Newsalert
EU Direct Tax Group

EU Direct Tax Group

On 5 February 2014 the Grand Chamber of the CJEU handed down an important decision, which makes clear that tax rules that de facto discriminate can be contrary to the free movement provisions.

Hervis, a Hungarian resident company, was part of an Austrian group.

Under the Hungarian law, in effect between 2010 and 2013, the rate of the tax on retail trade activity was steeply progressive. In addition, companies who were part of a group were liable to pay tax on the basis of their shares, in proportion to their turnover, of the special tax payable by all the Hungarian group companies on the basis of their overall turnover.

Given the two elements of the Hungarian regime (the steeply progressive rates and the fictitious turnover allocated to ‘group’ companies), a company belonging to a group, like Hervis, would be subject to a higher tax burden than an ‘unrelated’ domestic company operating in a franchise structure (which would not have to take into account fictitious turnover from other companies and, hence, a higher tax rate).

The question was whether this was in breach of EU law. The CJEU examined the question under the freedom of establishment as the rules concerned taxable persons classified as associated undertakings per the Hungarian Corporate Income Tax Act.

In its judgment the CJEU found that the Hungarian rules have the effect of disadvantaging taxpayers which are associated to other companies compared with taxpayers which are not part of such a group of companies. Consequently, the provisions of the questioned act may result in indirect discrimination, which is in breach of the freedom of establishment, provided that the entities affected by such provisions are mostly part of company groups seated in other EU member states. The CJEU noted that the Hungarian Government did not provide any grounds to justify the different treatment.

Impact on the Hungarian proceeding

It is now up to the Tribunal of Székesfehérvár to decide whether the Special tax Act (STA) discriminates certain taxpayers based on the freedom of establishment – namely whether the taxpayers in the qualifying upper band of the Retail Tax are mostly members of foreign groups of companies. Depending on the outcome of the main proceeding between Hervis and the National Tax Authority, the Tribunal’s decision may not only have an effect on the retail sector but also on other sectors, as besides the Retail Tax, another special tax defined in the STA (the Telecommunication Tax) and – from 2013 – also the local business tax is based on a calculation method which is identical or very similar to the one analysed in the CJEU proceeding.