Netherlands corporate exit taxation provisions incompatible with EU law - National Grid Indus BV case

On 29 November 2011 the Court of Justice of the European Union (‘the Court’) issued its judgement in the National Grid Indus BV (‘NGIBV’) case. The court ruled that the Netherlands corporate exit tax arising on the transfer of seat of a company from the Netherlands to the UK infringes the freedom of establishment. This summary alert will be followed by our commentary on the implications of the judgment.

Background

NGIBV is a limited liability company that transferred its effective place of management from the Netherlands to the United Kingdom. At the time of the transfer the company owned a group loan receivable, denominated in Sterling. Following the rise in value of Sterling against the Netherlands guilder (the transfer of the place of effective management took place before the introduction of the euro), the value of the loan receivable had increased and an unrealised currency gain rested on the loan receivable.

On the date of the transfer, the unrealized currency gain was assessed, based on the Netherlands corporate exit tax provisions and immediate payment of the tax due was demanded. NGIBV lodged an appeal against the tax levied on this unrealized currency gain, arguing that the Netherlands corporate exit taxation provisions were contrary to the principle of freedom of establishment under Article 49 of the Treaty on the Functioning of the European Union (‘the Treaty’).

Summary of decision

The Court decided that the Netherlands exit tax provisions are an infringement of the freedom of establishment, since a company transferring its place of effective management to another Member State suffers a disadvantage in terms of cash flow, compared to a similar company transferring its place of effective management within Netherlands territory. This infringement, however, could be justified by the need to preserve the allocation powers between the Member States.
The Court also found that it is proportionate that the amount of tax is established without taking into account subsequent decreases or increases in value.

However, when determining whether the immediate recovery of the amount of tax due upon the transferring of the place of effective management is proportionate, the Court made a distinction between situations in which:

- it would be complex for the taxpayer to perform a cross-border tracing of the individual assets for which a capital gain was ascertained at the time when the company transferred its place of management to another Member State, and
- such tracing would be easy to perform.

The Court ruled that it would be less harmful to the freedom of establishment principle if a company transferring its place of management to another Member State had the choice between immediate payment of the amount of tax and deferred payment of the amount of tax, combined with tracing the transferred assets.

Since the Netherlands exit tax provisions do not include the option of deferred payment with an obligation to trace the assets transferred, but instead demand immediate payment of the tax, the Court decided in the case at hand that the Netherlands exit tax provisions are disproportionate and therefore in conflict with the principle of freedom of establishment.

How Ernst & Young can help

Companies which have incurred an exit tax due to a movement from one EU Member State to another may wish to consider the possibility of appealing any such charge based on the principles set out in this case.

Ernst & Young has a network of EU tax subject matter professionals in each Member State and has experience in advising on a broad range of EU tax issues.

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