Exit tax and Double Taxation

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One of the most important problem of international taxation is double taxation. This phenomenon arises when the taxpayer has not been granted a step-up to fair market value upon migration in the host State or has not been granted a credit to offset its tax liability in the emigration or immigration State; anyway, following transfer, the taxpayer has two jurisdictions lined up, ready to exercise their taxing rights over the same capital gain.

It seems obvious that these issues are likely to dissuade cross-border reorganizations and, consequently, this disadvantage implies a different treatment between the taxpayers that wishing exercise their freedom of circulation and establishment and those that, instead, remain on the territory of the State. The Member States have signed a project of Internal Market, that is far different from a single market; in fact, if there was a single market there would be no problem to exit from a State and enter to another because this move would be a non-problem and would be treated in the same manner as a domestic relocation. Since, in practice is not as, it is hard to affirm to have a single market.

Also in the light of the fact that the taxpayer through the payment of a tax upon emigration is certainly not encouraged to transferring cross-border, the reasons of this tax are clear, and the problem is not its existence but concerns its proportionality; in fact, the EU law question is: which measure that effectively protects the tax claim of the departure State is least obstructive to free movement?

So, it is important to note that the fiscal coherence and the balanced allocation of taxing power, which are a justification for the exit taxes, must be balanced with the choose of the measure less obstructive for the free of movement and establishment.

This balance has fluctuated over the years through the several, and sometimes contradictories, judgments of the Court of Justice, on the basis of national cases submitted to it.

The case law of the Court shows a distinction between emigration of legal entities whose existence depends from domestic legal system, and emigration of natural persons that tends to exist regardless of any specific national law (even if they need of European nationality in order to enjoy of the freedoms of the Treaty).

Both cases "Hughes de Lasteyrie du Saillant" and "N" are the most important pronunciations about the exit tax towards natural persons, that represent the first pillars in this matter.

The recent pronunciation of the Court of Justice in the case "National Grid Indus BV" concerns, instead, the transfer of legal persons.

The case "National Grid Indus BV" is important for several reasons but, it is of

particular significance the Court's statement according to which, there can not be the application of Article 49 of the Treaty, which provides for freedom of establishment, all times when the State of origin requires the liquidation of companies incorporated under its jurisdiction that transferred their seat abroad.

In fact, as will be seen in detail in this paper, any State is free to choose between the theory of incorporation and the theory of real seat, which means that there are States that can impose the liquidation of their companies after the transfer.

However, the problems created by the exit tax and the transfer of residence are caused primarily by an EU policy towards them "bland", and for this reasons they require an immediate legislative action.