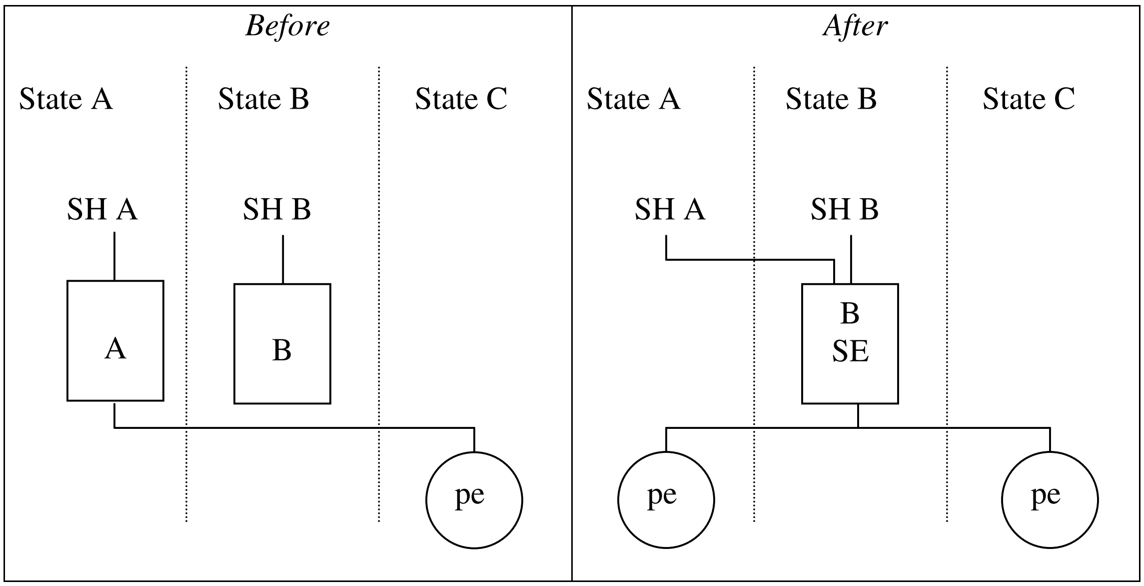
THE NETHERLANDS

CASE 1

Merger by acquisition

(Art. 2 par. 1 jo. Art 17 par. 2(a) Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and B are existing companies
- A and B are public limited-liability companies (see Annex I to Reg. 2157/2001)
- State A, State B, and State C are EU Member States
- A:
  - formed under law of Member State A
  - registered office in Member State A
  - head office in Member State A
  - has a permanent establishment in Member State C
- B:
  - formed under law of Member State B
  - registered office in Member State B
  - head office in Member State B
- B SE:
  - registered office in Member State B
  - head office in Member State B
  - will be covered by the EC Merger Directive

Transactions

- A:
  - transfers all assets and liabilities to B
  - in exchange for shares in B (and cash payment if any, not exceeding 10% of nominal value of shares to be issued) issued to shareholder(s) of A
  - will be wound up without going into liquidation

- B / B SE:
  - as the acquiring company, B will take the form of an SE when the merger takes place (Art. 17 Reg. 2157/2001: "In the case of a merger by acquisition, the acquiring company shall take the form of an SE when the merger takes place". Consequently, there are in fact two transactions: 1) the merger and 2) a transformation of a public limited-liability company into an SE. With regard to the transformation, see also Case 9.)
  - will be regarded as public limited-liability company governed by law of Member State B

Questions

1) Assume Member State A is your country

   Tax effects for A in Member State A

   a) Will the merger give rise to any taxation of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes), or is there roll-over relief?

      Art. 14b CITA of the Corporate Income Tax Act (CITA) provides for roll-over relief in case of legal mergers between Dutch resident companies or between a Dutch resident company and a company incorporated under foreign law but resident in another EU Member State. As a result of the legal merger under Art. 14b CITA, the transferring company disappears. Art. 3.55 par. 5 of the Personal Income Tax Act ("ITA") stipulates that companies resident in an EU Member State are companies listed in the Annex to Directive 90/434/EEC ("the Merger Directive"), which currently does not include the SE. However, for purposes of this report, it is assumed that the SE is covered by the Merger Directive.
      Art. 14b CITA applies provided the following conditions are met:
      - *the same provisions apply in respect of profit determination for the disappearing and the surviving companies; and*
      - *none/neither of the merging companies are entitled to loss carry forward (see however question 1)c) below); and*
      - *future taxation is guaranteed.*

      If these conditions are not met, no roll-over relief is available. However, the transferring and receiving companies may, before the merger, file a joint request with the tax inspector aiming at application of roll-over relief. In such case, the

tax inspector may set additional conditions to ensure the levy and collection of tax. These conditions may relate to the profit determination of the acquiring company in a year, the permissible reserves and loss utilisation, and the inclusion of foreign tax results in the tax base for Dutch tax purposes.
The tax-free rollover facility will not apply if the legal merger is primarily implemented to avoid or defer tax and is not initiated by commercial motives like the reorganisation or rationalisation of the activities (not portfolio investments) of the absorbing and absorbed company.

The profits resulting from the merger in relation to the permanent establishment in Member State C will not be exempt, since after the merger, the profits will not be taxable in the Netherlands anymore. However, the transferring company may apply for relief to avoid double taxation.

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State A, be taken over with the same roll-over relief by the permanent establishment of B SE in Member State A?

Yes, provided that after the merger, the assets and liabilities form a permanent establishment in the Netherlands or become part of an existing permanent establishment in the Netherlands of the absorbing company.

c) Will B SE's permanent establishment in Member State A be allowed to take over the losses of A that have not been exhausted for tax purposes?

Yes, under certain conditions:
- *prior approval of the tax inspector is required;*
- *the taxable profits of the absorbing company are divided into one part relating to the enterprise transferred from the absorbed company and another relating to its own (former) enterprise. Pre-merger losses can only be set off (carried forward) against profits from the same enterprise.*
  Under the Netherlands CITA, losses can be carried forward indefinitely.

If B would be a company resident in Member State A, would it then be allowed to take over these losses?

Yes, under certain conditions:
- *prior approval of the tax inspector is required;*
- *the taxable profits of the absorbing company are divided into one part relating to the enterprise transferred from the absorbed company and another relating to its own (former) enterprise. Pre-merger losses can only be set off (carried forward) against profits from the same enterprise.*
  Under the Netherlands CITA, losses can be carried forward indefinitely.

d) Will Member State A renounce any right to tax the permanent establishment in Member State C?

Yes. After the merger, the connection between company A in the Netherlands and its permanent establishment in Member State C disappears. B SE is - with regard to the permanent establishment in Member State C - neither a resident taxpayer nor a non-resident taxpayer in the Netherlands. Consequently, the profits made by the permanent establishment after the merger will not be taxable in the Netherlands anymore. However, since the merger exemption does not apply to the profits concerning this permanent establishment in Member State C, the capital gains arising as a result of the merger itself will be taxable.

e) Or will Member State A tax profits or capital gains with respect to the permanent establishment as a result of the merger? If so, will Member State A give relief for any (notional) tax charged on these profits or capital gains by Member State C?

The merger exemption does not apply to the profits concerning the permanent establishment in Member State C. Therefore, the capital gains arising as a result of the merger will be part of taxable in the Netherlands. Since the Netherlands have tax treaties with all other EU Member States, an exemption for the avoidance of double taxation will apply.

f) Will Member State A reinstate in the taxable profits of A such losses of the permanent establishment as have been set off against the taxable profits of A in Member State A and which have not been recovered at the time of the merger?

No, only the permanent establishment's merger profits will be set off against the losses taken into account for the calculation of worldwide income prior to the merger.
Remark: the question arises whether, on the basis of art. 13c CITA concerning the participation exemption, SH A will be confronted with taxation on income received from its participation in BSE or capital gains derived upon the disposal of its participation in B SE up to a maximum amount of the losses of the permanent establishment in Member State C that have been set off against the taxable profits of A in the Netherlands.

<u>Tax effects for SH A in Member State A</u>

g) Will the issue of shares by B SE to SH A, resident in Member State A, in exchange for shares in A give rise to any taxation of the income, profits or capital gains of that shareholder?

According to 8. CITA jo. Art. 3.57 ITA, a rollover relief is available. The shares in B SE acquired by SH A as a result of the merger will have the same book value as the book value of the shares in company A had prior to the merger. Rollover relief will only be granted if the merger is undertaken for commercial reasons, such as restructuring or rationalising of active business of the companies

involved in the merger, and does not form part of a tax avoidance or tax deferral arrangement.
If rollover relief is not available, the capital gain arising as a result of the merger may be exempt from tax under the participation exemption.
The participation exemption only applies to corporate shareholders (not being portfolio investment companies) and if the following conditions are fulfilled:

- *the shareholding is at least 5% of the nominal issued and paid-in share capital of the subsidiary;*
- *the subsidiary is a company with a capital divided into shares;*
- *the shares in the subsidiary are not held as inventory.*

Additionally, if the subsidiary is a company resident outside the Netherlands, the following conditions must also be met:

- *the shares in the subsidiary may not be held as portfolio investment (Remark 1: note that shares held in a foreign passive finance company are always deemed to be held as portfolio investment.*
  Remark 2: a portfolio investment in a company resident in an EU Member State may nevertheless qualify for the participation exemption if certain conditions are met);
- *the foreign subsidiary is subject to tax on its profits.*

As far as company capital taxation (currently levied at a rate of 0,55%) is concerned, a rollover relief exists.

h) Will the issue of shares by B SE to a shareholder of A, not resident in Member State A, in exchange for shares in A give rise to any taxation of the income, profits or capital gains of that shareholder?

No. As far as withholding tax on dividends is concerned, in general, the merger capital gains will not be taxed, since it is not considered to be dividend. However, for Dutch dividend withholding tax purposes, the shares in the SE will be deemed to have the same value as the old shares did. In this way, the dividend withholding tax claim on the old shares remains.

i) Will the answers to the questions 1g) and 1h) differ if SH A is:
   i) A corporate shareholder?

