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Exemption from loss cancellation on change of shareholders may constitute state aid

The ECJ has held that a Finnish exemption from a loss forfeiture provision on the change of shareholders would be state aid if the authorities may apply it with discretion and would require Commission approval if the details of the scheme have substantially changed since Finland's accession in 1995.

The Finnish income tax act provides for a 10 year loss carry forward. However, the carry forward is cancelled on a change in ownership of more than 50% of the company's share capital or on the withdrawal of more than 50% of the shareholders. This cancellation is, however, not to be applied for a good reason in the interests of business continuation, and the Tax Directorate of Finland has issued a circular setting out its view of the criteria constituting a good reason. The provision is currently under attack by an unsuccessful claimant for exemption on the grounds that it is arbitrary and thus constitutes unlawful state aid in the absence of a specific approval from the European Commission.

The ECJ has basically declined to rule on the question put, saying that it has not been given the necessary facts for it to come to a founded view on the subject. However, it has made some interesting observations. In particular, it makes the point that it has not been instructed on the background to the legislation or on its application in practise. This means that it is unable to decide on the basis of comparison with the "normal system". If the ten year loss carry forward is the norm, its cancellation on a change in shareholders would be the exception potentially justified by the need to curb trade in tax-loss companies. Exemption from the exception could then be justified on the basis that the legitimate tax objective is not impaired. If the cancellation on change of a majority of the shareholders is the norm, the exemption would need to be justified on the basis of specific tax objectives. However, in all cases, the discretion of the authorities must be limited to verifying the fulfilment of objective criteria. If they have discretionary powers to authorise exemption from a tax provision on the basis of non-tax criteria – such as the furtherance of an employment objective – the measure could constitute selective state aid. That aid would be lawful until the Commission determines otherwise if the present system is substantially similar to that in force in 1995 on Finland's accession to the EU. If it has changed significantly in the meantime, it could constitute "new aid" requiring Commission approval before it could be implemented. However, here too, the court did not have the facts necessary to make the distinction.

The ECJ case reference is C-6/12 *P Oy*, judgment of July 18, 2013.

n.b. The parallel German provision exempts companies from loss cancellation on a transfer of more 50% of the share capital to a single shareholder if the transfer is made in the context of a corporate recovery programme. The Commission refused to authorise the provision on the grounds that it was too general - in some ways the opposite attitude to that taken by the ECJ in the Finnish case - and Germany's appeal against the Commission's decision was rejected on a formality. However, a number of private claims - with government support - against the Commission are still pending. The exemption provision has, for the meantime, been disapplied, though there is a promise to reactivate it, should a future ECJ decision give legal support for doing so.

Keywords

change of shareholders, loss cancellation, loss forfeiture, state aid