MARIA NELSON

Utflyttning av aktiebolag
– en analys i ljuset av den internationella skatterätten och EU-rätten

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UTFLYTTNING AV AKTIEBOLAG

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MercurIUS Förlags AB
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Maria Nelson
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7. English summary

The purpose of this study was to analyse the migration of limited liability companies (hereinafter "companies") in the light of international tax law and EU law. From *Segers*, *Daily Mail* and *Centros*, it follows that a recipient state has to respect the law of the state of origin. Due to the definition of the persons enjoying the freedom under article 48 EC, the law of the state of origin is decisive for the freedom of establishment of a company in this respect. Another Member State than that where the company was formed is obliged to recognise the legal personality of the company as long as its legal personality is maintained under the law according to which it was formed. Thus, no change of nationality shall occur in the recipient state. As little as natural persons have a Treaty right to change their nationality are companies required to change theirs. Instead the business conducted by the company in this other Member State falls under the application scope of secondary establishments. An earlier study with those conclusions has served as a starting point for this one.

This study deals only with direct taxes. The very meaning of migration of companies has been analysed from an EU-law perspective. The study focuses on those areas where the state of law is unclear. The analysis has been made consecutively based on the argumentation made therein. Below, only isolated arguments and, additionally, some results of the analysis shall be recalled. It is not possible to give a complete account of the reasoning, as this would require reiterated argumentation that would necessarily extend over several pages.

Almost all Swedish tax treaties with other OECD states currently in force contain a clause that is equivalent to Article 4(1) of the OECD Model Tax Convention. In order to enjoy the tax treaty benefits a company

must be classified as resident within the meaning of Articles 1 and 4(1). Different interpretations of the said Articles have been analysed. The examination has focused on the relationship between the connecting factors and the other conditions a person must fulfil in order to qualify as a resident.

Although there appears to be unanimity among scholars that the connecting factors refer to them as applied in national law, there is no consensus as to whether all connecting factors used in national law are connecting factors within the meaning of the OECD Model. This disunity reflects to some extent the implications of applying residence and nationality to companies. The Swedish view, however, is that there is a requirement of unlimited liability to pay tax which a person has to fulfil in order to qualify as resident. The second sentence of Article 4(1) is thereby interpreted *e contrario*. There is, however, no support for such a conclusion. Instead, the development of the OECD Model and its Commentary shows that the very same tax liability was intended both before and after the addition of the second sentence to Article 4(1). The fact that unlimited tax liability is often a consequence of residence according to national law does not imply that the OECD Model requires unlimited tax liability. If the assessment of whether a person should be considered a resident in one of the Contracting States is made dependent on whether that person is unlimited liable to pay tax, then companies formed in accordance with the law of a state applying the territoriality principle cannot be considered residents. However, regardless of whether the tax liability is considered to be the most comprehensive form or unlimited liability, this is not a problem for Swedish companies since they all are unlimited liable to pay tax. Hence, the territoriality principle and matters relating thereto have not been treated in more detail here.

Article 4(1) could be read as only stipulating that a person shall be liable to tax by reason of residence or an equivalent connecting criterion in order to satisfy the requirement of tax liability enshrined in the Article. The connecting criterion used in Swedish law, registration, is not, however, mentioned. Here, therefore, the meaning of the connecting criterion "domicile" has been discussed, followed by, in particular, the meaning of "any other criterion of a similar nature". It is not clear whether "similar nature" means that a connecting factor not mentioned must serve the same purpose as the other connecting factors, or whether its content must be the same as theirs.

7. English summary

While some authors presuppose that formal connecting factors giving rise to unlimited tax liability are covered by Article 4(1), leading German authors in the field of international tax law take a different view. According to them, the connecting factor "criterion of a similar nature" does not entail a general clause embracing all national connecting factors causing tax liability. A connecting factor – even one that causes unlimited liability to tax – cannot be considered a connecting factor in the sense of the OECD Model unless it relates to a place.