   The shares held in company A by a corporate shareholder resident in the Netherlands may qualify for the participation exemption (also with respect to dividend withholding tax).
   If the shares are attributable to a permanent establishment in the Netherlands of a non-resident, the shares held in company A by the permanent establishment may also qualify for the participation exemption. Furthermore, the permanent establishment may apply the merger roll over relief, on the basis of Art. 8 CITA jo. Art. 3.57 ITA.

ii) An individual shareholder not owning a substantial interest?

Shares held by an individual shareholder do not qualify for the participation exemption (see above under 1)g)).
A resident individual, owning less than 5% of the shares, has to pay personal income tax at a rate of 30% on a deemed yield of 4% of the average net wealth during the tax year (which is the calendar year for individuals). For purposes of calculating the average net wealth, the real value of the shares at the beginning and the end of the calendar year has to be taken into account. Capital gains itself are not taxed. On the basis of art. 3.57 ITA, SH A must value the shares in B SE at the value the shares in company A had immediately prior to the merger.

A non-resident individual owning less than 5% of the shares in a company resident in the Netherlands is not subject to income tax for dividends and capital gains.

The capital gains arising as a result of the merger will not be subject to dividend withholding tax, since it is not considered to be dividend.

iii) An individual shareholder owning a substantial interest?

Both resident and non-resident individual shareholders owning a substantial interest (at least 5% of the shares) in a company resident in the Netherlands are subject to personal income tax at a rate of 25% on regular income derived from the shares and capital gains arising upon the disposal of the shares. However, for resident individual shareholders, under art. 4.41 par 3 ITA, a merger roll over relief applies in the case of legal mergers upon request of the taxpayer. According to art. 4.42 ITA, if rollover relief is granted, the acquisition price of the shares in B SE will be deemed to be the same value as the acquisition price of the shares in company A. In this way, the personal income tax claim on the shares in company A remains to exist.
On the basis of Art. 7.5 par. 5 ITA, the rollover relief does not apply to a non-resident individual shareholders owning a substantial interest, in the case of a legal merger whereby the absorbing company is not resident in the Netherlands.

iv) An individual entrepreneur?

Shares held by an individual shareholder do not qualify for the participation exemption (see above under 1)g)).
However, according to Art. 3.57 ITA, an individual entrepreneur may qualify for roll over relief in case of a legal merger. Again, the shares in the SE will be deemed to have the same value as the shares in company A had at the moment immediately prior to the merger. In this way, the profits tax claim on the shares in company A remains to exist.

2) Assume Member State B is your country

Tax effects for B and B SE in Member State B

a) According to Art. 17 par. 2 Reg. 2157/2001, the acquiring company shall take the form of an SE when the merger takes place. According to Art. 37 par. 2 Reg. 2157/2001 the conversion of a public limited-liability company into an SE shall not result in the winding up of the company or in the creation of a new legal person. However, the Regulation itself does not give guidance with regard to taxation. Will the fact that B takes the form of an SE have corporate income tax consequences in Member State B?

According to Art. 28a CITA a conversion as mentioned in Civil Law, other than a conversion of a public limited-liability company (Naamloze Vennootschap met beperkte aansprakelijkheid – N.V.) into a private limited-liability company (Besloten vennootschap met beperkte aansprakelijkheid – B.V.) and vice versa or a conversion of a foundation (Stichting) into a association (Vereniging) and vice versa, is considered to be a liquidation. Currently, the SE is not included in the qualifying companies list in Civil Law. Consequently, as a result of the transformation of company B into an SE corporate income tax will be due on the profits arising as a result of the merger and company B must withhold dividend withholding tax on the liquidation proceeds distributed to the shareholder. However, one may put a request to the tax inspector. And, according to Art, 28a sub 3 CITA, the tax inspector may only determine conditions, which guarantee future taxation. Therefore, if future taxation of the profits is guaranteed, it seems that there is a possibility to avoid taxation in the case of transformation. According to art. 37 par 2 of EU Regulation 2157/2001 (the SE-regulation) a transformation of a company into an SE is not considered a winding up of the company. Since the SE Regulation has direct effect for the EU Member States, this rule will probably override the national regulations.

b) What is the value for tax purposes that B SE has to attribute to the assets and liabilities, which are transferred to B SE as part of the merger and that form a permanent establishment in Member States A and C?

Pursuant to Art. 14b par. 2 and par. 10 ITA, and assuming that all conditions for rollover relief in case of a legal merger are met, the value that B SE has to attribute to the assets and liabilities transferred to B SE as part of the merger and that form permanent establishments in Member States A and C is the same book value as the book value in company A prior to the merger.

Tax effects for SH B in Member State B

c) Will the fact that B will take the form of an SE result in tax consequences for SH B?

Generally not. According to Dutch law, changing a company's legal form is not explicitly considered to be a transfer of assets or an alienation of assets.

See answer under question 2)a) above.

d) Will the answer to question 2c) above differ if SH B is:
   i) A corporate shareholder?

   No, generally not. See answer under question 2)c) above. Furthermore, the shareholding of the corporate shareholder in company B may qualify for the participation exemption.

   ii) An individual shareholder not owning a substantial interest?

   A resident individual, owning less than 5% of the shares, has to pay personal income tax at a rate of 30% on a deemed yield of 4% of the average net wealth during the tax year (which is the calendar year for individuals). For purposes of calculating the average net wealth, the real value of the shares at the beginning and the end of the calendar year has to be taken into account. Capital gains itself are not taxed.

   iii) An individual shareholder owning a substantial interest?

   Both resident and non-resident individual shareholders owning a substantial interest (at least 5% of the shares) in a company resident in the Netherlands are subject to personal income tax at a rate of 25% on regular income derived from the shares and capital gains arising upon the disposal of the shares. However, under art. 4.41 par 3 ITA, a merger rollover relief applies in the case of legal mergers upon request of the taxpayer. According to art. 4.42 ITA, if rollover relief is granted, the acquisition price of the shares in B SE will be deemed to be the same value as the acquisition price of the shares in company A. In this way, the personal income tax claim on the shares in company A remains to exist.
   Since the absorbing company is resident in the Netherlands, the rollover relief applies to a resident shareholder as well as to a non-resident shareholder owning a substantial interest.

   iv) An individual entrepreneur?

   According to Art. 3.57 ITA, an individual entrepreneur may qualify for rollover relief in case of a legal merger. Again, the shares in the SE will be *deemed to have the same value as the shares in company A had at the moment immediately prior to the merger. In this way, the profits tax claim on the shares in company A remains to exist.*

3) Assume Member State C is your country

<u>Tax effects for A and B SE in Member State C with respect to its permanent establishment in Member State C</u>

a) Will the merger give rise to any taxation in A of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes) or is there rollover relief?

The general merger rollover relief also applies to foreign entities with a permanent establishment in the Netherlands (Art. 18 CITA)

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State C, be taken over with the same roll-over relief by the permanent establishment of B SE in Member State C?

Yes, they must (Art. 18 par. 1 CITA jo. Art. 14b CITA).

c) Will B SE's permanent establishment in Member State C be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes?

Yes, according to a decree of 19 December 2000 (no. CPP2000/3148), it is possible for B SE to submit a request to the tax inspector to take over the PE losses. The PE losses can only be set off against future profits arisen from the same activities as conducted prior to the merger, or activities that result from the activities as conducted prior to the merger.

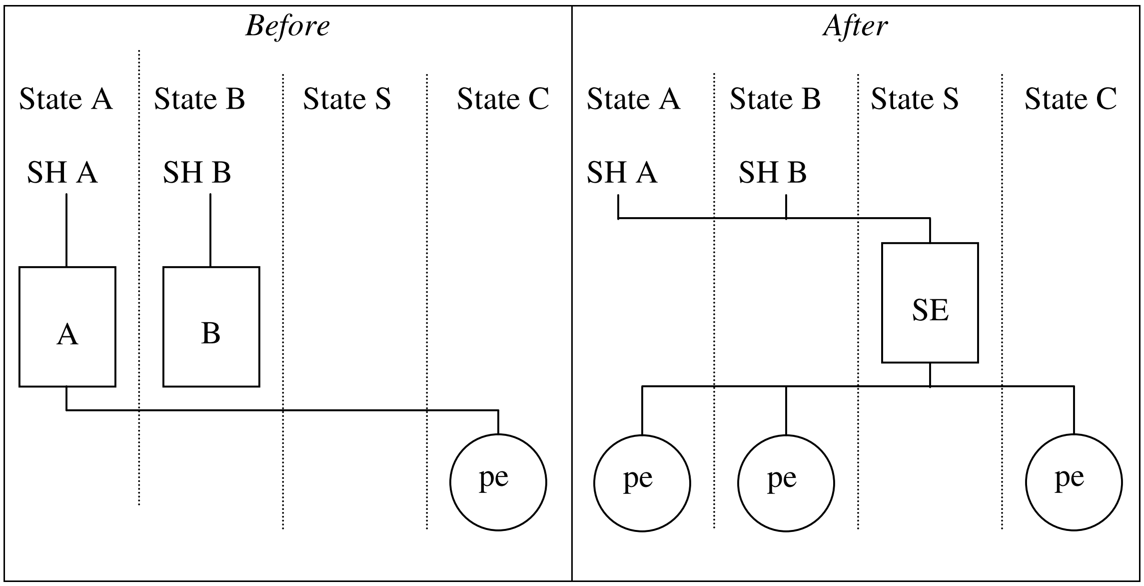
d) If B SE would be a company resident in Member State C, would it then be allowed to take over these losses? See Merger Directive Art. 6.

Yes, see answer 3c above.

