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IBFD Tax Research Report:
COMPARATIVE RESEARCH ON (CONDITIONAL) EXIT WITHHOLDING TAXES

Report for:
GroenLinks fractie
Tweede Kamer der Staten-Generaal

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1. Introduction

IBFD has been requested by the GroenLinks faction in the second chamber of the parliament of the Netherlands to provide an overview of the tax system provisions in place in a number of countries dealing with the emigration of companies from these countries.

1. *Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?*
    a. *If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.*
    b. *If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?*
    c. *If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?*
    d. *Only regarding EU countries: If the answer to this question is positive, how does the exit tax work in relation to other EU countries? Do specific rules apply in this respect?*
2. *Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?*
    a. *If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?*

The countries for which the research was requested are the following:

- Canada;
- Czech Republic;
- Denmark;
- France;
- Germany;
- Ireland;
- Italy;
- Luxembourg;
- Poland;
- Spain;
- Switzerland;
- United Kingdom; and
- United States.

In Chapter 2, these questions will be answered for the selected states. Although the research focuses primarily on dividend withholding tax, attention is also paid to corporate income tax. However, no attention has been paid to other taxes and stamp duties. Chapter 3 contains a brief summary of the findings.

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2. Answers to the questions for the selected States

Canada

1. Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?

There are two exit tax provisions under Canadian tax law applicable to emigrating corporations: (i) for corporate income tax purposes, a deemed disposition (subject to certain exceptions) at fair market value of the corporation’s property immediately before the moment of emigration and subsequent taxation of any gains under the normal corporate taxation rules applicable to resident corporations; and (ii) a special departure tax that is the equivalent of a branch tax or dividend withholding tax on the corporation's surplus.

The rules are as follows:

Deemed year-end

Where a taxpayer that is a corporation ceases to be resident in Canada at any particular time, paragraph 128.1(4)(a) of the Canadian Income Tax Act (the Act) provides that the taxpayer's taxation year shall be deemed to end immediately before that moment. The taxpayer shall also be deemed to have begun a new taxation year at the particular time and not to have established a fiscal period before the particular time.

Deemed disposition and reacquisition

Where a corporation ceases to be resident in Canada at any particular time, the taxpayer will be deemed, at the time referred to as the “time of disposition”, to have disposed of each property (with certain exceptions) owned by the taxpayer for proceeds equal to the fair market value of the property at the time of disposition, which is deemed to occur during the taxation year ending immediately before the taxpayer ceases to be resident in Canada (128.1(4)(b)). The purpose of this deemed disposition is to ensure that the taxpayer is subject to income tax in Canada in respect of gains and profits that accrue while the taxpayer is resident in Canada. The taxpayer is then deemed to have reacquired, at the particular time, each property deemed to have been disposed of by the taxpayer, at a cost equal to the proceeds of disposition of the property (128.1(4)(c)).

Calculation of tax owing

By virtue of the deemed disposition rule in paragraph 128.1(4)(b), when a corporation ceases to be resident in Canada, it will realize recapture of capital cost allowance and other income amounts, such as accrued inventory gains and it will also realize taxable capital gains with respect to capital property. These amounts will be included in computing income for its last taxation year before it becomes a non-resident, and tax will be payable under Part I of the Act (normal corporate income tax on residents) on its taxable income for that taxation year.

Consistent with this provision, Canada’s treaty policy is to have tax treaty partners allow for a step-up in the cost base of property to fair market value on emigration to recognize deemed dispositions by

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aiming to include a provision in the tax treaties concluded by Canada with its tax treaty partners. An example of such a clause can be found in article 13(6) of the Belgium-Canada Income and Capital Tax Treaty (2002):

> Where an individual who ceases to be a resident of a Contracting State, and immediately thereafter becomes a resident of the other Contracting State, is treated for the purposes of taxation in the first-mentioned State as having alienated a property and is taxed in that State by reason thereof, the individual may elect to be treated for purposes of taxation in the other State as if the individual had, immediately before becoming a resident of that State, sold and repurchased the property for an amount equal to its fair market value at that time. However, this provision shall not apply to property, which would give rise, if it were alienated immediately before the individual became a resident of that other State, to a gain, which may be taxed in that other State nor to immovable property situated in a third State.

We are not aware of any cases or administrative decisions to this effect.

This treaty policy does not apply to the Canadian additional departure tax under Section 219.1(1)

Additional departure tax

Where a taxation year of a corporation is deemed by paragraph 128.1(4)(a) to have ended, a special departure tax will also apply to the corporation under subsection 219.1(1) (which is in Part XIV of the Act). Section 219.1 is generally designed to impose tax on such corporations equal to an amount roughly representing the Part XIII tax (withholding tax) that would have been payable on amounts then available for distribution, had they been distributed as dividends by a corporation resident in Canada (i.e., the tax is generally analogous to a dividend withholding tax on the emigrating corporation's surplus).

Under this section, the corporation is liable, in its last taxation year before ceasing to be resident in Canada, to pay a tax of 25% of the amount by which the fair market value of all of the property owned by the corporation immediately before the end of such taxation year exceeds the total of (i) the paid-up capital of all the issued shares of the corporation immediately before the end of such year, and (ii) all debts owing by the corporation (or obligations of the corporation to pay an amount) at the end of such taxation year (other than amounts payable by the corporation in respect of dividends and amounts payable under section 219.1). Part I taxes and federal and provincial capital taxes owing by the corporation with respect to such taxation year would be included in debts owing at the end of such year. Essentially, it is the amount that would be available for a dividend payment to shareholders. The additional departure tax under section 219.1 is payable on or before the corporation's filing-due date for its last taxation year before ceasing to be resident in Canada.

The corporation is the taxpayer. This tax is calculated as part of the corporation’s tax return for the final year. The full text of the provision is included in the appendix.
We are unable to say what the motivations are of the Canadian government other than to comment that taxes are typically imposed in Canada as part of the annual return. This allows for the usual adjustments to be made for expenses, losses, etc. before the corporate tax is calculated. Please also note that, in certain circumstances, a shareholder can become liable for a corporation’s debts where the corporation pays a dividend at a time when the corporation owes tax. This is found in section 160, which is also appended.

a. **If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.**

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Since section 219.1 is in Part XIV of the Act, the exemptions in subsection 219(2) apply. As a result, the special departure tax is not applicable to a corporation that was, throughout the year, a bank, a corporation whose principal business was the transportation of persons or goods, communications, or mining iron ore in Canada, or a corporation exempt from tax under section 149 (e.g. a charity or crown corporation).

In addition to legislative exemptions, there may be tax planning techniques to get around the tax.

Note that the exceptions in subparagraphs 128.1(4)(b)(i) to (v) available to an individual or a trust are not available to a corporation. The various relieving provisions available to an individual or a trust (subsections 128.1(5) (instalments), (6) (returning former resident), (7) (returning trust beneficiary), (8) (post emigration losses), 126(2.21) (foreign tax credit), section 119 (special tax credit where subsection 40(3.7) applies) and subsections 220(4.5) to (4.71) (security for departure tax)) do not apply to a corporation or are not needed.

b. If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?

1. Tax base

In general terms, the tax payable under section 219.1 for the year equals 25% per cent of the amount, if any, by which the fair market value of all the property owned by the corporation immediately before the cessation of residence in Canada exceeds the total of the corporation's paid-up capital, the corporation's outstanding debts and other obligations to pay an amount (other than obligations to pay dividends and amounts payable under section 219.1) and, where a tax was payable by the corporation under subsection 219(1) or section 219.1 for a preceding taxation year that began before 1996 and after the corporation last became resident in Canada, four times the total of all amounts that would, but for sections 219.2 and 219.3 and any tax treaty, have been so payable.

2. The rate

The rate is 25% rate but may be reduced under section 219.3 to the rate of tax that may be imposed by Canada in accordance with the applicable tax treaty on dividends paid by a corporation resident in Canada to a corporation resident in the other country that owns all of the shares of the payor corporation.
We are not able to answer why the 25% can only be reduced if the shares of the Canadian company are 100% owned by a non-Canadian parent company. The full provision has been appended. In applicable cases, Canada will honour its tax treaty obligations and apply the reduced rate for dividend withholding tax mentioned in the applicable tax treaty. Thus, for portfolio shareholders resident in countries with which Canada has concluded a tax treaty, usually a rate of 15 percent applies.

3. The taxpayer

The taxpayer is the Canadian corporation that is intending to emigrate. It is imposed immediately before the moment of emigration when the corporation is still a Canadian resident corporation.

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Can the tax be postponed?

There is no provision for instalments and security under section 219.1. In contrast, for individuals, there are provisions for instalments and security in respect of exit tax.

c. If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?

The tax treaty cannot relieve the tax on the basis of residency, as the taxpayer was a resident of Canada at the time the departure tax became payable. The tax treaty would only impact the rate under section 219.3. This also refers to the additional departure tax under Section 219.1(1). Both these taxes are triggered in the moment before emigration while the corporation was still a resident of Canada so the corporation cannot claim to be a resident of a different state at that moment. We are not aware of any view taken by the Canadian legislature and/or the Canadian tax authorities regarding the relationship of the additional departure tax and tax treaties entered into by Canada with countries of residence of the shareholders.

2. Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?

It should be noted as an aside that, under Canada's laws, a Canadian corporation cannot legally merge with a corporation resident in another country. To accomplish such a merger, either the Canadian corporation must first "continue" in the foreign jurisdiction and merge under its laws or the foreign corporation must first "continue" into a Canadian jurisdiction in accordance with the laws of the applicable jurisdictions.

In terms of a step-up, the answer is yes. As is the case with the emigration rules, a corporation or trust that becomes resident in Canada at a particular time will be deemed to have a fiscal year-end immediately before the change of residence (128.1(1)(a)). It will also be deemed to dispose of the corporation's property for fair market value proceeds (128.1(1)(b) and to reacquire such property at a cost equal to the amount of such proceeds (128.1(1)(c)). Further, where a corporation becomes resident in Canada, special rules may apply which could result in a deemed dividend to the immigrating corporation or to the shareholders of the immigrating corporation (128.1(1) (c.1 and c.2)). Subsection 128.1(2) then provides for an adjustment to the paid-up capital of an immigrating corporation, either upward or downward, at the time of immigration.

a. If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?

Under subsection 128.1(2) of the Act, an adjustment to paid-up capital is calculated in respect of each class of shares of the capital of the corporation. The adjustment is the difference, either positive or negative, between the cost to the corporation of each property deemed to be disposed of and reacquired by the corporation on immigration (which is the fair market value of each property at the time of immigration) and the amount of all debts or other obligations of the corporation to pay an amount which is outstanding at the time of immigration. The aggregate adjustment is allocated among all of the classes of shares of the immigrating corporation in proportion to the relative fair market value of the shares of each class. Finally, the adjustment so determined is reduced by the paid-up capital of the class, calculated before making the adjustment.

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If the adjustment so calculated is positive, it is only added in computing the paid-up capital of the corporation if the corporation so elects in respect of all classes of its shares by notifying the Minister in writing within 90 days of the time of immigration: subparagraph 128.1(2)(b)(i). If the adjustment as calculated is negative, it must be deducted in computing paid-up capital: subparagraph 128.1(2)(b)(ii). This answer above deals with a corporation becoming a resident of Canada so the departure tax is not relevant. It does apply to the deemed dividend under 128.1(1) (c.1 and c.2). The provisions work together. The deemed disposition leads to an adjustment to paid-up capital. If the adjustment so calculated is positive, it is only added in computing the paid-up capital of the corporation if the corporation elects for this in respect of all classes of its shares by notifying the Minister in writing within 90 days of the time of immigration: subparagraph 128.1(2)(b)(i). Where an immigrating corporation has increased the paid-up capital in respect of a particular class of its shares pursuant to an election under subparagraph 128.1(2)(b)(i), the corporation is deemed to have paid, immediately before the time that it is deemed to have disposed of its property, a dividend on the shares of that class equal to the amount added to the paid-up capital of the class: subparagraph 128.1(1)(c.2)(i).

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Additional Tax on Non-resident Corporations (continued)

219.1 (1) If a taxation year of a corporation (in this subsection and subsection (2) referred to as the "emigrating corporation") is deemed by paragraph 128.1(4)(a) to have ended at any time, the emigrating corporation shall, on or before its filing-due date for the year, pay a tax under this Part for the year equal to the amount determined by the formula

$$25\% \times (A - B)$$

where

A

is the fair market value of all the property owned by the emigrating corporation immediately before that time; and

B

is the total of

(a) the paid-up capital in respect of all the shares of the capital stock of the emigrating corporation immediately before that time,

(b) all amounts (other than amounts payable by the emigrating corporation in respect of dividends and amounts payable under this section) each of which is a debt owing by the emigrating corporation, or an obligation of the emigrating corporation to pay an amount, that is outstanding at that time, and

(c) if a tax was payable by the emigrating corporation under subsection 219(1) or this section for a preceding taxation year that began before 1996 and after the emigrating corporation last became resident in Canada, four times the total of all amounts that would, but for sections 219.2 and 219.3 and any tax treaty, have been so payable.