Against this prevailing view, it could be held that the aim of the tax treaties is to avoid double taxation. An historical interpretation of the OECD Model does not, however, lead to the conclusion that registration and similar criteria are connecting factors within the meaning of Article 4(1). Moreover, the connecting factor "registration" and its counterparts can be equated with citizenship. In addition, the ordinary meaning of residence also indicates physical presence at a certain place. Thus, there must be an *in casu* assessment of whether a national connecting factor such as incorporation, for instance, is sufficiently place related to be a connecting factor leading to residence under the Model Tax Convention.

The Swedish connecting factor may be compared with that which is applied to US companies. The US counterpart has been considered to be essentially different from the connecting factors used in the OECD Model. Since the US does not base tax upon residence, the US treaties have added another connecting factor, namely the place of incorporation. In its tax treaties, however, Sweden does not add any connecting factors to those of the OECD Model.

In order to give the examination a wide impact, the focus of this study, as far as tax treaty law is concerned, has been on the OECD Model. Consequently, the intentions of parties upon signing different tax treaties have not been taken into further consideration. Having said this, it must be pointed out that from a German perspective the Swedish-German tax treaty has been interpreted to contain only place related connecting factors. The intention of Sweden is, of course, that Swedish companies shall be considered residents according to Article 4(1), although for the most part only the OECD connecting factors are used in Swedish tax treaties. *De lege ferenda* it is therefore submitted that Sweden should add to the treaties that Swedish companies shall be considered resident persons. It is noteworthy that earlier Swedish tax treaties have included deemed residence and the

like. Vogel et al. even depicts the difference between OECD and US tax treaties as "fundamental".

Once dual residence has arisen, it shall be resolved under Article 4(3) by applying the place of effective management criterion ("POEM"). POEM is an ambiguous expression that was first clarified in the Commentary on the 2000 Model. The meaning of POEM has been dealt with thoroughly above. Thereby the various proposals suggested for how to determine the POEM have been analysed insofar as they have been deemed to still be of interest. It is unclear to what extent in these documents guidance on the meaning of POEM is considered to be obtained from national law, but, clearly, guidance therein is derived from national law. From the literature it is also apparent that some influence from national law is unavoidable. In this study, possible implications of Article 3(2) for the application of the POEM-criterion have been dealt with. In doing so, the Swedish so-called Luxembourg clause has been used as an example whereby an application of POEM criterion lex fori clearly does not fulfil the purpose of avoiding double taxation. It is held that the POEM shall be construed independently. The difficulties of solving the matter of dual residence by using national law are also evident in cases of dual residence caused by the management criteria as applied in the UK and in Germany. The new wording of the explanation of the meaning of POEM in the 2008 OECD Model, however, makes it even more unspecific than in the 2000 version. Nevertheless, it is still clear that a company can only have one single POEM at any given moment.

As far as residence is concerned, the 2008 version of the Model Tax Convention provides an alteration even in other regards. From the interpretation that a company residence under national law is not affected by the fact that it has a new residence state, it follows that a company may be classified as a resident according to different tax treaties applied at the same time. Given that national law does not provide special rules in those cases where a company has become a resident of another state according to Article 4(3), the company still, according to national law, satisfies the requirements of Article 4(1). It could be argued that it follows from the wording of Articles 1 and 4 that the determination of fiscal residence under a tax treaty does not extend beyond the application of the tax treaty itself. According to the new Commentary, however, whether or not a person, according to a tax treaty, has become resident of another state has impact on the classification of that person as a resident. The reason presented hereto is that the person

will not be subjected to the most comprehensive taxation, since the person is considered resident in another state according to a tax treaty. This interpretation provided in the 2008 Commentary is not entirely new, but it has been met with criticism. There seems, however, to be some support for the interpretation made in the 2008 Model in Dutch case law. It is of interest to point out that Article 4(1) is thereby considered to contain a requirement of unlimited tax liability. Since the starting point is that an unlimited tax liability has been restricted by the application of a tax treaty, the reasoning illustrates the importance of making a distinction between taxation, which de facto has been limited to source taxation, and the territoriality principle. If the tax liability requirement in Article 4(1) is defined as a requirement of the most comprehensive taxation according to the national law in question, the new interpretation will not imply that a company formed in accordance with the law in a state applying the territoriality principle does not qualify as a person within the meaning of the OECD Model.

