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Higher tax-free allowance also for non-resident beneficiaries

The ECJ held that the German inheritance and gift tax option for taxation as a resident does not fully resolve the conflict with EU law from the lower personal allowances for non-residents. In consequence and considering an earlier ECJ judgment of April, 2010 the referring Lower Tax Court now finally ruled in favour of the taxpayer.

The Inheritance and Gift Tax Act provides for certain personal allowances depending on the degree of kinship between testator (donor) and beneficiary. If both parties are non-resident, the personal allowance is only €2,000 regardless of kinship. In 2010, the ECJ held this distinction to be an unacceptable restriction on the free movement of capital (C-510/08 *Mattner* judgment of April 22, 2010) and the government responded by introducing an option for EU/EEA-residents for taxation as German residents for the two periods of ten years before and after the chargeable transfer.

In the case before the Lower Tax Court of Duesseldorf a mother living in England for many years wished to transfer a German property to her two daughters who were similarly long-term British residents. She protested against the low personal allowance for chargeable transfers between residents in another EU country, but refused to exercise the option for taxation as a German resident on the grounds that she could not know what the coming ten years might bring. In support of her position, she claimed that Germany had insufficiently transposed the Mattner judgment into national law. The Lower Tax Court then referred the case to the ECJ.

The ECJ followed the approach taken by the advocate general in his opinion of February 18, 2016 and held that a national law provision in conflict with EU law remains in conflict with EU law, even if there is an option for those affected not to apply it. Lastly, the option is more burdensome on residents of other member states as it requires taxation as a resident for a twenty year period, whereas the corresponding provision for residents merely accumulates all chargeable transfers in the ten years up to the date of the transfer at issue.

Specifically, the ECJ saw a conflict with EU-law in two ways: First of all in a situation where the tax is calculated by applying a lower tax-free allowance if the beneficiary does not specifically request otherwise by opting for the higher tax-free allowance, and secondly and foremost if – as a result of an option for the higher tax-free allowance by the non-resident beneficiary – all the gifts received by that beneficiary from the same person over the course of the 10 years preceding and the 10 years following that gift (thus accumulating all chargeable transfers over a period of 20 years) must be taken into account.

The ECJ went on to say that where – under national gift tax legislation - non-resident beneficiaries who received the property from a non-resident donor, and, on the other hand, non-resident or resident beneficiaries who received such property from a resident donor and resident beneficiaries who have acquired it from a non-resident donor are put on equal footing the national legislation cannot — without infringing the requirements of EU law — treat those beneficiaries differently with respect to the application of an tax-free allowance.

Accordingly, the referring Lower Tax Court has now decided in the above sense and held that the higher tax-free allowance of €400,000 be available for the taxpayer. Appeal to the Supreme Tax Court was not granted.

The ECJ case reference is C-479/14 *Hünnebeck* judgment of June 18, 2016

Lower Tax Court of Duesseldorf, decision of July 13, 2016 (case reference: 4 K 488/14 Erb)

Schlagwörter

non-resident beneficiary, non-resident donor, personal allowances, tax free gift allowance