

By PwC Deutschland | 18. November 2024

ECJ to decide on failure of Germany to eliminate discriminatory tax treatment of reinvested capital gains

The European Commission decided to refer Germany to the European Court of Justice for having failed to remedy the infringement of the free movement of capital (Article 63 TFEU and Article 40 of the EEA Agreement) due to its discriminatory tax treatment of reinvested capital gains upon sale of real estate located in Germany.

Germany grants a deferral of taxation for reinvested capital gains made on the sale of real estate located in Germany provided that the real estate has been attributed to the fixed assets of a domestic permanent establishment for an uninterrupted period of at least 6 years (replacement reserve according to Section 6b Income Tax Act). Corporations established in Germany, even without a business activity therein, are deemed to have such a permanent establishment at their place of management (i.e. in Germany). Taxpayers established in other EU/EEA Member States are deemed not to have such permanent establishments in Germany. Hence, they are denied such tax deferral on reinvested capital gains from the sale of German real estate.

In the opinion of the Commission this difference in treatment constitutes a restriction of the free movement of capital (Article 63 TFEU and Article 40 of the EEA Agreement) for which the Commission has not found any valid justifications.

Regarding the requirement of reinvestment of capital gains, the Commission notes that the former rule in German tax law of allocating newly acquired fixed assets to a permanent establishment located in Germany was already considered by the Court of Justice of the European Union as contrary to EU law (ECJ judgment **C-591/13**, *Commission v. Germany*; a summary to be found in our **blog post of 16 April 2015**).

More details to be found in the Commission's press release of 14 November 2024.

Schlagwörter

replacement reserve, sale of real estate