



Newsflash

EU Direct Tax Group

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Finnish Supreme Administrative Court asks ECJ for preliminary ruling on possible State aid relating to loss carry forward regime

On 30 December 2011, the Supreme Administrative Court of Finland decided to refer a preliminary ruling to the ECJ on whether the Finnish loss carry forward regime constitutes unlawful state aid with regard to Article 107(1) TFEU (SAC 2011:118).

According to Articles 117 and 119 of the Finnish Income Tax Act confirmed tax losses are carried forward. However, according to Article 122(1) of the Income Tax Act, carry forward tax losses are lost if more than 50% of the shares in the company that has losses have changed ownership directly or indirectly. However, according to Article 122(3) of the Income Tax Act the tax authorities may in special circumstances, when it is vital for continuing of the business activities, grant permission based on an application to retain tax losses regardless of the ownership change.

According to Article 108(3) TFEU, if an EU Member State is granting any form of State aid that may distort or threaten to distort competition by favoring certain undertakings or the production of certain goods, insofar it affects trade between Member States, the Member State must inform the Commission in sufficient time to enable it to submit its comment of any plans to grant or alter any State aid. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

The Supreme Administrative Court considered that permission procedure of the Finnish loss carry forward regime could constitute State aid which should have been notified to the Commission according to Article 108(3) TFEU. However, Finland has not notified the Commission of the tax regime, which was already in force when Finland became a member of the EU. Hence the Court considered it to be unclear whether the regime may be applied as it has not been notified to the Commission and the Commission has not given its final decision on the issue.

The Supreme Administrative Court referred the following questions for a preliminary ruling:

- 1) Shall the requirement of selectivity of Article 107(1) TFEU be interpreted with regard to the permission procedure of Article 122(3) of the Finnish Income Tax Act in the manner that it causes an obstacle to grant permission to deduct tax losses in change of ownership situations without compliance with the procedure of the last sentence of Article 108(3) TFEU?
- 2) Should the main rule of Articles 117 and 119 of the Income Tax Act, according to which a company may deduct confirmed tax losses, be considered when interpreting the requirement of selectivity especially for determination of the reference group or should the requirement of selectivity, be interpreted in the light of regulation regarding the change of ownership?
- 3) If it is considered that the requirement of selectivity of Article 107 TFEU is, in principle, met, can the permission procedure of Article 122(3) of the Finnish Income Tax Act be justified on the basis that it is an inherent mechanism of the tax system which is necessary e.g. in order to prevent tax avoidance?
- 4) When considering the existence of a possible justification and whether it is an inherent mechanism of the tax system, what considerations should be given to the extent of the discretionary power of the authorities? Is the inherent mechanism of the tax system required not to leave discretionary power to the authority applying the law and is it required that the conditions to grant exception are strictly determined in legislation?

There are at the moment several cases pending on the Supreme Administrative Court regarding the right to retain tax losses regardless of the ownership change. These cases will wait for the preliminary ruling.

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