

Euro Tax Flash

Issue 239 - November 14, 2014

Euro Tax Flash from KPMG's EU Tax Centre



CJEU Decision in *Commission v UK* (Case C-112/14)

Free movement of capital – infringement proceedings – capital gains
– anti-avoidance - UK

In a judgment rendered on November 13, 2014 the CJEU ruled that anti-avoidance legislation introduced by the UK that made taxpayers with a 10% or greater shareholding in non-resident “close” companies immediately liable to tax on the gains arising on the disposal of company assets, regardless of whether they actually received the proceeds, was contrary to the free movement of capital (Art. 63 TFEU).

Background

Under UK domestic rules a “close” company is a company under the direct (or indirect) control of a limited number of shareholders, or those with an interest in the company’s capital or income.

The provisions which form the basis of the infringement proceedings were amended following receipt of a reasoned opinion from the Commission, but because the legislation was not amended within the prescribed time, the Commission proceeded to bring the action.

CJEU Decision

The same tax treatment did not extend to taxpayers with shareholdings in resident “close” companies, tax only being charged on the distribution of any gains, or if taxpayers disposed of their interests in the company, and calculated according to the amount actually received.

The CJEU found that this difference in tax treatment discouraged UK resident taxpayers from investing in non-resident close companies and impeded the possibility of such companies to attract capital, which was prohibited, in principle, by Art. 63 TFEU.

According to CJEU case law, such a restriction may be justified on the grounds that it fulfilled the objective of combating tax evasion and tax avoidance, where rules are predicated on an assessment of objective elements, which make it possible to identify the existence of a wholly artificial arrangement entered into only for tax reasons.

While it was not disputed by the Commission that the domestic rules may contribute to this objective, any restriction must also be proportionate to the objective it sets out to achieve and give taxpayers the opportunity to provide commercial justification for transactions without undue administrative constraints.

The CJEU observed that the UK provisions did not specifically target wholly artificial arrangements and instead applied generally to all gains made on disposals by non-resident close companies.

Furthermore, the domestic rules did not offer taxpayers any opportunity to provide evidence to the UK tax authorities of the economic reality of their interest in the non-resident company. As such, the restriction went beyond what was necessary to achieve the objective and could not be justified.

EU Tax Centre Comment

The outcome of the infringement proceedings is perhaps unsurprising in light of established CJEU case law and may be relevant to taxpayers with holdings in non-resident entities facing similar disadvantageous tax treatment as a result of domestic anti-avoidance provisions.

The judgment is also interesting in view of the current discussions regarding the compatibility of EU law with the proposed amendments to the Parent-Subsidiary Directive which would introduce a general anti-avoidance rule (see [ETF 238](#) and [ETF 230](#) for more information).

Should you require further assistance in this matter, please contact

the EU Tax Centre or, as appropriate, your local KPMG tax advisor.

Robert van der Jagt

Chairman, KPMG's EU Tax Centre and
Partner, Meijburg & Co
vanderjagt.robert@kpmg.nl

Barry Larking

Director EU Tax Services, KPMG's EU Tax Centre
larking.barry@kpmg.nl

[Back to top](#)

kpmg.com/socialmedia



kpmg.com/app



[Privacy](#) | [Legal](#)

KPMG's EU Tax Centre, Laan van Langerhuize 9, 1186 DS Amstelveen, Netherlands

Euro Tax Flash is published by KPMG International Cooperative in collaboration with the EU Tax Centre. Its content should be viewed only as a general guide and should not be relied on without consulting your local KPMG tax adviser for the specific application of a country's tax rules to your own situation. The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2014 KPMG International Cooperative (KPMG International), a Swiss entity. Member firms of the KPMG network of independent firms are affiliated with KPMG International. KPMG International provides no client services. No member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties, nor does KPMG International have any such authority to obligate or bind any member firm. All rights reserved.