

ECJ in brief

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GERMANY

AG Opinion in the Scheunemann case

Scheunemann case (C-31/11) – AG Opinion on disadvantages for inheritance tax purposes when Third State participations are concerned

On March 20, 2012, AG Trstenjak delivered her opinion in a preliminary ruling concerning disadvantages for inheritance tax purposes when Third State participations are concerned.

According to former German inheritance tax law (2007), the inheritance of a direct holding of more than one quarter of the nominal capital of a company benefited from a tax-free amount and a reduction in value of 35 percent if the heir kept the shareholding for at least five years after the inheritance. However, the benefits were only granted if the company was resident in Germany or in the EU/EEA, but not for companies resident in Third States.

The claimant, the heir of a 100 percent shareholding in a Canadian company, is of the opinion that this provision restricts the free movement of capital. The Federal Fiscal Court tends to agree with the claimant but referred the case to the ECJ for clarification.

The AG is of the opinion that:

- the free movement of capital is applicable as the act of an inheritance itself is covered by this freedom;
- based on the scope of the provision, the freedom of establishment is applicable as well;
- the freedom of establishment prevails as the aim of the tax advantages and its requirement to continue operating the undertaking for five years is to encourage the heir into the role of a business leader.

As a result, the case would not be judged on the basis of the free movement of capital so that Third

State participations will not benefit from the tax advantages described above.

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ITALY

ECJ decision in the 3M Italia case (C-417/10)

ECJ decision on the abuse of rights and Italian litigation amnesty procedure

On March 29, 2012, the ECJ issued its decision in the 3M Italia case. The ECJ found that the principle of abuse of rights, as defined in VAT Cases C-255/06 and C-425/06 (Halifax and Part Service), is not applicable to non-harmonised taxes and EU law does not provide for a general principle which forces Member States to combat abusive practices in the field of direct taxation.

The introduction of a national general abuse of rights principle is discussed in Italy.

Furthermore, the ECJ established that the Italian litigation amnesty procedure (amnesty in exchange for a levy of 5 percent of the taxable amount) is compatible with EU law. In particular, the Italian procedure is not in breach of the freedoms guaranteed by the TFEU, of the principle of non-discrimination and of the EU general principles of effectiveness and prohibition of abuse of rights provided for by Article 4(3) TFEU. In addition, the ECJ established that the Italian litigation amnesty procedure does not constitute State Aid as it is not selective.

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