TAX LAW

Academic Year 2016 / 2017

AGENDA - Session 11-

- Definition of Capital Gains
- Tax values and Tax Deferral
- Art.13 OECD MC

Required Readings:

- ***Art. 13, OECD MC***
- ***OECD Commentary on Art. 13 (all)***

Capital Gains

- Capital gains/losses are usually defined as the positive/negative difference realised upon disposal of an assets other than inventory assets.

Capital gain/loss*=* ***consideration*** *for the* ***disposal*** *–* ***cost base***

- In order to correctly determine a capital gain/loss, it is necessary to identify:
  - when the assets is actually, or deemed to be, **disposed of**;
  - which is the consideration realised;
  - Which the cost base upon which the gain/loss is computed

Capital Gains

- **Disposal**:
  - Sale
  - Insurance reimbursement of the loss of the asset
  - Utilisation outside the business scope
  - Any realization event*:*
    - *Contribution in kind*
    - *Merger*
    - *Demerger*
    - *Exchange of assets*

Capital Gains

- Consideration:
  - Price paid (*e.g.* sale)
  - Fair market value of the assets received in exchange (*e.g.* exchange of shares)
  - Fair market value of the asset disposed (*e.g.* contribution in kind)

- Cost Base = Tax value

Tax Value and Tax Deferral

- **Non recognition Rules**

There may be situations in which a tax payer has realised a gain or a loss on disposal of an asset, but recognition (*i.e.* relevance for tax purposes) is deferred until a later event occurs.

- ***Roll Over Treatment***

The tax position of a tax payer or asset is rolled over into another tax payer or asset (*i.e.* the consideration for the transfer of the asset is deemed to be equal to its tax base.

Article 13 OECD MC

- The main rule of this article is to be found in the fourth para. which provides that capital gains earned by a person who is a resident of one state from the alienation of property may be taxed only in the state where the alienator is resident.
- The first 3 para of this article are exceptions to this general rule

Article 13 OECD MC

- **Terminology**

The terminology employed in this article is incomplete in the sense that there are no definitions of the operative terms alienation and [capital] gains. The term alienation clearly includes but is not limited to the sale, exchange, transfer or passing upon death of property but is also intended to have an even wider scope of application.

Article 13 OECD MC

- **Alienation of immovable property**

The first exception to the general rule set out in para. 4 is found in para. 1 of the article, which allocates the taxing rights of income from the alienation of immovable property to the state where the property is situated.

The rule matches that laid down in art. 6 and in particular it follows the definition of immovable property found therein.

Article 13 OECD MC

- **Para. 2 property of a permanent establishment**

The second exception concerns movable property constituting business property of a permanent establishment. Under this rule the taxation rights arising from the alienation of such property or even from the alienation of the PE itself will be allocated to the state of the PE