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EBC Position on the extension of unlimited Japanese inheritance tax liabilities to certain foreign nationals having no significant nexus to Japan

On December 8th, 2016 the LDP and New Komeito Tax Committee published its tax reform plans, which were endorsed by the Cabinet on December 22, 2016. The reform aims at overcoming the Japanese economy's slow growth. The tax reform will exempt foreign nationals who have stayed less than 10 years in Japan from Japanese inheritance tax with assets located overseas. The European Business Council in Japan (EBC) welcomes this measure which encourages the mobility of foreign talent and is meaningful to overcome the obstacles built up in 2013, when an inheritance tax law revision had widely captured the heirs of foreigners living in Japan.

The inheritance and gift taxes, therefore, will be levied on foreigners who have lived in Japan for more than ten years during a fifteen year period. However, the tax reform is unfortunately also proposing that these taxes be applicable for up to a five year period after having left Japan. This means that foreigners may have to pay Japanese inheritance tax based on overseas assets even though they do not reside in Japan. This is raising great concerns among those having stayed or are about to stay for a long time in this country. It is calling into question a number of recent policies by the Abe Government as well as international legal principles.

The EBC strongly supports the Japanese Government's efforts to raise foreign indirect investment to internationally comparable levels. The mobility of foreign talent, the fostering of investments and entrepreneurship has rightfully been identified by various Government policies, such as the visa rules easing and the aforementioned partial inheritance tax exemption of foreigners.

Japan is a country that requires long-term commitment, endurance and deep embedment in its culture to be successful. It is therefore not surprising that numerous European and other foreign enterprises and organizations deploy long-term foreign residents to serve their interest. The abrupt introduction of unlimited inheritance tax liabilities to this group of people will disincentivise them from continuing to stay here. The EBC is questioning the motive underlying why foreigners who have spent a long time to contribute to foreign investment shall become subject to unlimited inheritance tax when returning to their home countries for a period of up to five years. It is well respected that Japan, in the same way as other countries, takes appropriate measures against its own citizens moving away from their inheritance and gift tax obligations.

It is contradictory and lacks an economic rational that on the one hand, short-term foreign talent is welcomed and tax reliefs are provided to them, while long-term residents approaching the tenth year of their stay are well advised to return home. Japan will lose the knowledge, expertise and understanding of long-term residents. This loss will impact the structure of the foreign population and result in a drain of talent. It is meaningless to ease visa policies encouraging applications for a permanent residence permit, when at the same time establishing hurdles for long-term stayers.

The EBC is very concerned about whether the new rule complies with international law and brings into question whether sufficient consideration has been spent to ensure beyond doubt that the new rule is in line with the law of nations. Has it duly been tested whether for the extraterritorial application of the Japanese inheritance tax law there is a genuine, relevant and sufficient nexus? Japan would tax persons having returned to their home country or elsewhere for as long as five years. Having been away from Japan for such a long time strongly speaks against assuming a relevant significant nexus.

The German Constitutional Court holds that the imposition of tax against an overseas foreigner requires that reasonably justified nexus is given, such as citizenship, physical presence, residence, and abode.

The United Kingdom contends that, as a general proposition, the territoriality principle in customary international law dictates that one State should not seek to legislate in respect of the conduct of nationals established in another State in the absence of a sufficient nexus for so doing.

U.S. scholars, most prominently the American Law Institute's Restatement, hold that "a state can only exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is reasonable"

Comparison cannot easily be made to the French four years rule because France has inheritance tax treaties with 38 countries. Accordingly, these treaties override the rule, making its application irrelevant for foreigners from major nations. Notably, Japan does not belong to this group of nations, as Japan over the past seven decades has concluded only one estate and inheritance tax treaty (with the US in 1954).

The EBC therefore strongly urges the Japanese government to reconsider the planed extension of unlimited inheritance and gift tax liabilities to foreigners having returned to their home countries.

About the EBC:

The European Business Council in Japan (EBC)/European (EU) Chamber of Commerce in Japan is the trade policy and advocacy arm of 16 European national chambers of commerce and business associations in Japan. Established in 1972, the EBC works to improve the business and investment environment in Japan. It currently represents more than 2,500 local European companies and individuals, some 350 of whom participate directly in the EBC's 26 sector-based committees.

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