(2) The paid-up capital referred to in paragraph (a) of the description of B in subsection (1) is deemed to be nil if

(a) one or more shares of the emigrating corporation are, at the time the emigrating corporation ceases to be resident in Canada, owned by another corporation resident in Canada;

(b) the other corporation is controlled, at that time, by a non-resident corporation; and

(c) the emigrating corporation is, immediately after that time — or becomes, as part of a transaction or event or series of transactions or events that includes the emigrating corporation ceasing to be resident in Canada — a foreign affiliate of the other corporation.

(3) Subsection (4) applies if

(a) a corporation ceases to be resident in Canada at any time (referred to in subsection (4) as the "emigration time");

(b) an amount is required by paragraph 212.3(2)(b) or subsection 212.3(7) to be deducted in computing the paid-up capital in respect of a class of shares of the capital

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stock of the corporation because of an investment in a subject corporation made by a CRIC that is described in any of paragraphs 212.3(10)(a) to (f);

(c) subsection 212.3(9) has not applied in respect of any reduction of the paid-up capital in respect of a class of shares of the capital stock of the corporation or a specified predecessor corporation (as defined in subsection 95(1)) of the corporation; and

(d) subsection (2) does not apply in respect of the cessation of residence.

(4) If this subsection applies, the paid-up capital referred to in paragraph (a) of the description of B in subsection (1) is to be increased, immediately before the time that is immediately before the emigration time, by the lesser of

(a) the total of all amounts each of which is an amount by which the paid-up capital of a class of shares of the capital stock of the corporation was required by paragraph 212.3(2)(b) or subsection 212.3(7) to be reduced in respect of an investment in a subject corporation made by the CRIC that is described in any of paragraphs 212.3(10)(a) to (f); and

(b) the total of all amounts each of which is

(i) the fair market value of a share of the capital stock of a subject corporation that is owned by the corporation immediately before the emigration time,

(ii) the portion of the fair market value of a particular share of the capital stock of a foreign affiliate of the corporation owned by the corporation immediately before the emigration time that may reasonably be considered to relate to a share of the capital stock of a subject corporation that was previously owned by the corporation and for which the particular share was substituted, or

(iii) the fair market value of a debt obligation, other than a pertinent loan or indebtedness (as defined in subsection 212.3(11)), of a subject corporation that is owned by the corporation immediately before the emigration time.

(5) For the purposes of subsections (3) and (4), ***CRIC*** and ***subject corporation*** have the meaning assigned to those terms by subsection 212.3(1) and ***investment*** has the same meaning as in subsection 212.3(10).

[NOTE: Application provisions are not included in the consolidated text see relevant amending Acts and regulations.]

R.S., 1985, c. 1 (5th Supp.), s. 219.1

1994, c. 21, s. 99

1998, c. 19, s. 220

2012, c. 31, s. 51

2014, c. 39, s. 66

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219.2 Notwithstanding any other provision of this Act, where an agreement or convention between the Government of Canada and the government of another country that has the force of law in Canada

> **(a)** does not limit the rate of tax under this Part on corporations resident in that other country, and
>
> **(b)** provides that, where a dividend is paid by a corporation resident in Canada to a corporation resident in that other country that owns all of the shares of the capital stock of the corporation resident in Canada, the rate of tax imposed on the dividend shall not exceed a specified rate,

any reference in section 219 to a rate of tax shall, in respect of a taxation year of a corporation to which that agreement or convention applies on the last day of that year, be read as a reference to the specified rate.

[NOTE: Application provisions are not included in the consolidated text see relevant amending Acts and regulations.]

R.S., 1985, c. 1 (5th Supp.), s. 219.2

1994, c. 21, s. 100

219.3 For the purpose of section 219.1, where an agreement or convention between the Government of Canada and the government of another country that has the force of law in Canada provides that the rate of tax imposed on a dividend paid by a corporation resident in Canada to a corporation resident in the other country that owns all of the shares of the capital stock of the corporation resident in Canada shall not exceed a specified rate, the reference in section 219.1 to "25%" shall, in respect of a corporation that ceased to be resident in Canada and to which the agreement or convention applies at the beginning of its first taxation year after its taxation year that is deemed by paragraph 128.1(4)(a) to have ended, be read as a reference to the specified rate unless it can reasonably be concluded that one of the main reasons that the corporation became resident in the other country was to reduce the amount of tax payable under this Part or Part XIII.

[NOTE: Application provisions are not included in the consolidated text see relevant amending Acts and regulations.]

1994, c. 21, s. 100

1998, c. 19, s. 220.1

Tax liability re property transferred not at arm's length
160 (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

> **(a)** the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,
> **(b)** a person who was under 18 years of age, or
> **(c)** a person with whom the person was not dealing at arm's length, the following rules apply:
> **(d)** the transferee and transferor are jointly and severally, or solidarily, liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised

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Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted for it, and

(e) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.

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Czech Republic

1. Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?

No, the Czech Republic does not impose (conditional) dividend withholding tax on undistributed profits when a company transfers its residence from the Czech Republic to another State. We are not aware of a specific Czech tax law provision that would impose a dividend withholding tax in the referenced context. Obviously, the Czech Tax Administration Code contains in its article 8 a general anti-avoidance clause that can be leveraged e.g. to deny an exemption from withholding tax or re-characterize an abusive transaction (a concept which is further developed by case law). In particular, this substance-over-form provisions entitle the tax authorities to look through any transaction and assess tax according to the real substance of the transaction.

a. If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.

Not applicable.

b. If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?

Not applicable.

c. If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?

Not applicable

Only regarding EU countries: If the answer to this question is positive, how does the exit tax work in relation to other EU countries? Do specific rules apply in this respect?

Not applicable.

2. Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?

No

a. If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?

Not applicable.

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Denmark

1. Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?

One cannot say that Denmark has a general "(conditional) dividend withholding tax on undistributed profits" when companies transfer their residence outside of Denmark. Denmark does, of course, have rules on exit taxation when companies transfer their residence outside of DK (found in SEL § 5, subsection 7) in accordance with EU law.

> *See **Selskabsskatteloven §5** (https://danskelove.dk/selskabsskatteloven/5)*
> ***Stk 1***
> *When companies and associations etc. resident in this country are dissolved, the tax liability continues until the time of the dissolution. […]*
> ***Stk 7***
> *If a company or association, etc. ceases to be liable to tax pursuant to section 1 , or if a company or an association, etc. becomes domiciled abroad, Greenland or the Faroe Islands in accordance with the provisions of a double taxation agreement, assets and liabilities that are not still covered by Danish taxation, are considered to be disposed of at the time of departure. The sale price is set at the trade value at the time of departure.*

In its judgment of 18 July 2013 (case C-261/11) the European Court of Justice (ECJ) held that the Danish exit tax rules were in conflict with EU law, cf. Article 49 TFEU on the freedom of establishment. As a result, the DK rules have been amended so that payment can be deferred. The exit tax needs to be paid in 7 annual installments and the deferral will end immediately if the conditions are no longer met (for instance if assets are transferred outside of the EU/EEA area).

> *See Selskabsskatteloven § 26 (*https://danskelove.dk/selskabsskatteloven/26
> *Stk 1*
> *Companies and associations etc. that are tax resident in a country that is a member of the EU / EEA, including under a possible double taxation agreement, may choose to defer payment of the tax calculated on the transfer of assets and liabilities, cf.* § 5, PCS. 7 *and* 8 *, […] when the tax calculation is due to the assets and liabilities being transferred to the head office or one of the company's etc. permanent establishments located in a country that is a member of the EU / EEA. […].*
> *Stk 2*
> *Postponement pursuant to* para. 1 *is conditional on the company or association, etc. submitting a tax return to the customs and tax administration in time for the income year in which the transfer took place. The choice of deferral must be announced together with the tax return. […]*
>
> *And Selskabsskattelove § 27 (*https://danskelove.dk/selskabsskatteloven/27*)*
> *Stk 1*
> *In the event of deferral pursuant to* section 26 *, a deferral balance is established. The deferred amount consists of the calculated tax for the assets and liabilities transferred in the income year.*
> *Stk 2*
> *[…] Per income year, at least one installment calculated as 1/7 of the deferral amount that constituted the balance at the establishment of the deferral balance is paid. [..]*
> *Stk 3*
> *If an asset or liability that is covered by a deferral […] again becomes subject to Danish taxation and still a deferral balance remains […] the remaining deferred amount must be repaid […].*
> *Stk 4*

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If a company or association etc. that has been deferred pursuant to section 26 *becomes tax resident in a country that is not a member of the EU / EEA, including a possible double taxation agreement, this is equated with a disposal of the market value of the assets and liabilities covered by the deferral pursuant to* section 26 *, provided that the assets and liabilities are not or will not be linked to a permanent establishment in a country that is a member of the EU / EEA. If assets and liabilities that are covered by deferral pursuant to* section 26 *are internally transferred to a permanent establishment located outside the EU / EEA, this is equated with a disposal of the market value at the time of transfer*
Stk 5
The company […] must submit a tax return for each income year in which there is a positive deferral balance. At the same time as submitting this tax return, information must be provided on in which country the assets covered by a deferral pursuant to section 26 *are located at the end of the income year. […] If the tax return is not submitted in time, the deferral lapses and the amount on the deferral balance falls due for payment. The Customs and Tax Administration may disregard the exceeding of the deadline for filing tax returns.*
Stk 6
The deadline for payment of amounts covered by para. 2 *and* 5 *are on 1 November in the calendar year following the income year or in the case of a deferred income year on 1 November in the calendar year following the calendar year for which the deferred income year takes its place. Payment no later than the 20th of the month in which the amount after the 1st clause. due for payment is considered timely. If the amount is not paid on time, the due amount will bear interest with the interest pursuant to* section 7 (1) *of the* Collection Act. 1 *, see.* Paragraph. 2 *, pr. commenced month from the due date to count.*
Stk 7
The deferred amount bears interest at an interest rate of 1 percentage point above Danmarks Nationalbank's discount, however, at least by 3 per cent. […]

In addition, DK has a range of anti-abuse rules (found in SEL § 2D) to ensure that the original limited tax liability on dividends is not avoided by various "creative" arrangement, such as by making the payment appear as a repayment on debt or by making a vertical merger with a foreign parent company (or other restructuring). The cases in SEL §2D revolve mostly around instances where structures have been put in place to circumvent dividend withholding tax (in combination with a merger or seat transfers). These should prevent that straight dividend that would trigger withholding are somehow transformed into a tax-exempt sale of shares and repayment of a note.

The transfer of the residency (for tax purposes) of a Danish company to another jurisdiction does – as a rule – not lead to the levy of dividend tax and also if a merger is subject to the Merger Directive.

But, if a merger is not subject to the Merger Directive or the right to levy dividend tax is not waived under a tax treaty, and the receiving company owns at least 10% of the share capital of the ceasing company then the liquidation proceeds can be taxed as with dividend withholding tax.

Similarly, if a non-resident shareholder: owns less than 10 percent of the share capital, does not qualify for exemption from dividend taxation and is affiliated with the liquidating company – but is not a tax resident in another EU/EEA member state and the taxation should have been eliminated or reduced under the parent-subsidiary directive or a Danish tax treaty if the shareholding had exceeded 10 percent – the liquidation proceeds can be subject to dividend withholding tax.

If there are individual shareholders that are domiciled outside the EU/EEA area and that have controlling interests in the company that is dissolved in a merger then this – by way of anti-avoidance measure - can be qualified as a liquidation subject to dividend withholding tax.

Also, cash proceeds paid to a shareholder in the ceasing company, and the cancellation of shares in the ceasing company by the continuing company, receive dividend treatment if a dividend from the

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ceasing company would trigger Danish taxation. This scheme was addressed in the following decisions: SKM2010.772.SR, SKM2010.782.SR, and SKM2011.159.LSR.

*See Selskabsskatteloven §2D (*https://danskelove.dk/selskabsskatteloven/2d*)*
Stk 1
If a legal person transfers shares […] in a group company (the acquired company) to another group company […] (the acquiring company) and the consideration for this transfer wholly or partly consists of other than shares in the acquiring company or associated companies, this part of the consideration is considered a dividend. […].
Stk 2
If a legal person transfers shares […] to companies which at the time of transfer are essentially without financial risk in connection with business activity, cf. section 33 A, subsection 3 , and the consideration partly consists of other than shares in the acquiring company or associated companies, this part of the consideration is regarded as dividend. The same applies if the transferor only receives remuneration in other than shares in the acquiring company or associated companies and the transferor after the transfer owns such securities […].
Stk 3
Business activity which within the last 3 years prior to the transfer of shares, etc. has been acquired from a person or a company, etc., which has the connection with the acquiring company […] is not included in the assessment pursuant to subsection 2 , cf. § 33 A, subsection 3 . […]
Stk 4
Remuneration in other than shares in the receiving company or associated companies in connection with mergers or divisions that are not covered by the Merger Tax Act is considered dividend if the shareholder after the restructuring owns shares in one of the contributing or receiving companies or associated companies. PCS. 1 , 4th sentence, shall apply correspondingly.
Stk 5
When determining when the companies are affiliated, section 2 of the Tax Assessment Act applies. A company and an association, etc., which according to Danish tax rules do not constitute an independent tax subject, but whose circumstances are regulated by company law rules, a company agreement or an association statute, are equated with a legal person.

a. **If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.**

   See above.

b. **If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?**

   See above.

c. **If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?**

   See above.

d. **Only regarding EU countries: If the answer to this question is positive, how does the exit tax work in relation to other EU countries? Do specific rules apply in this respect?**

   See above.