After the analysis of Article 4(1) and 4(3), the study focused on exit taxation of Swedish companies. The relationship between exit taxation and tax treaties is not clear. Exit taxes are not further dealt with in the OECD Model. Here, possible parallels have been drawn to the Commentary on, for example, Article 7 upon taxing asset transfers from permanent establishments to a parent company abroad as well as the taxation of capital gains according to Article 13. Exit taxation has also been discussed in light of the Commentary on the allocation of the powers to tax during the year of the change of residence of a natural person.

Scholars have dealt with the issue of whether exit taxation of natural persons is consistent with international tax law. The starting point here is often that the unlimited tax liability is discontinued in the former resident state upon emigration, and that the natural person becomes unlimited liable to pay tax in the new state of residence. Such arguments may also be used when discussing the compatibility of exit taxation of companies with international tax law, even when they remain unlimited liable to tax subsequent to emigration. The reason for this is that the tax claims that can be upheld by, the state of origin, as a result of the application of tax treaties can be compared to source taxation, i.e. it can be held that it is similar to natural persons' limited liability to tax after emigration.

The Swedish withdrawal taxation has undergone numerous changes, especially – as far as this study is concerned – during the latter part of the

1990s. When changing residence, no taxation is due according to what has here been referred to as the general withdrawal rule. Whether the tax treaties apply to another withdrawal rule, which was introduced in 1995 following Sweden's accession to the EU, depends not only on matters of general concern, such as whether exit tax is to be considered taxation of an income and whether there were similar taxes at the time the treaty at issue was signed (cf. Article 2). It also depends on the construction of this rule, hereinafter referred to as the exit tax rule. According to the exit tax rule, it is considered a withdrawal that income from business operations shall no longer be taxed in Sweden. The meaning of the exit rule has here, in short, been held to be that a company shall be exit taxed for assets which Sweden loses the right to tax due to the application of a tax treaty. In connection to the exit tax rule, which was in fact introduced due to an adjustment in the Swedish Company Act to make the latter compatible with EC law, a requirement of immediate reversing of deferral funds was also designed. The analysis shows that the only situation in which the exit tax rule was intended not to apply is in fact the only situation in which it may apply.

The time of the levy of the Swedish exit taxes coincides, at the very earliest, with the moment at which the company has a new state of residence. In order for the former resident state to have the right to tax an emigrated person, special rules are required.

Several reasons have been presented for why the Swedish exit tax rule is contrary to international tax law. Yet it is doubtful whether exit taxes, as such, should be classified as international juridical double taxation. One reason hereto is the time period. Double taxation normally occurs at the earliest when the new state of residence taxes the company for what it has been exit taxed for in its former state of residence. This notwithstanding, exit taxation may be considered to be inconsistent with the objective of the tax treaties since one and the same value increase will normally be taxed twice, and exit taxes – other than the Swedish exit tax on companies – undermine the objective of the tax treaties in the very last second before they become applicable. The relevant question is thereby when the protective effect of a tax treaty actually occurs.

Above, the first ever examination of the exit tax rule has been discussed. Following its interpretation by the National Board for Advanced Tax Rulings in order to make it compatible with EC law, international juridical double taxation, even under a strict interpretation of the expression, would

have occurred since the taxation would be triggered when the assets in a foreign state were sold.

As far as the requirement of immediate reversal of deferral funds is considered, it is contrary to EU Law, regardless of which assessment of the meaning of international tax law is adhered to. If one regards the meaning of international tax law to be that already realized income may be taxed after emigration, a requirement of immediate reversal must be regarded as disproportionate. If one interprets international tax law to mean that they cannot be taxed by the state of emigration after the company's emigration, Sweden has not, from an EU perspective, upheld the coherence of its tax system at an individual level.

