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Roll-over relief provision infringes EU freedom of establishment

The ECJ has held the roll-over relief provisions allowing deferral of the tax charge on a capital gain from the sale of business property to infringe the freedom of establishment inasmuch as they require reinvestment of the gain in a replacement asset in Germany.

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Under a long-standing, though periodically modified, provision in the Income Tax Act, businesses may defer the tax charge on the capital gain from the sale of certain business assets (mostly land and buildings) by deducting the gain from the cost of a replacement asset. This reduces the amortisation basis of the replacement or, alternatively, its base cost for computing any future gain on sale. The replacement must be acquired within a set time limit (basically four years for the purchase or commencement of construction) and must be held as a fixed asset of a domestic permanent establishment. The European Commission took issue with this latter condition which appears to discourage German businesses from moving to another member state of the EEA.

The ECJ has now held in favour of the Commission. The German right to taxation on the gain on sale of a German fixed asset is undisputed. However, immediate taxation on the gain reinvested in another member state is discriminatory in comparison to the roll-over relief – effectively a long-term deferral – available on reinvestment in Germany. Neither the Commission nor the court accepted the correlation between the initial gain and the subsequent gain on sale, or annual write-down, of the replacement asset. The ECJ has now insisted that the German business reinvesting the gain on the sale of a German asset in a replacement asset in another member state at least be allowed the option of deferring payment of the tax liability. It would then be for the business to claim the deferral and accept the additional administrative burden as a necessary consequence, or to accept immediate taxation for the sake of administrative simplicity. If, however, a business felt able to accept the administration, the tax authority would have no grounds for claiming that its own additional administrative effort was unreasonable. Time will show the import of this latter remark.

The ECJ case reference is C-591/13 *Commission v. Germany* judgment of April 16, 2015.

Schlagwörter

business property, capital gain, roll-over relief