Press and Information

Court of Justice of the European Union

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Judgment in Case C-371/10
National Grid Indus BV v Inspecteur van de Belastingsdienst Rijnmond / kantoor Rotterdam

EU law does not in principle preclude the charging of tax on unrealised capital gains relating to the assets of a company when it transfers its place of management to another Member State

However, immediate recovery of the tax at the time when the company transfers its place of management, without the company being given the possibility of deferred payment of the tax, is not compatible with EU law

National Grid Indus BV, a company incorporated under Netherlands law, had its place of effective management in the Netherlands. Since 1996 it has had a claim expressed in sterling against National Grid Company plc, a company established in the United Kingdom. Following the rise in value of the pound sterling against the Netherlands guilder, an unrealised exchange rate gain was generated on that claim.

On 15 December 2000 National Grid Indus transferred its place of effective management to the United Kingdom. After the transfer, it was deemed to be resident in the United Kingdom, by virtue of a double taxation convention[1]. It consequently ceased to obtain profits taxable in the Netherlands, so that, under Netherlands legislation, a final settlement of the unrealised capital gains existing at the time of the transfer of the place of management was drawn up by the Netherlands tax authorities, who demanded immediate payment of the tax.

National Grid Indus contested that decision, claiming that it was contrary to the principle of freedom of establishment.

The Gerechtshof Amsterdam (Regional Court of Appeal, Amsterdam) (Netherlands), which is hearing the case, decided to refer the question to the Court of Justice.

In its judgment of today, the Court of Justice starts by confirming that National Grid Indus may rely in this case on freedom of establishment in order to challenge the decision of the Netherlands tax authorities.

Next, the Court finds that a company incorporated under Netherlands law wishing to transfer its place of effective business outside the Netherlands suffers a disadvantage in terms of cash flow, compared to a similar company keeping its place of management in the Netherlands. Under the national legislation, the transfer of a Netherlands company's place of management to another Member State entails the immediate taxation of the unrealised capital gains relating to the assets transferred, whereas such capital gains are not taxed when a Netherlands company transfers its place of management within Netherlands territory. That difference of treatment is liable to deter a company incorporated under Netherlands law from transferring its place of management to another Member State and **constitutes a restriction that is in principle prohibited by the Treaty provisions on freedom of establishment**.

The Court recalls, however, that preserving the allocation of powers of taxation between the Member States is a legitimate objective. Also, in the absence of any unifying or harmonising

[1] Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains, concluded between the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland.

measures of the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation. In that context, the transfer of the place of effective management of a company of one Member State to another Member State cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer. **The legislation at issue is therefore appropriate for ensuring the preservation of the allocation of powers of taxation between the Member States concerned.**

However, in order to assess the proportionality of such legislation, a distinction must be drawn between the establishment of the amount of tax and the recovery of the tax.

Definitive establishment of the amount of tax at the time when the company transfers its place of management to another Member State

The Court finds that the Member State of origin complies with the principle of proportionality if, for the purpose of safeguarding the exercise of its powers of taxation, it determines definitively – without taking account of decreases or increases in value which may occur subsequently – the tax due on the unrealised capital gains that have arisen in its territory at the time when its power of taxation in respect of the company in question ceases to exist. A possible omission by the host Member State to take account of decreases in value at the time of realisation of the asset concerned does not impose any obligation on the Member State of origin to revalue at that time a tax debt which was definitively determined at the time when the company in question, because of the transfer of its place of effective management, ceased to be subject to tax in the latter Member State.

The Court recalls that that the Treaty offers no guarantee to a company that transferring its place of effective management to another Member State will be neutral as regards taxation. Given the relevant disparities in the tax legislation of the Member States, such a transfer may or may not be to the company's advantage from a tax point of view, according to circumstances.

Immediate recovery of the tax at the time when the company transfers its place of management to another Member State

The Court accepts that the asset situation of a company may appear so complex that an accurate cross-border tracing of the destiny of all the items making up the company's fixed and current assets until the unrealised capital gains incorporated into those assets are realised is almost impossible. Such tracing will moreover entail efforts representing a considerable or even excessive burden for the company in question.

Thus it cannot be ruled out that the administrative burden that would be entailed by an annual return, suggested by the Commission, which would necessarily relate to every asset in respect of which a capital gain was established at the time of the transfer of the place of effective management of the company concerned, would give rise as such, for that company, to a hindrance to freedom of establishment.

In other situations, on the other hand, the nature and extent of the company's assets would make it easy to carry out a cross-border tracing of the individual assets for which a capital gain was ascertained at the time when the company transferred its place of management to another Member State.

In those circumstances, **national legislation offering the choice** to a company transferring its place of management to another Member State between, first, immediate payment of the amount of tax, which creates a cash-flow disadvantage for the company but frees it from subsequent administrative burdens, and, secondly, deferred payment of the amount of tax, possibly together with interest in accordance with the applicable national legislation, which necessarily involves an administrative burden for the company in connection with tracing the transferred assets, would constitute a measure which would be less harmful to freedom of establishment than the measure at issue. If a company were to consider that the administrative burden in connection with deferred recovery was excessive, it could opt for immediate payment of the tax.

Consequently, the Court's answer is that legislation of a Member State which prescribes the immediate recovery of tax on unrealised capital gains relating to assets of a company transferring its place of effective management to another Member State at the very time of that transfer **is disproportionate**.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

The full text of the judgment is published on the CURIA website on the day of delivery.

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