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Tax aspects of corporate redomiciliations

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Tax aspects of corporate redomiciliations

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Roadmap for Discussion

Tax aspects of corporate redomiciliations

I. Introduction: Definition of corporate redomiciliations

II. Current trends motivating corporate redomiciliations (tax and non-tax factors)

III. Case Study:

    A. Inbound redomiciliation of a holding company

    B. Outbound redomiciliation of an IP structure

IV. Conclusion: What are the main tax considerations to be addressed upon a corporate redomiciliation?

I. Introduction – Definition of corporate redomiciliations

Legal definition of corporate redomiciliation:

- Conversion of the company into a different legal form due to a change of jurisdiction (without losing legal personality)
- With or without transfer of the human and material means

Possibility notably offered in the EU according to the Mobility Directive

Alternative structuring:

- Cross-border merger (upstream, downstream and reverse - private company merging with a publicly listed company)
- Transfer of assets to a newly incorporated company in the new jurisdiction and liquidation of the previous company
- Vs. transfer of effective management enables *tax* but not *corporate* redomiciliation

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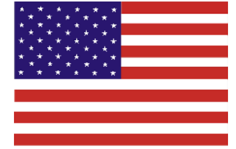
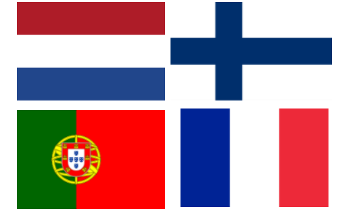
II. Trends motivating corporate redomiciliations – United States



- Taxation
  - Anti-inversion rules intended to discourage movement of US businesses abroad.
  - Lower US corporate income tax rate (21%) and other incentives have reportedly helped to retain US companies and to (re-)attract non-US companies to move to the US. (Ex. AbbVie, Mylan, Broadcom)
- Regulatory environment and political landscape
- Financial - access to US capital markets, financing, exit or IPO
- Strategic opportunities (customers, operations, etc.)

II. Trends motivating corporate redomiciliations – Others



In the Netherlands:

- Outbound redomiciliations (notably to Spain) mainly driven by wish to access new markets and to bring the companies closer to the UBO.
- Other outbound redomiciliations were tax driven. Redomicilation is not a taxable event for Dutch withholding tax purposes.

In Finland:

- Only one known (outbound) redomiciliation since implementation of the EU Mobility Directive.
- Generally, a company may wish to transfer its domicile to another country, for instance, to be closer to its major investors or its management or in case of a change of the company's listing venue.

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III. Case Study: Inbound versus Outbound redomiciliations

A. Inbound redomiciliation of a holding company

Tax and non-tax challenges in the new jurisdiction

B. Outbound redomiciliation of an IP structure

Tax considerations related to the exit from the country

III. Case Study

A. Inbound redomiciliation of a holding company: tax and non-tax challenges in the new jurisdiction

Netherlands

- As a consequence of the inbound redomicilation of a company to the Netherlands, such company will become liable to Dutch CIT. The Netherlands offers a **step-up mechanism** that ensures assets and liabilities are valued at the **FMV upon entry**, preventing tax on gains that occurred before the redomiciliation. The Dutch tax system does **not recognize foreign losses** incurred prior to the relocation. The holding period of the assets and shares continues.
- **Shareholders** that become liable to pay Dutch (income) tax on income from the shares in that company **also get a step-up** to the FMV of those shares.
- The redomiciled company keeps the legal personality – if the departing jurisdiction so consents.
- Tax planning of the redomiciliation that is often done is to do i) a **prior revaluation of the assets** before the transfer and <u>**possibly**</u> **ii) a dividend distribution and capital increase** in order to also get a step up for withholding tax purposes.
- **Transfer pricing agreements** can be sought with the NLTA to agree on the opening balance.