However, according to a new regulation, introduced since the the Swedish exit tax rules were set aside, the ordinary rule for reversal of deferral funds shall be applied to companies emigrating within the EEA. However, deficits shall not be considered. Thus, emigrating and non-emigrating companies are not put in the same position.

According to the new regulation, companies migrating within the EES have the possibility to postpone the payment of the withdrawal tax. Thus, the question arises whether the postponed payment of tax makes the exit tax regime compatible with EC law. The conclusion drawn above is that it does not. For instance the postpone taxation is argued to be compatible with EC law since it would be a result of the parallel exercise by two Member States of their fiscal sovereignty. It is however thereby the Swedish exit tax rule that is the hindrance to the freedom of establishment.

The application scope of the advanced tax ruling on exit tax has been discussed. Above it has been concluded that a comparison between the treatment of national establishments and foreign establishments was the basis for the rejection of the Swedish exit tax rule. The assessment made in the ruling could, however, be said to imply that an emigration has already taken place, i.e. it presupposes that companies are entitled to have their residence in another EU state. In this study, however, difficulties from an EU law perspective have been identified, if the assessment really should have as a starting point that a company already is resident in another EU-state than the one under the laws of which the company was formed has been formed.

A number of questions would have to be answered before finding the situation acte claire. In short, the major issues relate to internal situation, the relationship between the registered office and residence, change of residence under the Treaty, the meaning of establishment and, finally, the

meaning of EU law in matters relating to dissimilar treatment of companies on grounds of residence.

Clearly the ECJ breaks through the basic function of tax treaties by using arguments that do not always heed the function of residence in internal law and in tax treaty law. On the other hand, considering the importance that, from a EU law perspective, is attached to a persons overall ability to pay tax, it implies a certain focus on the state from which the taxpayer has his income even though he does not have his treaty residence in that state. This is because it is only that state which can take account of his personal and family circumstances in levying the tax. There is, however, nothing in the nature of a company to imply that the major part of its income stems from its state of residence.

In the literature the assessment of infringements when dealing with tax treaties from an EC law perspective has been discussed. The question thereby is which impact the existence of a tax treaty has on the assessment of whether an internal rule is considered an infringement or not. According to this view, the tax treaties interplay with the internal rules already at the level of the assessment where it shall be decided whether there is an infringement against EC law at all. In the situation concerned, surely no problem occurs since a tax treaty hereby is considered to limit the application scope of the internal rule; it could, however, be queried how such an assessment as to whether there is an infringement or not would relate to EC law as a whole, cf. for instance 167/73 Commission v. France. In addition, it is possible to interpret the repeatedly used expression, "as far as the exercise of the power of taxation so allocated is concerned, the Member States must comply with the Community rules," as indicating that the assessment to be made when dealing with matters that have a tax treaty background do not differ from the ones to be made when only national law is concerned. Actually, the interpretation that the tax treaties are to be considered already when assessing whether or not there is an infringement at hand is not far from the thought that the assessment would be the same. However, the relationship between EC law and tax treaties has only been dealt with here en passant, since the conclusion drawn above is that the practice of the ECJ on tax treaties relates to situations too unlike those in which a Swedish company changes residence. One obvious reason is, of course, that the issue has never been a dual residence solved by the tie-breaker. Rather, it has been an application of the distribution rules with the starting point that one of the contracting states is clearly already the resi-

dent or source state. When dealing with international law, it was concluded above that it was possible to apply parts of arguments used when a natural person becomes limited liable to pay tax since the Swedish taxation of the company after its emigration is restricted to source. However, from an EC perspective this is far fetched and not even cases concerning taxation by a company's source state are prima facie of interest. This is already due to the role the unlimited tax liability plays in the EC discrimination assessment. The unlimited liability to pay tax in Sweden remains after the migration of the Swedish company.

However, according to the general approach, the common practice in the field of company taxation is applied in the exit taxation assessment, leaving the exit as such unconsidered. Also typical for the approach which in general has been applied is that – if the exit as such is considered at all – companies are considered on par with natural persons being citizens of the EU. The only distinction made thereby is that there could be a differentiation necessary due to the sort of income a company has compared to that of an individual. In this study, exit taxation of companies has been analysed with parts of this general approach, which, for instance, was applied when the Swedish rule was set aside. However, the study has not focused on that approach, suggesting instead an alternative one for the assessment of exit taxes.

