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Corporate exit tax hinders freedom of establishment

The ECJ has held the Portuguese taxation of the unrealised gains inherent in a company’s assets on change of corporate residence from Portugal to be an unjustified hindrance on the freedom of establishment.

Portugal levies an exit tax on companies wishing to move their corporate residence from Portugal either by change of registered office or by change of place of management by adding the unrealised gain inherent in their net assets to taxable income in the final year of Portuguese tax residence. Effectively, the final year's taxable income is based on a valuation of assets at market values. The same applies to a permanent establishment of a foreign entity migrating from Portugal to another country.

The ECJ has now passed judgment on a complaint by the European Commission that these provisions are a hindrance on the freedom of establishment of Portuguese and other EU companies with Portuguese business interests. Their application to the closure of a business operation is acceptable, as the same consequence would be felt by a Portuguese company closing down its local branch or ceasing business operations altogether. However a company moving its registered office, place of management or business operation within Portugal would not face tax consequences, whereas a move abroad would trigger immediate taxation from the full release of all hidden reserves to taxable income. The object of this taxation, the need to ensure ultimate Portuguese taxation of all gains earned in Portugal, is legitimate, but the method used to achieve it goes beyond what is necessary. Allowing taxpayers to defer the taxation at an interest rate in accordance with national law would constitute, so the court, a measure less harmful than the present method.

The ECJ case reference is C-38/10 *Commission v Portugal*, judgment of September 6, 2012.

Schlagwörter

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