CASE 2

Merger by formation of a new company

(Art. 2 par. 1 jo Art 17. par 2(b) Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and B are existing companies
- A has a permanent establishment in Member State C
- SE is a new company
- A and B are public limited-liability companies (see Annex I to Reg. 2157/2001)
- State A, State B, State C, and State S are EU Member States
- A:
  - formed under law of Member State A
  - registered office in Member State A
  - head office in Member State A
- B:
  - formed under law of Member State B
  - registered office in Member State B
  - head office in Member State B
- SE:
  - formed under law of Member State S
  - registered office in Member State S
  - head office in Member State S
  - will be covered by the EC Merger Directive

Transactions

- A:
    - transfers all assets and liabilities to SE
    - in exchange for shares of SE (and cash payment if any, not exceeding 10% of nominal value of shares to be issued) issued to shareholder(s) of A
    - will be wound up without going into liquidation
- B:
    - transfers all assets and liabilities to SE
    - in exchange for shares of SE (and cash payment if any, not exceeding 10% of nominal value of shares to be issued) issued to shareholder(s) of B
    - will be wound up without going into liquidation
- SE:
    - will be a newly formed SE
    - will be regarded as public limited-liability company governed by the law of Member State S

Questions

1) Assume Member State A is your country

<u>Tax effects for A in Member State A</u>

a) Will the merger give rise to any taxation of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes), or is there rollover relief?

According to Art. 14b CITA there is a general rollover relief. See further answer to Case 1, question 1)a).

The profits resulting from the merger in relation to the permanent establishment in Member State C will not be exempt, since after the merger, the profits will not be taxable in the Netherlands anymore. However, the transferring company may probably apply for relief to avoid double taxation.

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State A, be taken over with the same roll-over relief by the permanent establishment of SE in Member State A?

See answer to Case 1, question 1)b).

c) Will SE's permanent establishment in Member State A be allowed to take over the losses of A that have not been exhausted for tax purposes? If SE would be a company resident in Member State A, would it then be allowed to take over these losses?

Yes, subject to certain conditions. See answer to Case 1, question 1)c).

d) Will Member State A renounce any right to tax the permanent establishment in Member State C?

Yes. See answer to Case 1, question 1)d).

e) Will Member State A reinstate in the taxable profits of A such losses of the permanent establishment as have been set off against the taxable profits of A in Member State A and which have not been recovered at the time of the merger?

No. See answer to Case 1, question 1)f).

f) Or will Member State A tax profits or capital gains of the permanent establishment resulting from the merger? If so, will it give relief for any (notional) tax charged on these profits or capital gains by Member State C?

The relief will not apply with respect to the merger of the permanent establishment in Member State C, since after the merger Member State A looses its taxing right with respect to the permanent establishment. However, since the Netherlands has entered into tax treaties with all Member States, the Netherlands will give relief.

<u>Tax effects for SH A in Member State A</u>

g) Will the issue of shares by SE to SH A, resident in Member State A, in exchange for the shares in A give rise to any taxation of the income, profits or capital gains of that shareholder or is there roll-over relief?

See answer to Case 1, question 1)g)

h) Will the issue of shares by SE to a shareholder of A, not resident in Member State A, in exchange for the shares in A give rise to any taxation of the income, profits or capital gains of that shareholder or is there roll-over relief?

No. As far as withholding tax on dividends is concerned, in general, the merger capital gains will not be taxed, since it is not considered to be dividend. However, the shares in the SE will be deemed to have the same value as the old shares did. In this way, the dividend taxation claim on the old shares remains.

i) Will the answers to the questions 1g) and 1h) differ if SH A is:
   i) A corporate shareholder?

   See answer to Case 1, question 1) i)i).

ii) An individual shareholder not owning a substantial interest?

See answer to Case 1, question 1) i)ii).

iii) An individual shareholder owning a substantial interest?

See answer to Case 1, question 1) i)iii).

iv) An individual entrepreneur?

See answer to Case 1, question 1) i)iv).

2) Assume Member State S is your country

Tax effects for SE in Member State S

a) What is the value for tax purposes that SE has to attribute to the assets and liabilities, which are transferred to SE as part of the merger and that form a permanent establishment in Member States A, B and C?

Pursuant to Art. 14b par. 2 and par. 10 ITA, and assuming that all conditions for rollover relief in case of a legal merger are met, the value that B SE has to attribute to the assets and liabilities transferred to B SE as part of the merger and that form permanent establishments in Member States A and C is the same book value as the book value in company A prior to the merger.

Tax effects for shareholder(s) of SE in Member State S

b) Is there any provision in the legislation of Member State S that affects the shareholder of SE whether resident in Member State S or not? For example, are there provisions with regard to the valuation of the shares received in SE?

In most cases Member State S will have no reason to tax, because the merger profits are not within the scope of the Dutch CITA. In case of a non-resident shareholder, the merger will not result in taxation in the Netherlands. In the case of a resident shareholder rollover relief applies with regard to the valuation of the SE shares received in exchange for the shares in company A or B.

3) Assume Member State C is your country

<u>Tax effects for A and SE in Member State C in respect of its permanent establishment in Member State C</u>

a) Will the merger give rise to any taxation of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes) or is there roll-over relief?

The general rollover relief will apply.

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State C, be taken over with the same rollover relief by the permanent establishment of SE in Member State C?

Yes.

c) Will SE's permanent establishment in Member State C be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes?

Yes, according to a decree of 19 December 2000 (no. CPP2000/3148), it is possible for SE to submit a request to the tax inspector to take over the PE losses. The PE losses will only be deductible from the future profits, which have a clear relation with the loss making activities.

If SE would be a company resident in Member State C, would it then be allowed to take over these losses?

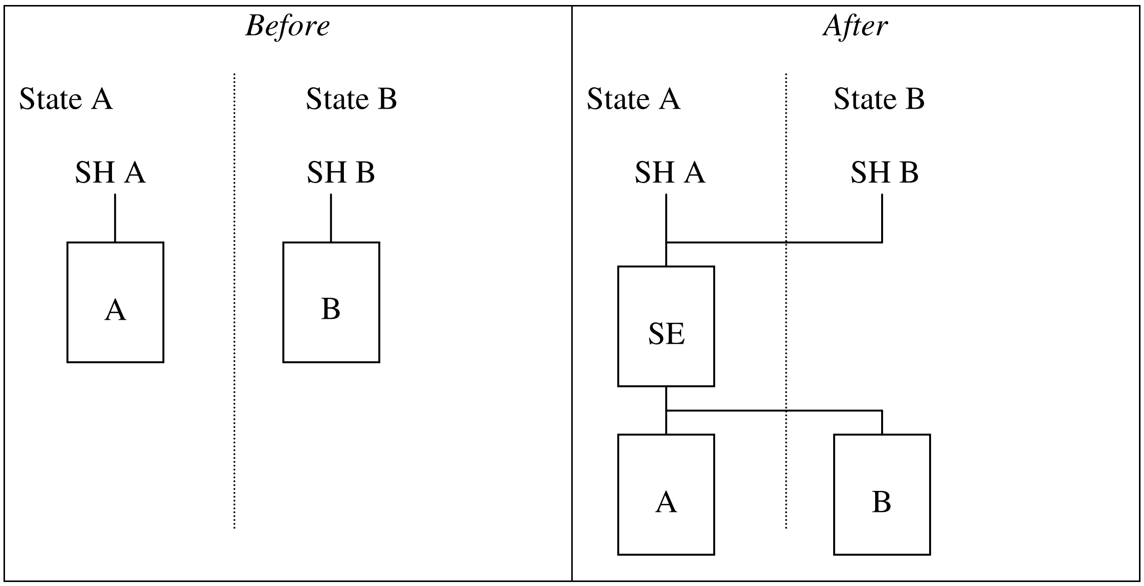
Yes.

See answer to Case 1, question 1)c).

CASE 3

Formation of a Holding – SE – 1

(Art. 2 par. 2(a) jo. Art. 32, Art. 33 and Art. 34 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and B are existing companies
- SE is a new company
- A and B are public or private limited-liability companies (see Annex II Reg. 2157/2001)
- State A and State B are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B:
    - formed under law of Member State B
    - registered office in Member State B
    - head office in Member State B
- SE:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
    - will be covered by the EC Merger Directive

Transactions

- SE:
  - will be regarded as public limited-liability company governed by the law of Member State A
  - acquires holding in A and B
  - such that it obtains more than 50% of the permanent voting rights in A and B
  - in exchange for shares in SE
  - issued to the shareholders of A and B

Questions

1) Assume Member State A is your country

   Tax effects for SE in Member State A

   a) Are there any provisions for the valuation for tax purposes of the shares in A and B acquired by SE? Do the shares have to be valued at the book value of the exchanging shareholder or at a higher value?

      In general there are no special provisions. The shares have to be valued according to general accounting principles.

      If the participation exemption regime applies, dividends of all kinds and capital gains derived from the alienation of shares are tax exempt. Notwithstanding this exemption, liquidation losses may be deductible provided certain conditions are met. When calculating the future liquidation losses of companies A and B, the acquisition price of the shares is the same as the acquisition price of SH A and SH B respectively (art. 13d par 6 and par 7 CITA).

   b) Are there any provisions for the valuation for tax purposes of the shares issued to SH A and SH B? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

      Yes, according to Art. 3.55 ITA (which also applies for CITA purposes) a rollover relief for exchange of shares applies. According to Art. 3.55 par 6 ITA the shares have to be valued at the same book value as applied to the shares in A and B immediately before the merger.

      If the participation exemption regime applies, the acquisition price of the shares in order to calculate future deductible liquidation losses is the same as the acquisition price for the shares in A and B (Art. 13d par 6 and par 7 CITA).

According to Art. 3a par 1 Dividend Withholding Tax Act ("DWTA"), for dividend withholding tax purposes, the shares have to be valued at the book value of the shares exchanged by the shareholder.

Tax effects for SH A in Member State A

c) Will the issue of shares by SE to SH A in exchange for shares in A give rise to any taxation of the income, profits or capital gains of SH A or is there roll-over relief?

