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Higher inheritance tax allowances for residents also for EU taxpayers

The ECJ has held that the higher inheritance and gift tax allowances due to residents should also be granted on capital transfers between non-residents where at least one of the parties is resident in an EU member state.

The Inheritance and Gift Tax Act grants tax-free allowances based on the degree of kinship on capital transfers to or from a German resident. These allowances range between €20,000 and €500,000. If neither party to the transfer is a German resident, the allowance on a chargeable transfer falls to €2,000 regardless of the degree of kinship. The European Commission sees this distinction as discriminatory and has brought an infringement case against Germany before the ECJ.

The ECJ has now held in favour of the Commission. The distinction restricts the freedom of capital movement of taxpayers resident in other member states of the EU and cannot be justified on the grounds of tax system coherence or control considerations. The higher allowances are given subject only to the domestic residence of at least one of the parties and vary only by degree of kinship. The tax charge on a transfer to or from a domestic resident is therefore solely based on the value of the transfer and on the closeness of the relation between testator/donor and acquirer, neither of which are in any way dependent on the country of residence. Arguments based on control considerations also fail, given that any loss of control from having to consult the authorities of another member state necessarily also arises on cross-border transfers within the EU.

The ECJ explicitly did not rule on transfers falling under a December 2011 amendment to the Inheritance and Gift Tax Act. This allows an acquirer to opt for taxation as though one of the parties had been a German resident, if at least one of them was resident in an EU member state at the time of the transfer. It applies to all assessments still open on December 14, 2011 and to transfers after that date. Initially, the Commission saw this amendment as only a partial solution to the problem; whether it will persist in this stance remains to be seen.

The ECJ case reference is C-211/13 *Commission v. Germany* judgment of September 4, 2011.

Keywords

allowances, degree of kinship, inheritance tax