A particular reason for highlighting residence here has been that the ECJ, even though expressing that a company is not to be treated less favourable by a national rule due to its residence, in fact has never dealt with cases involving companies having residence in another state than their state of origin in direct tax matters.

Moreover, the difficulties identified above in the possible assessment from an EC law perspective of a situation in which a company is resident in another state than its state of origin, and the fact that the question of whether a company is entitled to allocate its POEM to another Member State is unanswered, made it more interesting to focus the study on the emigration as such rather than to apply the general practice of the ECJ on company taxation on the exit situation. Based on this approach, here designated the alternative approach, the conclusion has been drawn that companies do not have a general right to change their tax residence under the Treaty. As companies do not have a general right to change tax residence it follows that exit taxation of emigrating companies cannot always be contrary to it. To determine which subjects enjoy the freedom of establish-

ment, article 48 EC refers to the national laws of the Member States. Whether there is a right to transfer the POEM out of the state of origin depends on the law of the state of origin.

Swedish companies, however, continue to exist after the relocation of their POEM from Sweden to another EU state. They can therefore be equated to natural persons, cf. Article 48 EC. Yet the question arises whether this necessarily implies that exit taxation of Swedish companies is incompatible with EU law. The ECJ has never, or at least only once, depending on how Daily Mail is interpreted, assessed exit taxation of companies. In the original proceedings in Daily Mail, the question was whether exit taxation of a company changing residence was compatible with the freedom of establishment. One interpretation by commentators of Daily Mail is that exit taxes are compatible with freedom of establishment. Another is that the ruling following the case law on natural persons is obsolete. Swedish authors conclude that the question of exit taxation was not answered in Daily Mail since the case only involved company law issues. Neither in the Swedish ruling on exit taxation of companies, nor in the preparatory works issued due to the ruling is any regard paid to Daily Mail. Some commentators hold that exit taxation of SE-companies should be interpreted as incompatible with EU law and that it therefrom follows that exit taxation of all companies is incompatible with EC law. Given that exit taxation of SE-companies is incompatible with EC law, it does, however, not follow that exit taxation of companies, which – unlike SE-companies – exist only under national law, is incompatible with the freedom of establishment.

Regardless of which interpretation of Daily Mail is adhered to, the fact remains that the ECJ has not ruled on the matter of whether exit taxation of companies formed in accordance with the law of a state applying the registration principle is in line with the freedom of establishment. In its judgement in Daily Mail, the ECJ did not consider the fact that the UK was applying the incorporation principle. Therefore, in this study, similarities and dissimilarities from a tax perspective between the emigration of natural persons and companies have been analysed, as well as what constitutes primary and secondary establishments.

The conclusion has been drawn that a recipient state may not require that the management has to be in the recipient state or in the state of origin. Above, the meaning of establishment, as well as residence criteria in relation thereto have been analysed. It has also been discussed whether the

negative integration actually harms the internal market. Also the exit situation when the person making the "key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made" in a closely held company changes his residence has been discussed.

A somewhat closer look at the meaning of Article 43 EC raises the question of what a company's change of residence may be equated to. Scholars assume that a change of residence of a company should be equated with the change of residence of natural persons. In this study a close connection between recognition and classification as primary establishment and classification as secondary establishment has been put forward. The idea that companies would have a tax nationality under EU law determined by the location of their effective management, in the way that the company should have received the nationality of the recipient state, has been rejected.

It is clear, however, that certain of the scholars regard the POEM, head office and similar forms of management centres as primary establishment from a tax perspective. Furthermore, the prevailing interpretation of *Centros* and *Überseering* now is that companies under the Treaty have a right to immigration, but not to emigration. One consequence of this interpretation would, however, be that Article 43 EC has a different meaning depending on whether the applying state is an emigrating state or an immigrating state. Moreover, the question arises as to what the possible situations of immigration and emigration would be. From a state applying the registration principle no emigration is at hand. From a state applying the seat principle in its pure form an emigration is not possible. To a state applying the registration principle, immigration is, from the perspective of this state, not considered to have occurred regardless of whether the company is formed in accordance with the law of a state applying the seat principle or the registration principle. The interpretation made here is that the ECJ in these judgements actually established that there was no emigration or immigration at hand.