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2. **Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?**

The general rule is that in case of a cross border merger etc. the receiving company takes over all of the assets and liabilities of the receiving company as if they had been acquired at the time they were acquired by the receiving company. There are no separate rules for a step-up for the application of the dividend withholding tax. Danish legislation does not appear to differentiate along capital size.

In many countries it may be possible – even if there is no formal step-up rule – to organize a step-up so that retained earnings that have arisen before merger are not liable for dividend withholding tax in the new resident country. However, at this point it is not yet clear whether such 'work-arounds' also are available in Denmark

See **Fusionskatteloven §8 and § 15** (https://danskelove.dk/fusionsskatteloven/8 and https://danskelove.dk/fusionsskatteloven/15)

> *FUS § 8*
> *Stk1*
> *Assets and liabilities held by the transferring company at the time of the merger are treated in the calculation of the taxable income of the receiving company as if they had been acquired by it at the time they were acquired by the contributing company and for the acquisition sums to which they have been acquired by this company […]. Any tax depreciation and write - downs made by the contributing company are considered to have been made by the receiving company. Assets that must be depreciated proportionately in the contributing company […] can also only be depreciated proportionately in the receiving company. […]*
>
> *FUS § 15*
> *Stk 1*
> *In the event of a merger between a company domiciled in this country and a company domiciled abroad, and in the event of a merger between companies domiciled abroad […]*
> *Stk 2*
> *If a public limited liability company […] merges […] with a resident company , the rules* § 8 pcs. 1-4 *shall apply […] to those of the contributing company's assets and liabilities, etc., which as a result of the merger are linked to a receiving company domiciled here. […] The assets and liabilities of the contributing company that are linked to the receiving company's permanent place of business abroad, and which are not already subject to Danish taxation, are considered in the calculation of the receiving company's taxable income in this country to be acquired to those in the* Corporation Tax Act. 4 A, para. 1 *and* 2 *, and* § 8 B *stated acquisition sums and acquisition dates.*

a. **If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?**

   Not applicable (see above).

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France

1. **Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?**

There is no definition of tax residence in the French tax code (Code général des impôts, hereafter "CGI"), and no definition of a transfer of residence either. However, paragraph 2 of article 221 of the CGI deals with the "transfer of seat" (*transfert de siège*), the seat corresponding to the registered head office (*siège social statutaire*). According to tax authorities (guidance BOI-IS-CESS-10 dated 2 August 2017), the notion of seat also includes the place of effective management (*siège de direction effective*). In practice, it is the seat of a company that determines its residence for tax purposes, so the transfer of seat is equivalent to a transfer of residence (I will use both expressions as synonymous).

As a principle, article 221 of the CGI provides that the transfer of a company's residence out of France is treated as a cessation of business (*cessation d'entreprise*). Such event leads to the taxation of outstanding profits, provisions and unrealized capital gains (in the hands of the company) as well as the taxation of a deemed distribution of dividends, theoretically in the hands of the shareholders but actually in the hands of the distributing company.
If the shareholder is not resident in France, the taxpayer is the company, i.e. the company is liable for the payment of the withholding tax. Distributions to French resident shareholders are not subject to a withholding tax, so in domestic situations the taxpayer would be the shareholder. The main rule in France is that in the event of a transfer of the residence of a company out of France, the profits and reserves are deemed to have been distributed to the shareholders. This position is in line with article 111 bis of the CGI, which provides that where a legal person ceases to be subject to (French) corporate income tax, its profits and reserves, whether converted into capital or not, are deemed to be distributed to shareholders.

However, these rules do not apply to companies transferring their residence from France to another states of the EU or to Iceland or Norway to avoid any violation of EU law (*see* 1.d.
below). Furthermore, business reorganizations such as mergers may be subject to a specific tax regime (article 210 A of the CGI), the scope of which is not limited to EU-resident companies: in such case, the transfer of residence may be tax neutral (i.e. no withholding tax is due).

   a. **If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.**

   Where there is a transfer of residence leading to a cessation of business (i.e. any transfer to a non-EU jurisdiction, except Iceland and Norway), there is a deemed distribution of dividends. The dividend tax is withheld with respect to non-resident shareholders only. French-resident shareholders must include dividends deemed distributed in their taxable profits, which are taxed after the end of the financial year.

   b. **If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?**

   The taxable base is the total amount of profits and reserves, whether incorporated to the capital or not, as well as premium resulting from tax-exempt mergers. The rate of the dividend withholding tax (WHT) applicable to non-resident corporate shareholders is as follows:

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- corporate shareholders: the rate of the WHT is equal to the French corporate income tax rate, i.e. 26.5% in 2021 (25% from 1 January 2022);
- individual shareholders: 12.8%.

It is not possible to postpone the dividend withholding tax, which must be declared and paid within 60 days following the transfer.

c. If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?

The dividend withholding tax applies within the limits of applicable tax treaty provisions. Where a treaty prevents or limits the source state to withheld any tax on dividends, no or reduced dividend withholding tax may be levied.
With respect to the application of tax treaties to deemed dividend distribution, we are not aware of any case law or administrative guidance clarifying this point.
In general, there is very few information on this matter. We are not aware of any position taken by the Parliament or the tax authorities on this question. In our opinion, France considers it has a right to tax dividends stemming from French companies, including at the time of the transfer of their residence out of France.

d. Only regarding EU countries: If the answer to this question is positive, how does the exit tax work in relation to other EU countries? Do specific rules apply in this respect?

Transfer of residence from France to another EU member state are not considered as leading to a cessation of business (article 221 of the CGI). However, where assets are transferred, unrealized capital gains on such assets are taxed, regardless whether the transfer goes along with a transfer of residence, a transfer of PE or is a mere isolated transfer. In other words, transfers of residence give rise to taxation if assets are also transferred (i.e. no PE in maintained in France). In such case, the corresponding tax may be paid over a 5-year period upon election made by the taxpayer.

In application of article 111 bis of the CGI, a transfer of residence accompanied with a full transfer of assets (i.e. where no PE is maintained in France) should also lead to a deemed distribution, as the company ceases to be subject to French corporate income tax. Article 111 bis of the CGI makes no distinction regarding the destination state, i.e. it should also apply in case of a transfer of residence within the EU. However, the tax authorities consider that article 111 bis of the CGI is Not applicable in such case (paragraph 220 of guidance BOI-IS-CESS-10 dated 2 August 2017). They underline that the transfer of residence is neutral for shareholders (taxpayers may rely upon this interpretation if a dispute arises).

2. Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?

The French legislation does not seem to provide for a step-up for dividend withholding tax purposes.

In the case of a share-to-share merger, the question whether the value of the shares (in a foreign company) contributed to the issued shares (by a French company) is fully recognized as paid-up capital for French dividend withholding tax purposes depends whether the merger is made under the tax-neutral regime or not.
In the case of the tax-neutral regime, the future deemed dividend is the capital gain from the sale of shares issued by the French merging company. The acquisition cost of the initial shares (contributed to the merging company) will be considered as the acquisition cost of the issued shares;

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When the tax-neutral regime is not applicable, the acquisition cost of the issued shares is the value of these shares at the time of the merger. So there may be a step-up, because the capital gain on the contributed shares is subject to tax at the time of the merger.

a. If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?

Not applicable (see above).

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Germany

1. Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?

No, Germany does not impose (conditional) dividend withholding tax on undistributed profits when a company transfers its residence from Germany to another State.

Germany has implemented article 5 of the EU Anti-Tax Avoidance Directive which provides for an exit tax. The German exit tax applies in case a company transfers its residence from Germany to another State (due to migration or cross border merger).

As a general principle, to the extent that Germany will lose the taxing rights over assets transferred in a transfer of residence or cross-border reorganization, those transfers will be valued at their fair market value with the resulting capital gains triggering immediate taxation (section 4(1)(3) of the EStG and section 12 of the KStG). If all the assets remain within the German tax jurisdiction, i.e. within a permanent establishment (PE), the cross-border reorganization remains tax neutral.

If a company transfers its residence to a non-EU/EEA Member State, the company is deemed dissolved and liquidation taxation applies. All hidden reserves are deemed realized and taxed in Germany immediately. However, section 12 of the KStG does not provide for a deemed distribution of profitsto the shareholders. There is only a deemed liquidation of the company and taxation of the hidden reserves of the company's assets at the company level.

If a company transfers its residence to a EU/EEA Member State, exit taxation (i.e. taxation of all hidden reserves) is assessed but not immediately levied. The payment of the exit tax may be deferred (interest free) until actual realization against provision of a guarantee or may be spread over a period of 5 years.

In a normal merger, the transferring company is dissolved. The general rule on the dissolution of a company is that liquidation taxation applies whereby all hidden reserves are taxed at normal rates. Also, section 11(1) of the UmwStG foresees as a general rule that for income tax purposes, all assets of the transferring company have to be recorded in the final tax balance sheet at fair market value. However, section 11(2) of the UmwStG allows the transferring company to determine how to record its assets in the final tax balance sheet if certain conditions are met. In the case of a merger of EU/EEA companies, the transferring company can use the book values (or intermediate values) in its final tax balance sheet (section 11(2) of the UmwStG), i.e. roll over the hidden reserves, provided that:

- it is ensured that the hidden reserves will be taxed at a later time at the level of the receiving company;
- the right of Germany regarding the taxation of the transferred assets will not be excluded or limited; and
- no consideration is paid for the transfer of the assets, or the entire consideration consists of shares in the receiving company.

German taxation of hidden reserves is ensured if the receiving company is subject to unlimited German corporate income tax (generally this means that it must be a German resident company) or the transferred assets form part of the assets of a German permanent establishment of the receiving company.

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The German exit tax is considered compatible with tax treaties. The exit tax is considered due at the last moment before the loss of the right to tax (but not after that moment), so that the levy of the exit tax is not in conflict with tax treaties.

a. **If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.**

   Not applicable

b. **If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?**

   Not applicable

c. **If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?**

   Not applicable

d. **Only regarding EU countries: If the answer to this question is positive, how does the exit tax work in relation to other EU countries? Do specific rules apply in this respect?**

   Not applicable

2. **Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?**

Germany applies a step-up when a company becomes resident in Germany for Corporate Income Tax purposes. Any assets that are transferred into Germany are to be valued at market value (unless the rules of the EU Merger Directive apply). The market value is then the starting point for any taxation levied in the future in Germany.

Germany does not apply a "step-up" for national dividend withholding tax purposes.

German resident companies must keep a capital contribution account (section 27 of the KStG (corporate income tax act). This account takes note of the paid-up capital which may be distributed back to the shareholders without triggering taxation. Any other distributions to the shareholders are considered profit distributions triggering taxation, i.e. withholding tax. In case of mergers, any consequences for the capital contributions accounts of the involved companies are dealt with in section 29 of the KStG. Section 29 of the KStG predominantly deals with cases involving German resident companies only, as non-resident companies do not have a capital contribution account within the meaning of section 27 of the KStG. Section 29 (6) of the KStG, however, provides that for transferring non-resident companies in a merger situation, the amount of paid up capital contributions must be determined and will be treated as capital contribution account within the meaning of section 27 of the KStG. This allows the transferring company to preserve the paid-up capital contributions, which may be subsequently distributed tax free to shareholders. If the transferring company fails to

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provide sufficient proof for determining the correct amount of paid-up capital contributions, all amounts are considered profit reserves which cannot be distributed tax free.

The scope of section 29 (6) of the KStG covers companies resident in EU Member States. Because of EU law, the provision should be interpreted as applying also to companies resident in EEA Member States. Companies resident in third countries are not covered.

The amount of capital contributions determined in accordance with section 29 (6) of the KStG is subsequently treated the same way as if it would be a capital contribution account of a resident company. In accordance with paragraphs (1) to (5) of section 29 of the KStG, the following steps apply:

1. The nominal capital of the transferring company is deemed to be reduced to 0 and increases the amount of capital contributions.

2. The amount of capital contributions (paid in capital and nominal capital) is added to the capital contributions account of the acquiring company. This is however limited in situations where the acquiring company holds a participation in the acquired company (upstream merger). In that case, in as far as the acquiring company holds a participation in the acquired company, the amount if capital contributions of the acquired company is not added to the capital contribution account of the acquiring company. I.e. if the acquiring company holds a 20% participation in the acquired company, only 80% of the amount of capital contributions of the acquired company is added. In case of a downstream merger, the amount of capital contributions of the acquired company is reduced corresponding to the amount of the participation of the acquired company in the acquiring company.

