De fiscale gevolgen van de vervreemding van aandelen in Belgie, Duitsland, Nederland en het Verenigd Koninkrijk

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SUMMARY

The topic of this work covers the fiscal aspects of the disposal of shares from the taxpayer's private capital. The research is undertaken in a comparative scope in which the fiscal systems of Belgium, Germany, The Netherlands and the United Kingdom are included.

The first question to be asked is whether profits resulting from the disposal of shares should be subject to taxation. Under the system of the United Kingdom capital gains in general are regarded more or less like ordinary income and are as a rule subject to taxation. In the other countries, Belgium, Germany and the Netherlands, capital gains are not regarded as ordinary income and as a rule these gains are not subject to taxation unless the gains are realized in the course of a business. Capital gains on the disposal of private capital should as a rule not be subject to taxation unless 'certain conditions' are met. In this respect all these countries (except the United Kingdom) distinguish between substantial an non-substantial participation holders. The United Kingdom Capital Gains Tax is comparable to the substantial participation rules in the other countries.

Substantial participation holders can be regarded as 'comparable to' persons carrying out a business. Therefore gains arising from the disposal of shares should be subject to taxation. This justification for the substantial participation rule can be found in the systems of Belgium, Germany as well as The Netherlands. In all these countries the qualification 'substantial shareholder' is in some way related to the extensiveness of the interest in the company. The yardstick used to measure the interest differs extensively between the countries examined. The main differences are the way in which shares held by family members are treated and the minimal percentage used for qualifying a participation as substantial.

In Belgium, Germany and the Netherlands gains realized by non-substantial shareholders are subject to taxation provided that the administration of the privately held shares was conducted for income-making rather than consumption purposes. The system of the Netherlands does not contain a special provision for the taxation of this type of capital gains, and the possibilities for taxation are small. The German system does provide for a special provision under which gains on the disposal of private capital are subjected to taxation under the condition that the disposal takes place within a specific period following the acquisition of the asset disposed of. Under the Belgium system these type of gains are subject to taxation if the gains arise from administration that can not be regarded to be 'normal'. The answer to the question whether a certain specific form of administration can be regarded to be `normal' depends mainly on the specific circumstances of the case.

Substantial participations

In order for a substantial shareholder to be taxed under the substantial participation rule a disposal is required. Speaking in broad terms all the national systems of Belgium, Germany, the Netherlands and the United Kingdom use the same concept of `disposal',but at some points differences occur:

- Disposals by way of gift are taxed in different ways. Under the system of the Netherlands and the United Kingdom disposals by way of gift are taxed using the market value of the shares as consideration. In Belgium and Germany the shares are supposed to be acquired for the price of acquisition paid by the person disposing of the shares by way of gift. If the shares do not form part of a substantial holding after the disposal by way of gift, the shares are

subject to the substantial holding rule for five more years.

- Substantial differences occur where the disposal involves the company in which the shares are held (e.g. the purchase by the company of its own shares). In these cases the problem occurs that from the point of view of the company the consideration paid can be regarded as a distribution.
- Differences also occur in cases of death of the shareholder. Under the system of the United Kingdom the death of the shareholder does not lead to a disposal, and the heirs can use the market value at the time of death as the price of acquisition. Under the other systems the death of a shareholder either leads to a deemed disposal at market value or to an acquisition at the purchase price equal to the price of purchase applicable to the person who died.
- Under the systems of Germany and the Netherlands, the emigration of a substantial participation shareholder leads to an "exit-charge". It not only can be doubted whether the levy is in accordance with the EC Treaty, but it can be stated that this kind of taxation is not in accordance with tax treaties. Under the OECD model double taxation convention gains from the disposal of shares by individuals are taxable in the state of residence. The exit-charge is not in line with this internationally accepted principle. It is recommended to implement a system under which the profit emerging from a disposal of shares is shared between all the countries the disposer has been resident of during the time the shares were held.
- A substantial participation holder who does not qualify as a substantial participation holder after he has disposed of a part of his interest in the company is treated differently under the different systems. In the Netherlands this shareholder is deemed to have disposed of his whole holding. In Belgium and Germany a different system is used. The shareholder is regarded to be a substantial shareholder for a period of five years following the disposal.
- The Belgium substantial holding rule includes a very distinctive feature: a disposal will only lead to taxation if the acquirer of the shares disposed of is member of a group of qualifying acquirers. This group is very limited, and as a result the scope of the Belgium substantial participation rule is very limited.

