

This month in H&I

Marcu. Request for a preliminary ruling is inadmissible. Question on application of reverse charge mechanism is hypothetical. Court of Justice (comments by Edwin Thomas)

Commission v Greece. Greek preferential inheritance tax for bequests of which the beneficiaries are non-profit-making legal persons. Restriction on the free movement of capital. Court of Justice (comments by Katerina Perrou)

X. Belgian Fairness Tax. Infringement of Article 4 Parent-Subsidiary Directive. Court of Justice (comments by Alexander Fortuin)

AFEP. French Surtax. Infringement of Article 4 Parent-Subsidiary Directive. Court of Justice (comments by Alexander Fortuin)

Compass Contract Services. Adjustment of output and input VAT. Different limitation periods do not breach EU law. Court of Justice (comments by Edwin Thomas)

Litdana. Application of margin scheme. References on the invoices relating both to the application of the margin scheme by the supplier and to exemption from VAT. Court of Justice (comments by Dagmara Dominik-Ogińska)

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domestic and foreign non-profit organizations; the effect of the condition of reciprocity established in the law as prerequisite for granting the exemption to foreign non-profits; the function of domestic non-profits as carrying out State responsibilities; and the severe budgetary impact that an extension of the exemption may have, given the hard economic situation of the country, were all rejected by the Court.

No Opinion of the Advocate General was issued on this case.

Following the judgment, Greece has amended its legislation to grant the same tax treatment to non-profit organizations established in other EU/EEA countries, abolishing the condition of reciprocity.

Court of Justice of the European Union, 4 May 2017, no. C-98/16

ARRÊT DE LA COUR (septième chambre)

4 mai 2017¹

«Manquement d'État – Fiscalité – Libre circulation des capitaux – Article 63 TFUE – Article 40 de l'accord EEE – Droits de succession – Legs en faveur d'organismes sans but lucratif – Application d'un taux préférentiel aux organismes qui existent ou sont légalement constitués en Grèce ainsi qu'aux organismes étrangers similaires sous réserve de réciprocité – Différence de traitement – Restriction – Justification»

Dans l'affaire C-98/16,

ayant pour objet un recours en manquement au titre de l'article 258 TFUE, introduit le 17 février 2016,

Commission européenne, représentée par MM. W. Roels et D. Triantafyllou, en qualité d'agents, partie requérante,

contre

République hellénique, représentée par Mmes M. Tassopoulou et V. Karra, en qualité d'agents, partie défenderesse,

LA COUR (septième chambre),

composée de Mme A. Prechal, président de chambre, MM. A. Rosas (rapporteur) et E. Jarašiūnas,

juges,

avocat général: Mme J. Kokott,

greffier: M. A. Calot Escobar,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1. Par sa requête, la Commission européenne demande à la Cour de constater que, en adoptant et en maintenant en vigueur une législation qui prévoit un taux préférentiel des droits de succession pour les legs effectués en faveur d'organismes sans but lucratif qui sont établis dans d'autres États membres de l'Union européenne ou de l'Espace économique européen (EEE) sous réserve de réciprocité, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 63 TFUE et de l'article 40 de l'accord sur l'Espace économique européen, du 2 mai 1992 (JO 1994, L 1, p. 3, ci-après l'«accord EEE»).

Le cadre juridique

2. L'article 25, paragraphe 3, du code grec des droits de succession prévoit:

«Les acquisitions sont soumises à une imposition distincte, conformément aux dispositions du paragraphe 5 de l'article 29, dès lors que les bénéficiaires sont:

[...]

les personnes morales sans but lucratif, qui existent ou sont légalement constituées en Grèce, ainsi que les personnes morales étrangères similaires sous réserve de réciprocité et les biens visés à l'article 96 de la loi d'urgence no 2039/1939 (FEK A' 455), dès lors qu'ils poursuivent de manière avérée:

¹ Langue de procédure: le grec.

r serve de r ciprocit , la R publique hell nique a manqu  aux obligations qui lui incombent en vertu de l'article 63 TFUE et de l'article 40 de l'accord sur l'Espace  conomique europ en, du 2 mai 1992.

2) La R publique hell nique est condamn e aux d pens.

[Signatures]

Comments

Analysis

Background

This is not the first time that provisions of the Greek Inheritance Tax Code (Law 2961/2001) have been the subject of a judgment of the CJ. Only recently, by Law 4474/2017 (Published in the OJ of the Hellenic Republic Folio A, n. 80 of 7 June 2017), did the Hellenic Republic comply with the judgment of the Court in case CJ 26 May 2016, C-244/15 *Commission v Greece*, where it was found that the provisions of the Inheritance Tax Code providing for a tax exemption from inheritance tax on the acquisition of a first residential property only for heirs who are Greek residents was in breach of the free movement of capital (for a commentary on this case, see K. Perrou, *Commission v Greece, Greek inheritance tax exemption is discriminatory*, *Court of Justice*, H&I 2016/8.16). In the subject case C-98/16, a different provision is under scrutiny: the provision concerning the tax rate applicable to bequests on non-profit organizations. Under the Greek Inheritance Tax Code, non-profit organizations are subject to a special tax treatment: they are taxed at a flat rate of 0.5%; this is a final taxation.

This tax treatment is reserved (i) for non-profit organizations that exist or are formed in Greece, and (ii) for similar foreign non-profits, under the condition of reciprocity (Article 25(3)(b) in combination with Article 29(5)(b) of the Inheritance Tax Code). The provision does not further distinguish between the foreign non-profits between EU/EEA ones and third-country ones. Furthermore, it does not contain any differentiation according to the residence of such non-profits; the reference to 'existence' or 'formation' in Greece refers to the fact that a non-profit is legitimately present or lawfully formed in Greece, according to the Greek legislation.

In its correspondence with the Greek Government, the Commission maintained that the Greek legislation has the effect of reducing the value of the property bequeathed to the foreign comparable non-profit entities that are established in another EU/EEA State that does not grant a reciprocal preferential tax treatment to Greek non-profit organisations. According to the Commission, such a reduction in the value of an inheritance entails a restriction on the free movement of capital, which cannot be justified and is contrary to Article 63 TFEU and Article 40 EEA Agreement (See European Commission - Press release of 26 March 2015 'Taxation: Commission refers Greece to Court regarding the inheritance tax treatment of bequests to non-profit organizations', IP/15/4674, available at https://europa.eu/rapid/press-release_IP-15-4674_EN.htm).

A number of issues arise from this case. First of all, it is interesting that the Commission, although invoking Article 63 in its entirety, it has limited the infringement procedure to non-profit organizations that are resident in the EU (and EEA) countries, without any reference to non-profits in third countries. A second issue that is worthy of mention is the question of comparability and how this is established in the present case. A third issue that is dealt with is the concept of restriction in the present case.

Furthermore, the issue of whether reciprocity in the tax treatment of Greek non-profits in the foreign country can be a prerequisite for the application of the lower tax rate for bequests to foreign non-profits is discussed. Another issue concerns the argument put forward by the Greek Government that the Greek non-profits perform social policy functions that would otherwise be performed by the State. One last issue that is worth discussing is the request by the Greek Government that the Court should review its position on the argument that is often invoked by governments regarding the loss of tax revenue and adapt its position to the current economic situation.

These issues will be discussed in the following sections.

