



EU Direct Tax Newsalert

CJEU annuls Commission Decision that held German restructuring clause to be State aid

On 28 June 2018, the Court of Justice of the European Union (CJEU) issued its judgment in *Andres (on behalf of Heitkamp BauHolding) v Commission (C-203/16 P)*.

Background

In Germany, loss carry-forwards of corporate income tax payers are completely forfeited if more than 50% of the shares are transferred within a period of five years. Due to the financial crisis in 2009, Germany introduced a new rule pursuant to which loss carry-forwards could be retained if the shares were transferred for the purpose of restructuring the corporate entity (restructuring clause).

In 2011, the European Commission decided that the restructuring clause was selective as it foresaw an exception to the general loss forfeiture rule that was applicable in case of a change of ownership. The Commission ordered recovery of the unlawful State aid by Decision 2011/527/EU from the taxpayers that had benefited from the restructuring clause.

Besides the German government, several corporate income tax payers brought actions for annulment of the Commission Decision with the EU General Court. The claim of Heitkamp BauHolding was rejected on 4 February 2016 (case T-287/11). The General Court held that (1) Heitkamp BauHolding was directly and individually concerned by the Commission Decision and thus had brought an admissible action, but (2) the selectivity of the restructuring clause had been correctly defined by the European Commission. So the action was unfounded. Heitkamp BauHolding brought an appeal and asked the CJEU to set aside the General Court judgment.

CJEU judgment

With respect to the first procedural issue, the CJEU decided that an applicant is individually concerned by a Commission Decision if it is affected by that Decision by reason of certain attributes which are peculiar to it or a factual situation which differentiates it from all other persons. Therefore, in the view of the CJEU the General Court had rightfully found that

Heitkamp BauHolding, which had received a ruling from the German tax authorities stating that it met the requirements for the application of the restructuring clause, was entitled to bring the action for annulment. Examining the second question, the CJEU held that the General Court by considering the loss forfeiture rule to be the reference framework had artificially taken some provisions from a broader reference framework, i.e. the loss carry-forward rules. As a consequence, the General Court had defined the reference framework too narrowly. This error in the determination of the reference framework vitiated the whole selectivity analysis which led the CJEU to uphold Heitkamp's appeal against the General Court's judgment and the Commission Decision.

Takeaway

The judgment has an impact on German corporate income tax payers who were obliged to repay tax benefits resulting from the application of the restructuring clause under the recovery order in Commission Decision 2011/527/EU. Furthermore, the CJEU judgment affects taxpayers who suffered a loss forfeiture after a change of ownership performed for restructuring purposes.

As the State aid Decision of the European Commission was annulled by the CJEU, the recovery payment requests must be seen as unlawful. Hence, taxpayers should apply for a correction of their tax assessments and the refund of the taxes paid (including interest). Furthermore, losses that were forfeited after the issuance of the Commission Decision can be restored under Section 34 para. 6 of the German Corporate Income Tax Act.

Whilst this judgment is an important decision in the often difficult question of how to determine the correct reference framework in fiscal State aid cases it unfortunately does not really provide much guidance on how to approach that question in a particular case and therefore this is an area that is likely to remain the subject of much debate going forward.

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