Exemption for Major Shareholdings and PEs

The Return of the CC(C)TB: First Critical Analysis

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Article 8(c-e) Exempt Revenues

1. Proceeds from a disposal of shares, if min. 10 % holding in capital or of voting rights during the 12 months preceeding the disposal

2. Profit distributions, if min. 10 % holding in capital or of voting rights for 12 consecutive months

3. Income of a PE received by the taxpayer in the residence state

N.B.: not only intra-EU situations – also income from third countries!

Exclusion of shares held for trading

Proceeds from a disposal of shares and

profit distributions from shares

held for trading

A share is held for trading if

(a) it is acquired or incurred principally for the purpose of **selling it or repurchasing it in the short term** or

(b) it is part of **a portfolio of identified financial instruments, including derivatives**, that are managed together and for which there is evidence of a recent actual **pattern of short-term profit-taking**.

- Short term ?

Exclusion of shares held by life insurance undertakings

- Proceeds from a disposal of **shares held by life insurance undertakings**
- Profit distributions **received by life insurance undertakings**

Why do we need a participation exemption provision?

- need to eliminate both **juridical and economic double taxation** on corporate direct equity investment

- **debt** should not be favoured over **equity**

- In line with the **Parent-Subsidiary Directive**

- for **neutrality** reasons profit distributions, share disposals and PE income should be covered

- **exemption simpler** than credit, but **switch-over clause** needed

The Holding Requirement

- min. 10 % in capital or of voting rights
- 2011 proposal did not have
- same 10 % in the Parent-Subsidiary Directive
- many domestic law participation exemption provisions limit to direct investment

Holding requirement – What is capital?

- no definition
- compare Parent-Subsidiary Directive
- however,
  - no shares held for trading
  - not only intra-EU situations

- only direct holdings
- Legal relation - mere holdings of shares in usufruct does not qualify (C-48/07 *Les Vergers du Vieux Tauves)*

Holding Period

- “during the 12 months preceding the disposal”
- “for 12 consecutive months” in the case of a distribution

- Compare Parent-Subsidiary Directive: option to require holding ”for an uninterrupted period of at least 2 years”
  - It cannot be required that the time has ellapsed before the distribution

    =>- CCTB profit distributions => the same interpretation

    - CCTB disposlas => 12 months have to be before the disposal

Cost Deductions

- expenses incurred for the purpose of deriving exempt income are not deductible (Article 12(g))

$\Rightarrow$symmetry

- Compare the 2011 proposal: costs fixed at a flat rate of 5 % of the exempt income

- What expenses are covered? interest payments? – not clear

Foreign Tax Credit

- source state taxes related to the exempt income not creditable (Art. 55)

Switch-over Clause

- exemption method may lead to double non-taxation or low taxation

⇒**switch-over to the credit method** necessary in low tax situations

⇒ Art. 53: **normal credit** instead of exemption

if a **third country entity** (switch-over does not apply to intra-EU situations!)

is subject, in its residence state, to a statutory corporate tax rate lower than **50 % of the statutory tax rate** that the taxpayer would have been subject to, on such foreign income, in its residence state

- does not apply if **tax treaty prevents**

Conclusions

- economic an juridical double taxation of direct investment should be eliminated
- double non-taxation or double benefit situations must be eliminated

$\Rightarrow$the proposed participation exemption provision is justified

But does the whole CC(C)TB proposal go beyond what is necessary

=> Subsidiarity principle? Proportionality principle?