3. In a last step, the nominal capital of the acquiring company is adjusted based on the combined capital contributions account. Based on this capital contributions account, the amount of paid in capital (which can be distributed tax free) and other capital contributions (which can be distributed only by triggering taxation) can be identified.

Based on the above, there is no “step-up” available in scenarios b) and c). Scenario a) is not explicitly dealt with by the German tax laws. However, a company transferring its legal seat to Germany would also need to establish a capital contributions account within the meaning of section 27 of the KStG. When doing so, the underlying principle of section 29(6) are likely to apply, with the result that there is also no “step-up” available in scenario a).

a. If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?

Not applicable.

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Appendix: Section 27 and section 29 of the KStG

§ 27 Nicht in das Nennkapital geleistete Einlagen

(1) Die unbeschränkt steuerpflichtige Kapitalgesellschaft hat die nicht in das Nennkapital geleisteten Einlagen am Schluss jedes Wirtschaftsjahrs auf einem besonderen Konto (steuerliches Einlagekonto) auszuweisen. Das steuerliche Einlagekonto ist ausgehend von dem Bestand am Ende des vorangegangenen Wirtschaftsjahrs um die jeweiligen Zu- und Abgänge des Wirtschaftsjahrs fortzuschreiben. Leistungen der Kapitalgesellschaft mit Ausnahme der Rückzahlung von Nennkapital im Sinne des § 28 Abs. 2 Satz 2 und 3 mindern das steuerliche Einlagekonto unabhängig von ihrer handelsrechtlichen Einordnung nur, soweit sie den auf den Schluss desvorangegangenen Wirtschaftsjahrs ermittelten ausschüttbaren Gewinn übersteigen (Einlagenrückgewähr). Der Bestand des steuerlichen Einlagekontos kann durch Leistungen nicht negativ werden; Absatz 6 bleibt unberührt. Als ausschüttbarer Gewinn gilt das um das gezeichnete Kapital geminderte in der Steuerbilanz ausgewiesene Eigenkapital abzüglich des Bestands des steuerlichen Einlagekontos.

(2) Der unter Berücksichtigung der Zu- und Abgänge des Wirtschaftsjahrs ermittelte Bestand dessteuerlichen Einlagekontos wird gesondert festgestellt. Der Bescheid über die gesonderte Feststellung ist Grundlagenbescheid für den Bescheid über die gesonderte Feststellung zum folgenden Feststellungszeitpunkt. Bei Eintritt in die unbeschränkte Steuerpflicht ist der zum Zeitpunkt des Eintritts in die Steuerpflicht vorhandene Bestand der nicht in das Nennkapital geleisteten Einlagen gesondert festzustellen; der gesondert festgestellte Bestand gilt als Bestand des steuerlichen Einlagekontos am Ende des vorangegangenen Wirtschaftsjahrs. Kapitalgesellschaften haben auf den Schluss jedes Wirtschaftsjahrs Erklärungen zur gesonderten Feststellung von Besteuerungsgrundlagen abzugeben. Die Erklärungen sind von den in § 34 der Abgabenordnung bezeichneten Personen eigenhändig zu unterschreiben.

(3) Erbringt eine Kapitalgesellschaft für eigene Rechnung Leistungen, die nach Absatz 1 Satz 3 als Abgang auf dem steuerlichen Einlagekonto zu berücksichtigen sind, so ist sie verpflichtet, ihren Anteilseignern die folgendenAngaben nach amtlich vorgeschriebenem Muster zu bescheinigen:
1. den Namen und die Anschrift des Anteilseigners,
2. die Höhe der Leistungen, soweit das steuerliche Einlagekonto gemindert wurde,
3. den Zahlungstag.
Die Bescheinigung braucht nicht unterschrieben zu werden, wenn sie in einem maschinellen Verfahrenausgedruckt worden ist und den Aussteller erkennen lässt.

(4) Ist die in Absatz 1 bezeichnete Leistung einer Kapitalgesellschaft von der Vorlage eines Dividendenscheinsabhängig und wird sie für Rechnung der Kapitalgesellschaft durch ein inländisches Kreditinstitut erbracht,so hat das Institut dem Anteilseigner eine Bescheinigung mit den in Absatz 3 Satz 1 bezeichneten Angabennach amtlich vorgeschriebenem Muster zu erteilen. Aus der Bescheinigung muss ferner hervorgehen, fürwelche Kapitalgesellschaft die Leistung erbracht wird. Die Sätze 1 und 2 gelten entsprechend, wenn anstelleeines inländischen Kreditinstituts eine inländische Zweigniederlassung eines der in § 53b Absatz 1 oder 7 desKreditwesengesetzes genannten Unternehmen die Leistung erbringt.

(5) Ist für eine Leistung der Kapitalgesellschaft die Minderung des Einlagekontos zu niedrig bescheinigt worden, bleibt die der Bescheinigung zugrunde gelegte Verwendung unverändert. Ist für eine Leistung bis zum Tag der Bekanntgabe der erstmaligen Feststellung im Sinne des Absatzes 2 zum Schluss des Wirtschaftsjahrsder Leistung eine Steuerbescheinigung im Sinne des Absatzes 3 nicht erteilt worden, gilt der Betrag der Einlagenrückgewähr als mit 0 Euro bescheinigt. In den Fällen der Sätze 1 und 2 ist eine Berichtigung oder erstmalige Erteilung von Steuerbescheinigungen im Sinne des Absatzes 3 nicht zulässig. In anderen Fällen ist die auf den überhöht ausgewiesenen Betrag der Einlagenrückgewähr

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entfallende Kapitalertragsteuer durch Haftungsbescheid geltend zu machen; § 44 Abs. 5 Satz 1 zweiter Halbsatz des Einkommensteuergesetzes gilt insoweit nicht. Die Steuerbescheinigungen können berichtigt werden. Die Feststellung im Sinne des Absatzes 2 für das Wirtschaftsjahr, in dem die entsprechende Leistung erfolgt ist, ist an die der Kapitalertragsteuerhaftungnach Satz 4 zugrunde gelegte Einlagenrückgewähr anzupassen.

(6) Minderabführungen erhöhen und Mehrabführungen mindern das Einlagekonto einer Organgesellschaft, wennsie ihre Ursache in organschaftlicher Zeit haben.

(7) Die vorstehenden Absätze gelten sinngemäß für andere unbeschränkt steuerpflichtige Körperschaftenund Personenvereinigungen, die Leistungen im Sinne des § 20 Abs. 1 Nr. 1, 9 oder Nr. 10 desEinkommensteuergesetzes gewähren können.

(8) Eine Einlagenrückgewähr können auch Körperschaften oder Personenvereinigungen erbringen, die in einem anderen Mitgliedstaat der Europäischen Union der unbeschränkten Steuerpflicht unterliegen, wenn sie Leistungen im Sinne des § 20 Abs. 1 Nr. 1 oder 9 des Einkommensteuergesetzes gewähren können. Die Einlagenrückgewähr ist in entsprechender Anwendung der Absätze 1 bis 6 und der §§ 28 und 29 zu ermitteln. Der als Leistung im Sinne des Satzes 1 zu berücksichtigende Betrag wird auf Antrag der Körperschaft oder Personenvereinigung für den jeweiligen Veranlagungszeitraum gesondert festgestellt. Der Antrag ist nachamtlich vorgeschriebenem Vordruck bis zum Ende des Kalenderjahrs zu stellen, das auf das Kalenderjahr folgt, indem die Leistung erfolgt ist. Zuständig für die gesonderte Feststellung ist die Finanzbehörde, die im Zeitpunktder Abgabe des Antrags nach § 20 der Abgabenordnung für die Besteuerung nach dem Einkommen örtlich zuständig ist. 6Bei Körperschaften oder Personenvereinigungen, für die im Zeitpunkt der Antragstellung nach §20 der Abgabenordnung keine Finanzbehörde zuständig ist, ist abweichend von Satz 5 das Bundeszentralamt für Steuern zuständig. Im Antrag sind die für die Berechnung der Einlagenrückgewähr erforderlichen Umständedarzulegen. In die Bescheinigung nach Absatz 3 ist das Aktenzeichen der nach Satz 5 oder 6 zuständigen Behörde aufzunehmen. Soweit Leistungen nach Satz 1 nicht gesondert festgestellt worden sind, gelten sie als Gewinnausschüttung, die beim Anteilseigner zu Einnahmen im Sinne des § 20 Abs. 1 Nr. 1 oder 9 des Einkommensteuergesetzes führen.

§ 29 Kapitalveränderungen bei Umwandlungen

(1) In Umwandlungsfällen im Sinne des § 1 des Umwandlungsgesetzes gilt das Nennkapital der übertragenden Kapitalgesellschaft und bei Anwendung des Absatzes 2 Satz 3 und des Absatzes 3 Satz 3 zusätzlich das Nennkapital der übernehmenden Kapitalgesellschaft als in vollem Umfang nach § 28 Abs. 2 Satz 1 herabgesetzt.

(2) Geht das Vermögen einer Kapitalgesellschaft durch Verschmelzung nach § 2 des Umwandlungsgesetzesauf eine unbeschränkt steuerpflichtige Körperschaft über, so ist der Bestand des steuerlichen Einlagekontosdem steuerlichen Einlagekonto der übernehmenden Körperschaft hinzuzurechnen. Eine Hinzurechnung des Bestands des steuerlichen Einlagekontos nach Satz 1 unterbleibt im Verhältnis des Anteils des Übernehmers an dem übertragenden Rechtsträger. Der Bestand des Einlagekontos des Übernehmers mindert sich anteilig im Verhältnis des Anteils des übertragenden Rechtsträgers am Übernehmer.

(3) Geht Vermögen einer Kapitalgesellschaft durch Aufspaltung oder Abspaltung im Sinne des § 123 Abs. 1und 2 des Umwandlungsgesetzes auf eine unbeschränkt steuerpflichtige Körperschaft über, so ist der Bestanddes steuerlichen Einlagekontos der übertragenden Kapitalgesellschaft einer übernehmenden Körperschaft im Verhältnis der übergehenden Vermögensteile zu dem bei der übertragenden Kapitalgesellschaft vor dem Übergang bestehenden Vermögen zuzuordnen, wie es in der Regel in den Angaben zum Umtauschverhältnisder Anteile im Spaltungs- und Übernahmevertrag oder im Spaltungsplan (§ 126 Abs. 1 Nr. 3, § 136 desUmwandlungsgesetzes) zum Ausdruck kommt.

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Entspricht das Umtauschverhältnis der Anteile nicht dem Verhältnis der übergehenden Vermögensteile zu dem bei der übertragenden Kapitalgesellschaft vor der Spaltungbestehenden Vermögen, ist das Verhältnis der gemeinen Werte der übergehenden Vermögensteile zu dem vor der Spaltung vorhandenen Vermögen maßgebend. Für die Entwicklung des steuerlichen Einlagekontos des Übernehmers gilt Absatz 2 Satz 2 und 3 entsprechend. Soweit das Vermögen durch Abspaltung auf eine Personengesellschaft übergeht, mindert sich das steuerliche Einlagekonto der übertragenden Kapitalgesellschaftin dem Verhältnis der übergehenden Vermögensteile zu dem vor der Spaltung bestehenden Vermögen.

(4) Nach Anwendung der Absätze 2 und 3 ist für die Anpassung des Nennkapitals der umwandlungsbeteiligtenKapitalgesellschaften § 28 Abs. 1 und 3 anzuwenden.

(5) Die vorstehenden Absätze gelten sinngemäß für andere unbeschränkt steuerpflichtige Körperschaften undPersonenvereinigungen, die Leistungen im Sinne des § 20 Abs. 1 Nr. 1, 9 und 10 des Einkommensteuergesetzesgewähren können.

(6) War für die übertragende Körperschaft oder Personenvereinigung ein Einlagekonto bisher nicht festzustellen, tritt für die Anwendung der vorstehenden Absätze an die Stelle des Einlagekontos der Bestand der nicht in das Nennkapital geleisteten Einlagen zum Zeitpunkt des Vermögensübergangs. § 27 Abs. 8 gilt entsprechend.

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Ireland

1. **Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?**

Application of the dividend withholding tax
Currently under the Irish tax law, no dividend withholding tax (WHT) is levied on undistributed profits of the company[1]. In accordance with Section 172B of the Taxes Consolidation Act, 1997 (TCA 1997), the WHT applies to all "relevant distributions" made by Irish resident companies.

Relevant distributions are defined in Section 172A TCA 1997 as: (i) any distribution within the meaning of Chapter 2 of Part 6 of TCA 1997 (i.e. Section 130 TCA 1997, etc.), (ii) any amounts deemed to be distributions under the close company rules[2], and (iii) any scrip dividends as per Section 816 TCA 1997[3].

Definition of the "distribution" under Section 130 TCA 1997 makes it clear that "distribution" comprises any dividend paid to the shareholder. Please also refer to **Appendix 1** for the complete definition of "distribution" under Section 130 TCA 1997. It should be noted that Section 130 TCA 1997 specifically excludes from the definition of "distribution" a distribution made in respect of share capital in a winding up.

