By PwC Deutschland | 01 February 2019

# Free movement of capital in cases of shareholdings of at least 10%

**In its judgement of 24 July 2018, published on 30 January 2019, the Supreme Tax Court held that with regard to national provisions with a requirement of a minimum shareholding of at least 10%, the principle of the free movement of capital is not blocked by the principle of freedom of establishment. Whilst the judgement specifically related to a legal provision, which is no longer applicable, it represents a departure by the Supreme Tax Court from its previous view on this issue.**

The proceedings related to the 2001 year of assessment. The case dealt with a rule requiring a lump-sum add-back of 5% of dividend income received from a non-resident company as deemed non-deductible business expenses. In particular the Court considered whether the rule breached the principle of free movement of capital (now Article 63 TFEU), which freedom also provides protection against discrimination to persons resident outside the EU/EEA .

**Background**

The appellant was a GmbH, which held 25.17% of the shares in an Indian company. In 2001 the Indian company made a distribution to the GmbH. The dividend was exempt from tax both under the German/Indian Tax Treaty and under a domestic provision, subject to a minimum shareholding of 10%. However, under a related domestic provision, 5% of it was treated as a deemed non-deductible business expense.

**The judgement**

In deciding which fundamental freedom – free movement of capital or freedom of establishment (Article 49 TFEU) - was applicable the Supreme Court referred to the judgement of the European Court of Justice (ECJ) in Deister Holding (C-504/16), in which it was held that national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities fell within the provisions of the Treaty on freedom of establishment. Whereas, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking should be examined exclusively in light of the free movement of capital.

The Supreme Tax Court had decided in several judgements issued in 2012 (I R 7/12) and 2013 (I R 10/11) that an indirect shareholding of at least 10% typically indicated an ability to "exert a definite influence" so that the freedom of establishment prevailed.

However, against the background of intervening ECJ case law (Italcar C-282/12 and Kronos International, C-47/12) the Supreme Tax Court has now revised its view. A shareholding of at least 10% may indeed exclude those investments from the scope of the exemption where they are made with the sole intention of investing money without influencing the management and control of the company. However, the fact that such a shareholding quota was a requirement did not mean per se that the exemption only applied to shareholdings, which enabled their holder to exert a definite influence on a company's decisions and to determine its activities. A shareholding of this level does not automatically mean that shareholder with a holding of 10% or more, does exert a definite influence on the distributing company.

Thus, the relevant provision not only applied to dividends which were received by domestic companies which applied their shareholding to exert a definite influence on the distributing company but also applied to dividends which were received by shareholders who did not exert influence. As a result, as the provision only applied the lump-sum add-back to holdings in foreign companies it could be considered to contravene the principle of free movement of capital despite the fact that the provision only applied to shareholdings of at least 10%.

**Source** Supreme Tax Court judgement of 24 July 2018 (I R 75/16) published on 30 January 2019

**Keywords**

EU Law, Fundamental Freedoms, free movement of capital, freedom of establishment, minimum holding