No, on the basis of Art. 3.55 ITA (also applicable for CITA purposes) a rollover relief in case of exchange of shares applies.

d) Will the answers to the question 1c) differ if SH A is:
   i) A corporate shareholder?

   No, art. 3.55 ITA applies in case of exchange of shares. Furthermore, the participation exemption regime may be applicable.

   ii) An individual shareholder not owning a substantial interest?

   A resident individual, owning less than 5% of the shares, has to pay personal income tax at a rate of 30% on a deemed yield of 4% of the average net wealth during the tax year (which is the calendar year for individuals). For purposes of calculating the average net wealth, the real value of the shares at the beginning and the end of the calendar year has to be taken into account. Capital gains itself are not taxed.

   iii) An individual shareholder owning a substantial interest?

   According to Art. 4.41 ITA, exchange rollover relief applies upon request in case of exchange of shares.

   iv) An individual entrepreneur?

   According to Art. 3.55 ITA, exchange rollover relief applies in case of exchange of shares.

2) Assume Member State B is your country

Tax effects for SH B in Member State B

a) Will the issue of shares by SE to SH B in exchange for shares in B give rise to any taxation of the income, profits or capital gains of SH B or is there roll-over relief?

Yes, according to Art. 3.55 ITA (also applicable for CITA purposes) a roll-over relief for exchange of shares applies.

b) Will the answers to the question 1a) differ if SH B is:
   i) A corporate shareholder?

   No, art. 3.55 ITA applies in case of exchange of shares. Furthermore, the participation exemption regime may be applicable.

   ii) An individual shareholder not owning a substantial interest?

   A resident individual, owning less than 5% of the shares, has to pay personal income tax at a rate of 30% on a deemed yield of 4% of the average net wealth during the tax year (which is the calendar year for individuals). For purposes of calculating the average net wealth, the real value of the shares at the beginning and the end of the calendar year has to be taken into account. Capital gains itself are not taxed.

   iii) An individual shareholder owning a substantial interest?

   According to Art. 4.41 ITA, rollover relief applies upon request in case of exchange of shares.

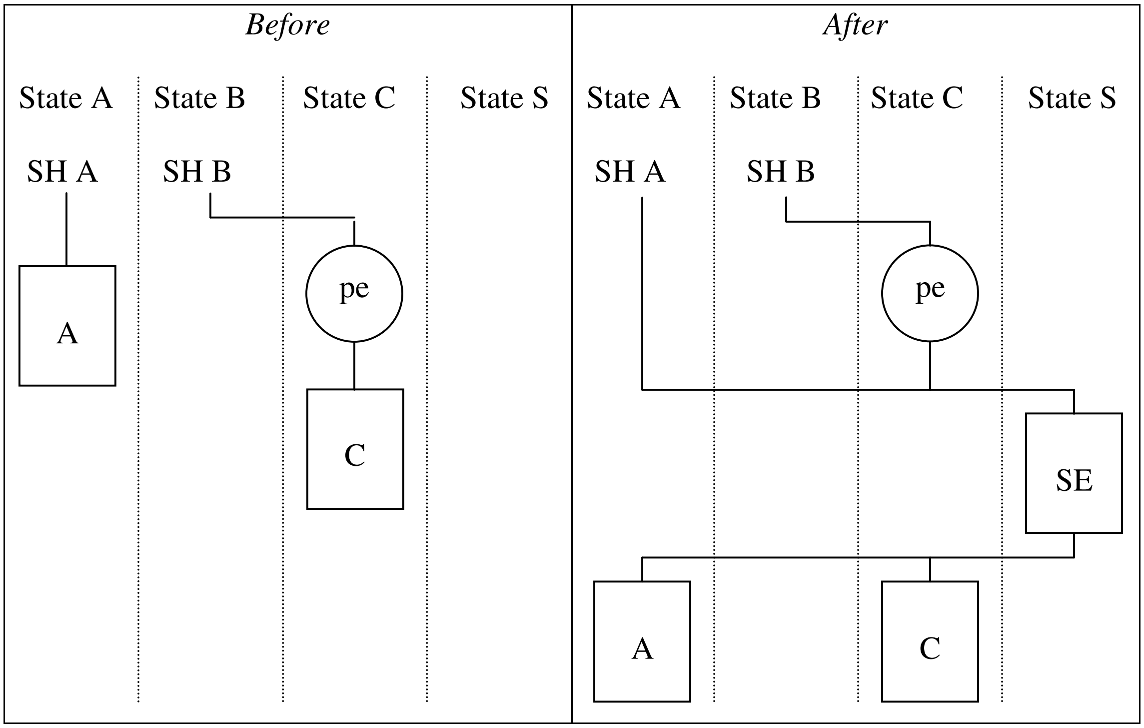
   iv) An individual entrepreneur?

   According to Art. 3.55 ITA, rollover relief applies in case of exchange of shares.

CASE 4

Formation of a Holding – SE

(Art. 2 par. 2(a) and (b) jo. Art. 32, Art. 33, and Art. 34 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and C are existing companies
- The shares in C are attributable to pe in State C
- SE is a new company
- A and C are public or private limited-liability companies (see Annex II)
- State A, State B, State C and State S are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- C:
    - formed under law of Member State C
    - registered office in Member State C
    - head office in Member State C
- SE:
    - formed under law of Member State S

- registered office in Member State S
- head office in Member State S
- will be covered by the EC Merger Directive

Transactions

- SE:
  - will be regarded as public limited-liability company governed by the law of Member State S
  - acquires holding in A and C
  - such that it obtains more than 50% of the permanent voting rights in A and C
  - in exchange for shares in SE
  - issued to the shareholders of A and C

Questions

1) Assume Member State A is your country

   <u>Tax effects for SH A in Member State A</u>

   a) Will the issue of shares by SE to SH A in exchange for shares in A give rise to any taxation of the income, profits or capital gains of SH A or is there roll-over relief?

      No, on the basis of Art. 3.55 ITA (also applicable for CITA purposes) a rollover relief in case of exchange of shares applies.

   b) Will the answer to the above question be different in the case of:
      i) SH A being an individual shareholder not owning a substantial interest?

         A resident individual, owning less than 5% of the shares, has to pay personal income tax at a rate of 30% on a deemed yield of 4% of the average net wealth during the tax year (which is the calendar year for individuals). For purposes of calculating the average net wealth, the real value of the shares at the beginning and the end of the calendar year has to be taken into account. Capital gains itself are not taxed.

      ii) SH A being an individual shareholder owning a substantial interest?

         According to Art. 4.41 ITA rollover relief applies upon request in case of exchange of shares.

      iii) SH A being an individual entrepreneur?

According to Art. 3.55 ITA rollover relief applies in case of exchange of shares.

iv) SH A being a corporate shareholder?

No, art. 3.55 ITA applies in case of exchange of shares. Furthermore, the participation exemption regime may be applicable.

2) Assume Member State B is your country

<u>*Tax effects for SH B in Member State B*</u>

a) Will the issue of shares by SE to SH B in exchange for shares in C give rise to any taxation of the income, profits or capital gains of SH B or is there rollover relief?

No taxation. SH B is still a resident and can therefore apply the rollover relief in the case of exchange of shares (Art. 3.55 ITA). Otherwise a deduction to prevent double taxation would probably apply.

b) Will the answer to the above question be different in the case of:
i) SH B being an individual entrepreneur?

No.

ii) SH B being a corporate shareholder?

No. Furthermore, the participation exemption regime may be applicable.

3) Assume Member State C is your country

<u>Tax effects for SH B in Member State C</u>

a) Will the issue of shares by SE to SH B in exchange for shares in C give rise to any taxation of the income, profits or capital gains of SH B or is there rollover relief?

No, Art. 3.55 ITA also applies to permanent establishments (on the basis of Art. 18 CITA and Art. 8(1) CITA). Prerequisite is that the shares can be attributed to the permanent establishment

b) Will the answer to the above question be different in the case of:
i) SH B being an individual entrepreneur?

According to Art. 7.2(1)(2) ITA, Art.3.55 (rollover relief) also applies for foreign individual entrepreneurs.

ii) SH B being a corporate shareholder?

No. Furthermore, the participation exemption regime may be applicable.

4) Assume Member State S is your country

<u>*Tax effects for SE in Member State S*</u>

a) Are there any provisions for the valuation for tax purposes in Member State S of the shares of A and C acquired by SE? Do the shares have to be valued at the book value of the exchanging shareholder or at a higher value?

There are no special provisions. The shares have to be valued according to general accounting principles. See further Case 3, question 1)a).