Based on the above, there should be no Irish divided WHT charged until the actual date of dividend distribution – i.e. payment of the profits, and where the company paying the dividend is an Irish tax resident.

Exemption from dividend WHT
It should be noted that TCA 1997 provides for a range of the WHT exemptions (as set out in the EU Parent-Subsidiary Directive (Section 831 TCA 1997) or in Section 172C – Section 172D TCA 1997) that may apply to the distributions made by an Irish resident company provided that the relevant conditions are met.

Generally, Irish dividend WHT will only apply where the dividend is paid to the Irish tax resident individuals or to a corporate shareholder, which is not tax resident in the EU and/or a country with which Ireland has a Double Tax Agreement. In particular:
- Section 172B(8) TCA 1997 provides that dividend WHT does not apply to the distributions paid by an Irish resident 51% subsidiary to its Irish resident parent company;
- Section 172C and Section 172D TCA 1997 list the persons (who have made the appropriate declaration set out in Schedule 2A TCA 1997 to the distributing company or, where relevant, to the authorized withholding agent or to a qualifying intermediary) who are non-liable and are entitled to receive relevant distributions without deduction of dividend WHT; and

[1] However, it should be noted that there is surcharge levied on the undistributed profits of the "close companies" as noted below. Such surcharge, however, is not a WHT but additional tax levied on the undistributed profits of the services companies that are considered "close companies".
[2] Section 441 TCA 1997 provides for a surcharge on the undistributed income of service companies that are "close companies" (includes an Irish resident company which is under the control of 5 or fewer participants). The surcharge applies where the principal part of the company's income is derived from the carrying on directly of a "profession" (not defined in legislation), the provision of "professional services" (again not defined in legislation), or a company which has or exercises an office or employment. Subject to a number of limited exceptions and after taking distributions into account, a surcharge of 15% is applied to certain undistributed income of the service company
[3] Dividends on shares (scrip dividends) issued in place of cash dividends, at the option of the shareholder.

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- No dividend WHT should apply to dividends paid to a related 5% EU-tax resident company under the EU Parent Subsidiary Directive ("EU PS") (transposed into Irish law under s831 TCA 1997). A similar provision in respect of dividends paid to a Swiss tax resident company is contained in s831A TCA 1997. Where both the EU PS and the domestic exemption under s172D TCA 1997 equally apply to exempt an Irish tax resident company from dividend WHT (say in the case of a dividend paid to a related French company), the EU PS should be relied on in the first instance as there is no requirement to have a declaration in place under Schedule 2A TCA 1997 before payment of the dividend (unlike under s172D TCA 1997).

Please see **Appendix 2** for list of the dividend WHT exemptions.

Exit tax on migration

In addition, currently there is no provision under TCA 1997 whereby the undistributed profits of the company ceasing to be a tax resident in Ireland will be subject to dividend WHT. Under s627 TCA 1997, where a company ceases to be tax resident in Ireland, it will be deemed to have disposed of and immediately reacquired all of its assets at market value. The deemed disposal and reacquisition will be regarded as a chargeable event giving rise to a chargeable gain (or loss) and thus should be subject to capital gains tax (CGT).

Similarly, when Irish company "leaves" Ireland the taxable gain realized by the parent company on such migration of the Irish subsidiary will be calculated based on the standard rules under Capital Gains Tax Acts – fair market value of the shares at the date of migration less acquisition costs. Net gain will be subject to CGT unless the relief applies under domestic law or tax treaty.

For further details on application of the Irish exit tax rules see https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-20/20-02-01.pdf.

a. **If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply**.

   Not applicable. There is no dividend WHT applied to the undistributed profits of the company ceasing to be an Irish tax resident.

b. **If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?**

   Not applicable. There is no dividend WHT applied to the undistributed profits of the company ceasing to be an Irish tax resident.

c. **If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?**

   Not applicable. There is no dividend WHT applied to the undistributed profits of the company ceasing to be an Irish tax resident.

d. **Only regarding EU countries: If the answer to this question is positive, how does the exit tax work in relation to other EU countries? Do specific rules apply in this respect?**
   Not applicable. There is no dividend WHT applied to the undistributed profits of the company ceasing to be an Irish tax resident.

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2. **Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?**

No, if the company becomes the tax resident of Ireland, normal rules regarding the application of divided WHT should apply (see above). The charge to WHT in Ireland is generally triggered on payment and the value is the actual EUR amount paid as at that date, therefore dividend WHT is applied as at the payment date if the dividend payment is made by a company that is Irish tax resident at that time. This is regardless of where the company was tax resident when those profits where generated. Whether the size of the paid-up capital would be somehow relevant to the tax base of the Irish dividend withholding tax is more an accounting or legal question than a tax question. From a tax perspective, any distribution made by the company that is not the return on the paid up capital/share premium, if permissible under the company law/accounting standards, is considered as dividend distribution and thus subject to WHT (assuming that the distribution falls within the definition included in Section 130 TCA 97).

In addition, it should be noted that Section 130 (1) TCA 97 contains a rule whereby the payment out of share capital/premium/reserves will be considered as repayment of capital (thus not subject to dividend WHT) up to the amount that was actually paid by the shareholders. Therefore, if the company issues new shares by capitalizing its reserves (e.g. bonus shares) any future repayment of the share capital relating to the portion of those shares that were "funded" out of the company's reserves will be considered as a dividend distribution. For more details, please see: https://www.charteredaccountants.ie/taxsource/1997/en/act/pub/0039/nfg/sec0135-nfg.html.

However, there are multiple different exemptions for Irish dividend WHT. As noted above, generally, Irish WHT will only apply where the dividend is paid to Irish tax resident individuals or to a company where the residence is not in the EU and/or a country with which Ireland has a Double Tax Agreement. Please also see general exemption from dividend WHT included in **Appendix 2**.

In addition, Section 129A TCA 1997 contains an anti-avoidance provision, whereby the exemption from CIT on dividend received by Irish resident company from another, connected Irish resident company (Section 129 TCA 1997) will not apply where the profits out of which the dividends are paid were earned by the paying company while it was resident outside the State. The section provides that distributions out of such profits will be subject to tax in the same way as foreign-sourced dividends – currently at CIT rate of 12% or 25%. Further details of the application of such anti-avoidance provision are included in **Appendix 3** below.

   a. **If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?**

      Not applicable (*see* above).

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Appendix 1 – Definition of “distribution” for the purpose of dividend WHT under Section 172B TCA 1997

Under Section 130 TCA 1997, the term “distribution” is to be given the meaning laid down in this Chapter and in sections 436, 436A and 437 which contain special provisions in relation to close companies and in section 816(2)(b) in relation to shares issued in place of dividends.

The definition does not include distributions made in respect of share capital on the winding up of a company.

The term “distribution” means:

- any dividend paid by a company, including a capital dividend, •
- any other distribution out of the company’s assets in respect of shares in the company except any part of the distribution which represents a repayment of capital or is equal in amount or value to any new consideration received by the company in respect of the distribution,
- any amount in respect of the redemption or part redemption of bonus securities which is not referable to new consideration,
- any interest or other amount paid out of the assets of a company in respect of:
  - bonus securities issued on or after 27 November, 1975,
  - unquoted securities convertible directly or indirectly into shares of the company and unquoted securities with rights to receive shares or securities of the company,
  - securities the consideration for which (that is, the interest given by the company for the use of the principal) is to any extent dependent on the company’s results or is at more than a reasonable commercial rate (in the latter case the excess interest over the reasonable commercial rate is a distribution) – this provision does not apply to certain securities issued in the course of securitisation transactions to which section 110 applies (see note to that section),
  - securities issued by a company and held by a non-resident company where the company is a 75 per cent subsidiary of the non-resident company,
  - securities issued by a company and held by a non-resident company where both companies are 75 per cent subsidiaries of a third company which is not resident in the State,
  - except where 90 per cent or more of the share capital of the company which issued the securities is directly owned by a resident company, securities issued by a company and held by a non-resident company where both companies are 75 per cent subsidiaries of a third company which is resident in the State,

    In relation to the last three categories of securities, the application of this provision can be disapplied in certain circumstances (see notes to sections 452 and 845A for details),

  - securities connected with shares in the company (that is, where the rights attaching to either the securities or the shares, and in particular the conditions on which the securities or the shares can be transferred, are such that it is necessary or advantageous that the securities and the shares be held, disposed of or acquired together),

- any amount treated as a distribution by subsection (3) and any amount in respect of a bonus issue followed by a repayment of share capital as described in section 131.
- any qualifying amount, (defined in subsection (2C)) which is paid to a beneficiary of an Employee Share Ownership Trust (ESOT), where that ESOT is linked to an Approved Profit-Sharing Scheme (APPS).

For further details see Notes for Guidance - Taxes Consolidation Act 1997 Section 130 TCA 1997 available here https://www.revenue.ie/en/tax-professionals/documents/notes-for-guidance/tca/part06.pdf

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Appendix 2 – Exemption from dividend WHT under Section 172B(6), 172C, 172D and 831A

- Exemption from dividend WHT for certain persons (Section 172C TCA 1997). The paying company is not required to operate dividend WHT on making distributions to the following persons:
  - a company resident in the State which is a 51% parent of the paying company (Section 172B(8) TCA 1997)
  - a company resident in the State which is not a 51% parent of the paying company but which has made a declaration
  - an approved occupational retirement benefit scheme and an approved “self-employed” retirement benefit contract or trust scheme,
  - a qualifying share ownership trust,
  - a collective investment undertaking,
  - a charity approved as such for tax purposes,
  - Personal Retirement Savings Accounts (PRSAs) and exempt unit trusts Revenue approved charities and pension schemes),
  - certain sporting bodies,
  - designated brokers for special portfolio investment accounts,
  - trustees of approved minimum retirement funds and approved retirement funds,
  - trustees of special savings incentive accounts,
  - certain persons who would be entitled to exemption from income tax in respect of distributions, primarily focusing on permanently incapacitated individuals,

- Exemption from dividend WHT on distributions to Non-Irish resident recipients (Section 172D TCA 1997). Subject to having received the appropriate declaration from the recipient, a paying company does not have to operate DWT on distributions to:
  - an individual who is neither resident nor ordinary resident in the State but who is resident by virtue of the law of that territory in a relevant territory
  - a non-resident company which is by virtue of the law of a relevant territory, resident for tax purposes in that relevant territory but is not under the control of persons resident in Ireland,
  - a non-resident company which is under the control (directly or indirectly) of persons who, by virtue of the law of a relevant territory, are resident for tax purposes in that relevant territory and is not under the control (directly or indirectly) of persons who are resident in Ireland
  - a non-resident company the principal class of shares of which or of its 75% parent company are substantially and regularly traded on a recognized stock exchange in the State, in a relevant territory or on any other stock exchange approved by the Minister for Finance

- In addition to the broad exemptions from dividend WHT for non-residents set out above, the EU Parent/Subsidiary Directive, as implemented in domestic legislation, also provides exemption from dividend WHT on the payment of distributions to certain parent companies. There is no requirement for the recipient company to make a declaration to the paying company in order to avail of this exemption. To qualify for this exemption, the recipient must own (directly) 5% of the share capital of the paying company during an uninterrupted period of 2 years and the parent company must be resident for tax purposes in an EU Member State. Note, this exemption is not available if the parent company exists as part of a scheme or arrangement where one of the main purposes is the avoidance of DWT.
- A similar provision, but with a requirement for 25% ownership, applies where the parent company is resident for tax purposes in Switzerland (Section 831A TCA 1997).

For further details see Notes for Guidance - Taxes Consolidation Act 1997 Section 129A 1997 available here https://www.revenue.ie/en/tax-professionals/documents/notes-for-guidance/tca/part06.pdf

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Appendix 3 – Section 129A TCA 1997

Where a company receives a dividend from a connected company which became resident in the State in the period beginning on the date 10 years before the payment of the dividend or 3 April 2010, whichever is the later, the dividend or part of the dividend which is paid out of profits earned while a company was resident outside the State will not be exempt under section 129 TCA 1997 but will be chargeable to corporation tax under Case IV of Schedule D.

The amount by which a dividend exceeds the distributable profits of the company for the period (“specified period”) since the company became resident in the State will be treated be as paid out of profits earned while the company was non-resident.

The distributable profits of the specified period are defined as the aggregate of the accounting profits for the period from the date the company became resident in the State to the last day of the accounting period immediately before the accounting period in which the distribution is made as reduced by any distributions for that period which were exempt under section 129 TCA 1997.

For further details see Notes for Guidance - Taxes Consolidation Act 1997 Section 129A 1997 available here https://www.revenue.ie/en/tax-professionals/documents/notes-for-guidance/tca/part06.pdf

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Italy

1. **Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?**

No, when a company transfers its residence abroad, Italy does not impose a conditional withholding tax on undistributed profits based on a deemed dividend distribution to the shareholders.