III. Case Study

A. Inbound redomiciliation of a holding company: tax and non-tax challenges in the new jurisdiction

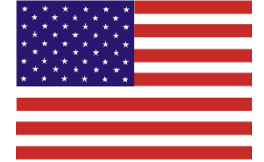
Finland

In Finland, **no changes in tax laws** were made in connection with the implementation of redomiciliation under the EU Mobility Directive. The Finnish Tax Administration ("FTA") is yet to publish guidelines on redomiciliation under the new rules.

- Under corporate law, change of domicile possible within the EEA only. Legal personality remains regardless of change of corporate form and domicile.
- Under existing rules on the inbound transfer of assets, tax residence or PE, **tax step-up of assets** held by the company recognized to the exit tax value in the source country. Expected to apply also in case of inbound redomiciliation under the EU Mobility Directive.
- No Finnish capital gains taxation or other direct effect for shareholders (at least where shareholding remains the same)?
- No transfer tax for shareholders or the company (in case assets include real estate or securities)?
- Carried-forward tax losses: rules on final losses?
- **Advance ruling to confirm tax treatment highly recommended.**

III. Case Study

A. Inbound redomiciliation of a holding company: tax and non-tax challenges in the new jurisdiction

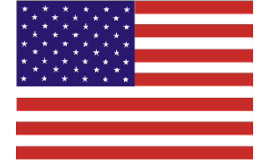


United States (1/2)

- Company that redomiciles to the United States generally becomes subject to US CIT, though the redomiciliation itself generally poses fewer US tax challenges.
- Availability of tax step-up depends on form of redomiciliation transaction:
    - Tax-free redomiciliation generally would not give rise to tax step-up at corporate or shareholder level. Inbound transactions more likely to be tax-free. Tax attributes, such as holding periods, would generally carry over.
    - Taxable redomiciliation generally would result in tax step-up at shareholder or corporate level, depending on nature of transaction(s). Tax attributes, such as holding periods, would generally "restart."
- Preservation of loss carryforwards may depend on nature of transaction(s):
    - Tax-free transactions generally preserve loss carryforwards.
    - Taxable transactions generally would not preserve loss carryforwards.
    - The utility of loss carryforwards may be subject to limitations if there are meaningful ownership shifts.

III. Case Study

A. Inbound redomiciliation of a holding company: tax and non-tax challenges in the new jurisdiction



United States (2/2)

- US treatment of “exit tax” in departing country
  - Potential mismatch between US and departing jurisdiction (e.g., tax basis of assets or stock).
  - Foreign tax credit for exit tax may be limited, subject to possible DTT relief.
- Legal personality may continue depending on form of transaction and jurisdictions involved.
  - Ex. Delaware law permits redomiciliations of non-US corporations by filing certificates of domestication and incorporation, with legal personality continuing.
- Tax planning
  - Generally, taxpayers do not seek advance rulings on a transaction due to time and expense—though advance transfer pricing agreements are common.
- Other nontax issues: beneficial owner reporting, regulatory compliance
- New regulations provide relief for certain IP repatriation (addressed below)

III. Case Study

B. Outbound redomiciliation of an IP structure: tax considerations related to the exit from the country

Netherlands

- An outbound redomiciliation may trigger **exit tax** (CIT) on the difference between the FMV of the assets and their tax book value. This may be different to the extent a PE (CIT) is maintained in the Netherlands to which (certain) assets are attributed. The exit tax applies to assets (and liabilities) that leave the Netherlands.
- The legal personality continues (no implied liquidation).
- The outbound redomiciliation may imply a **(deemed) alienation of the shares** in such company by its (non-Dutch) **shareholders**. Capital gain taxation often attributed to resident jurisdiction of shareholders under tax treaties.
- The redomiciliation **does not trigger a withholding tax event** → note a law is still pending that aims to introduce a withholding exit tax for conversions, mergers, etc.
- Dutch entities that are incorporated under the laws of the Netherlands are **always deemed to be resident** for CIT and withholding tax purposes in the Netherlands. A company that is converted into a non-Dutch legal entity remains to be incorporated under the laws of the Netherlands (view of NLTA). As such the redomiciled company needs to continue filing Dutch CIT returns.

