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Dutch exit tax excessively burdensome

The ECJ has held the Dutch exit tax on the transfer of a company's place of management to another member state to be excessively burdensome. It would be sufficient to allow establishment of the tax due on the unrealised gains at the time of departure, but to defer collection until the gains are realised.

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A UK owned finance company was established as a B.V. in the Netherlands. Sometime later, its management was replaced with staff from the UK parent and it closed its offices in Holland. It thus became tax resident in the UK by virtue of its place of management and the office closure meant that there was no longer even a Dutch permanent establishment. However, it retained its corporate identity as a B.V. The Dutch tax office assessed it to corporation tax on its results for its final year of Dutch residence together with its unrealised capital gains at the time of its departure. The company protested on the grounds that there would have been no tax on the unrealised gain, had it moved within Holland and that the gain now never would be realised, it being mostly an exchange gain (in euro) on a pound sterling loan to an associated company.

The ECJ has now held the assessment to be fundamentally acceptable. A tax charge on exit is, of course, a restriction on a company's freedom of establishment is, however, in principle justified by the need to protect the allocation of taxing rights between member states. A company deploys its assets to make profits and the right to tax any increase in value falls to the state of residence when the increase occurs. Events thereafter are a matter for the new state of residence (contrary to the advocate general's view that future losses on realisation should also be taken into account, if they effectively reversed the unrealised gain on change of corporate residence). Thus it is also of no moment that with the move to the UK there can be no possibility of actually realising the gain established (in euro) when the company's Dutch residence ceased. There could be no gain or loss on exchange in the UK in respect of a sterling loan. On the other hand, the exchange rate was not the only factor affecting the value of a loan. Should a bad debt risk arise, it would be a matter for the state of residence at the time it arose.

Whilst it was reasonable to establish the tax due on the hidden reserves at the time of the change of residence, it was not reasonable to demand immediate payment. The gain had not been realised and had not produced funds to pay the tax. The actual liability should be deferred until the gain or gains had been realised. Objections to the effect that this would be too complicated administratively for a company with many individual assets were met with the response that it was up to the company to decide. If it were too complicated administratively, the company would be able to avoid the problem by immediately paying the tax. If, on the other hand, it saw the additional administrative load as bearable, the same must also apply to the tax office responsible for overseeing compliance. At this point, the ECJ interrupted its own argument with a reference to the help available under the Mutual Assistance Directive. Finally, the court answered a mention of tax avoidance with the remark that "the mere fact that a company transfers its place of management cannot set up a general presumption of tax evasion".

The ECJ case reference is C-371/10 *National Grid Indus*, judgment of November 29, 2011.

Schlagwörter

exit tax, place of management, residence, unrealised gains