A resident company may transfer its registered office to another jurisdiction without the need to undergo a winding-up procedure (i.e. without a previous liquidation). From a tax perspective, the transfer of residence abroad is considered a sale at market value of the company's assets (i.e. a deemed disposal of the assets), unless the assets are allocated to a permanent establishment located in Italy. If after the transfer of the tax residence abroad there is no permanent establishment in Italy, the deemed gains on the assets of the company are subject to tax in Italy. Similarly, tax-deferred reserves recorded on the balance sheet of the transferring company are also only subject to tax if, and to the extent that, they are not recorded in the assets of a permanent establishment located in Italy (article 166 of the Italian Income Tax Code). The same rules apply in the case of an outbound merger.

a. **If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.**

   Not applicable.

b. **If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?**

   Not applicable.

c. **If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?**

   Not applicable.

d. **Only regarding EU countries: If the answer to this question is positive, how does the exit tax work in relation to other EU countries? Do specific rules apply in this respect?**

   Not applicable.

2. **Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?**

   Italy does not apply a step-up-base for the application of the dividend withholding tax when a company becomes a resident.

   Where a company transfers its residence in Italy, for Corporate Income Tax purposes its assets and liabilities must be recognized at their market value, irrespective of any exit taxation that may be suffered by the migrating company in the foreign jurisdiction, provided that such jurisdiction is

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listed in the Ministerial Decree of 24 February 1996 (white list). Alternatively, the value to be recognized for Italian tax purposes must be determined in accordance with an advance tax agreement to be reached with the Italian tax authorities. Absent such agreement, the tax value of the assets is the lower of: (i) the original cost of acquisition; (ii) the accounting value; and (iii) the market value (while the tax value of the liabilities is the higher of these three items) (article 166-bis of the Italian Income Tax Code). In the case of a merger, tax-deferred reserves that are recorded in the balance sheets of the merging companies before the merger give rise to taxable income in the hands of the company resulting from the merger if, and to the extent that, such reserves are not recorded in its balance sheet. However, reserves that are taxable upon distribution are taxable only in so far that the merger surplus is distributed or the increase in the stated capital exceeding the sum of the stated capital of the companies participating in the merger (net or gross participations) is repaid to the shareholders (article 172 of the Italian Income Tax Code).

a. If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?

Not applicable, see above.

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Luxembourg

1. **Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?**

A transfer of the legal seat of a domestic entity outside Luxembourg is considered as a liquidation for Luxembourg tax purposes, resulting in a deemed disposal of all of the Luxembourg company's assets and liabilities at fair market value based on article 172, paragraph 1 of the Luxembourg Income Tax Code (Loi concernant l'impôt sur le revenu). The transfer may, however, be made at book value if the migrated entity maintains a permanent establishment in Luxembourg (article 172, paragraph 2 of the ITC).

However, Luxembourg does not impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from Luxembourg to another state.

  a. **If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.**
     See above.

  b. **If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?**
     See above.

  c. **If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?**
     See above.

  d. **Only regarding EU countries: If the answer to this question is positive, how does the exit tax work in relation to other EU countries? Do specific rules apply in this respect?**
     See above.

2. **Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?**

Since 2020. article 43(1a) of the Luxembourg Income Tax Code provides that assets and liabilities transferred upon the migration of a foreign company to Luxembourg have to be valued at the value retained in the jurisdiction of departure, unless this value does not correspond to the market value. The step-up is equal to the difference between value at the time of migration to Luxembourg less the historical acquisition price.

However, no step-up applies for the application of the dividend withholding tax.

  a. **If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?**
  See above.

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Poland

1. Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?

In Poland, the exit taxation concerns the unrealized capital gains and does not cover undistributed profits to shareholders. Therefore, there is no withholding tax on undistributed profits, but Poland imposes tax on unrealized gains (exit tax) charged when a resident of Poland or a Polish asset leaves the country. As regards taxation of dividends, any dividend paid out from Poland is subject to 19% withholding tax but this does not apply to undistributed profits at the time of emigration. The tax is imposed when the dividend is paid. The tax is withheld subject to double tax treaties and exemption based on provisions implementing the EU Parent-Subsidiary Directive (there are some conditions to be met and an anti-abuse clause may apply). There is also a GAAR legislation in Poland. However, we cannot see how unpaid dividends may be taxed based on these provisions.

For the sake of completeness, it could be mentioned that the Polish legislation contains a General Anti-avoidance rule (GAAR). In line with the GAAR, transactions carried out with the main or one of the main purposes to obtain a tax benefit, which is contrary to the object or purpose of tax regulations, will not result in a tax benefit if the activities of the taxpayer were artificial. The tax consequences of such transactions should be assessed as if an alternative "appropriate" transaction had taken place. Also, additional penalties apply. There has to be in place - based on general tax provisions -some kind of e.g. dividend withholding taxation in given situation, which has been circumvented by artificial structure implemented by the taxpayer, in order to avoid this taxation. In such a case, the tax authorities may use GAAR and other provisions, in order to disregard the consequences of given actions of the taxpayer and to claim, that those actions were mainly tax motivated and there was no business substance. Nevertheless, it is always a very complex, long-lasting proceeding (in case of GAAR conducted solely at the central MoF level) and applied in very rare individual cases.

The CIT Act also provides for specific anti-avoidance rules relating to legal mergers. The merger tax neutrality is waived if the main or one of the main reasons for carrying out the legal merger was tax avoidance or tax evasion, which is deemed to be the case if there are no justified economic reasons for carrying out the transaction.

a. If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.

As mentioned before, exit tax in Poland is imposed only in relation to corporate income tax on unrealized gains and not also with dividend withholding tax on undistributed profits. Exit taxation with CIT applies if the following conditions are met jointly:

- A Polish tax resident changes its tax residency or an asset is moved from Poland to another country;
- As a result of such actions, the right to tax any potential future capital gains is shifted from Poland to another country.

Transfer of assets between head office and permanent establishments may also involve exit taxation, in particular in the following situations:

- A Polish tax resident transfers an asset from Poland (allocated to its Polish activity) to its permanent establishment abroad;

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- Non-resident transfers an asset from its Polish permanent establishment to another country;
- A Non-resident transfers from Poland its activity conducted through its Polish permanent establishment.

On the other hand, taxation as a result of the change of tax residence does not relate to assets that remain allocated to a permanent located in Poland.

A transfer of asset to another country is not subject to exit tax if the transfer does not last longer than 12 months and either is directly related to the liquidity management of a given taxpayer, related to the securing of a loan repayment or made in order to meet the capital requirements set out in EU law for credit institutions and investment firms.

b. If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?

For corporate taxpayers, the CIT tax base is the difference between the market value of the assets (enterprise) upon migration from Poland (or at the day preceding the change of tax residency) and their net tax value (that has not been tax deductible in any form whatsoever).

The tax rate is 19% (same as standard corporate income tax rate).

The exit tax is paid by Polish taxpayers moving their assets or their tax residency, or by non-residents having a Polish permanent establishment.

The taxpayer may apply to the competent tax authority for payment of all or part of the tax on income from unrealized gains in instalments for a period not longer than 5 years from the end of the tax year in which the obligation to pay it arose. It is only possible if the assets/tax residency are transferred to an EU/EEA country that is a party to an agreement with Poland or with the UE on mutual assistance in tax claims recovery equivalent to the mutual assistance under the Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

If there is a real risk of non-recovery of the tax, the tax authorities may ask for a guarantee, pledge or other security. When assessing if there is a real risk of non-recovery, one should take into account in particular specific factors listed in the respective provisions.

c. If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?

There are no special provisions nor practice in this respect.

In general, exit taxes do not interfere with division of taxing rights agreed in double tax treaties. In particular, it should be noted that each country has the right to tax its own residents. On the other hand, in some circumstances, the exit tax is imposed on non-residents (migration of a Polish permanent establishment assets to another country) – in the lack of specific provisions in the applicable double tax treaty, it may be considered not in line with Art. 13 (taxation of capital gains) or Art. 7 (business profits).

It may also happen that if the tax residency is moved to a country not having similar provisions, there may be some discrepancies as regards the tax value of the assets when they are actually disposed of and capital gain is taxed. In other words, the country to which the

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assets were moved/tax residency was shifted may disallow for a step-up for tax purposes or tax credit corresponding to tax paid upon exit in Poland.

d. Only regarding EU countries: If the answer to this question is positive, how does the exit tax work in relation to other EU countries? Do specific rules apply in this respect?

Yes, there are some specific provisions regarding EU countries. Please refer to point 2 for further details.

2. Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?

Poland does not apply a step-up for dividend withholding tax purposes.

a. If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?

See above.

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Spain

1. **Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?**

Spain does not impose a conditional dividend withholding tax on undistributed profits when a company transfers its residence to another State.

In the case of mergers or exchange of shares, shareholders would receive new shares from the resulting new entity valued according to an exchange ratio method. Shareholders are not taxed on the new shares received under certain conditions (e.g. any excess paid in cash cannot exceed 10% of the nominal value of the share).

Article 19 of the Spanish Corporate Income Tax dealing specifically with transfers of residence establishes an exit tax on the difference between the market value and the accounting value of assets, unless such assets are allocated to a permanent establishment in Spain (the assets under this case maintain the same value they had in the entity prior to the change of residence).

After a request made by European Commission, Spain introduced a payment of the tax in installments over 5 years if the transfer is made to another Member State or to a third country that is party to the Agreement on the European Economic Area.

a. **If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.**

   Not applicable

b. **If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?**

   Not applicable

c. **If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?**

   Not applicable

d. **Only regarding EU countries: If the answer to this question is positive, how does the exit tax work in relation to other EU countries? Do specific rules apply in this respect?**

   Not applicable

2. **Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?**

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There appear to be no specific rules for the application of a step-up in relation to the national dividend withholding tax. However, when a company moves its residence to Spain, existing profit reserves may be considered voluntary reserves or share premium.

In general, for corporate income tax purposes with respect to assets transferred to Spain that are subject to an exit tax in another Member State, the value established by that Member State will be acceptable, unless it does not reflect the market value. On the other hand, profit reserves are non-distributed income that remain in the corporation. If it is decided to distribute such reserves, once the legal conditions have been satisfied (in terms of mandatory reserves and distribution) a withholding tax applies, with certain exceptions. A general domestic withholding tax of 19% applies upon the distribution of dividends, which may be reduced by the application of a tax treaty or the Parent-Subsidiary Directive.

The paid-up capital has no relevance on the tax base, however legal conditions must be satisfied before dividends could be distributed (e.g. equity cannot be less than capital after distribution).

In a share-for-share merger, exchange of shares and mergers might be exempt from taxation for CIT purposes if the special merger regimes apply. In general, the shares received will be valued at the fiscal value that those shares had in the contributors.

a. **If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?**

See above

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Switzerland

1. Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?

Yes, Article 4(2) of the Withholding Tax Act (Bundesgesetz über die Verrechnungssteuer) makes this possible.
Due to time constraints we have not been able to determine whether case law on this matter exists. There may be case-law but extensive research would be required.

a. If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.

Yes – in all cases.

b. If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?

The tax base includes: open and hidden reserves of the Swiss corporation shifting its legal seat outside Switzerland. The tax rate is 35 percent calculated on the open and hidden reserves. The Swiss corporation is considered the taxpayer. No deferred taxation or payment in instalment is granted. The collection of withholding tax from the Swiss corporation is required, since treaties may not allow to collect tax from foreign shareholders.

c. If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?

The shareholder of the Swiss corporation may claim benefits under the treaty Switzerland has concluded with the residence state of the shareholder. Switzerland levies exit taxes by way of withholding tax and it is up to the shareholder to claim a (partial) refund according to tax treaty. This means that Switzerland takes the view that, in principle, it has a taxing right as the source country on the deemed dividend distribution under tax treaties concluded by Switzerland and the countries of residence of the shareholders.

Article 32, section 2, of the Swiss Federal Act on Withholding Tax[4] relates to the cases when the withholding tax is levied due to i.e. audit of the Swiss Federal Tax Authorities where the FTA concludes that a deemed/hidden dividend took place on which withholding tax is due. The withholding tax payment obligation is passed onward to the beneficiary of the deemed/hidden dividend. Any reduction of withholding tax will depend on the provision of the applicable tax treaty and whether the beneficiary is shareholder or affiliated entity.

[4] 2. Wird die Verrechnungssteuer erst auf Grund einer Beanstandung der ESTV entrichtet und überwälzt, und ist die Frist gemäss Absatz 1 bereits abgelaufen oder verbleiben von der Entrichtung der Steuer bis zu ihrem Ablauf nicht mindestens 60 Tage, so beginnt mit der Entrichtung der Steuer eine neue Frist von 60 Tagen zur Einreichung des Antrages.

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2. Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?

No. Article 61a of the Federal Direct Tax Act (Bundesgesetz über die direkte Bundessteuer) and corresponding cantonal legislation allow for a step-up but this step-up is for Corporate Income Tax purposes and not for dividend withholding tax purposes. The Withholding Tax Act (Bundesgesetz über die Verrechnungssteuer) does not seem to address this issue.

