



Strategic Regions Tax Newsletter

Deloitte Tohmatsu Tax Co.

Vol.40 April 2014

Netherlands

Supreme Court once again decided on compartmentalization in the participation exemption

No mandatory compartmentalization is to take place in case of a change of law governing the participation exemption, the Dutch Supreme Court decided once more. This decision confirms the judgment of 14 June 2013.

Under the participation exemption regime, a private limited liability company ("BV") – or a public limited liability company ("NV") – generally does not pay corporate income tax on the income from an interest of at least 5% of the shares in another joint stock company. Both the dividend received and the gain realized on sale of the shares are tax-exempt and regular book losses are non-deductible. In the past, the court decided on the question whether the entire realized capital gain should be exempt on sale of a participation if part of this profit can be allocated to a period in which the participation exemption was not applicable. This concerned situations in which a change of applicability had taken place. At the time, the Supreme Court decided that the gain should be compartmentalized: the part of the profit relating to the period in which the participation exemption was not applicable should be taxed. This case law only concerned situations where the participation exemption was not applicable in a

certain period due to a change of facts (fact compartmentalization): e.g., because the parent company first had an interest of 4% and then purchased another 1% of the shares. Case law shows that compartmentalization of the gains and book losses is obliged in all cases where a change of applicability occurs following a change of facts. It was unclear, however, whether this would also be the case for a change of applicability due to a change of law (rule compartmentalization).

(1) Similar participation

Before 2007, the participation exemption could apply to interests of less than 5% if it concerned a so called similar participation. As of 2007 the participation exemption was amended drastically. One of the changes implied cancellation of the concept of similar participation. Transitional provisions were implemented for then existing similar participations, as a result of which the participation exemption remained applicable up to and including 2009. But at the time, the government knowingly decided not to introduce a general transitional measure for - other - taxpayers that faced a change of applicability following an amendment of the law. The parliamentary treatment shows that the Supreme

Court was assumed to also prescribe rule compartmentalization in addition to fact compartmentalization.

(2) Judgment

On 14 June 2013, however, the Supreme Court decided that the participation exemption does not demand rule compartmentalization. Generally, the Supreme Court believes that following a change of applicability due to an amendment of the law, the gain realized on sale of an interest is to be taxed in accordance with the rule that applied at the time the gain was realized. In the present judgment the Supreme Court confirms this judgment. Furthermore, the present judgment shows that there is no obligation to write down an exempt participation.

(3) Change of law

The government was unhappy with the Supreme Court's interpretation of rule compartmentalization and submitted a bill last year. This bill is currently being treated in the House of Representatives. According to the proposed regulation, rule compartmentalization must be applied mandatorily with retroactive force, both for gains and for dividends. The circumstances will determine how this will work out for the companies involved and if clear, we will inform you accordingly.

Newsletter Archives

To see past newsletters, please visit our website.

www.tohmatsu.com/tax/nl/eu

Contacts

Deloitte Tohmatsu Tax Co.

HQ - Tokyo Office

Shin-Tokyo Building 5F, 3-3-1, Marunouchi, Chiyoda-ku, Tokyo 100-8305, Japan

TEL : +81-3-6213-3800

email: tax.cs@tohmatsu.co.jp

URL : www.deloitte.com/jp

All of the contents of these materials are copyrighted by Deloitte Touche Tohmatsu Limited, its member firms, or their related entities including, but not limited to, Deloitte Tohmatsu Tax Co. (collectively, the "Deloitte Network") and may not be reprinted, duplicated, etc., without the prior written permission of the Deloitte Network under relevant copyright laws.

These materials describe only our general and current observations about a sample case in accordance with relevant tax laws and other effective authorities, and none of Deloitte Network is, by means of this publication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. The opinions expressed in the materials represent the personal views of individual presenters and do not represent the official views of Deloitte Network. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this publication.

Deloitte Touche Tohmatsu (Japan Group) is the name of the group consisting of member firms in Japan of Deloitte Touche Tohmatsu Limited (DTTL), a UK private company limited by guarantee, and Deloitte Touche Tohmatsu (Japan Group) provides services in Japan through Deloitte Touche Tohmatsu LLC, Deloitte Tohmatsu Consulting Co., Ltd., Deloitte Tohmatsu Financial Advisory Co., Ltd., Deloitte Tohmatsu Tax Co., and all of their respective subsidiaries and affiliates. Deloitte Touche Tohmatsu (Japan Group) is among the nation's leading professional services firms and each entity in Deloitte Touche Tohmatsu (Japan Group) provides services in accordance with applicable laws and regulations. The services include audit, tax, consulting, and financial advisory services which are delivered to many clients including multi-national enterprises and major Japanese business entities through nearly 7,300 professionals in almost 40 cities of Japan. For more information, please visit Deloitte Touche Tohmatsu (Japan Group)'s website at www.deloitte.com/jp.

Deloitte provides audit, tax, consulting, and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries and territories, Deloitte brings world-class capabilities and high-quality service to clients, delivering the insights they need to address their most complex business challenges. Deloitte's more than 200,000 professionals are committed to becoming the standard of excellence.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see www.deloitte.com/about for a more detailed description of DTTL and its member firms.