160803_RDR3_August2016_v2_0final_078500.pdf

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Country specifics – *United Kingdom*

EXIT taxation of Corporations

- Reportable transactions include:
- the issue of shares or debentures by a foreign subsidiary
- transfer of shares or debentures in a foreign subsidiary
- a foreign subsidiary becoming a partner in a partnership
- There are exemptions, including:
- the issue of non-redeemable shares to a UK group company
- the issue of debentures to a UK group company
- the issue or transfer of shares to an unconnected company
- the issue of shares to all existing shareholders
- where all parties to the transaction are resident in the same territory
- All of these exemptions are subject to detailed conditions.

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Country specifics – *United Kingdom*

EXIT taxation of Corporations

- Often companies migrate from the UK to overseas as way of escaping UK taxation or taking up the advantage of a lower tax rate.

- **Methods of outbound migration**

- There are a number of ways in which a company can transfer its tax residence from the UK to another country.

- **Company incorporated in the UK and no double tax treaty is in place between the UK and the other country**

- The company will remain resident in the UK because it is incorporated in the UK. If it becomes resident in the other country under the tax rules there, it will be treated as a dual resident company. CTA 2009, s 14

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Country specifics – *United Kingdom*

EXIT taxation of Corporations

- **Company incorporated in the UK and double tax treaty is in place between the UK and the other country**
- The company may cease to be resident in the UK under the tie-breaker article in the treaty. Such an article will typically state that a company is treated as resident where its place of effective management is located, if it would otherwise be treated as resident in both countries. To effect a migration under this form of tie-breaker article it is therefore necessary that:
- the company becomes resident in the other country under the tax rules there
- the place of effective management is transferred to the other country
- The place of effective management will not necessarily be the same as the location of central management and control. CTA 2009, s 18

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Country specifics – *United Kingdom*

EXIT taxation of Corporations

- **Company not incorporated in the UK**

- The transfer of central management and control from the UK will mean that it is no longer tax resident in the UK.

- **Redomiciliation**
- Company law in some countries will allow a company to disincorporate there and reincorporate in another jurisdiction, constituting a migration for both legal and tax purposes. This is not possible under UK company law.

Country specifics – *United Kingdom*

EXIT taxation of Corporations

- **Disposal of assets**
- Assets which are no longer subject to corporation tax following the migration (which will be the case unless the company has a permanent establishment in the UK) will be treated as sold for market value. In particular:
- assets on which capital allowances have been claimed may give rise to a balancing allowance or a balance charge
- trading stock may give rise to a trading profit)
- chargeable gains or losses may arise on other assets, although these can be deferred or exempted under certain circumstances

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Country specifics – *United Kingdom*

EXIT taxation of Corporations

- # Exit charges

- TCGA 1992, s 185 deems a company to have sold all its assets at their market value immediately before it ceases to be UK tax resident. This may result in a chargeable gain which will be subject to corporation tax.
- Similar rules exist for intangible assets acquired or created after 1 April 2002 (and which therefore fall outside TCGA 1992).
- CTA 2009, s 859

- Any assets which continue to be within the scope of UK corporation tax (eg if the company uses them to trade in the UK through a permanent establishment) fall outside the scope of
- TCGA 1992, s 185.

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Country specifics – *United Kingdom*

EXIT taxation of Corporations

- Deferral of exit charge – UK holding company
- The exit charge can be deferred if:
- the assets are situated outside the UK and used for the purposes of a trade carried on outside the UK
- the migrating company is a 75% subsidiary of a company which remains UK resident
- both companies make an election within two years of the date of the migration
- The whole of the deferred gain becomes subject to tax if:
- the migrating company ceases to be a 75% subsidiary of the UK resident parent company
- the parent company itself ceases to be UK tax resident
- An appropriate proportion of the deferred gain becomes subject to tax if the migrating company disposes of an asset within six years of the migration.
- TCGA 1992, s 187

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Country specifics – *United Kingdom*

EXIT taxation of Corporations

Example 1 – deferral of gain on migration

*Refer to Appendix A

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Country specifics – *United Kingdom*

EXIT taxation of Corporations

- Deferral of exit charge – election

- From 11 December 2012, a migrating company can defer gains if it becomes resident in an EEA member state, carries on a business in an EEA member state and has a right to freedom of establishment under the TFEU.
- Interest is charged on the deferred payment at normal corporation tax interest rates and HMRC may require security if they believe there is a risk the tax will not be paid.
- There are two methods of deferral:

1. ‘Standard instalment method’

- Tax is paid in six equal instalments starting nine months after the end of the accounting period in which the company migrates. Full payment is due on the following instalment date if the company ceases to be resident in an EEA member state or enters into liquidation.