In broad terms all countries involved in this study use the same formula to calculate the profit emerging from the disposal. The main point of difference is the way in which inflation is taken into account. In both Germany and the Netherlands the influence of inflation is ignored. The Belgium system is equipped with a rule that is supposed to take inflation out of the profit, but the system used is highly inappropriate to meet this goal. The system of indexation allowances that used to be applicable in the United Kingdom did remove inflation from the chargeable gain. This system was however frozen andreplaced by a system under which the gain from the disposal is lowered according to the time the shares were held by the share holder.

Under the system of the United Kingdom the profit arising from the disposal of shares is taxed using the rate of income tax that would be applicable if the gain would be a part of income for the income tax. In the other countries a special rate is used. This rate is one form or the other linked with the regular rate of the income tax, but in all cases this rate is lower than the standard rate.

Under all the systems, except for Belgium, compensation of losses is available. The form in which this compensation takes place differs between the countries.

Non-substantial participations

Only the systems of Belgium, Germany and the Netherlands contain special rules applicable to non-substantial shareholders. With regard to the question when a disposal in the sense of the non-substantial holding takes place, non of the mentioned rules is very explicit. It seems safe to conclude that, broadly speaking, more or less the same situations are meant as under the substantial holding rule.

None of the mentioned systems contain explicit rules to calculate the profit emerging from a disposal by a non-substantial participation holder. It appears save to conclude that the rules applicable are more or less the same as the rules applicable to the disposal of a substantial participation.

Only under the Belgium system the profit emerging form a disposal by a non-substantial participation holder is taxed using a flat rate. Under the German system and under the system of the Netherlands this profit is taxed using the normal progressive rate of taxation.

In all the countries involved losses emerging from the disposal of non-substantial participations can be used to compensate other gains.

Harmonization

A second question this inquiry set out to answer was whether it is possible to harmonize the different systems investigated in this study. Judging from the different tax acts studies this question can be answered in a positive way. Due to the similarities found in the different systems it appears to be possible to come to some degree of harmonization. Whether harmonization will actually take place is a more difficult question to answer, because this is ultimately a political question which is difficult to answer from the perspective of the law.

In Chapter 6.4 the outlines of a proposal for such a harmonized system can be found. A summary follows.

Countries not having a capital gains tax should distinguish between substantial shareholders and non-substantial shareholders. For those countries having a capital gains tax all shareholders will be submitted to a capital gain tax along the lines to be implemented in countries not having a capital gains tax for substantial shareholders.

A substantial shareholder is defined as a taxpayer owing more than a certain percentage of subscribed capital. A percentage of 25% seems reasonable. Shares owned by relatives not further than twice removed and owned by other persons if it is reasonable to assume that these taxpayers jointly exercize control over the company could also be taken into account.
A difference should be made between full disposals, partial disposals, disposals in which the

corporation of which the shares are alienated is a party, transfer of shares due to decease, and alienations of shares owned by a shareholder who used to be, but no longer is a substantial shareholder.

The capital gain to be taxed upon alienation is to be calculated as the consideration paid for the shares disposed of minus purchase price minus costs. The consideration paid is to be calculated as the value of the compensation offered to the shareholder, in case of a partial alienation a pro rata allocation of this compensation is pleaded for. The market value of shares should be deemed as price of acquisition in case due to the acquisition a substantial participation arises, or in case of immigration.

The tax rate in case of substantial participation should be the same as the rate of other income of the shareholder. Facilities taking into account personal circumstances should be applicable by allocating the capital gain to five years and assuming that this allocated capital gain is taxed at the marginal rate applying to the taxpayer in that year. Compensation of losses should take place.

In case of a non-substantial participation capital gains should be taxed only in case of speculation. In this indisputable speculation may be assumed if the shares are disposed of within one year after acquisition. A disputable speculation arises if the shares are disposed of between one and two years after acquisition. Speculation may be proved by the tax inspector in case shares are alienated between two and five years after acquisition. For longer periods no speculation is to be assumed.

A special rate could be taken into account in case of alienation of shares between one year after acquisition. In other cases the same rate applicable to substantial participations should be used.

Losses derived from the disposal of a non-substantial participation may be compensated with profits derived from such disposals.

Resident taxpayers are taxable on capital gains and speculation gains derived from the disposal of both shares in resident and non-resident companies. Non-resident shareholders will be taxed only if they dispose of shares in a company resident in the shareholders country of source. Following the OECD-Model under tax treaties the country of residence should be granted the right to tax. However, in case a shareholder was a resident in more than one country during the holding period of his shares compartmenting should take place, thus giving each country in which the shareholder was a resident the right to tax the capital gain that arose during the period in which the shareholder was a resident in that country.

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