The raison d’être of corporate exit taxation lies in the need to raise vital revenue from taxpayers in order to support a state’s social programs and public services. Today’s exit tax regimes are complex, sprawling, and dynamic; they are in a constant state of flux, reflecting the political and economic realities of the areas in which they are imposed and the preferences of the decision-makers of the states involved. This is evidenced by the transnationalisation of the tax base of residence, the increased role of immovable property taxes, the growing part played by the tax treatment of international shareholders and the growth of transfer pricing and other tax avoidance techniques. As a result, the list of tax options for companies is becoming longer and longer, leading to increased tax uncertainty and increased compliance costs for businesses, which is seen as a distortion of the internal market. In addition, the present discussion will explore whether exit taxation, in the form of a tax on transfers of economic activities, could be a positive policy instrument that would be less likely to distort the internal market.

**Fifty shades of fair exit taxation of corporations**

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The issue of allocation of profits among enterprises and the importance of taxation for business decisions need to be approached on the basis of the underlying principle of territoriality. The principle of territoriality is the cornerstone on which the tax system of any State is built. It is the attribute in matters of exit taxation. The principle of territoriality ensures that the State has the exclusive right to impose taxes on the income earned by enterprises within its territory. This is coherent with the principle of national sovereignty, which is a cornerstone of the EU. By harmonising measures adopted at the supranational level, the principle of neutrality is being affirmed.

The answer to the question of fair sharing of taxes and the assurance that the national taxes are not lost to the State of residence is derived from the principle of territoriality. Unless the principle of territoriality were to be replaced with a different principle, the results of a tax policy would not be measurable.

The EU’s Tax Base Directive of 2003, the Action 6 of the recent BEPS Reports, the transfer pricing rules and the anti-abuse rules of BEPS Action 13 are all based on this principle. They all aim at ensuring that the income of the permanent establishment is taxed by the State of residence and that the profit of the permanent establishment is taxed by the State of residence.

Exit taxation however is a special tax on transfers of economic activities, and as such it is an extreme measure that needs to be prevented through the application of the principle of territoriality. The principle of territoriality is a cornerstone of the EU. It is the cornerstone on which the tax system of any State is built. It is the attribute in matters of exit taxation. The principle of territoriality ensures that the State has the exclusive right to impose taxes on the income earned by enterprises within its territory. This is coherent with the principle of national sovereignty, which is a cornerstone of the EU.
Conclusions

Both serious tax jurisdictions covered within the EU, the transfer of an economic activity defines a temporal partition meant to preserve the allocation of taxing rights. At this point the fair value of the asset must be assessed and compared with the book value in the exit State and the fair value must acknowledged in a step-up or a step-down and recognition of the deferred tax to be measured subsequent to the transfer. The host State should facilitate the recovery and protect the right of the exit State to levy tax on the unrealised gains as an element of actual legislation. The recovery of tax debt is a separate issue from the assessment and recognition of that debt.

The value is referred to as the price that would be received if an asset is sold or a liability is set off in an orderly transaction between market participants at the measurement date. The concept is closely related objectively to the principle of arm’s length advocacy by the OECD and enshrined in Article 9, however a transfer pricing adjustment to the arm’s length price results in the immediate taxation of all unrealised gains even for the case of purely domestic situations. Therefore, there is no discrimination between the domestic and the cross border situation in this regard.

The timing is also different, in respect of exit taxation, the realisation of gain will take place in the future and the actual price might differ from the fair value calculated at the moment of transfer. The transfer pricing implies a valuation that has happened at a point that is situated between the fair value at the moment temporal moment. The meaning of fair measurement is the core issue during the first stage of a cross-border transfer that might trigger exit taxation. However, this kind of fairness does not have any political or legal connotation beyond its objective desideratum.

What can be said about the fairness to exit taxation from the legal point of view? Taxation should take place according to circumstances that a cross-border transfer will be neutral as regards taxation. However, this kind of fairness does not have any political or legal connotation beyond its objective desideratum.

If the undertaking’s assets consist basically of a foreign currency loan and if the unrealised currency profits accruing in the State of origin no longer appear for tax purposes in the host State, the final settlement tax must be deferred until the date when an undertaking remaining in the State of origin would have to pay the relevant taxes and currency issues arising from these must be taken into account.

The conclusions of the Ruding Report are still valid today and they have been reaffirmed by the recent public consultation conducted by the European Commission (June-September 2015). An effective enforcement and harmonisation measures.

References

1. Supra, footnote [2].
3. Commission Communication subsequent to the conclusions of the Ruding Committee indicating guidelines on company taxation linked to the further development of the internal market SEC (92) 1078 final Brussels, 26 June 1992.
5. See the Public consultation on further corporate tax transparency via harmonisation measures.
6. Fair value is defined as the price that would be received, when an asset is sold or a liability is settled in an orderly transaction between market participants at the measurement date. The concept is closely related objectively to the principle of arm’s length advocated by the OECD and enshrined in Article 9, however a transfer pricing adjustment to the arm’s length price results in the immediate taxation of all unrealised gains even for the case of purely domestic situations. Therefore, there is no discrimination between the domestic and the cross border situations in this regard.

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