III. Case Study

B. Outbound redomiciliation of an IP structure: tax considerations related to the exit from the country

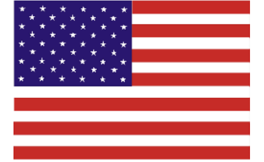
Finland

As mentioned, no changes in tax laws were made in connection with the implementation of the EU Mobility Directive. In tax practice, the Finnish Tax Administration has found that existing rules on redomiciliation of SE / SCE may effectively be applied to outbound redomiciliation. The FTA is however yet to publish guidelines.

- Under corporate law, change of domicile possible within the EEA only. Legal personality remains regardless of change of corporate form and domicile.
- **Exit taxation applies** to the extent assets do not remain with a PE in Finland.
- Continuity to the extent a PE remains in Finland: no exit tax or step up, tax losses can remain.
- **No Finnish capital gains taxation or other direct effect for shareholders**, at least where shareholding remains the same.
- No transfer tax for the shareholders or the company. Going forward, shares of the redomiciled company are considered foreign shares for transfer tax purposes.
- **Advance ruling to confirm tax treatment highly recommended.**

III. Case Study

B. Outbound redomiciliation of an IP structure: tax considerations related to the exit from the country



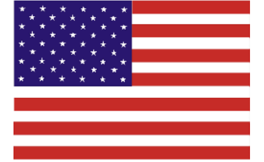
United States (1/2)

IRC Section 7874 applies if (1) a Foreign Acquiring Corporation directly or indirectly acquires “substantially” all of the assets of a US corporation; (2) at least 60% of the stock of the Foreign Acquiring Corporation is held by former shareholders of US corporation by reason of their ownership of the US corporation; and (3) after the acquisition, the expanded affiliated group does not have “substantial business activities” in the country where the Foreign Acquiring Corporation is organized (i.e., at least 25% of employees, payroll, assets, and income).

- If ownership percentage in (2) is 60% but less than 80%, then Foreign Acquiring Corporation is a “surrogate foreign corporation” → expatriated US entity and US affiliates taxed on “inversion gain” for 10 years post-transaction, which income cannot be offset by tax attributes. Other adverse tax results for 60% inversion include higher US tax rates on dividends to US shareholders, expanded BEAT scope, transition tax recapture and foreign tax credits if inversion within 10 years of 2017 TCJA, 20% excise tax on insiders’ equity-based compensation).
    - If US entity’s shareholders receive more than 50% of stock of Foreign Acquiring Corporation, those shareholders could be taxable on gain (but not loss) under IRC Section 367.
- If ownership percentage in (2) is 80% or more, then Foreign Acquiring Corporation is treated as a US corporation for all tax purposes → essentially defeats redomiciliation from a US tax perspective and may have ancillary adverse results (e.g., other non-US subs of Foreign Acquiring Corporation become CFCs).
    - Ex. In 2016, Cardtronics group redomiciled to UK parent; although 80% ownership threshold met, substantial business activities in the UK prevented adverse outcome.
- Various anti-abuse rules apply to limit avoidance of the rules (e.g., via multiple acquisitions, non-ordinary course distributions, public offering, cash-box).

III. Case Study

B. Outbound redomiciliation of an IP structure: tax considerations related to the exit from the country



United States (2/2)

IRC Section 367(a) generally applies to deny tax-free treatment for otherwise qualifying transactions (e.g., reorganizations, mergers).

- US corporation that transfers assets to non-US corporation generally must recognize built-in gain on the transfer. US shareholders generally recognize gain (but not loss) on stock-for-stock transfer – subject to exceptions for certain small shareholders or larger shareholders entering a gain recognition agreement with the IRS.

IRC Section 367(d) treats US entity making outbound transfer of IP in nonrecognition exchange as having a deemed sale for deemed annual royalties for transferor over IP's useful life (or until disposition).