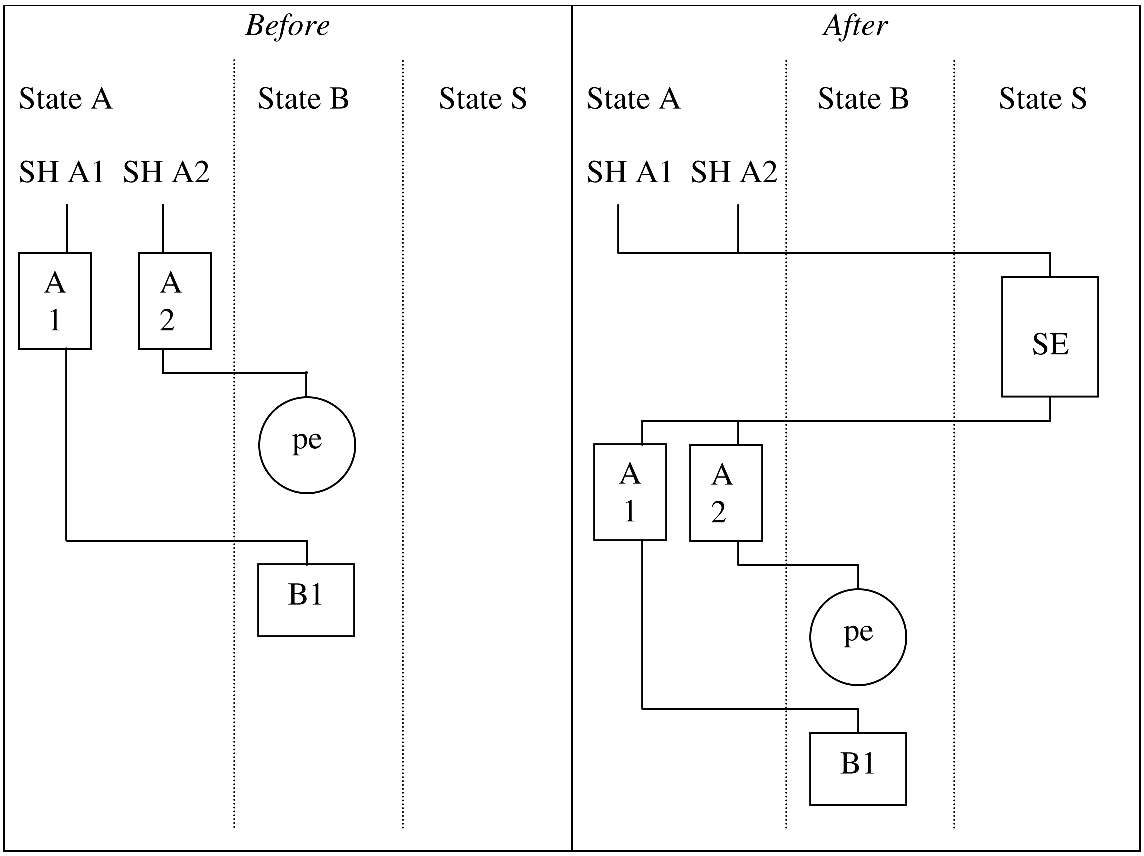
b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to SH A and SH B? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

Yes. See Case 3, question 1)b).

CASE 5

Formation of a Holding – SE

(Art. 2 par. 2(b) jo. Art. 32, Art. 33, and Art. 34 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A1, A2, and B1are existing companies
- pe is an existing permanent establishment of A2 in Member State B
- SE is a new company
- A1, A2, and B1 are public or private limited-liability companies (see Annex II to Reg. 2157/2001)
- State A, State B, and State S are EU Member States
- A1 and A2:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B1:
    - formed under law of Member State B

  - registered office in Member State B
  - head office in Member State B
- SE:
  - formed under law of Member State S
  - registered office in Member State S
  - head office in Member State S
  - will be covered by the EC Merger Directive

Transactions

- SE:
  - will be regarded as public limited-liability company governed by the law of Member State S
  - acquires holding in A1 and A2
  - such that it obtains more than 50% of the permanent voting rights in A1 and A2
  - in exchange for shares in SE
  - issued to the shareholders of A1 and A2

Questions

1) Assume Member State A is your country

   Tax effects for SH A2 in Member State A

   a) Will the issue of shares by SE to SH A2 in exchange for shares in A2 give rise to any taxation of the income, profits or capital gains of SH A2 or is there rollover relief?

      There is rollover relief. See case 3, question 1)c).

   b) Will the answer to the above question be different in the case of:
      i) SH A2 being an individual shareholder not owning a substantial interest?

         A resident individual, owning less than 5% of the shares, has to pay personal income tax at a rate of 30% on a deemed yield of 4% of the average net wealth during the tax year (which is the calendar year for individuals). For purposes of calculating the average net wealth, the real value of the shares at the beginning and the end of the calendar year has to be taken into account. Capital gains itself are not taxed.

      ii) SH A2 being an individual shareholder owning a substantial interest?

         According to Art. 3.55 ITA a rollover relief applies.

iii) SH A2 being an individual entrepreneur?

According to Art. 3.55 ITA rollover relief applies in case of an exchange of shares.

iv) SH A2 being a corporate shareholder?

Rollover relief will apply. Furthermore, the participation exemption may apply.

2) Assume Member State S is your country

Tax effects for SE in Member State S

a) Are there any provisions for the valuation for tax purposes in Member State S of the shares of A1 and A2 acquired by SE? Do the shares have to be valued at the book value of the exchanging shareholder or at a higher value?

See Case 3, question 1)a).

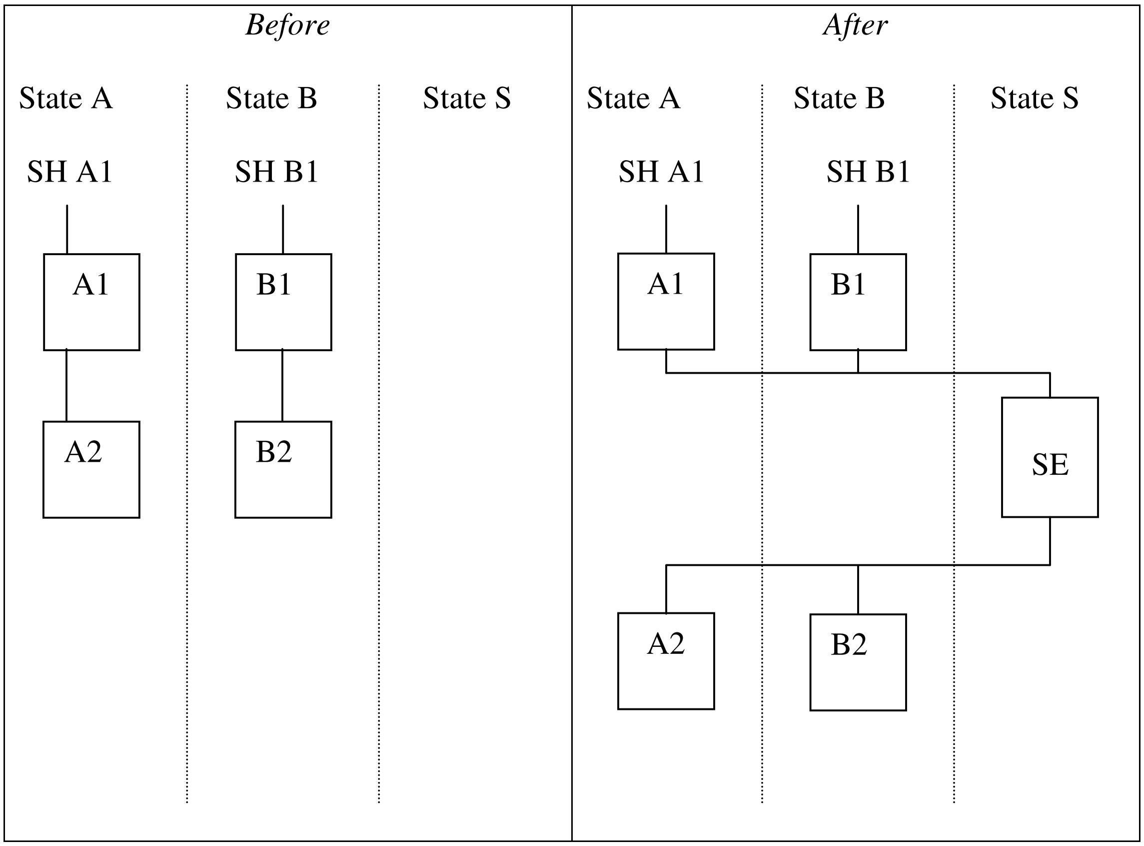
b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to SH A1 and SH A2? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

See Case 3, question 1)b).

CASE 6

Formation of a Subsidiary–SE by exchange of shares

(Art. 2 par. 3(a) jo. Arts. 35 and 36 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A1, A2, B1, and B2 are existing companies
- SE is a new company
- A1 and B1 are companies or firms within the meaning of Art. 48 par. 2 of the Treaty establishing the European Community or other legal bodies governed by public or private law (Art. 2 par. 3 Reg. 2157/2001)
- State A, State B, and State S are EU Member States
- A1 and A2:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B1 and B2:
    - formed under law of Member State B

    - registered office in Member State B
    - head office in Member State B

- SE:
    - formed under law of Member State S
    - registered office in Member State S
    - head office in Member State S
    - will be covered by the EC Merger Directive

Transactions

- A1 and B1:
    - form a subsidiary SE by way of contributing their subsidiaries A2 and B2 respectively to SE
- SE:
    - will be regarded a public limited-liability company governed by the law of Member State S
    - will acquire the shares in A2 and B2 in exchange for shares issued to A1 and B1

Questions

1) Assume Member State A is your country

   <u>Tax effects for A1 in Member State A</u>

   a) Will the issue of shares by SE to A1 in exchange for shares in A2 give rise to any taxation of the income, profits or capital gains of A1 or is there roll-over relief?

      No, on the basis of Art. 3.55 ITA (also applicable for corporate income tax purposes) a rollover relief for the exchange of shares applies.

2) Assume Member State S is your country

   <u>Tax effects for SE in Member State S</u>

   a) Are there any provisions for the valuation for tax purposes in Member State S of the shares of A2 and B2 acquired by SE? Do the shares have to be valued at the book value of the exchanging shareholder or at a higher value?

      See Case 3, question 1)a).

