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EU Direct Tax Newsalert

CJEU sets aside EU's General Court's judgment in 'Spanish tax lease system'

On 25 July 2018, the Court of Justice of the European Union (CJEU) handed down its judgment in the former 'Spanish tax lease system' (STLS) State aid case (C-128/16 *P, Commission v Spain and Others*), setting aside the earlier judgment of the General Court of the European Union (GC) in *Joined Cases T-515/13 and T-719/13*.

Background

In its decision of 17 July 2013, the European Commission (EC) concluded that the STLS constituted State aid, which was partially incompatible with the internal market (SA.21233 C/2011). The EC's procedure was based on a number of complaints, which alleged that the STLS allowed maritime shipping companies to benefit from a 20%-30% price reduction when purchasing vessels constructed by Spanish shipyards.

The STLS involved an *ad hoc* structure organised by a bank, which acted as an intermediary between a maritime shipping company and a shipyard. In particular, each vessel order involved a shipping company, a shipyard, a bank, a leasing company, and an Economic Interest Grouping (EIG) formed by the bank and investors who jointly purchased shares in the EIG. The operation of the STLS involved five separate Spanish tax measures, which, when combined, enabled the EIG to benefit from early and accelerated depreciation of the leased vessel applied under the ordinary corporate income tax system. This generated significant tax losses for the EIG, which due to the EIG being transparent for tax purposes, were deductible from the investors' own revenues pro rata to their shares in the EIG. When the EIGs elected for the tonnage tax system they would be tax exempt on the capital gains resulting from the sale of the vessel to the shipping company.

According to the EC, the combined application of the early depreciation and the tonnage tax constituted unlawful State aid to the EIGs and their investors. However, on 17 December 2015, the GC issued a judgment annulling the EC's decision. The EC appealed to the CJEU to set aside the GC's judgment.

The CJEU judgment

The CJEU held that the GC had applied Article 107 TFEU incorrectly when it concluded that the EIGs could not be

beneficiaries of the State aid solely based on their tax transparency, and hence only the investors benefitted from the advantages of the STLS. In the CJEU's view, the EIGs should also be considered as undertakings within the meaning of Article 107 TFEU as they carried on an economic activity. Even though the advantages were fully transferred to the EIGs' investors, the tax measures at issue were applied to the EIGs, who were the direct beneficiaries of the advantages arising from those measures.

As a consequence, the CJEU also found that the GC had incorrectly performed an assessment of the selectivity condition at the level of the investors and especially whether the tax authorities had a discretionary power when authorising an accelerated depreciation.

In addition, the CJEU found that the GC had erred in law where it accepted that the advantages obtained by the investors which participated in the STLS could not be regarded as selective, since those operations were available, on the same terms to any undertaking without distinction. Relying on its previous case law (in particular, C-20/15 & C-21/15, *World Duty Free Group*), the CJEU stated that the GC had erred in law since it did not ascertain whether the EC had established that the tax measures at issue, by their practical effects, introduced differentiated treatment of operators, where the operators which benefited from the tax advantages and those which were excluded from it, were, in view of the objective pursued by that tax system, in a comparable factual and legal situation.

Finally, the CJEU considered there was no contradictory reasoning nor a failure to state reasons in the EC's decision.

Takeaway

It should be noted that this judgment refers to the former STLS regime, which was modified in 2012. By setting aside the GC's judgment, the CJEU has referred the case back to the GC. The GC must now analyse the existence of State aid with respect to the EIG and its investors.

