

Newsalert

EU Direct Tax Group

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Taxation: Commission refers Denmark, The Netherlands and Spain to EU Court over exit tax rules

On 24 November 2010, the European Commission decided to refer Denmark, The Netherlands and Spain to the EU's Court of Justice for their provisions which impose an exit tax on businesses which cease to be tax residents in these countries or which transfer assets to a foreign head office or a foreign permanent establishment. The Commission considers these provisions to be incompatible with the freedom of establishment as laid down in Article 49 of the Treaty on the Functioning of the European Union (TFEU).

Under national tax law in Denmark, The Netherlands and Spain, a business is taxed on its unrealised capital gains if it changes its residence, moves its permanent establishment or transfers its assets to another Member State. However, comparable domestic operations are not taxed for unrealised capital gains that may arise.

The Commission considers that such taxation serves as a discriminatory penalty on companies wishing to leave these countries or to transfer assets abroad. The rules in question are likely to dissuade companies from exercising their right of freedom of establishment and therefore constitute a restriction to the freedom of establishment as laid down in Article 49 of the TFEU. Immediate taxation of accrued but unrealised capital gains at the moment of exit amounts to a restriction if there is no similar taxation in comparable domestic situations. It follows from the case-law that the Member States should defer the collection of their taxes until the moment of actual realisation of the capital gains, the Commission said.

Two other cases on company exit taxation are already pending at the EU Court of Justice: Case C-371/10 National Grid Indus BV and Case C-38/10 Commission v. Portugal. Other infringement proceedings have been started against Belgium and Norway (by the EFTA Surveillance Authority).

The referral of Denmark, Spain and The Netherlands to the EU Court of Justice reinforces the Commission's determination to move forward in the area of company exit taxation.

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