Country specifics – *United Kingdom*

EXIT taxation of Corporations

2. ‘Incorporation of an overseas branch’

- Another form of migration is the incorporation of an overseas branch. Subject to the controlled foreign company rules, and the exemption for branch profits, the incorporation of an overseas branch will mean that its profits are no longer subject to UK corporation tax.

- However, the incorporation of a branch is essentially the disposal of assets by the UK company to the new overseas subsidiary. This will be a connected party disposal, the proceeds of which will be deemed to be at market value.
- TCGA 1992, s 17

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Country specifics – *United Kingdom*

EXIT taxation of Corporations

- Any gain arising may be deferred provided certain conditions are satisfied:
- the UK company carries on a trade outside the UK through a permanent establishment
- the transfer of the trade is wholly in exchange for shares or shares and loan stock issued by the new subsidiary to the UK company
- the shares issued (together with any other shares already held by the transferor company) amount to at least 25% of the ordinary share capital of the new subsidiary
- TCGA 1992, s 140
- The deferred gain will become subject to tax if:
- within six years of the incorporation, the assets transferred to the new subsidiary are disposed of
- at any time, the shares or loan stock issued on the branch incorporation are disposed of.
- If only some of the assets or shares are disposed of, only part of the deferred gain will become subject to tax.

Country specifics – *United Kingdom*

EXIT taxation of Corporations

Example 2 – Deferral of gain on branch incorporation

*Refer to Appendix B

Country specifics – *United Kingdom*

EXIT taxation of Corporations

- Similar provisions exist in respect of intangible assets created or acquired after 1 April 2002. However, there is an additional requirement that the branch incorporation is undertaken for bona fide commercial reasons. Clearance can be obtained from HMRC that this condition is satisfied.

- CTA 2009, s 827
- In addition, each intangible asset transferred to the new subsidiary must be separately identified and the gain on each calculated separately. The chargeable gains rules require only that an aggregate gain is calculated. It is therefore important to ensure that all intangible assets are identified prior to incorporating the branch, not just to ensure that all assets are properly transferred, but also in order make the relevant election under CTA 2009, s 827.

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Country specifics – *United Kingdom*

EXIT taxation of Corporations

- International movements of capital
- Certain cross border transactions must be reported to HMRC within 6 months of being undertaken. The reporting requirement falls on the ultimate UK parent company of a group (even if the transaction is undertaken by a subsidiary). For these purposes, a company can include an LLP.
- FA 2009, Sch 17
- Transactions must be reported to HMRC if they have a value over £100m and a series of transactions may be aggregated when determining the value.

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Country specifics – *insert your country*

please point out main and special facts for Entry taxation for Corporations and Individuals

A case study is welcome

- i.e.….
  - Valuation of business assets
  - Does the value for exit taxation correspond with the value in entry country
  - How to avoid double taxation in country
  - …..
  - ……

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Country specifics – *insert your country*

please point out tax risks and important strategy to avoid disadvantages

Focus on important information of interests for your colleagues.

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Country specifics – *United Kingdom*

Entry taxation of Individuals

- As above we have a statutory residence test from 6 April 2013. Once someone is resident they become a UK taxpayer. They may use what is known as the remittance basis in relation to non UK income and or gains if they are considered not domiciled in the UK. However this becomes progressively more expensive as years of Residence increase, until at 15 years it is withdrawn altogether.

- Following from the changes to the rules for non-domiciled individuals with effect from 6 April 2017, a person who has a domicile of origin in the UK who returns to the UK, not withstanding how long they have lived abroad, will become immediately domiciled in the UK upon their return. This will therefore mean that they become liable to Income Tax, Capital Gains Tax and Inheritance Tax on their worldwide assets straight away. It will then take them at least 7 years to re lose their domicile their domicile of origin in favour of a domicile of choice.

