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Pre-accession relief rule applicable until Commission rules otherwise?

The advocate general on an ECJ case on special case exemption from a loss curtailment provision has suggested the court hold the exemption rule to be of pre-accession provenance and thus not to be disapplied as unauthorised state aid unless and until the Commission has come to that conclusion on the basis of a properly completed formal proceeding.

The Finnish Income Tax Act provides for a ten-year loss carry-forward, but subject to forfeiture on transfer of more than 50% of a company's shares. Tax offices are to disapply this forfeiture rule on application by the company claiming "special circumstances", such as rescue attempts to save the business. The tax authorities have issued official guidance to the effect that the forfeiture rule is to prevent the sale of tax losses and that "special circumstances" include share transfers in order to transfer ownership to the employees or – for family businesses – to the next generation. A manufacturing company faced with the forfeiture of its loss carryforward on a change of shareholders has maintained that it, too, should be granted exemption, even though its circumstances, although not abusive, were not "special" as described in the official guidance. The official guidance was too narrow and the Finnish courts should broaden the definition to render the benefit in the exemption unselective and therefore generally acceptable under European law.

The advocate general on the case has now published her opinion. She explicitly states that she is not taking a view on the state aid nature of the disputed measure. If, however, the exemption is state aid, it was enacted before Finland's accession to the EU and has been consistently applied since. It thus ranks, if at all, as pre-accession aid. By contrast to new aid measures, those instituted prior to a country's accession are to continue to be applied by the authorities and courts unless and until the Commission has established the fact – after completion of all due processes – that the rule at issue constitutes unlawful and unauthorised state aid. This means that until then, the national courts shall apply the law as it stands without reference to the ECJ or other European body.

The ECJ case reference is C-6/12 *P*, opinion of February 7, 2013.

Note: this case has a German parallel inasmuch as the European Commission has ordered Germany not to apply a similar provision exempting corporate recovery cases from loss relief forfeiture on change of shareholder. Germany has sued before the ECJ against this order, but the case has not yet been heard. Interestingly, the Commission is arguing that the German exemption is state aid precisely because of its general nature. The inference is that the Commission could have approved isolated instances of the exemption, but not its general application in all corporate recovery attempts. The advocate general on *P* would seem to have been at pains to avoid prejudging a German case on a Finnish issue.

Schlagwörter

Loss relief, change of shareholders, curtailment of losses