

News alert

EU Direct Tax Group



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Netherlands – AG opinion in exit tax case (National Grid Indus, C-371/10)

On 8 September 2011, Advocate General (AG) Kokott of the European Court of Justice (ECJ) delivered her opinion in the case of National Grid Indus BV (C-371/10). The AG stated that the Dutch exit tax which is levied on a company which changes its place of effective management from the Netherlands to the UK, is under certain conditions incompatible with the freedom of establishment.

Facts and circumstances

National Grid Indus BV is a company which moved its place of effective management from the Netherlands to the UK. Until that moment, National Grid Indus BV held a GBP receivable on a group company which contained an FX gain. The change of National Grid's tax residence triggered an exit tax on this gain.

The opinion

In the view of the AG, contrary to what some of the Member States have expressed, an 'emigrating' BV can invoke the freedom of establishment. The earlier *Daily Mail* case, clarified in subsequent ECJ case law, should not lead to another conclusion.

Subsequently, the AG stated that an exit tax which is levied on companies which change their effective place of management outside the Netherlands in respect of unrealised gains on their assets constitutes a restriction on freedom of establishment. This

restriction can be justified by the need to ensure a balanced allocation of the power to impose taxes between the Member States and the cohesion of the tax system. However, the immediate collection of this exit tax can go beyond what is necessary to achieve these objectives. A more proportionate approach would be to 'freeze' the taxable amount at the moment of emigration, and to wait with the collection of this tax until the moment of realization of the income.

The intervening Member States stated that it could be complex, or even impossible, to follow the assets involved to determine the moment on which the gains on these assets are actually realized. In the view of the AG this is certainly not at issue in all cases. In the present case, for example, there is only one receivable which could be monitored easily.

Current pending exit tax cases

Apart from the National Grid Indus case there are currently several cases pending at the ECJ which relate to exit tax provisions of EU Member States. The judgment in the National Grid Indus case will be a good indication of the outcome of these cases, because the National Grid Indus case will be decided by the Grand Chamber.

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