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Appendix A and B

EXAMPLE 1 and 2.docx

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Country specifics – *United Kingdom*

EXIT taxation of corporations

- Often companies migrate from the UK to overseas as way of escaping UK taxation or taking up the advantage of a lower tax rate.

- **Methods of outbound migration**
- There are a number of ways in which a company can transfer its tax residence from the UK to another country.

- **Company incorporated in the UK and no double tax treaty is in place between the UK and the other country**
- The company will remain resident in the UK because it is incorporated in the UK. If it becomes resident in the other country under the tax rules there, it will be treated as a dual resident company. CTA 2009, s 14

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Country specifics – *United Kingdom*

EXIT taxation of corporations

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Country specifics – *United Kingdom*

EXIT taxation of corporations

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- Company law in some countries will allow a company to disincorporate there and reincorporate in another jurisdiction, constituting a migration for both legal and tax purposes. This is not possible under UK company law.

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Country specifics – *United Kingdom*

EXIT taxation of corporations

- **Disposal of assets**
- Assets which are no longer subject to corporation tax following the migration (which will be the case unless the company has a permanent establishment in the UK) will be treated as sold for market value. In particular:
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-
- trading stock may give rise to a trading profit)
- •chargeable gains or losses may arise on other assets, although these can be deferred or exempted under certain circumstances

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Country specifics – *United Kingdom*

EXIT taxation of corporations

- # Exit charges
- TCGA 1992, s 185 deems a company to have sold all its assets at their market value immediately before it ceases to be UK tax resident. This may result in a chargeable gain which will be subject to corporation tax.
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- Any assets which continue to be within the scope of UK corporation tax (eg if the company uses them to trade in the UK through a permanent establishment) fall outside the scope of
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Country specifics – *United Kingdom*

EXIT taxation of corporations

- Deferral of exit charge – UK holding company
- The exit charge can be deferred if:
- •the assets are situated outside the UK and used for the purposes of a trade carried on outside the UK
- •the migrating company is a 75% subsidiary of a company which remains UK resident
- •both companies make an election within two years of the date of the migration
- The whole of the deferred gain becomes subject to tax if:
- •the migrating company ceases to be a 75% subsidiary of the UK resident parent company
- •the parent company itself ceases to be UK tax resident
- An appropriate proportion of the deferred gain becomes subject to tax if the migrating company disposes of an asset within six years of the migration.
- TCGA 1992, s 187
-

Country specifics – *United Kingdom*

EXIT taxation of corporations

Example 1

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Country specifics – *United Kingdom*

EXIT taxation of corporations

- Deferral of exit charge – election
- From 11 December 2012, a migrating company can defer gains if it becomes resident in an EEA member state, carries on a business in an EEA member state and has a right to freedom of establishment under the TFEU.
- Interest is charged on the deferred payment at normal corporation tax interest rates and HMRC may require security if they believe there is a risk the tax will not be paid.
- There are two methods of deferral:
- •standard instalment method. Tax is paid in six equal instalments starting nine months after the end of the accounting period in which the company migrates. Full payment is due on the following instalment date if the company ceases to be resident in an EEA member state or enters into liquidation.
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Country specifics – *United Kingdom*

EXIT taxation of corporations

- **Incorporation of an overseas branch**
- Another form of migration is the incorporation of an overseas branch. Subject to the controlled foreign company rules, and the exemption for branch profits, the incorporation of an overseas branch will mean that its profits are no longer subject to UK corporation tax.

