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By PwC Deutschland | 19 September 2022

UK Group Transfer Rules tested before the ECJ

In a reference for a preliminary ruling from the UK Upper Tribunal the European Court of Justice (ECJ) is asked whether the immediate tax charge on a transfer of assets from a UK resident company to a sister company resident in Switzerland (which does not carry on a trade in the UK through a permanent establishment) contrasts with EU-Law (Article 49 TFEU or Article 63 TFEU).

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Background

The case concerns the UK Group Transfer Rules which impose an immediate tax charge on a transfer of assets from a UK resident company to a sister company resident in Switzerland (which does not carry on a trade in the UK through a permanent establishment). Both of those companies are wholly owned subsidiaries of a common parent company, which is resident in another member state. The fact that such a transfer would be made on a tax neutral basis if the sister company were also resident in the UK (or carried on a trade in the UK through a permanent establishment) give rise to the question of whether such legislation constitutes a restriction on the freedom of establishment of the parent company in Article 49 TFEU or, if relevant, a restriction on the freedom to move capital in Article 63 TFEU.

GL is a company **resident for tax purposes** in the United Kingdom and is a member of the Japan Tobacco Inc. group. **In 2011**, GL disposed of intellectual property rights relating to tobacco brands and related assets to a sister company (JTISA), which is a direct subsidiary of a Netherlands group company and resident in Switzerland. The remuneration received by GL as consideration was paid by the Swiss company, which, for that purpose, had been granted inter-company loans by the Netherlands company for an amount corresponding to the amount of the remuneration. **In 2014**, GL sold all of the share capital which it held in one of its subsidiaries, a company incorporated on the Isle of Man, to the Netherlands company.

The tax authorities issued two notices determining the amount of the chargeable gains and profits that accrued to GL in the context of the 2011 and 2014 disposals in the relevant accounting periods. As the assignees were not resident for tax purposes in the United Kingdom, the gains on the assets were the subject of an immediate tax charge and no provision of UK tax law provided for the deferral of that charge or for payment in instalments.

Referral

The referring court states that the question that arises in the national proceedings is whether, in the context of the 2011 and 2014 disposals, the imposition of a tax charge without the right to defer payment of the tax is compatible with EU law, more specifically, in respect of both disposals, with the freedom of establishment provided for in Article 49 TFEU and, in respect of the 2011 disposal, with the free movement of capital referred to in Article 63 TFEU. The UK referring court submitted several questions to the ECJ for clarification.

Although the United Kingdom left the European Union on 31 January 2020, the ECJ continues to have jurisdiction to give a ruling on that request.

Opinion

In his Opinion the Advocate General (AG) suggests it be appropriate to answer the third, fifth and sixth questions solely in the light of the provisions on the free movement of capital in Article 49 TFEU (and not along the rules in Article 63 TFEU on free movement of capital). In the instance of the case at dispute, he considers that **freedom of establishment is the principal freedom** to which the national measure at issue

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relates. In his Opinion the AG thus proposes that the Court should answer the third, fifth and sixth questions as follows:

1) *Article 49 TFEU*

must be interpreted ***as not precluding national legislation relating to group transfer rules which imposes an immediate tax charge on a transfer of assets*** *by a company resident for tax purposes in the United Kingdom to a sister company which is resident for tax purposes in Switzerland (and does not carry on a trade in the United Kingdom through a permanent establishment)* ***in a situation where those companies are both wholly owned subsidiaries of a common parent company which has its tax residence in another Member State****, and in circumstances where such a transfer would be made on a tax-neutral basis if the sister company were resident in the United Kingdom (or carried on a trade there through a permanent establishment).*

2) *Article 49 TFEU*

must be interpreted as meaning ***that a restriction on the right to freedom of establishment*** *resulting* ***from the difference in treatment*** *between national and cross-border transfers of assets for consideration within a group of companies under national legislation which imposes an immediate tax charge on a transfer of assets by a company resident for tax purposes in the United Kingdom* ***may, in principle, be justified by the need to preserve a balanced allocation of taxing powers****, without there being any need to provide for the possibility of deferring payment of the charge in order to ensure the proportionate nature of that restriction, where the taxpayer concerned has realized proceeds by way of consideration for the disposal of the asset equal to the full market value of that asset.*

Source

The ECJ case reference is **C-707/20** *Gallaher* opinion of 8 September 2022.

Keywords

Knowledge Transfer (KT) / Wissenstransfer / Knowledge Management (KM) / Wissensmanagement, asset transfer