



24 November 2017

## European Court of Justice: The immediate recovery of the Finnish exit tax in connection with cross-border transactions constitutes a restriction on freedom of establishment pursuant to Art. 49 TFEU.

*KPMG Finland is assisting the claimant in the case currently pending before the Administrative Court of Helsinki connected to the CJEU's judgment.*

The CJEU delivered its ruling in C-292/16, A Oy on 23 November 2017. The claimant transferred its Austrian permanent establishment to an Austrian group company within the meaning of "transfer of assets" pursuant to Sec. 52 d of the Finnish Business Income Tax Act (BITA). The Finnish Tax Administration interpreted Sec. 52 e (3) BITA to the transfer thus that it allows the immediate taxation of the probable alienation price of the assets (attributable to the permanent establishment) in A Oy's taxation. From this tax, the tax which would have been payable for the same income in the state where the permanent establishment is situated but for the provisions of the Merger Directive, is deducted (*fictitious credit*). In the similar domestic transfer of assets, the principle of continuity would have been applied, i.e. the taxation of the unrealised capital gains would not have been conducted until the point of time where the assets are transferred again.

In these circumstances, the CJEU had to rule whether Sec. 52 e (3) BITA which enables the interpretation of immediate recovery of the tax constitutes a restriction on freedom of establishment. The Court noted that the domestic provisions follow the provisions of the Merger Directive which does not provide for the point of time where the tax can be recovered, but an opportunity to recover the tax. Therefore, the Member States have the competence to decide on the timing but not without taking into account EU law. The Court further noted that the treatments of domestic and cross-border situations were objectively comparable and not altered by the concept of fictitious credit. Thus, the provision constituted a restriction on freedom of establishment.

Although the restriction can be justified by an overriding reason to safeguard the allocation of the power to impose taxes between the Member States, it is nevertheless disproportionate to safeguard those powers. The CJEU referred to its previous case law and stated that it is sufficient that Member States can determine the amount of the payable tax on the capital gains at the time of the transfer. It is also sufficient in those circumstances that the taxpayer is allowed to elect whether to pay the tax immediately or postpone the payment with interest accruals to at some later point in time. Therefore, Sec. 52 e (3) BITA constitutes a restriction on freedom of establishment pursuant to Art 49 TFEU.

### Comment

The CJEU's ruling shows that although domestic statutes transpose provisions of the EU Corporate Tax Directives, it does not automatically mean that they follow the principles of the EU Treaties. The freedom of establishment pursuant to Art. 49 TFEU is a fundamental right provided by EU law and the Member States must take it into account. Objectively comparable domestic and cross-border situations must be treated similarly, taking into account public interest, but without going beyond what is necessary. Entities executing similar transactions are encouraged to contact KPMG Finland for further information.

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