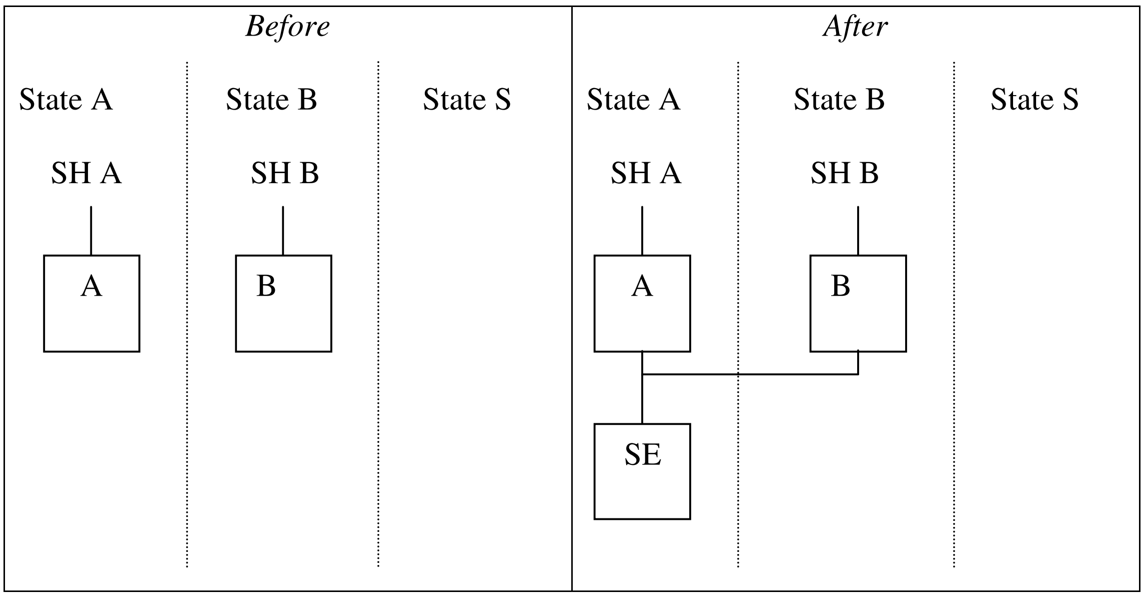
b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to A1 and B1? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

   See Case 3, question 1)b).

CASE 7

Formation of a Subsidiary–SE by contribution of cash

(Art. 2 par. 3(a) jo. Arts. 35 and 36 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A, and B are existing companies
- SE is a new company
- A and B are companies or firms within the meaning of Art. 48 par. 2 of the Treaty establishing the European Community or other legal bodies governed by public or private law (Art. 2 par. 3 Reg. 2157/2001)
- State A, State B, and State S are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B:
    - formed under law of Member State B
    - registered office in Member State B
    - head office in Member State B
- SE:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A

  - will be covered by the EC Merger Directive

Transactions

- *SE:*
  - will take the form of an SE
  - will be regarded a public limited-liability company governed by the law of Member State A
- A and B:
  - form a subsidiary SE

Questions

It is generally assumed that an SE will for domestic corporate income tax purposes be treated as a corporate entity. However, there may be differences between the treatment of an SE and other legal entities, if certain possibilities, e.g. participation exemption or fiscal unity etc. are only allowed between certain types of legal entities and the SE is not yet included. If relevant, please mention some of these situations in your answers to the following questions.

1) Assume Member State A is your country

   <u>Tax effects for A in Member State A</u>

   Will there be any tax effect for A in Member State A as a consequence of the formation of the subsidiary SE in Member State A?

   In general there are currently no tax consequences.
   In 2002, a Bill on a new fiscal unity system has been approved by Parliament and Crown and has entered into force on 1 January 2003. According to Decree the following conditions must be fulfilled:
   - *the parent company owns at least 95% of the shares of the subsidiary company;*
   - *the company's capital is divided into shares;*
   - *the company is subject to tax in the country where it is registered;*
   - *a distribution of profits of the company requires prior approval of the company's management;*
   - *the shareholders of the company are not liable for the debts of the company;*
   - *in general all shareholders have equal voting rights.*

   According to Art.1 Reg. 2157/2001, the SE will fulfil most of the conditions. Also Art. 3 Reg. 2157/2001 applies. Therefore, the conditions in Netherlands national law will apply to the SE. As far as tax liability is concerned, Art 2 CITA determines that a resident company with a capital divided into shares is subject to tax. Therefore, the SE, being a Netherlands company, will be subject to tax in the Netherlands. However, *if the fiscal unity regime applies, the Netherlands parent company (company A in this case) is deemed to be the taxpayer.*

As far as the participation exemption regime (Art. 13 CITA) is concerned, the dividends received from and capital gains arising on a disposal of the shares in SE will be exempt provided that all conditions under the participation exemption regime are fulfilled. Since the SE has a capital divided into shares, it will qualify as a company (condition 2 described above).

2) Assume Member State B is your country

<u>Tax effects for B in Member State B</u>

Will there be any tax effect for B in Member State B as a consequence of the formation of the subsidiary SE in Member State A?

In general there will be no tax consequences.

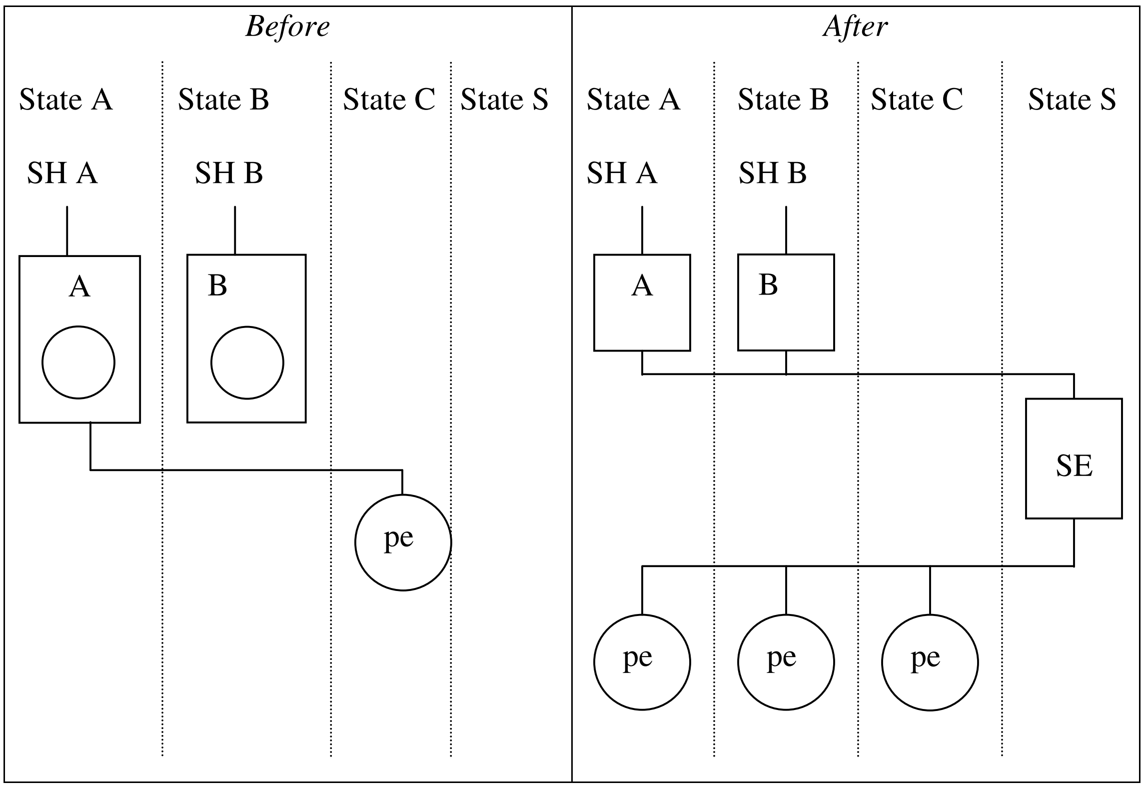
As far as the participation exemption regime is concerned, foreign companies may qualify for the regime, provided all conditions are fulfilled. See Case 1, question 1)g) for the conditions.

The fiscal unity regime as applicable until 31 December 2002, did not allow a company incorporated under foreign law to become a member of a fiscal unity. Under the regime applicable as from 1 January 2003, this approach has changed and under certain conditions it is possible for a company incorporated under foreign law to become a member of a fiscal unity. One of these conditions is that the foreign subsidiary has a permanent establishment in the Netherlands, and, under the relevant tax treaty, the Netherlands have the right to levy tax on the profits of this permanent establishment. Therefore, in this specific case, B and SE will not be allowed to form a fiscal unity in the Netherlands, since SE does not seem to have a permanent establishment in the Netherlands.

CASE 8

Formation of a Subsidiary–SE by transfer of assets

(Art. 2 par. 3(a) jo. Arts. 35 and 36 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A, and B are existing companies
- SE is a new company
- A and B are public or private limited-liability companies (see Annex II)
- A and B are companies or firms within the meaning of Art. 48 par. 2 of the Treaty establishing the European Community or other legal bodies governed by public or private law
- A has a permanent establishment in State C
- State A, State B, State C and State S are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A

- B:
  - formed under law of Member State B
  - registered office in Member State B
  - head office in Member State B
- SE:
  - formed under law of Member State S
  - registered office in Member State S
  - head office in Member State S
  - will be covered by the EC Merger Directive

Transactions

- SE:
  - will take the form of an SE
  - will be regarded a public limited-liability company governed by the law of Member State S
- A (and B):
  - form a subsidiary by way of contributing their branches in Member State A (and B respectively) to SE in exchange for the issue of shares by SE to A (and B respectively)
- A:
  - will transfer its permanent establishment in Member State C to SE in exchange for the issue of shares by SE to A

Questions

1) Assume Member State A is your country

   Tax effects for A and SE in Member State A

   a) Will the transfer of assets give rise to any taxation of capital gains (= real value of the assets and liabilities minus their value for tax purposes) or is there rollover relief?

      According to Art. 14 CITA rollover relief is granted in case a taxpayer transfers its business or an economically independent part thereof to another company against the issue of shares by the transferee company to the transferor company. The following conditions must be fulfilled:
      1. *the merging companies must be subject to the same tax regime;*
      2. *a business or an economically independent part thereof is transferred;*
      3. *the transferee company does not have losses available for purposes of carry-forward;*
      4. *the transferee company must be or become liable to Dutch corporate income tax;*

5. *future taxation is guarantee (hidden reserves, goodwill and fiscal reserves must remain within the scope of corporate income tax);*
6. *the shares acquired by the transferor company as well as the shares in the transferor company are not (in) directly transferred to a non-affiliated company within three years after the transfer, unless the subsequent transfer is initiated by commercial motives;*
7. *the transfer should be carried out by bringing together – on a permanent basis – two or more activities (excluding portfolio investments);*
8. *the enterprise merger is not primarily implemented to avoid or to defer corporate income tax, but is initiated by commercial motives like the reorganisation or rationalisation of the activities.*

If the above conditions are met, no special approval of the tax authorities is required.