- However, the incorporation of a branch is essentially the disposal of assets by the UK company to the new overseas subsidiary. This will be a connected party disposal, the proceeds of which will be deemed to be at market value.
- TCGA 1992, s 17

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Country specifics – *United Kingdom*

EXIT taxation of corporations

- Any gain arising may be deferred provided certain conditions are satisfied:
- •the UK company carries on a trade outside the UK through a permanent establishment
- •the transfer of the trade is wholly in exchange for shares or shares and loan stock issued by the new subsidiary to the UK company
- •the shares issued (together with any other shares already held by the transferor company) amount to at least 25% of the ordinary share capital of the new subsidiary
- TCGA 1992, s 140
- The deferred gain will become subject to tax if:
- •within six years of the incorporation, the assets transferred to the new subsidiary are disposed of
- •at any time, the shares or loan stock issued on the branch incorporation are disposed of
- If only some of the assets or shares are disposed of, only part of the deferred gain will become subject to tax.
-

Country specifics – *United Kingdom*

EXIT taxation of corporations

- Example 2
-

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Country specifics – *United Kingdom*

EXIT taxation of corporations

- Similar provisions exist in respect of intangible assets created or acquired after 1 April 2002. However, there is an additional requirement that the branch incorporation is undertaken for bona fide commercial reasons. Clearance can be obtained from HMRC that this condition is satisfied.
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- In addition, each intangible asset transferred to the new subsidiary must be separately identified and the gain on each calculated separately. The chargeable gains rules require only that an aggregate gain is calculated. It is therefore important to ensure that all intangible assets are identified prior to incorporating the branch, not just to ensure that all assets are properly transferred, but also in order make the relevant election under CTA 2009, s 827.

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Country specifics – *United Kingdom*

EXIT taxation of corporations

- International movements of capital

- Certain cross border transactions must be reported to HMRC within 6 months of being undertaken. The reporting requirement falls on the ultimate UK parent company of a group (even if the transaction is undertaken by a subsidiary). For these purposes, a company can include an LLP.
- FA 2009, Sch 17

- Transactions must be reported to HMRC if they have a value over £100m and a series of transactions may be aggregated when determining the value.

Country specifics – *United Kingdom*

EXIT taxation of corporations

- Reportable transactions include:

- •the issue of shares or debentures by a foreign subsidiary
- •transfer of shares or debentures in a foreign subsidiary
- •a foreign subsidiary becoming a partner in a partnership
- There are exemptions, including:
- •the issue of non-redeemable shares to a UK group company
- •the issue of debentures to a UK group company
- •the issue or transfer of shares to an unconnected company
- •the issue of shares to all existing shareholders
- •where all parties to the transaction are resident in the same territory
- All of these exemptions are subject to detailed conditions.

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Exit Taxation - USA
September 16, 2017
Malta

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United States – Individual Exit

FINAL TAXATION

Individuals who are liable for exit taxation:

- US Citizens, or
- US Green Card Holders, or
- "Long Term Resident" (non-US citizen permanent resident 8 of last 15 years)

If they meet **any** of the criteria below they are called **"Covered Expatriates"** and maybe subject to an exit tax:

- Net worth (Worldwide Assets) of $**2.0** million or more,
- Average net US income tax liability greater than **$162,000** for the **5 year** period prior to expatriation, (greater than $162,000 for an individual equals a taxable income of over $520,000 and a married couple filing jointly over $555,000),
- Failure to certify compliance (**Form 8854**) with US federal tax obligations for the past 5 years will make the individual liable.

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United States – Individual Exit (continued)

FINAL TAXATION (continued)

Tax Calculation:

- File a Hypothetical Income Tax Return (**Form 1040-C**) with an IRS office within two weeks of departure. A certificate will be issued and you must depart within 30 days of the certificate being issued. A 1040 tax return must also be filed by year end.
- The return is prepared as if the individual has **sold all** of their assets on the day before the renunciation.
- All assets are valued at Mark to Market/FMV for gains and losses.

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United States – Individual Exit (continued)

SPECIALS

Exceptions and Exclusions:

- Dual nationals from birth who have not lived in US for more than 10 of last 15 years and persons younger than **18-1/2** that haven't lived in US for more than 10 years. However, they still must file a **Form 8854**.
- There is an exclusion of gain (indexed for inflation) that an individual is allowed to use in determining the potential tax liability owed. In 2017 an individual can exclude up to **$699,000 of gains** for the Mark to Market/FMV calculation. Each asset category however needs to be segregated into classes.
- Property excluded from calculation:
  - Deferred compensation accounts
  - Tax deferred accounts (IRA)
  - Interest in non-grantor trust (a separate taxable reporting entity)

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United States – <u>Individual Exit</u> (continued)

EXTENSION for PAYMENTS

Deferral of Tax on sale of property will be allowed in certain circumstances

- Indicate which asset gains are being deferred (stocks, real estate, etc.)
- Need to provide adequate security for taxes **<u>and interest</u>** due (bond, letter of credit acceptable to IRS)
- File a waiver form of any benefit rights under another country's tax treaty (reduced tax rates, etc. pursuant to **Sec 877A**)

RETURN

For adult US citizen, exit is **final** and **irrevocable**. Former citizens can visit the US like any other non-US citizen, but not live or work in the US and any children born after renunciation are not US citizens.