However, if a Swiss company has capital contribution reserves and dividends are distributed from these capital contribution reserves, the dividends will not be subject to Swiss dividend withholding tax. Capital contribution reserves are contributions by the shareholders that exceed the face value of the registered share capital of a company, for instance capital surplus when shares are issued. Swiss company law also allows shareholders to contribute funds directly to the company's reserves without shares being issued in return. Capital contribution reserves may also result from contributions in kind.

In cross-border reorganizations, a capital contribution reserve may be created by contributing shares in a foreign company to a Swiss subsidiary. Starting 2020, the rules around tax-free dividend distributions have changed for listed companies. Although the overall volume of capital contribution reserve that can be repaid without dividend withholding tax will remain unchanged, it is no longer possible to distribute a dividend without any withholding tax; a taxable portion must now be distributed along with distributions from the capital contribution reserve.

a. If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?

For corporate income tax purposes, a foreign company immigrating to Switzerland may disclose hidden reserves existing at the time it incorporates in Switzerland. The assets may not be valuated beyond their market values. The amount of the step-up is equal to the difference between the book value and the market value of the assets.

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Appendix – Art. 61a Bundesgesetz über die direkte Bundessteuer

1. Deckt die steuerpflichtige Person bei Beginn der Steuerpflicht stille Reserven einschliesslich des selbst geschaffenen Mehrwerts auf, so unterliegen diese nicht der Gewinnsteuer. Nicht aufgedeckt werden dürfen stille Reserven einer Kapitalgesellschaft oder Genossenschaft aus Beteiligungen von mindestens 10 Prozent am Grund- oder Stammkapital oder am Gewinn und an den Reserven einer anderen Gesellschaft.

2. Als Beginn der Steuerpflicht gelten die Verlegung von Vermögenswerten, Betrieben, Teilbetrieben oder Funktionen aus dem Ausland in einen inländischen Geschäftsbetrieb oder in eine inländische Betriebsstätte, das Ende einer Steuerbefreiung nach Artikel 56 sowie die Verlegung des Sitzes oder der tatsächlichen Verwaltung in die Schweiz.

3. Die aufgedeckten stillen Reserven sind jährlich zum Satz abzuschreiben, der für Abschreibungen auf den betreffenden Vermögenswerten steuerlich angewendet wird.

4. Der aufgedeckte selbst geschaffene Mehrwert ist innert zehn Jahren abzuschreiben.

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United Kingdom

1. **Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?**

No. There is no withholding tax on dividends under UK domestic law. This applies equally to where a UK resident company transfers its residence to another state. However, upon transfer of a company (or its assets) outside the UK there is a deemed disposal at market value of those assets.

   a. **If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.**

      Not applicable

   b. **If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?**

      Not applicable

   c. **If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?**

      Not applicable

   d. **Only regarding EU countries: If the answer to this question is positive, how does the exit tax work in relation to other EU countries? Do specific rules apply in this respect?**

      Not applicable

2. **Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?**

No. There is no withholding tax on dividends under UK domestic law. There is therefore no step-up for application of such a tax. However, upon transfer of a company's residence to the UK a step-up to market value is provided in certain cases for purposes of computing any gain or loss on a subsequent realisation of the assets.

   a. **If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?**

      Not applicable

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United States

1. Does your country impose (a conditional) dividend withholding tax on undistributed profits when a company transfers its residence from your country to another State (e.g. due to a migration or a cross border merger or demerger)?

The United States has two sets of provisions that apply to US corporations who transfer stock or assets outside the United States: (1) provisions for so-called inversion transactions; and (2) provisions for US-outbound reorganization transactions (M&A).

For purposes of the discussion below, it should be noted that the United States determines tax residence of corporations solely on the basis of the place of incorporation, i.e. corporations organized under the laws of one of the US states are treated as domestic corporations and corporations organized under the laws of a foreign jurisdiction are treated as foreign corporations. The United States does not determine residence based on the place of the effective management of the corporation.

US domestic corporations are subject to US federal income tax on worldwide income, subject to a participation exemption, and foreign corporations are subject to US federal income tax only on US business income and other US source income.

A. Inversion Transactions

The United States enacted an expatriation regime for US corporations in 2003. This regime applies to transactions in which the stock or assets of a US domestic corporation are transferred to a foreign corporation but the shareholders of the US corporation remain largely unchanged (IRC § 7874).[5]

The acquiring foreign corporation in this case is referred to as a "surrogate foreign corporation", and the tax consequences depend on the percentage of stock of the surrogate foreign corporation that is owned after the acquisition by the former shareholders of the US corporation.

Significantly, if the former shareholders of the US corporation own 80% or more of the stock (by vote or value) of the surrogate foreign corporation, the surrogate foreign corporation will be treated as a US domestic corporation for US income tax purposes. In other words, although the transaction it is effective for corporate law purposes, it will not be given effect for US federal income tax purposes, and the foreign corporation will be subject to tax in the United States on its worldwide income as if it were a US domestic corporation.

The treatment of the surrogate foreign corporation as a US domestic corporation will result in corporate distributions being treated as US-source dividends that are subject to US withholding tax when paid to foreign corporations or to individuals who are non-US residents.[6] The withholding tax will apply at the regular US withholding rate (30%) or the reduced rate under an applicable income tax treaty.

The US Model Tax Convention of 2016 provides, however, that reduced treaty rates for dividends, interest, royalties, and guarantee fees paid by expatriated entities will not apply to payments made to

[5] All references herein at to the US Internal Revenue Code of 1986, as amended to date.
[6] The United States does not impose withholding tax on dividends paid to US domestic corporations or to US citizens or US residents.

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connected persons (generally defined at a 50% ownership level) for the 10-year period following the date of the expatriation.

If the former shareholders own below 80%, but still 60% or above, of the stock of the surrogate foreign corporation, the status of the foreign corporation will be respected, but income and gain recognized by the expatriated US entity during the 10-year period following the expatriation (referred to as the inversion gain) must be reported for US federal income tax purposes and may not be offset by the tax attributes of the expatriated entity (i.e. net operating losses and foreign tax credits).

Gain on assets is measured by the difference between the fair market value of the assets and the tax basis of the assets (generally either initial cost or depreciated value at the time of disposition). The rate of US corporate tax currently applicable to income and gain is 21%.

If the transaction reduces the ownership of the former shareholders below 60%, the inversion rules will not apply.

An inversion transaction occurs if:

- a foreign corporation acquires directly or indirectly substantially all the properties held directly or indirectly by a US domestic corporation;
- the former shareholders of the US corporation thereafter own a substantial percentage of the stock of the foreign corporation (defined at either a 60% or 80% level) by reason of holding the stock of the US domestic corporation; and
- the foreign affiliated group, as defined for this purpose, that includes the foreign corporation does not have substantial business activities in the foreign country in which the foreign corporation is created or organized as compared to the total business activities of the group (generally defined as 25% of employees, compensation, assets, and gross income).

Excise Tax on Stock Received by Corporate Insiders

An excise tax is imposed on the value of specified stock compensation received by insiders of the inverted US corporation, i.e. certain officers, directors and 10% shareholders (IRC § 4985). Such persons are referred to as disqualified individuals. The excise tax is imposed at a rate of 20% for corporations that first became expatriated after 22 December 2017, and at a rate of 15% for corporations that expatriated on or prior to such date.

Override of US Tax Treaty Obligations

The inversion provisions expressly provide that they may not be overridden by US treaty obligations, whether previously or subsequently entered (IRC § 7874(f)). In addition, the 2016 US Model Income Tax Convention includes provisions that deny the benefit of reduced withholding rates on dividends, interest, and royalties paid by expatriated US entities to related foreign persons. These provisions specify that the payments will be taxed in accordance with US domestic law (i.e. at the 30% US withholding rate) for the 10-year period following the expatriation.

Disallowance of Reduced Tax Rates for Individuals

Individual shareholders who receive dividends from expatriated US corporations after 22 December 2017 are not permitted to treat such dividends as “qualified dividend income” for purposes of claiming

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the reduced rates of tax applicable to qualified dividends. Such dividends are taxed at the regular progressive income tax rates.

B. Outbound Reorganization Transactions

The United States has a long-standing regime for the taxation of US-outbound transfers of stock or assets of US corporations in cross-border reorganization transactions (i.e. mergers, acquisitions, spin-offs, incorporations, liquidations).

In the purely domestic context, reorganization transactions can qualify for tax-free treatment to both the corporation and the shareholders if specified conditions are met. In the US-outbound context, however, such transactions generally result in "toll charges" being applied (IRC § 367(a)). In this case the gain (but not the loss) in the stock or assets transferred outside the United States must be recognized for US federal income tax purposes.

A number of exceptions apply to gain recognition, including transfers of stock or securities of US domestic corporations or stock or securities of foreign corporations. The exceptions generally apply, omitting the details, to shareholders who own less than 5% of the stock of the transferee corporation, with a requirement that shareholders who own 5% or more enter into a 5-year gain recognition agreement (GRA) with the US Internal Revenue Service. If certain "triggering events" occur with the 5-year period following the transaction (i.e. generally transfers of stock or assets of the outbound US corporation), the US transferor will be required to pay US federal income tax with respect to the initial transfer, including interest computed from the due tax of the US federal income tax return for the taxable year of the initial transfer.

An exception from gain recognition formerly applied to property transferred to a foreign corporation if the property was used by the foreign corporation in the active conduct of a trade or business outside the United States (IRC § 367(a)(3)) but such exception has been repealed.

a. **If the answer to this question is positive, does this exit tax apply in all cases or only if certain conditions are met? Please indicate which conditions apply.**

   See above

b. **If the answer to this question is positive, what is the taxable base for the withholding tax (and how is it calculated), which tax rate is applicable, who is considered the taxpayer and is it possible to postpone it (i.e. deferred taxation, payment by instalments)?**

   See above

c. **If the answer to this question is positive, how does the exit tax work under the tax treaties your country has concluded?**

   See above

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2. **Does your country apply a step-up-base when a company becomes a resident of your country for the application of the national dividend withholding tax (e.g. in case of a transfer of seat, a cross-border legal merger or in case of a cross-border share-for-share merger)?**

Introduction

The United States determines the character of corporate distributions to shareholders based on the earnings and profits (E&P) account of the distributing corporation (IRC § 316) and not on the basis of the stock capital accounts. A distribution is treated as a dividend for US federal income tax purposes to the extent of the E&P of the distributing corporation for the current year or the accumulated E&P of the distributing corporation from prior years.

An ordering rule applies at the shareholder level under which a corporate distribution is treated by a shareholder: (i) first as a dividend to the extent of the shareholder's pro rata share of the current or accumulated E&P of the distributing corporation, (ii) second as a non-taxable return of capital to the shareholder to the extent of the shareholder's tax basis in the stock, which is usually the initial cost basis of the stock or the tax basis of the stock as adjusted, substituted, or carried over from prior transactions, and (iii) third as gain from sale or exchange of the stock by the shareholder to the extent the distribution exceeds the shareholder's tax basis of the stock (IRC § 301(c)). The gain or loss is treated as short-term or long-term gain or loss depending on the length of time that the shareholder has owned the shares.

E&P is a unique US concept that measures the economic capacity of a corporation to make dividend distributions to the shareholders. E&P is computed by using taxable income as the starting point and then making certain required adjustments (IRC § 312), but It is not strictly the same as net income for US federal income tax purposes nor is it the same as retained earnings for financial accounting purposes.

For corporate law purposes (i.e. non-tax), the ability of a corporation to make a dividend distribution is governed by the corporate statutes of the US state (or the District of Columbia) where the corporation is organized. A US corporation may make distributions as a corporate law matter even in the absence of E&P since E&P is a tax concept rather than a corporate law concept. The corporate laws of US states vary from state to state, but in general, corporate distributions are permitted to be made out of the stock surplus accounts, i.e. earned surplus and often also capital surplus, but not from the stated capital account (i.e. the par value of the stock of the corporation). As noted above, the stock capital accounts are not used to determine the character of a corporate distribution for US federal income tax purposes.

A merger or acquisition (M&A) transaction can be carried out in the United States as a taxable transaction or as a tax-free reorganization. Although reorganizations are generally referred to as tax-free transactions, they are in actuality tax-deferred transactions, with the gain or loss preserved by a carryover of the tax basis of the stock or assets involved in the transaction and in general the survival or transfer of the historical tax accounts of the corporations involved in the transaction (i.e. E&P accounts, NOLs, capital losses, foreign tax credit accounts, etc.).

Transactions that involve reorganizations between US and foreign corporations in a US-inbound context, or that involve reorganizations between foreign corporations in a foreign-to-foreign context are subject to complex rules (IRC § 367(b) and extensive regulations thereunder). These rules are

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designed to prevent E&P that has been accumulated in a US controlled foreign corporation (CFC), but not yet taxed in the United States, from escaping US taxation as a result of the transaction, for example, if the foreign corporation goes out of existence in the transaction, loses it US CFC status, or a US shareholder of the CFC loses its status as such. In these situations, the E&P of the foreign corporation will either be taxed currently or transferred to another corporation that is a party to the transaction where they could be taxed by the United States at a future date.