Instead of viewing *Centros*, *Überseering* and *Inspire Art* as an expression of a right to immigration, the issue in the cases may be seen as follows: the recipient state took the view that companies formed in accordance with the law of another Member State by establishment in the recipient state wanted to set up a primary establishment and, therefore, the recipient state required that the companies comply with the rules for formation of com-

panies, etc., in that state. The ECJ, however, held that the law of the recipient state was contrary to the freedom of establishment. Thus, the judgments can be viewed as an expression of the right to a secondary establishment. With such a view, the discussion concerning primary establishments becomes redundant; so too does the discussion related to emigration and immigration. In other words, the companies involved in these cases did not in fact immigrate – they merely extended their business from their primary establishment to another Member State without being winded up in their origin state. Hence, the establishments were secondary and not primary. Furthermore, such a view is in line with the overall objective of Article 43 EC to assure national treatment, which here can be specified to include a right for foreign companies to set up secondary establishments on the same conditions that apply for companies formed in that particular Member State. In addition, it follows, for instance from *Centros*, that a company may de facto conduct all its business activities in another Member State than its state of origin. Thus, there is no hindrance for having the POEM in another Member State, and theoretically, to categorise it a secondary establishment. Moreover, it is not easy to see why, under EC law, there should be any sort of tax nationality, primary establishment, etc. According to the reasoning above, once a foreign company, i.e. a company which has been formed under the law of a Member State, has its place of management in another Member State, and thus is treated as unlimited liable to pay tax there, that state, by taxing the foreign company as unlimited liable to tax, also has to give this company the same benefits as companies established under its own law.

In addition, it has been held here that the emigration of a company cannot be equated to the emigration of a natural person that de facto moves from one Member State to another. The very change by an individual of fiscal residence presupposes an actual physical move from one Member State to another. There is no case law from the ECJ suggesting that a change of fiscal residence as such enjoys protection under EU law. The natural person can move from one Member State to another, which a company cannot do if it is not a SE-company. In order to do so, the company would have to change its registered office, i.e. change nationality, which in addition makes the comparison to a natural person less pertinent.

It could however be argued that the reason why a change of residence for natural persons has not per se been protected by the freedom of establishment is that the movement of natural persons within the EU does not nec-

essarily entail any undertaking of business activities. Therefore, it could be held that the change of a company's residence on the other hand per se uses the protection of the freedom of establishment. Legal persons protected by Article 48 EC, i.e. equated to natural persons who are citizens of the EU, may by their very nature be presupposed to carry on business activities. Above, the argumentation by scholars that companies such as letterbox companies would not be considered to be carrying on business activities has been rejected. Decisive is the categorization of the company in its state of origin. However, such a test of business activities could instead be read into secondary establishments. Thus, as natural persons have enjoyed the freedom of establishment or the freedom of workers only if they were to carry on some sort of economic activity, it would, as far as companies are concerned under the freedom of establishment correspond to an economic activity in the form of an establishment.

Establishments mentioned in Article 43 EC have not been defined in the Treaty. However, this is in accordance with the fact that companies formed under one Member State's national law shall be entitled to such secondary establishments in another Member State's, subject to the same conditions that apply for companies formed in that state.

A POEM in one Member State, as defined in the tax treaties, cannot be seen as an establishment unless it fulfils the requirements laid down by the ECJ on fixed establishment, durability and the like criteria for it to qualify as an establishment under the EC Treaty. The freedom of establishment aims at creating a genuine integration of the company in the economy of the state where the establishment is made. Making decisions essential to the business of the company does not fulfil those requirements. In summary, at the current stage of EC law, there is no support for a general rejection of all exit taxation of companies.

Källförteckning

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