United States – Corporate Exit

FINAL TAXATION

An EXIT of a corporation is called an INVERSION. An inversion generally is a transaction in which a domestic corporation is acquired by a foreign corporation

- The foreign corporation either acquires the assets or the equity of the domestic target.
- Some or all of the shareholders of the domestic target may become shareholders of the new foreign parent.
- There may be significant tax benefits from inverting under a foreign corporation.

For US corporations the Corporate Taxation rate is (on average) 35% of taxable worldwide income.

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United States – Corporate Exit (continued)

FINAL TAXATION (continued)

Taxable Inversions:

A taxable inversion occurs if 3 conditions are met (**Sec 7874**):

1. A foreign corporation acquires substantially all of the properties of a domestic target.
2. After the acquisition, at least 60% of the stock of the foreign corporation is owned by the former US shareholders of the target.
3. After the acquisition, the foreign acquirer does not have "Substantial Business Activities" in the jurisdiction of the foreign acquirer.

United States – Corporate Exit (continued)

TAX BURDEN

There are **two** types of Taxable Inversions

1. Limited Inversion Penalty – When there is 60-80% ownership by former domestic shareholders after inversion:
    - Foreign entity is subject to gain on income realized on the actual inversion and any gain or income recognized **within 10 years** on the transfer of stock or licensing of certain property as well as limitations on the usage of certain tax credits and net operating losses (NOL).
2. Inversion Penalty - Greater than 80% ownership by former domestic shareholders - will continue to be taxed as a **domestic corporation**.

United States – <u>Corporate Exit</u> (continued)

TAX BURDEN (Continued)

<u>EXCEPTION</u> to domestic ownership <u>“Ownership Continuity Test”</u> (The “25% Test”) is the <u>“Substantial Business Activities”</u> which states that at least:

- 25% of employees are located in new foreign jurisdiction,
- 25% of employee compensation attributed to new foreign jurisdiction,
- 25% of Group’s asset value located in that new country, and
- 25% of Group’s total income is derived in that country.

No Sec 7874, no INVERSION.

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United States – Entry Tax

INDIVIDUALS

- Personal Property-household effects are entitled to duty-free entry; there may be some State Use tax possible depending on the state.
- Non-residents aliens are required to file 1040NR tax returns and Resident aliens Green Card or Long Term Residents are required to file 1040 based on world-wide income.
- FATCA Requirements for overseas assets if a resident alien ("Substantial Presence Test" - more than 31 days in current year and more than 183 in past 3 years)
- Gifts (or Loans) - $100,000 per year are tax free from nonresident aliens, except when:
  - From Foreign Trust - the recipient must report income and pay tax
  - If a Gift on Tangible and/or Real Property ("US situs" property)

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United States – Entry Tax (continued)

CORPORATIONS

There are no separate entry taxes charged by the US except for tariffs and duties at border (0-20%) on tangible property brought to the US.

Tangible property **not for** resale (distribution) may also be subject to use tax in the appropriate state (0-10%, similar to a VAT tax).

However, all foreign owned US corporations are subject to Transfer Pricing Issues (**Sec 482**), similar to other countries' rules and regulations (eg. OECD). A transfer price is the price charged for intercompany transactions among related entities.

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United States – Entry Tax (continued)

CORPORATIONS (continued)

The US standards on Transfer Pricing are governed by the "arm's length" standard to determine appropriate pricing, ie. "Would an independent unrelated company agree to this same pricing that is used with an affiliated company?"

