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EURO TAX FLASH
KPMG'S EU TAX CENTRE

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Euro Tax Flash from KPMG's EU Tax Centre

EU Court of Justice decides that Swedish non-deductibility of currency loss on foreign shares does not breach EU law

Sweden – European Union – Freedom of establishment – Foreign shareholding – Currency losses

On June 10, 2015 the Court of Justice of the European Union (CJEU) decided that the Swedish rules that deny a deduction for a currency loss on shares in a foreign company were not contrary to EU law. The decision was primarily based on the fact that a similar loss could arise on shares in a Swedish company and this would also be non-deductible.

Background

The case concerned a Swedish company holding a dollar denominated shareholding of 45% in a UK company. The Swedish company intended to sell the shareholding, which would have resulted in a currency loss. Under Swedish tax law capital gains and losses (including those resulting from currency movements) on the alienation of such shares were not recognized for tax purposes. The Swedish company claimed this was contrary to EU law apparently on similar grounds to those accepted by the CJEU in the Deutsche Shell case, i.e. that the Swedish rules would result in an investment in another Member State being more uncertain – and therefore less favourable - than an investment in Swedish currency in a Swedish company. The Swedish Supreme Court subsequently referred the question to the

CJEU.

CJEU Decision

Referring to its earlier case law, the CJEU noted that the facts of the case were covered by the freedom of establishment. It based its decision that the Swedish rules were not in breach of this freedom on the fact that capital losses (including currency losses) on shares such as those in question were not deductible irrespective of whether the companies in which the shares were held were or were not established in Sweden. Consequently there was no less favourable treatment of shares in foreign companies than in Swedish companies. In this respect the CJEU reached the same decision as the Attorney-General. The CJEU added that even if a Swedish company was likely to be discouraged from investing in a foreign company through the non-deductibility of its potential currency losses, this did not require Sweden to adapt its tax system to that of other countries where the investment could also turn out to be advantageous (i.e. if a currency gain arose).

The CJEU distinguished the case in question from the facts of Deutsche Shell, on the basis that in the latter case currency gains and losses were in general recognized for tax purposes, unless a tax treaty provided otherwise, whereas under the Swedish rules such gains and losses were in general not recognized for tax purposes. Allowing a deduction for currency losses under the Swedish rules would result in an asymmetrical treatment of currency gains and losses.

Having decided that the Swedish rules did not constitute a restriction on the freedom of establishment the CJEU, unlike the AG, did not comment on the possible justifications.

EU Tax Centre Comment

This is a remarkable decision in view of the similarity of its facts with the Deutsche Shell case on the one hand, and the different outcomes of the two cases on the other. However, the key to the difference seems to lie in whether or not the same tax treatment applies in the case of foreign and domestic investments. The CJEU's decision is likely to have a negative impact on claims by companies based in other EU Member States which exempt currency losses derived from shareholdings in both domestic and foreign companies.

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor.

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