If the transferor company cannot more one or more of the conditions under 1), 3) and 5), a tax-free rollover may still be available, subject to additional conditions.

The transfer of the permanent establishment in Member State C will give rise to taxation, although a deduction to prevent double taxation will probably apply.

b) May provisions or reserves which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State A be taken over with the same roll-over relief by the permanent establishment of SE in Member State A?

According to Art. 14 CITA the (exempt) transfer concerns profits derived from or at the transfer. Also provisions and reserves must be taken over.

c) Are there any provisions in the legislation of Member State A for the valuation for tax purposes of the shares in SE acquired by A?

On the basis of Art. 14 par 3 CITA the acquisition price of the shares will be the book value of the assets and liabilities transferred minus the fiscal reserves and the risk reserve formed (in case the group finance regime applies).

d) Will SE's permanent establishment in Member State A be allowed to take over the losses of A which have not been exhausted for tax purposes? (If SE would be a company resident in Member State A, would it then be allowed to take over these losses?)

Contrary to the Netherlands general merger approach, it is not allowed to carry forward company losses belonging to the transferring company to the acquiring company. The State Secretary explains this by referring to the fact that the transferring company does not disappear and therefore has the possibility to deduct the loss from future profits. One might oppose that, if the participation *exemption will apply, the transferring company will not have any taxable profits anymore against which losses can set off, and future capital gains on the disposal of assets will be taxed in SE. This condition is not a violation of Art.6 Merger Directive, because the treatment also applies to national residents.*

e) Will Member State A renounce any right to tax the permanent establishment in Member State C?

Yes, although the capital gain arising from the transfer of the permanent establishment in Member State C will be set off against the losses taken into account prior to the transfer.

Remark: on the basis of Art. 13c CITA (regarding the participation exemption regime) SH A may be confronted with non-exempt participation exemption results from B SE up to a maximum amount of the losses of the permanent establishment taken into account prior to the merger.

f) Will Member State A reinstate in the taxable profits of A such losses of the permanent establishment in Member State C as have been set off against the taxable profits of A in Member State A and which have not be recovered (see art. 10 par. 2 of the EC Merger Directive)?

No, but see remark at question 1)e) of this case.

g) Or will Member State A tax profits or capital gains of the permanent establishment resulting from the transfer of assets?

Yes, see question 1)a) of this case.

h) If question g) is answered affirmatively, will Member State A give relief for the notional tax charged on these profits or capital gains by Member State C, assuming that Member State C would have levied tax (see art 10 par. 2 of the EC Merger Directive)?

Yes, as far as a tax treaty or the national Decree applies. If the national Decree applies, the transfer profits, must be taxed in the source country (as confirmed by the Netherlands Supreme Court).

2) Assume Member State S is your country

<u>Tax effects for SE in Member State S</u>

a) What is the value for tax purposes that SE has to attribute to the assets and liabilities of the permanent establishments in Member States A, B and C that are transferred to SE as part of the merger?

In general, SE has to value the assets and liabilities at market value. If the permanent establishment has to value the assets and liabilities at book value according to the source country regulations, this may cause distortions.

<u>Tax effects for A as shareholder of SE in Member State S</u>

b) Is there any provision in the tax legislation of Member State S that affects A as shareholder of SE?

- *Foreign corporate shareholders owning 5% or more of the shares in a Dutch resident company are subject to tax in the Netherlands under the substantial interest regime, if the shares are held as portfolio investment (Art. 17 par 3 sub b CITA).*
- *Generally, the distributions of dividends by SE will be subject to dividend withholding tax. Again, a tax treaty may reduce the dividend withholding tax rate or the Parent Subsidiary Directive as implemented in Dutch tax law will apply.*

3) Assume Member State C is your country

<u>Tax effects for A and SE in Member State C in respect of its permanent establishment in Member State C</u>

a) Will the transfer of assets give rise to any taxation of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes) or is there rollover relief?

No, according to Art. 18(1) CITA, Art. 14 CITA also applies to permanent establishments in the Netherlands of foreign taxpayers.

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State C, be taken over with the same rollover relief by the permanent establishment of SE in Member State C?

Yes, see question 1)b) of this case.

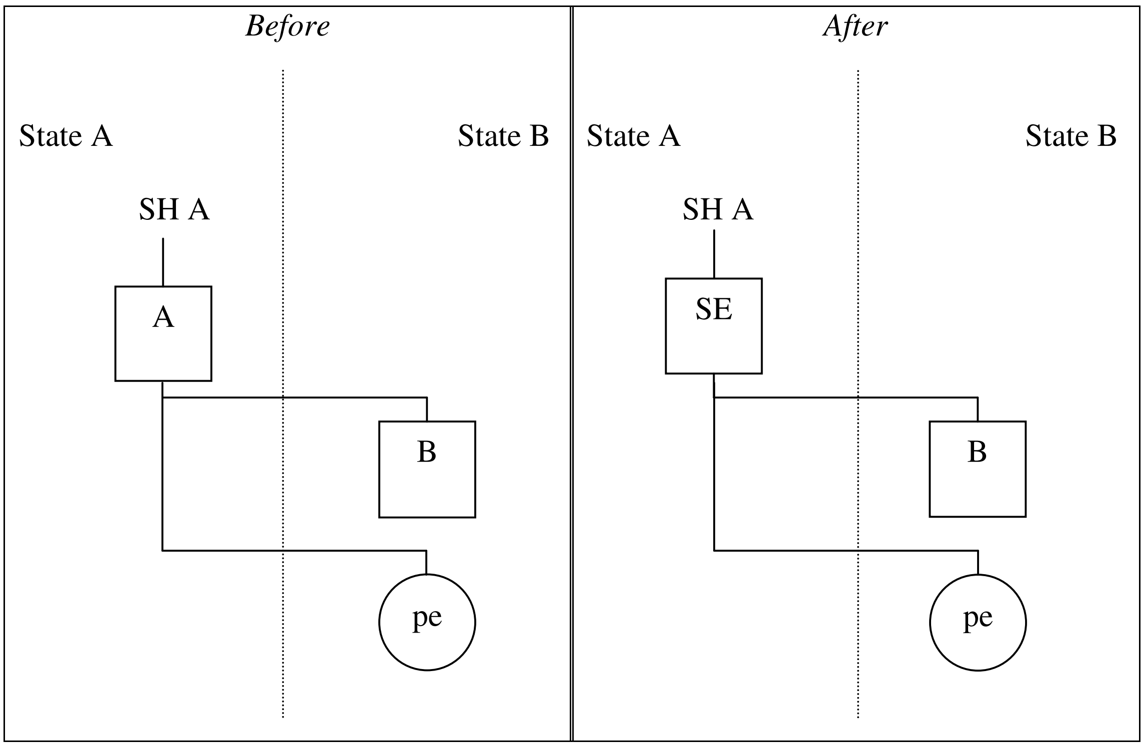
c) Will SE’s permanent establishment in Member State C be allowed to take over the losses of A’s permanent establishment that have not been exhausted for tax purposes? If SE would be a company resident in Member State C, would it then be allowed to take over these losses?

In principle, under the enterprise merger regime, pre-merger losses will remain with the transferor company. However, since the liability to Dutch tax of the transferor company ends at the moment of the transfer, the tax authorities can be *requested to allow that the losses can be taken over by the transferee company. This applies in the case when the transferee company is a Dutch resident as well as in the situation where the transferee company is resident abroad and will become a non-resident taxpayer as a result of the transfer. The liability to Dutch tax must end as a result of the transfer.*

CASE 9

Transformation of public limited-liability company into an SE

(Art. 2 par. 4 jo. Art. 37 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and B are existing companies
- pe is an existing permanent establishment
- A and B public limited-liability companies (see Annex I of Reg. 2157/2001)
- State A and State B are EU Member States
- A:
  - formed under law of Member State A
  - registered office in Member State A
  - head office in Member State A
- B:
  - formed under law of Member State B
  - registered office in Member State B
  - head office in Member State B

Transactions

- A will be transformed into an SE, governed by the law of Member State A (Pursuant to Art. 37 par. 2 Reg., the transformation shall not result in the winding up of A or in the creation of a new legal person. However, the Regulation itself does not give guidance with regard to taxation.)

Questions

1) Assume Member State A is your country

<u>Tax effects for A in Member State A</u>

a) Will the transformation of A into an SE give rise to any taxation of capital gains (= real value of assets and liabilities transferred minus their value for tax purposes) or is there roll-over relief for the business carried on in Member State A, or in Member State B through a permanent establishment?

According to strict interpretation of Art. 28a CITA, the transformation is deemed to be a (non exempt) liquidation. The liquidation gives rise to taxation. However, one may put a request to the tax inspector. And, according to Art, 28a sub 3 CITA, the tax inspector may only determine conditions, which guarantee future taxation. Therefore, if future taxation of the profits is guaranteed, it seems that there is a possibility to avoid taxation in the case of transformation. See further Case 1, question 2)a).

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State A, be carried over to SE in Member State A?

This depends on the decision of the tax inspector, but he must be reasonable.

c) Will SE be allowed to take over the losses of A that have not been exhausted for tax purposes?

If the tax inspector decides that the company has not gone into liquidation, the losses will remain with the company.

<u>Tax effects for SH A in Member State A</u>

d) Will there be any effect for SH A because of the transformation of its subsidiary company A into an SE?

If, according to question 1c, there is no liquidation considered, there will be no effects.