- Tangible goods/Materials – Are costs paid similar to other subsidiaries or are too high when compared to various methods: comparable uncontrolled price, resale price, cost plus, etc.?
- Intangible assets – Are royalty rates for use fair or overcharged?
- Services – Are services reasonable and priced accordingly?
- Leases, loans and guarantees – Can a similar lease be obtained in US at the same conditions and rates, are loans at arm's length rates, etc.

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United States – Entry Tax (continued)

CORPORATIONS (continued)

The IRS has the authority to impose penalties of either 20% or 40% with any income adjustment they deem necessary. If the IRS determines that:

- 20% Additional Tax Penalty **plus** the Additional Tax
  - An intercompany transfer price was less than 50% or more than 200 % of arm's length price or
  - The transfer pricing adjustment increases taxable income by $5 million or more, a penalty equal to 20% of the additional tax may be assessed.
- The penalty increases to 40% if:
  - The intercompany transfer price was less than 25% or more than 400% of an arm's length price or,
  - The transfer pricing adjustment is $20 million or more.

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United States – Risks and Strategies

INDIVIDUALS

Exit strategy for individuals may be different for US citizens and US Green Card Holders. They would involve numerous factors including:

- whether they are married to a non-US citizen,
- where their assets are located for non-US citizens,
- ownership of the assets,
- gifting laws,
- overseas trusts, and
- corresponding treaty country.

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United States – Risks and Strategies (continued)

INDIVIDUALS (continued)

Some strategies for individuals qualifying as “Covered Expatriates” are:

- Make sure all tax obligations and compliance issues have been met. If not, **amend** returns and make the **necessary payments** including interest and penalties that may accrue,
- File Form 8854 and attest to this,
- For both US citizen spouses gifting of property up to $5.5 million in order to equalize asset ownership can be done.
- File separate spouse tax returns for 5 years prior to renouncing. The $162,000 income tax liability is for **both** single and married.
- Gifting to Non-US citizen spouse can be up to $149,000 in a year without a gift tax.

United States – Risks and Strategies (continued)

CORPORATIONS

The risks are many for an inversion and include the substantial business activities test along with the domestic shareholders percentages. In recent years, the political backlash has had an effect as well.

Some strategies for a successful inversion averting tax penalties:

- Substantial business activities – the prospective parent has substantial business activities in a favorable tax jurisdiction,
- Strategic combination – the shareholders of the new foreign parent are different (at least 40% different) from the former shareholders of the domestic target as a result of business combination with another company.

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United States – Current Developments

TREATY

Double Taxation Treaties – The US implemented a new treaty in 2016 which differed slightly from the one implemented in 2006. The new model reinforces the US policy to eliminate double taxation without creating opportunities for non-taxation through tax evasion or avoidance:

- Deny treaty benefits on deductible payments of highly mobile income (royalties, interest and guarantee fees) made to a related party, enjoying low or no taxation under a preferential regime ("special tax regime", STR).
- Limitation on Benefits modifications to prevent "treaty shopping" by third-country residents that are not intended beneficiaries of the treaty

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United States – Current Developments (continued)

TREATY (continued)

BEPS incorporation in 2016 US Treaty Model:

- Elimination of double taxation without creating opportunities for non-taxation through tax avoidance.
- Protection against contract-splitting abuses of the 12 month PE threshold for construction or installation projects.
- 12 month ownership for 5 percent withholding rate

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United States – Current Developments (continued)

TRUMP ADMINISTRATION PROPOSALS

Corporate:

- Lower corporate tax rate to 15% (doubtful as of Sep 7, 2017/Ryan mid-to-low 20’s)
- Passthroughs taxed at 15%
- One time repatriation of foreign earnings ($2 trillion) at 10%
- Territorial tax system for corporations

Individual:

- Individual income tax brackets reduced to 3 with tax rates of 12-33% on income and 0-20% on capital gains
- Individual elimination of all deductions except for mortgage interest, retirement savings and charitable contributions
- Eliminate Marriage Penalty, Alternative Minimum Tax and Estate Tax

United States – <u>Current Developments</u> (continued)

CROSS BORDER ACTIVITIES

- Permanent Establishment thresholds, dependent and independent agents and preparatory and auxiliary activities
- Consistent application of treaty modifications
- Compliance issues on businesses of new PE rules