

Newsflash

EU Direct Tax Group

Finnish Supreme Administrative Court decision on possible state aid relating to loss carry forward regime (P Oy, C-6/12)



EU Direct Tax Group

The EUDTG is one of PwC's Thought Leadership Initiatives and embedded in the International Tax Services Network. The EUDTG is a pan-European network of EU tax law experts and provides assistance to organizations, companies and private persons to help them to fully benefit from their rights under EU law.

Should you be interested in receiving the free bi-monthly newsletter, then please send an e-mail to eudtg@nl.pwc.com, with "subscription EU Tax News".

Background

According to Section 122 of the Finnish Income Tax Act, carry forward tax losses are lost if more than 50% of the shares in the company that has losses have changed ownership. However, the tax authorities may in special circumstances, when it is vital for continuing the business activities, grant permission based on an application to retain tax losses regardless of the ownership change. Finland had not notified the Commission of the loss carry forward regime which was already in force when Finland became a member of the EU.

In its decision given on 18 July 2013 (P Oy, C-6/12), the CJEU concluded that the Finnish tax regime could be regarded as selective within the meaning of article 107(1) TFEU in case it was considered that the "normal" reference system consists of the rule according to which carry forward tax losses are lost in a change of ownership situation and the rule on granting special permission to utilize the losses, despite the change of ownership, constitute an exception. However, the CJEU concluded that it does not have sufficient information on the Finnish tax regime at its disposal. The CJEU left, in principle, all important issues (selectivity, justification and existing/new aid) open and to be clarified by Finnish Supreme Administrative Court (SAC).

Decision of the SAC

On 21 October 2013, the SAC gave its decision (KHO 2013:167) where it evaluated the matter both from the point of view of state aid and from the point of view of applying the relevant provision (Section 122) in the taxation of the taxpayer, P Oy.

As regards the state aid issue, the SAC began by repeating the judgment of the CJEU where it was held that the Finnish regime should be classified as 'existing aid' (if it constitutes aid at all). Furthermore, it was noted by the SAC that when carrying out this classification, the potential "amendments of the detailed arrangements for the implementation of the regime" (as discussed by the CJEU) should be taken into account. According to the SAC, in the context of potential state aid, such amendments can take place either through (i) legislation, (ii) interpretation

guidelines or (iii) case law and tax practice.

As regards point (i), the SAC noted that no amendments have taken place that would have amended the detailed arrangements of Section 122 in the way that was discussed by the Court. Here the SAC specifically refers to paragraphs 46 and 47 of the CJEU decision, where it is stated that any amendments extending the scope of the regime can lead to a classification as new aid. As regards point (ii), according to the SAC, the guidelines have first and foremost been a way to unify the nationwide implementation practice and the guidelines have not extended the scope of the regime. Finally, as regards point (iii), the SAC concluded that the case law and tax practice regarding tax loss carry forwards has not changed in a manner that would indicate the extension of the scope of the regime or that the selectivity had increased during the time Finland has been a member of the EU.

In the light of the above, the SAC held that the state aid provisions in EU law do not prevent, in the case at hand, the granting of a permission to retain the losses despite a change in ownership. The SAC held that this is the case regardless of whether the Finnish regime were to be as such considered as state aid within the meaning of article 107(1) TFEU. Therefore, there is no need to evaluate whether the regime fulfills the criteria for state aid.

Finally, the SAC held that the taxpayer had presented that there are special circumstances within the meaning of Section 122 to carry forward the tax losses despite a change in ownership.

Conclusions

The SAC basically established that it does not have competence to investigate the issues relating to selectivity and justification.

As the Finnish regime should in the view of the SAC be regarded as existing aid, it is now up to the Commission to take action. In case the Commission would initiate a process, it could request Finland to change legislation regarding the regime for the future.

This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, PricewaterhouseCoopers does not accept or assume any liability, responsibility or duty of care for any consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.

© 2013 PwC. All rights reserved. Not for further distribution without the permission of PwC. "PwC" refers to the network of member firms of PricewaterhouseCoopers International Limited (PwCIL), or, as the context requires, individual member firms of the PwC network. Each member firm is a separate legal entity and does not act as agent of PwCIL or any other member firm. PwCIL does not provide any services to clients. PwCIL is not responsible or liable for the acts or omissions of any of its member firms nor can it control the exercise of their professional judgment or bind them in any way. No member firm is responsible or liable for the acts or omissions of any other member firm nor can it control the exercise of another member firm's professional judgment or bind another member firm or PwCIL in any way.