Commission Asks France, Germany, Greece to Amend Tax Rules

The European Commission has issued reasoned opinions to France, Germany, and Greece, contending that their national tax legislation violates EU rules.

The commission announced the actions on September 24 in a release (MEMO/15/5657) that lays out infringement procedures undertaken this month. The three EU member states have two months to respond to the commission's concerns or they will be referred to the Court of Justice of the European Union.

The commission asked France to comply with procedural rules when it refunds to nonresidents tax deducted at source that was not due on dividends. In the event of a complaint, nonresidents are allowed less time to make their application than taxpayers who reside in France, the commission said.

The CJEU has found that the procedural rules of a member state must not make it impossible or excessively difficult to repay tax levied contrary to European law, the commission said.

In its request to Germany, the commission asked the government to amend legislation on the application of VAT to travel agents. The commission found that the VAT regime allows a travel agent to set a so-called VAT margin (the difference between the cost to the agent and the amount paid by the traveler, exclusive of VAT) as the taxable amount.

Under German VAT law, the VAT margin can be applied only to travel services provided to private end-users, the commission said. Travel agents are also allowed to set a single profit margin for all the travel packages sold during a tax period, the commission said.

In September 2013 the CJEU found that a similar scheme in Spain applied not only to private travelers, but to all customers, including businesses, the commission said. The Court said the travel agent should calculate the VAT margin per travel service and should not be allowed to make an overall calculation of the VAT margins in a tax period.

Finally, the commission asked Greece to amend its excise duty scheme for the alcoholic beverages *tsipouro* and *tsikoudia*. It said Greece applies a super reduced excise duty rate when the drinks are produced in bulk by vineyards and agricultural producers.

According to the commission, EU rules provide that the same excise duty rate should apply for all products made with ethyl alcohol. It said EU law clearly states that exceptions must be strictly interpreted. The commission said Greece's reduced excise duty rate for the two beverages violates EU excise duty guidelines.

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Germany

Proposed Changes to Real Estate Transfer Tax

The German Annual Tax Act 2016 (Gesetz zur Umsetzung der Protokollerklärung zum Gesetz zur Anpassung der Abgabenordnung an den Zollkodex der Union und zur Änderung weiterer steuerlicher Vorschriften), includes important amendments to the real estate transfer tax (RETT) law that will most likely be enacted by the end of the year.

Share Deal/Partnerships

For share deals involving partnerships that own real estate, RETT is triggered if, within five years, 95 percent or more of the partnership interest is directly or indirectly transferred. The draft amendments clarify that for an indirect transfer of partnership interest, there is a look-through approach if the indirect owner is a partnership itself. Partnership interest transfers at an upper-tier level count proportionally. If, however, the partnership interest is held by a corporation, an indirect transfer requires that at least 95 percent of the shares in the corporation be transferred. The legislature now intends to codify this long-established distinction, which recently became doubtful following decisions by the Federal Tax Court.

Unwinding of Real Estate Funds

Unwinding open-end real estate funds triggers RETT twice. RETT is first caused by the transfer of the real estate from the funds to the depository, as provided for by German fund law, and second by the direct or indirect sale of the real estate by the depository to the ultimate buyers. A draft act provides for RETT relief regarding the transfer of the real estate to the depository — this transfer is not avoidable, because the depository has the legal obligation to unwind the funds' assets. The RETT relief will be revoked retroactively if the depository has not sold the real estate within three years to the ultimate buyers, generally with RETT triggered by this resale. It's not clear whether this proposal will be part of the 2016 act or if it will be introduced as part of another draft tax bill.

RETT Base for Share Deals

The Federal Constitutional Court (Bundesverfassungsgericht) held on June 23 that the provisions determining the RETT base in share deals are unconstitutional and cease to apply as from January 1, 2009. The tax base is 12.5 times the annual rent (for vacant spaces — the usual rent), reduced by certain amounts, depending on the age of the buildings. The actual RETT charge is calculated by applying the RETT rate with the rates ranging from 3.5 to 6.5 percent.

