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Advocate General's Opinion in Case C-318/07

Hein Persche v *Finanzamt Lüdenscheid*

ADVOCATE GENERAL MENGOZZI PROPOSES THAT THE COURT ALLOW THE SAME TAX ADVANTAGES FOR CROSS-BORDER DONATIONS AS FOR DONATIONS TO DOMESTIC ORGANISATIONS

In his tax return for 2003, Mr Hein Persche, a German national, claimed a tax deduction for a donation in kind valued at approximately EUR 18 180, made to a body established and recognised as charitable in Portugal (a nursing home to which a children's home had been added). The Finanzamt refused the deduction sought on the ground that the beneficiary of the donation is not established in Germany.

The Bundesfinanzhof, the highest German court having jurisdiction over tax matters and before which the case is pending at final instance, has asked the Court of Justice whether a donation made in the form of everyday consumer goods is subject to the principle of the free movement of capital and whether a Member State may make the right to a tax deduction subject to the condition that the beneficiary must be established in that Member State.

In his Opinion today, Advocate General Mengozzi states first that, in his view, donations in kind (of moveable or immoveable goods) constitute movements of capital provided that the elements making up those donations are not restricted to within the borders of a single Member State. The fact that the donation was made in the form of everyday consumer goods relates merely to the method of making the donation. He also observes that most Member States grant donors various forms of tax advantages which, in reducing the cost of the donation for donors, encourage them to make further such gestures. Less favourable treatment for cross-border donations may thus discourage people likely to make such donations. He accordingly finds that the German legislation constitutes a restriction on the movement of capital.

Next the Advocate General considers whether less favourable treatment for cross-border donations might be justified by the fact that the beneficiary bodies are in different situations. It is necessary to ascertain whether, in the present case, the beneficiary body abroad, which has been recognised as being charitable, is in a situation which is objectively comparable to that of a charitable body established in Germany, which could benefit from the tax exemption under the German tax code by reason of the objectives it pursues.

According to the Advocate General, when bodies established abroad have as their mission the advancement of charitable interests identical to those set out in the German law which give rise to the exemptions – in this case, assistance to children and to the elderly – and satisfy the requirements imposed by that law on domestic bodies, those situations are indeed comparable. It is for the national authorities, including the courts, to assess the issue of comparability.

Lastly, the Advocate General considers whether the less favourable treatment for cross-border donations might be justified by the need to ensure the effectiveness of fiscal supervision, a reason which, according to the Court's case-law, may justify a restriction on free movement.

As a rule, under German law, if the beneficiary body is established in Germany, it is not for the donor to establish that that body manages its charitable activities in accordance with its statutes (Germany has, for example, introduced a donation certificate issued by beneficiaries and annexed by donors to their tax returns). For a body established abroad, however, the Advocate General considers that donors should be allowed to provide supporting documents in order to enable the national tax authorities to check that the conditions relating to the statutes and actual management required for recognition as a charitable body under the national rules are satisfied. Those tax authorities would remain free to refuse a deduction if they are not provided with the relevant supporting documents or are unable to check the information provided by the donor.

Consequently, the absolute impossibility of being allowed to provide such evidence is, in the view of the Advocate General, disproportionate to the objective of ensuring effective fiscal supervision.

The donor might, moreover, encounter difficulties in gathering evidence about the statutes and/or actual management of a body established abroad. In that case, in order to ensure that the free movement of capital is respected in practice, the authorities of a Member State should attempt – without however having to bear a disproportionate administrative burden – to obtain such evidence using the cooperation mechanisms in place between Member State authorities in the area of direct taxation[1] or under the auspices of a bilateral tax agreement.

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

[1] Introduced by Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15).

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The full text of the Opinion may be found on the Court's internet site
http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-318/07
It can usually be consulted after midday (CET) on the day of delivery.

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