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By PwC Deutschland | 13 March 2025

ECJ: Higher gift tax for foreign family foundation in breach of EU principles?

The Cologne Tax Court has asked the European Court of Justice for a preliminary ruling regarding the favorable inheritance tax classes for domestic family foundations which are not available to foreign family foundations. The Cologne tax court has doubts as to whether this different treatment is in line with the principle of free movement of capital. In his Opinion delivered today the Advocate General sees no infringement of EU law.

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Background

In the case of dispute, a donor living in Germany had donated assets to the plaintiff, a so-called family foundation domiciled in Liechtenstein and established under Liechtenstein law. The beneficiaries of the foundation are the donor's children and grandchildren. With the gift tax return, the plaintiff requested the assessment of gift tax, considering a tax-free allowance of EUR 200,000 and the application of a tax rate of 19% according to tax class I.

The tax office assessed the gift tax without granting the tax class privilege by taking into account instead a tax-free amount of only EUR 20,000 and applying a tax rate of 30% according to tax class III.

More details of the decision of the Cologne Tax Court to be found **here**.

Opinion of Advocate General Campos Sánchez-Bordona

The Advocate General believes that Article 40 of the Agreement on the European Economic Area of 2 May 1992 must be interpreted as **not precluding** legislation of a Member State of the European Union which, in laying down the rules governing the gift tax applicable to the establishment by a resident of that Member State of a foundation registered in a State belonging to the European Economic Area, and in order to **maintain the fiscal cohesion** of that legislation, imposes tax conditions which are more onerous than those applicable to the establishment of a foundation in the abovementioned Member State, as a symmetrical counterbalance to the fact that **the foreign foundation is not liable to pay substitute inheritance tax**, which, conversely, is payable by foundations registered in that Member State.

According to the referring tax court, the German legislature “proceeded from the principle that the advantages granted by the tax-class privilege would be offset by the disadvantages of the **substitute inheritance tax**. In introducing the substitute inheritance tax, the legislature had the objective of placing foundation constructs on an equal footing with succession by natural persons by means of recurring taxation. However, that rule could be laid down only in respect of national family foundations. As far as family foundations established abroad are concerned, the German legislature had and has no means of levying substitute inheritance tax”.

Source:

ECJ case reference **C?142/24** *Familienstiftung* - Opinion of 13 March 2025.

Keywords

family foundation, foreign foundation