If company is deemed to be liquidated, the participation exemption may apply to the liquidation profits.

e) Will the answer to question d) be different in the following situations:

i) SH is a corporate shareholder?

Participation exemption may apply.

ii) SH is an individual shareholder not owning a substantial interest?

A resident individual, owning less than 5% of the shares, has to pay personal income tax at a rate of 30% on a deemed yield of 4% of the average net wealth during the tax year (which is the calendar year for individuals). For purposes of calculating the average net wealth, the real value of the shares at the beginning and the end of the calendar year has to be taken into account. Capital gains itself are not taxed.

iii) SH is an individual shareholder owning a substantial interest?

According to Art. 4.16 ITA (deemed alienations), the transformation is not considered to be an alienation of shares. Therefore, no taxation will apply.

iv) SH is an individual entrepreneur?

Generally, the transformation is not considered to be a transfer liable to tax for income tax on profits. See answer to question 1)a) of this case.

2) Assume Member State B is your country

<u>Tax effects for the shareholder of B in Member State B</u>

a) Will there be any effect for the shareholder of B because of the transformation of its parent company A into an SE?

There are no consequences for company B if its shareholder changes. Therefore, the transformation of the shareholder into another type of company should also not have any tax consequences.

Tax effects for A and SE in Member State B

b) Will A be subject to any taxation of capital gains (= real value of assets and liabilities minus their value for tax purposes) or is there rollover relief?

Generally a transformation is not considered to be a transfer. Therefore, there will be no taxation.
Art. 28A does not apply to foreign corporate taxpayers; therefore there is no taxation on the profits.
See also answer to question 1)a) of this case.

c) If not, what is the value for tax purposes that SE has to attribute to the assets and liabilities of the permanent establishment in Member State B?

The same book value as in company A.

d) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State B, be taken over with the same rollover relief by the permanent establishment of SE in Member State B?

According to the regulations, no transfer has taken place. Therefore, rollover relief does not apply.

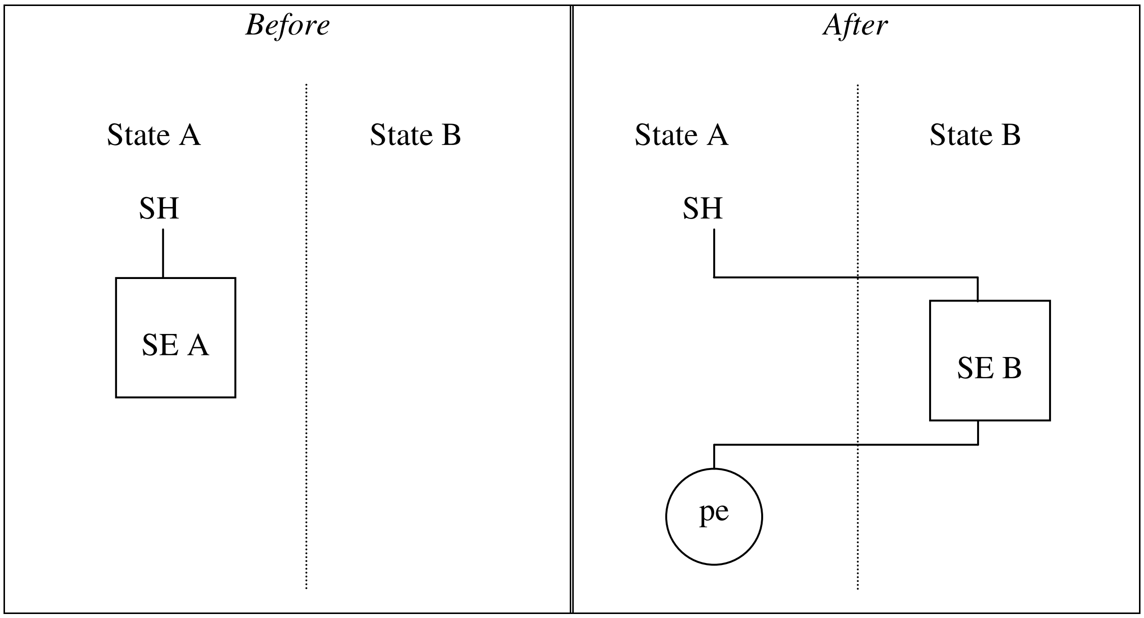
e) Will SE's permanent establishment in Member State B be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes?

According to the regulations, no transfer has taken place. Therefore, the losses remain with the permanent establishment.

CASE 10

Transfer of registered office of an SE

(Art. 8 par. 1 jo. Art. 37 Reg. 2157/2001)



Facts and assumptions

- SE is an existing SE
- State A and State B are EU Member States
- SE A:
  - formed under the law of Member State A
  - registered office in Member State A
  - head office in Member State A
- SE B:
  - statutes are amended to conform to the law of Member State B
  - registered office in Member State B
  - head office in Member State B

Transactions

- registered office and head office of SE are transferred to Member State B (pursuant to Art. 8 Reg. 2157/2001 such a transfer shall not result in the winding up of SE or in the creation of a new legal person)

Questions

1) Assume Member State A is your country

<u>Tax effects of the transfer for SE</u>

a) Does the transfer entail a winding up of SE for tax purposes?

No. However, according to Art. 15c CITA exit taxation is due in case of the emigration of companies. There is no exemption for emigration to EU-countries. Considering that Art. 15c CITA is meant to prevent the exit of tax claims, one might argue that Art. 15c CITA does not apply if and insofar the tax claim remains in the Netherlands (under the tax treaties, the Netherlands tax authorities may levy tax on the profits attributable to the permanent establishment in the Netherlands).

b) What are the tax consequences in case of a winding up of SE?

SE A has to pay corporate income tax on the liquidation profits. Dividend withholding tax is to be withheld by SE A on the distribution of the liquidation proceeds.

c) Does it make a difference whether or not a permanent establishments of SE B remains in Member State A?

No. However, see the answer on question 1)a) of this case.

d) If after the transfer of the registered office, SE B will have a permanent establishment in Member State A, can SE B take over the provisions and reserves which are partly or wholly exempt from tax with the same roll-over relief?

There is no rollover relief. The assets and liabilities of the permanent establishment may be valued at market value.
However, in case one successfully argues that no corporate income tax is due upon the emigration of the SE (see also question 1)a) of this case), the assets and liabilities of the permanent establishment may have to be valued at the book value of the assets and liabilities before the emigration.

e) If after the transfer of the registered office, SE B will have a permanent establishment in Member State A, can SE B's permanent establishment in Member State A take over the losses of SE A that have not been exhausted for tax purposes?

No. However, see the answers to questions 1)a) and 1)d) of this case.

Tax effects of the transfer for SH

f) What are the tax effects for SH in case the transfer results in a winding up of SE for tax purposes?

(The liquidation profits will be subject to corporate income tax, due by SE A.) The distribution of the liquidation proceeds to the shareholder will be subject to dividend withholding tax to be withheld by SE A. Depending on the type of shareholder, this dividend may be taxable (see below).

g) Is the answer to 1f) different if:
   i) SH is a corporate shareholder?

   The participation exemption may apply.

   ii) SH is an individual not owning a substantial interest?

   A resident individual, owning less than 5% of the shares, has to pay personal income tax at a rate of 30% on a deemed yield of 4% of the average net wealth during the tax year (which is the calendar year for individuals). For purposes of calculating the average net wealth, the real value of the shares at the beginning and the end of the calendar year has to be taken into account. Dividends and capital gains itself are not taxed.

   iii) SH is an individual owning a substantial interest?

   According to Art. 4.16 ITA, the emigration is not considered to be an alienation of shares. Therefore, no taxation will apply.

   iv) SH is an individual entrepreneur?

   Generally the emigration is not considered to be a transfer liable to tax for income tax on profits.

h) Are there any effects for tax purposes if the transfer of the registered office is not considered as a winding up for tax purposes?

No.

i) Is the answer to 1h) different if:
   i) SH is a corporate shareholder?

   No, although additional conditions will have to be met with respect to the participation exemption regime.

ii) SH is an individual shareholder?
iii) SH is an individual not owning a substantial interest?
iv) SH is an individual owning a substantial interest?
v) SH is an individual entrepreneur?

No to ii), iii), iv) and v).

2) Assume Member State B is your country

<u>Tax effects of the transfer for SE</u>

a) If SE is considered to be a new company, how should the assets and liabilities of SE be valued?

According to general accounting principles, the assets and liabilities will have to be valued at market value. Therefore, the annual tax-deductible depreciations will be higher. Also, the Netherlands will have a dividend withholding claim and a capital gains claim on the profits not yet distributed. However, under a tax treaty or the Parent Subsidiary Directive as implemented in Dutch tax law, the dividend withholding tax rate may be reduced.

<u>Tax effects of the transfer for SH</u>

b) Are there any tax effects for SH in case the transfer results in a formation of a new SE in your country? For example, with regard to the valuation of the shares in SEB?

The dividend withholding tax rate in the Netherlands may differ from the rate in Member State A. The rate may however be reduced under the relevant tax treaty or the Parent Subsidiary Directive as implemented in the Netherlands tax legislation.

Non-resident individual shareholders owning a substantial interest (at least 5% of the shares) in a company resident in the Netherlands are subject to personal income tax at a rate of 25% on regular income derived from the shares and capital gains arising upon the disposal of the shares.

A non-resident individual owning less than 5% of the shares in a company resident in the Netherlands is not liable to income tax.

If a non-resident individual or company conducts a business in the Netherlands through a Dutch permanent establishment, the shares in a Dutch company are deemed to be part of that permanent establishment (Art. 17a sub b CITA). The shares held by the permanent establishment may qualify for the participation exemption. If not, dividends distributed by SE B and capital gains arising upon the disposal of the shares in SE B will be subject to personal income tax (if the *non-resident is an individual) or corporate income tax (if the non-resident is a company). The dividend withholding tax to be withheld on dividend distributions can be deducted from the personal income tax or corporate income tax claim.*