- On October 9, 2024, US authorities issued regulations to cover **"repatriations" of IP**, which would terminate deemed royalty inclusions upon transfer or re-transfer to "qualified domestic persons" if certain reporting requirements are met.
    - Rules not applicable retroactively
    - Transfers to US partnerships (or partnerships with US partners) not in scope
    - Uncertainty remains concerning adjusted basis of repatriated IP
    - No coordination rules to address other 367(d) transfers among related non-US corporations

IV. Conclusion: Main tax considerations

INBOUND redomiciliation	Finland	USA	Netherlands
Tax step-up	Yes, provided exit taxation in source country	Generally, no step-up if transaction is nontaxable	Step-up for CIT purposes No step-up for WHT purposes
Shareholders situation	Potentially no direct effect?	Non-US shareholders subject to US WHT on dividends; generally, no capital gains tax unless corporation is US real estate rich	Shareholders may become subject to Dutch (income) tax if they hold a substantial (>5%) interest in a Dutch company + Step-up
Legal personality	Continues under corporate law	Legal personality may continue, depending on applicable state law (e.g., DE)	Legal personality continues
Tax planning	May be necessary	May be necessary to qualify for nontaxable treatment	Tax planning prior to redomiciliation may be necessary (revaluation of assets)
Advance tax ruling	Advance ruling highly recommended	Rarely sought due to time and costs	Advance tax ruling may be sought on valuation of assets

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IV. Conclusion: Main tax considerations

OUTBOUND redomiciliation	Finland	USA	Netherlands
Exit tax	Yes	Yes, if inversion with continued ownership of at least 60% but <80%. Annual deemed royalties for certain outbound IP transfers	CIT exit tax applies to assets that leave the Netherlands
Limitation of Exit tax	Tax practice: to the extent assets remain with a PE in Finland	N/A	To the extent PE remains, no exit tax is triggered
Legal personality	Continues under corporate law	Legal personality continues, subject to applicable foreign law	Legal personality continues, no liquidation is implied
Shareholders situation	Tax practice: potentially no direct effect	Gain may be triggered for US shareholders (due to deemed sale of stock) depending on transaction structure	Redomiciliation may trigger (deemed) alienation of the shares for the shareholder
Other tax implications (trailing tax, …)	Advance ruling highly recommended	If inversion with continued ownership of at least 80%, “foreign acquirer” may be taxed as US corporation. Annual deemed royalties terminate for certain IP repatriations	Redomiciled company may need to continue to file CIT returns

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Some insights for France

INBOUND redom.	France
Tax step-up	Yes as a principle (with some uncertainties in the absence of exit taxation in source country)
Shareholders situation	No direct effect (but future distributions and capital gains may become taxable in France)
Legal personality	Legal personality may continue under French corporate law
Tax planning	Revaluation of assets and distributions prior to the inbound transfer may be relevant (except if substance issues exist)
Advance tax ruling	Rarely applied

OUTBOUND redom.	France
Exit tax	Yes on all profits + latent and deferred capital gains (for EU transfers, payment can be spread over 4 years)
Limitation of Exit tax	For EU transfers (+ Iceland and Norway), if a PE is maintained in France, no exit tax is triggered
Legal personality	Legal personality continues subject to applicable foreign law
Shareholders situation	For EU transfers: no taxation For non-EU transfers: taxation of a deemed distribution
Other tax implications (trailing tax, …)	For pure holding companies, EU cross-border mergers can be preferred as no exit tax is due in France

Questions & Answers

What about your jurisdiction?

I. How do corporate redomiciliations usually take place?

II. What current trends motivating corporate redomiciliations (tax and non-tax factors) do you observe?

III. Case Study:

   A. Inbound redomiciliation of a holding company – what would be different in your jurisdiction?

   B. Outbound redomiciliation of an IP structure – what would be different in your jurisdiction?

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