In 2007 the Federal Constitutional Court held the special tax base mentioned above to be unconstitutional for purposes of inheritance tax law because it does not have any connection to the assets' current market value. Under these rules, the tax base is on average considerably below the fair market value, often below 50 percent of the property's fair market value. For purposes of inheritance tax law, the valuation methods were changed accordingly following the 2007 decision of the Federal Constitutional Court, even though — for RETT purposes — the old rules remained unchanged. Thus, the decision issued by the Federal Constitutional Court on June 23 was not surprising.

The legislature wants to act quickly and introduced a draft law in the Annual Tax Act 2016. The draft provides for a new RETT base applicable retroactively from January 1, 2009. The new RETT base is to be determined by the revised valuation methods provided for inheritance tax purposes. These methods provide for a more precise determination to finally get results that are closer to the actual net asset value.

The new rules are to be enacted retroactively from January 1, 2009. Transactions executed before January 1, 2009, will not be affected. Transactions executed since January 1, 2009, will not be subject to the new rules, provided that a respective RETT assessment notice based on the old valuation methods has already been issued. However, all transactions since 2009 that have not been assessed may retroactively be subject to the new rules.

♦ *Hardy Fischer, partner, P+P Pöllath + Partners in Berlin*

India

India's 'Black Money' Problem Greater Internally, GFI Speakers Say

Indian Prime Minister Narendra Modi has made political capital out of his promise to bring ''black money'' back from overseas, but untaxed revenue within the country has been a greater factor in the increase in illicit financial flows over the past 15 years, said speakers at the Global Financial Integrity (GFI) conference in Washington on September 22.

Over $682 billion illicitly left India between 1948 and 2012, according to research just released by GFI in its first book, *Illicit Financial Flows: The Most Damaging Economic Condition Facing the Developing World*. That illicit outflow amounts to 1.4 percent of India's GDP.

According to the GFI speakers, statistical data are harder to quantify for the untaxed internal economy. Irfan Nooruddin, an associate professor at Georgetown University, said that although the amount of outflows avoiding tax is very high, ''most illicit black money stays in the economy.'' Dev Kar, chief economist with GFI and previously a senior economist with the IMF, said the untaxed part of the internal economy accounts for about half of Indian GDP.

Nooruddin said transfers of untaxed funds are driven by macroeconomic uncertainty, which pushes Indians to hedge against the future by getting money out of the country. He said that September 30 is an important deadline for disclosing unreported overseas income because after that, draconian penalties will be imposed. Those with undeclared foreign income or assets may file a disclosure by the end of the month and pay tax at a flat rate of 30 percent, in addition to an equal amount as a penalty. (Prior coverage: *Tax Notes Int'l*, Mar. 30, 2015, p. 1151.)

In March, India's Finance Ministry called for a flat tax on undisclosed foreign income and assets and harsher penalties for noncompliance, including three to 10 years in jail for willful attempts at tax evasion. Taxpayers who fail to disclose foreign income and assets, as well as financial interest in any entity, will pay the 30 percent tax, plus a penalty of three times the amount of tax due. The Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015, became law on May 26. (Prior coverage: *Tax Notes Int'l*, May 18, 2015, p. 591.)

Illicit Flows Within and Without

When India reformed its economy in 1991 and moved away from a planned economy with capital controls, illicit financial flows increased dramatically, both within India and leaving the country, according to Kar.

The new law makes good on Modi's promise to address tax evasion, Kar said, but he noted that internal economic distortions caused by internal illicit financial flows are more significant than external flows, although less politically important.

''Estimates of illicit funds went from 8 percent of GDP after independence in 1949 to 50 percent of a much larger economy now,'' Kar said. With only 3 percent of the Indian labor force paying taxes, there is a real sense of ''tax fatigue'' that has led the growing middle class to seek banking overseas, he said.

''Policies in the 1990s just made it easier for people to send money abroad,'' Kar said. ''Reform created the incentives and the ability'' to transfer funds illicitly and keep them out of the tax man's hands, Nooruddin added.

Under-invoicing on goods brought into India also distorts economic activity and tax collection, the speakers said. Illicit inflows amount to about 1.8 percent of GDP, according to the GFI statistics, for a cumulative total of $842.9 billion between 1948 and 2012.

The growth of the Indian economy has created a larger middle class, many of whom are intent on keeping their money away from the government, Nooruddin said. The sheer size of the Indian population needs