

ANNEX (Implementation Decree – unofficial translation)

Income tax. Corporate income tax. Recovery. Extension for payment of final settlement tax

14 December 2011

No. BLKB 2011/2477M

Tax Authority / National Office Tax Regions, Letters and policy decrees

The State Secretary of Finance has decided the following

This decree follows from the decision of the Court of Justice of the European Union (“ECJ”) dated 29 November 2011, C-371/10. Under conditions, in anticipation of legislation and deviating from the current legislation, extension for payment will be allowed to the extent of the final settlement tax that is included in a tax assessment.

1. Introduction

On 29 November 2011, the ECJ rendered its decision on the question whether, and under which conditions, the Netherlands may levy taxes on the occasion of the transfer of the place of effective management from the Netherlands to another Member State (National Grid Indus BV).

In anticipation of legislation, this decree aims to bring the practical implementation in line with the aforementioned decision of the ECJ. This decree relates to the recovery of (corporate) income tax assessments that include a tax component that is related to the provisions of the articles 3.60 and 3.61 of the Income Tax Act 2001 or the articles 15c and 15d of the Corporate Income Tax Act 1969 (OHP: the final settlement taxes).

Terms and abbreviations

CITA: Corporate Income Tax Act 1969

(OHP: ITA: Income Tax Act 2001)

2. Preliminary ruling of the Court

2.1 Decision on final settlement tax

The Court has ruled that EU law does not preclude taxation of unrealized gains relating to assets of a company which ceases to derive taxable profits in the Netherlands. It is not necessary to take into account decreases in value which may occur subsequently. It makes no difference that the unrealized capital gains can not be reflected in the host Member State under the tax system in force there.

The Court further ruled that in such cases, legislation under which a taxpayers can choose between immediate payment and deferred payment, possibly together with interest, is acceptable. The risk of non-recovery may be taken into account with measures, such as a bank guaranty. The recovery of the tax will be deferred until the actual realization. The Court considered that the choice for extension will necessarily be accompanied by an administrative burden associated with monitoring the transferred assets.

I want to point out that the ECJ ruling is based on the freedom of establishment. The freedom of establishment is applicable to EU and EEA countries, but not to 'third' countries. Therefore, the ECJ ruling and this decree do not apply to 'third' countries.

3. Practical implementation: taxpayer is given a choice

3.1 Settlement of objections

From the ruling, I understand that (corporate) income tax assessments including a component which is related to the provisions of the articles 3.60 and 3.61 of the ITA or the articles 15c and 15d articles of the CITA are legitimate

In practice, sometimes the decisions on objections against (corporate) income tax assessments in which a component is related to the provisions of the articles 3.60 and 3.61 of the ITA or the articles 15c and 15d of the CITA were held in abeyance. As far as the decisions were held in abeyance in connection with the previously discussed case C-371/10 (OHP: National Grid), the tax inspector can now dismiss these objections by referring to the ruling of the ECJ. When dismissing the objection the inspector will refer to the possibility to opt for extension for payment with the tax collector.

3.2 Issue of assessments

To the extent necessary, the tax inspector can issue a(n) (corporate) income tax assessment pursuant to the provisions of the articles 3.60 and 3.61 of the ITA or the articles 15c and 15d CITA. The Tax Inspector will, whenever possible, refer to the possibility to opt for extension for payment.

3.3 Opting for extension for payment

The taxpayer can pay the assessment within the term of payment as stated on the assessment. If he opts for extension, the following applies:

- Extension is granted to the extent the assets, on which a tax is levied on the basis of the articles 3.60 and 3.61 of the ITA or the articles 15c and 15d CITA, have not been 'realized'. The assessment of realization takes place on the date on which the taxpayer opts for extension on the basis of an overview of 'unrealized' assets.
- Collection interest is due on the amount that remains unpaid from the day after the payment date of the assessment.
- The Tax Collector requires securities for the extension, where a bank guarantee is most common. The guarantee must cover the amount for which the extension is granted.
- The extension is for an indefinite period of time.
- The extension terminates upon 'realization'. Therefore, as a condition for the extension, the tax collector requires that the taxpayer provides an overview of the 'unrealized' assets once per calendar year so that the extension may continue to apply to that extent. This overview may be a continuation of the balance sheet (with a specification of the reserves) as was applicable for the levy of tax based on the articles 3.60 and 3.61 of the ITA or the articles 15c and 15d of the CITA. The tax collector will end the extension in full when the taxpayer fails to provide the overview.

3.4 End of extension at 'realizing'

The extension of payment does not apply to the extent of 'realization'. For the term 'realization', firstly, the tax base on which the tax was levied pursuant to the application of the articles 3.60 and 3.61 of the ITA or the articles 15c and 15d of the CITA is important. This tax base may include multiple components, such as hidden reserves, goodwill, tax reserves. To the extent these components, as a consequence of a (legal) act, would result in profit realization in the Netherlands, there will be a 'realization' that terminates the extension for payment.

An arrangement can be made with the Tax Collector about the items included in 3.3 and 3.4.

4. Entry into force and expiration date

This decision shall enter into force on the day after the date of issue of the Government Gazette in which it is placed and will have retroactive effect to 29 November 2011.

This decision shall expire as from the entry into force of the legislation in which the ruling of the ECJ dated 29 November 2011, C-371/101, will be enacted into Dutch legislation.

This decision will be placed in the Government Gazette.

The Hague, 14 December 2011
The State Secretary of Finance,
F.H.H. Weekers.