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By PwC Deutschland | 03 March 2015

No objection to 10 year tax deferral on transfer of assets abroad

An ECJ advocate general has suggested the court rule that a German practice of allowing deferral of taxation on the hidden reserves (appreciation in value) in intangible assets transferred abroad is proportional and reasonable in the light of the overall need to ensure a fair distribution of taxing rights between member states.

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A German limited partnership transferred substantially its entire business of managing intellectual property rights to its Dutch permanent establishment. The tax authorities found the market value of the assets transferred to be significant and established a tax liability of the partners on the gain on transfer. They then allowed actual payment to be deferred over a ten-year period following the then administrative custom (in the meantime the deferral has been enacted into the Income Tax Act – one-fifth of the gain is to be added to taxable income in the year of transfer and in each of the following four years). The partners objected, largely because the establishment of a gain on transfer ignored the possibility of a later decline in value as the IP became obsolescent, and the case came before the ECJ as a possible infringement of the partners' freedom of establishment.

The ECJ advocate general on the case has now suggested the court accept German taxation on the gain in question as a restriction on the freedom of establishment justified by the overriding need to preserve the internationally agreed division of taxing rights between member states. It would be disproportionate to tax the deemed gain on transfer, since no liquidity resulted from the move. However, ten years was long enough to earn sufficient income from exploiting the assets to meet the payment demand. The appreciation in value up to the date of the transfer was a German taxable event; further developments were a matter for Dutch taxation. The gain in Germany followed from the market value at the date of the transfer. This would be the future base cost in Holland for calculating a future gain or loss with tax effects as determined by Dutch law.

The ECJ case reference is C-657/13 *Verder* opinion of February 26, 2015.

Keywords

IP, hidden reserves, intangible assets, intellectual property