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By PwC Deutschland | 26 April 2013

No immediate tax on move to another member state

The ECJ has held that immediate taxation of the difference between book and market value of assets moved to another member state goes beyond what is necessary to preserve the legitimate interests of the first state in preserving its tax base if the same move within the country would be tax-free.

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Spain provides for immediate taxation of the inherent gain (the difference between book and market value) in business assets transferred abroad. The transfer can be direct in the form of a physical movement to an establishment of the taxpayer in the other country, or indirect through a change in the taxpayer's residence. There is no similar charge to taxation in the event of a corresponding move within Spain, and the effect of a change of residence is reduced by an exemption in respect of assets remaining attached to a Spanish permanent establishment. The European Commission sees this distinction between moves within the country and within the EU as discrimination amounting to a restriction on the freedom of establishment and has brought an infringement case against Spain before the ECJ.

The ECJ has now held in favour of the Commission. Charging an inherent gain to immediate taxation goes beyond what is necessary to protect Spain's legitimate interest in taxing the gain accruing during the Spanish period of residence when ultimately realised. The gain can be established at the time of the move, but settlement of the liability should be deferred until realisation puts the taxpayer in funds to meet it. The court did not accept the Spanish provisions for payment deferral as sufficient protection for the taxpayer, as they were not automatic. It did, however, seek to allay Spanish concerns as to collectability of the debt by pointing to the Mutual Assistance Directive for the Collection of Tax Debts. In taking this position, the court followed its earlier case law, in particular, the Nat*ional Grid Indus* judgment of November 29, 2011, case C-371/10.

The ECJ case reference is C-64/11 *Commission v. Spain*, judgment of April 25, 2013

Keywords

asset transfer, freedom of establishment, transfer abroad