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Judgment of the Court of Justice in Case C-101/05

Skatteverket v A

THE COURT OF JUSTICE CLARIFIES THE APPLICATION OF THE PRIINCIPLE OF FREE MOVEMENT OF CAPITAL IN RELATIONS BETWEEN MEMBER STATES AND THIRD COUNTRIES

Where a Member State makes a tax advantage conditional upon satisfying conditions, compliance with which can be verified only by obtaining information from a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage if it proves impossible to obtain such information from that country.

Swedish legislation grants taxpayers resident in Sweden a tax exemption in respect of dividends distributed in the form of shares in a subsidiary by a limited liability company established in Sweden or in an EEA [1] Member State, but refuses to grant them that exemption where such a distribution is made by a company established in a third country outside the EEA, unless that country has concluded a convention providing for the exchange of information with Sweden.

A owns shares in company X, which has its registered office in Switzerland and is considering distributing the shares which it holds in one of its subsidiaries. A applied to the Skatterättsnämnden (Revenue Law Commission) for a preliminary decision on whether such a distribution was exempt from income tax. The Skatterättsnämnden responded that the distribution of shares contemplated by X should be exempt from income tax under the provisions of the Treaty on free movement of capital.

Taking the view that those provisions are unclear with regard to the movement of capital between Member States and third countries, the Skatteverket appealed against the preliminary decision of the Skatterättsnämnden to the Regeringsrätten, which asked the Court of Justice of the European Communities whether the Swedish legislation is compatible with Community law.

With regard to the movement of capital between Member States and third countries, the Court points out, first of all, that the provisions on free movement of capital may be relied on before national courts and may render national rules that are inconsistent with them inapplicable, irrespective of the category of capital movement in question.

[1] The European Economic Area is an association agreement signed in May 1992 between the European Community and its Member States and three Member States of the European Free Trade Association (EFTA), namely Iceland, Norway and Lichtenstein.

The Court acknowledges that the liberalisation of the movement of capital with third countries may pursue objectives other than that of establishing the internal market, such as, in particular, that of ensuring the credibility of the single Community currency on world financial markets and maintaining financial centres with a world-wide dimension within the Member States. However, it states that the Member States enshrined the principle of free movement of capital in the same article of the EC Treaty and in the same terms for movements of capital taking place within the Community and those relating to relations with third countries, whilst at the same time providing safeguard clauses and derogations which apply specifically to the movement of capital to or from third countries.

According to the Court, the extent to which the Member States are authorised to apply certain restrictive measures on the movement of capital cannot be determined without taking account of the fact that **movement of capital to or from third countries takes place in a different legal context from that which occurs within the Community**. Because of the degree of legal integration that exists between Member States of the European Union, in particular by reason of the presence of Community legislation which seeks to ensure cooperation between national tax authorities, the taxation by a Member State of economic activities having cross-border aspects which take place within the Community is not always comparable to that of economic activities involving relations between Member States and third countries. According to the Court, it may also be that a Member State will be able to demonstrate that a restriction on the movement of capital to or from third countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States.

Next, the Court states that the effect of legislation such as the Swedish legislation is to discourage taxpayers resident in Sweden from investing their capital in companies established outside the EEA. Since the dividends which such companies pay to Swedish residents receive less favourable tax treatment than dividends distributed by a company established in an EEA Member State, the shares of such companies are less attractive to investors residing in Sweden than shares in companies established in such a State. **Such legislation therefore entails a restriction of the movement of capital between Member States and third countries**.

The Court observes that **the need to guarantee the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying such a restriction** if the measure in question complies with the principle of proportionality, in that it must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it.

In that regard, the Court finds that, within the Community, a Member State cannot rely on the fact that it may be impossible to seek cooperation from another Member State in conducting inquiries or collecting information in order to justify a refusal to grant a tax advantage. However, in view of the fact that the movement of capital between Member States and third countries takes place in a different context, that approach cannot be transposed in its entirety to the movement of capital to or from countries.

The Court finds that, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, **it is, in principle, legitimate for that Member State to refuse to grant that advantage if**, in particular, because that third country is not under any contractual obligation to provide information**, it proves impossible to obtain such information from that country**.

It is for the national court to ascertain whether the Swedish tax authorities are able to verify that the requirements under Swedish law for entitlement to the exemption in respect of dividends are satisfied and whether the convention concluded between Sweden and Switzerland permits the Swedish tax authorities to obtain the information they need.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: CS, DE, EN, ES, EL, FR, HU, IT, NL, PL, SK, SV

The full text of the judgment may be found on the Court's internet site
http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-101/05
It can usually be consulted after midday (CET) on the day judgment is delivered.

For further information, please contact Christopher Fretwell
Tel: (00352) 4303 3355 Fax: (00352) 4303 2731