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Transfer of Legal Seat

A foreign corporation that wishes to change its legal seat to the United States may do so under the reorganization provisions, which recognize a change in identity, form, or place of incorporation of a corporation as a type of qualified tax-free transaction, i.e. a type F reorganization (IRC § 368(a)(1)(F)).[7] As noted above, the United States determines corporate residence for US federal income tax purposes based solely on the place where the corporation is organized for corporate law purposes, so corporate immigration into the United States would require such a transaction or another type of transaction by the foreign corporation where assets are transferred into a US corporate entity.

In the context of a US-inbound transfer of its legal seat by a foreign corporation, the applicable regulations treat the transaction as a deemed transfer by the foreign corporation of its assets to a US corporation followed by an exchange by the shareholders of the foreign corporation of their stock for shares of the newly formed US corporation (Treas. Reg. 1.367(b)-2(f)). The regulations provide that it is immaterial whether the applicable domestic or foreign law treats the US corporation as a continuation of the old corporation.

The tax consequences of the change of a foreign corporation to a legal seat to the United States are similar to a merger transaction (see below), i.e. the tax basis of the assets of the foreign corporation at the time of the transfer would carry over into the US corporation, without a step-up. The E&P account and other tax accounts of the foreign corporation would also carry over to the US corporation (IRC § 381).

If the foreign corporation that changes its legal seat to the United States was a CFC with respect to the United State prior to the change, the transfer will result in a loss of US CFC status, since the new corporation is a US corporation and therefore not a CFC, and the US shareholders of the foreign corporation will be required to recognize dividend income in an amount equal to their pro rate share of the accumulated E&P of the foreign corporation that has not yet been subject to US federal income tax.

Cross-Border Legal Merger

A merger transaction between a US domestic corporation and an unrelated foreign corporation can be carried out as either a taxable purchase transaction or as a tax-free reorganization. If carried out as a tax-free merger transaction, i.e. a type A reorganization (IRC § 368(a)(1)(A)), where the assets of the foreign corporation are transferred to the US corporation and the shareholders of the foreign corporation receive stock of the US corporation in exchange for their stock in foreign corporation, the tax basis of the assets of the foreign corporation at the time of the transfer will carry over into the US corporation, without a step-up. The E&P account and other tax accounts of the foreign corporation will also carry over to the US corporation (IRC § 381).

If the US-inbound transaction involves the merger of a US-controlled foreign subsidiary into its US domestic parent corporation, the undistributed E&P of the foreign corporation (E&P) are required to be taken into income as a dividend by the US corporation. This prevents the US corporation from avoiding US tax of the undistributed earnings of the foreign subsidiary. The US parent corporation is permitted to claim a tax credit for the foreign income taxes that have been imposed on the earnings.

[7] It would also be necessary for the corporate law of the US state to which the foreign corporation wishes to transfer its legal seat to allow such a transfer in the case of a foreign corporation.

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Similar treatment applies to a US-inbound liquidation of a US-controlled foreign subsidiary into its US domestic parent corporation, i.e. the undistributed E&P of the foreign corporation are required to be taken into income as a dividend by the US corporation.

Cross-Border Share Acquisition

In the case of a qualified acquisition by a US corporation of a foreign corporation in a cross-border share -for-share acquisition, where the US corporation acquires 80% or more of the stock of foreign corporation solely in exchange for voting stock of the US corporation, the transaction will be treated as a tax-free reorganization, i.e. a type B reorganization (IRC § 368(a)(1)(B)). If no further transaction occurs to combine the two corporations, and the foreign corporation continues its existence as a subsidiary of the US corporation, a step-up in the tax basis of the assets of the foreign corporation will not result, since the assets will remain within the corporate entity of the foreign corporation. The E&P account of the foreign corporation will also remain within the foreign corporation at its pre-acquisition amount.

In the case of the acquisition by a US corporation of the stock of a foreign corporation in a purchase transaction, i.e. not a share-for-share exchange as described above, and where the US corporation acquires a controlling interest in the foreign corporation, defined at an 80% stock ownership level, the US corporation is permitted to make an election to treat the stock acquisition as an asset purchase and step-up the inside basis of the assets of the acquired corporation to be equal to the purchase price of the stock as adjusted for liabilities (IRC § 338). In this case the E&P account of the foreign corporation would not transfer to the US corporation.

Concluding Remark

The international tax regime of the United States was extensively revised by the Tax Cuts and Jobs Act of 2017. The revisions made by the TCJA reduce the ability of US multinational enterprises to accumulate foreign E&P offshore and defer such E&P from US federal income tax. The changes made by the TCJA included a transition tax that required US CFCs to repatriated their accumulated and previously untaxed E&P to the United States (IRC § 965) and a regime (the GILTI regime) that imposes US federal income tax on the annual earnings of CFCs that exceed a nominal 10% return on tangible assets (IRC § 951A).[8] The GILTI regime, together with the long-sanding US CFC regime (Subpart F), greatly reduce the ability of US CFCs to accumulate untaxed foreign earnings offshore. The TCJA also adopted a participation exemption for dividends paid by foreign corporations from foreign-source earnings (IRC § 245A).

a. If the answer to question 2 is positive, how is this step-up calculated (e.g. is a merger reserve recognized as paid-up capital for dividend withholding tax purposes)?

See above

[8] The GILTI regime (Global Intangible Low-Taxed Income) corresponds in general to the Income Inclusion Rule (IIR) of the OECD Pillar 2 initiative, but with a number of key differences.

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3. Short Summary of Findings

Although several countries included in this analysis levy tax when a company moves its residence for tax purposes to another country, in most of these cases, taxation is restricted to Corporate Income Tax on unrealized capital gains. In most cases undistributed profits are not taxed when a company emigrates from a country.

Canada, France and Switzerland do also levy dividend withholding tax on undistributed profits when a company emigrates from those countries in addition to an exit tax on unrealized capital gains. When dividends are deemed to be paid to non-resident shareholders, these countries take into account the limitations to its taxing rights under its double taxation conventions. Further, in principle, there is no possibility for deferral of the payments.

In a number of countries such as the Czech Republic, Denmark and Poland existing General Anti-avoidance Rules (GAARs) or specific anti-avoidance rules may be used to ensure that dividend withholding tax is not avoided in the case of for instance mergers. However, those anti-avoidance provisions do not constitute any independent legal basis to impose any additional taxation. In other words they do not trigger the application of additional dividend withholding tax, because the taxpayer misbehaviour.

When a company becomes a resident of a country, most states allow the company to value its assets at the fair market value for corporate income tax purposes. However, no step-up is usually given for dividend withholding tax purposes.

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Annex I – Summary of the Proposal for a Conditional Exit Tax in the Dutch Dividend Withholding Tax Act 1965

1. Introduction

On 9 October 2020, Mr Bart Snels, member of the Dutch Parliament, submitted a bill to introduce an exit tax into the Dutch Dividend Withholding Tax Act 1965. This proposal follows an earlier proposal submitted on 10 July 2020 and subsequent amendments on 18 September 2020. The purpose of the proposed exit tax is twofold:
1. To safeguard the accrued Dutch dividend withholding tax claim on the profit reserves of a company; and
2. To prevent corporate reorganisations that would result in the disappearance of this dividend withholding tax claim without a foreign dividend tax claim replacing it.

The proposed exit tax applies to situations where a company «leaves» the Netherlands through a cross-border reorganisation and the host country does not take over the profit reserves for the purposes of a withholding tax on dividends, for example because the host country does not have a withholding tax on dividends.

The proposal is based on the long-standing doctrine underlying the Dutch Dividend Withholding Tax Act 1965 according to which all profit reserves of a company from its incorporation until its liquidation must ultimately be taxed as dividend income at the level of the shareholders. According to the initiator of this new bill, the absence of an exit tax in the current Dutch Dividend Tax Act 1965 is a tax gap that urgently needs to be filled.

If adopted, the proposal will apply retroactively as of 18 September 2020, 12 noon. This means that from this date companies and their shareholders will have to take this exit tax into account when considering a cross-border reorganisation in which the accrued Dutch dividend withholding tax claim on the profit reserves is lost and is not taken over by another country.

2. Deemed dividend distribution

According to the proposal, a company «leaving» the Netherlands for a qualifying state through a cross-border reorganisation would be deemed to have distributed all its profit reserves to its shareholders for Dutch dividend withholding tax purposes.
This deemed profit distribution is triggered in the following events:

- The company transfers its seat to a qualifying state;
- In the context of a legal merger, the company transfers all of its assets and liabilities to another company in a qualifying state in exchange for the issuance of shares to its shareholders in that other company;
- In the context of a demerger/spin-off, the company transfers all or part of its assets and liabilities to another company in a qualifying State in exchange for the issuance of shares to its shareholders in that other company; and
- The majority of the shares in the company are acquired by another company in a qualifying state in exchange for shares in that other company.

The proposal defines qualifying states as states which do not have a withholding tax on dividends comparable to the Dutch dividend withholding tax. To be considered a withholding tax comparable to Dutch dividend withholding tax, the tax rate at which the dividends are taxed is, in principle, irrelevant. However, if it is a zero or near-zero rate, there is no comparable withholding tax on

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dividends. States which grant a «step-up» for the purposes of a withholding tax on dividends in respect of imported profit reserves resulting from a cross-border reorganisation, are also considered qualifying states.

The deemed dividend distribution includes all of the company's profit reserves, including the hidden reserves and goodwill, to the extent that they exceed a threshold of € 50 million. For example, if a company's profit reserves amount to € 250 million, € 200 million (€ 250 million -/- € 50 million) is deemed to have been distributed to shareholders in proportion to their profit entitlement.

An exemption shall apply to the extent that the dividend is deemed to have been paid to a company holding at least 5% of the shares and that company is also a resident of a state with which the Netherlands concluded a tax treaty. In these cases, the Netherlands will normally refrain from taxing outbound dividends at source. As a consequence, the proposed exit tax does not apply to the many regional headquarters of foreign multinationals present in the Netherlands. These regional headquarters are normally set up as a local subsidiary based in the Netherlands.

3. Tax liability

In principle, the tax liability on the deemed dividend distribution is calculated on the basis of the statutory tax rate of the Dutch dividend withholding tax rate of 15%. For example, if the deemed dividend amounts to € 200 million, the tax liability amounts to € 30 million (15% x € 200 million). The tax liability may be reduced to the extent that the dividend is deemed to have been paid to a foreign shareholder who is entitled to a (partial) reduction of the dividend tax pursuant to a tax treaty concluded with the Netherlands. For example, in a limited number of tax treaties the Netherlands has agreed on a maximum rate of 10% for portfolio shareholders.[9]

As is usually the case with withholding tax on dividend, the company plays an important role as the remitter of the tax on behalf of its shareholders. According to the proposal, the Dutch tax authorities would impose a so-called «protective tax assessment» on the company equal to the amount of tax due. The company would automatically be granted an interest-free deferral of payment of the tax. The tax debt will be recovered in the future to the extent that dividends are actually paid out after the reorganisation.

In order to reflect the fact that the recovered tax liability does not have to borne by the company, the bill provides for a right of recourse by the company against the shareholders who actually receive the dividend. Under certain circumstances, the company may be expected to link the Dutch exit tax to a class of shares. As a result, the company can pay out the dividend to its shareholders on a net basis.

It is proposed to waive the remaining tax liability in the event of liquidation of the company. The remaining tax liability will also be waived if the dividends actually distributed become subject to a withholding tax on dividends, for example in the event that a state would introduce a withholding tax on dividends.

[9] For example, see the Netherlands-United Kingdom Tax Treaty's Article 10(2)(a)(i). If immediately prior to the reorganisation 20% of the company's shareholders are portfolio shareholders resident in the United Kingdom, 20% of tax liability is calculated at the reduced 10% rate.

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4. Step-up on entry into the Netherlands

Dutch dividend withholding tax is levied on distributions from the company's worldwide profits. This is in line with the internationally accepted principle that a state has the right to tax (mainly portfolio) dividends at source regardless of where the distributed profit primarily arose.

When a company «enters» the Netherlands through a cross-border reorganisation, Dutch tax legislation currently provides for a tax exemption. On the basis of this exemption, future distributions from existing profit accumulated in the foreign period are exempt from dividend withholding tax. Technically, these so-called «imported» profit reserves are regarded as paid-up capital for Dutch dividend tax purposes («step-up»). The cross-border reorganisations covered are share-for-share mergers, legal merger and demergers. The bill extends this exemption to cases in which a company transfers its seat to the Netherlands.

According to the initiator of this new bill, the proposed exit tax creates a balanced tax system. As a result the Netherlands:

1. grants an exemption for «imported» profit reserves on entry;
2. imposes a conditional exit tax on «exported» profit reserves on departure.

5. Tax credit relief for Dutch shareholders

Shareholders resident in the Netherlands can normally offset the Dutch dividend withholding tax against the income tax or corporate income tax due. The bill maintains this tax credit. It is proposed to grant a shareholder the right to a tax credit to the extent that the company has reclaimed the Dutch exit tax from that shareholder. As noted above, the bill provides for a right of recourse for the company against the shareholders who actually receive the dividend.

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