Euro Tax Flash from KPMG's EU Tax Centre

CJEU decision in the X v Staatssecretaris van Financiën case (C-283/15)

Individual income tax – Deduction of negative income – Freedom of establishment – Tax advantage to take into account taxpayer's personal and family circumstances

On February 9, 2017 the Court of Justice of the European Union ('CJEU', or 'Court') rendered its decision in the X v Staatssecretaris van Financiën case (C-283/15). The case concerned a taxpayer whose total income was split between two states, none of which were his state of residence. At issue was whether one of the latter states should take the negative income arising from his dwelling in his Member State of residence into account and, if so, how much. The CJEU ruled that the negative income should be taken into account on a pro rata basis, provided the taxpayer's Member State of residence is not in a position to grant him an advantage.

Background

In 2007, X, resident in Spain, earned 60% of his total taxable income from the Netherlands and 40% from Switzerland. His dwelling, located in Spain, generated negative income. Under Dutch tax legislation, he could not deduct the negative income against his taxable income in the Netherlands, as he was a non-resident taxpayer. However, a resident taxpayer in the Netherlands would be entitled to the deduction. The Dutch Supreme Court asked the CJEU for a preliminary ruling on whether the Dutch legislation on the deduction of the negative income was compatible with the provisions of free movement in the TFEU.

The CJEU decision

The CJEU first addressed whether the freedom of establishment precludes a Member State from refusing the deduction of negative income to a non-resident where he receives 60% of his total taxable income in that Member State. Taking into account that the negative income relating to the dwelling located in the taxpayer's Member State of residence forms a tax advantage connected to his ability to pay, the Court referred to *Schumacker*, C-279/93 and other earlier case law. The Court ruled that the *Schumacker* doctrine applies in this case, even though X received his income entirely or almost exclusively in not one but several States, and that the taxpayer, as a non-resident, was entitled to deduct the negative income in the Netherlands, as his Member State of residence was not in a position to grant such a tax advantage.

The second question referred to the Court was whether, in the case of more than one Member State of activity, each Member State should take the full amount of the negative income into account or should allow it to be partially deducted. The CJEU first affirmed that all the taxpayer's personal and family circumstances must be duly taken into account irrespective of the allocation among the Member States of activity. However, in order to reconcile this with the Member States' right to allocate taxing rights among themselves, in particular to avoid the accumulation of tax advantages, the taxpayer must be permitted to submit a claim for his right to deduct negative income to each Member State of activity where such advantage is granted, in proportion to the share of his income received within each of those Member States.

Furthermore, the Court ruled that the fact that the non-resident taxpayer receives part of his income within a non-Member State is irrelevant for the purposes of answering the second question.

EU Tax Centre comment

The decision has practical importance as it makes clear to EU-resident individuals that their personal and family circumstances will be taken into account by the Member States of work/activity if their residence state is not in a position to grant relevant benefits, even in the event they receive most of their income in more than one Member State. Whether this objective will be achieved in the present case, where one of the states of activity was a non-EU state remains to be seen.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.

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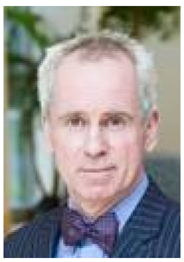

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