Case C-436/06

Per Grønfeldt and Tatiana Grønfeldt

v

Finanzamt Hamburg — Am Tierpark

(Reference for a preliminary ruling
from the Finanzgericht Hamburg)

(Free movement of capital — Taxation — Income tax — National legislation concerning the taxation of profits made from the sale of shareholdings (shares) in limited companies)

Judgment of the Court (Second Chamber), 18 December 2007 . . . . . I - 12359

Summary of the Judgment

Free movement of capital — Restrictions — Tax legislation — Income tax
(Art. 56 EC)

Article 56 EC is to be interpreted as precluding the legislation of a Member State by which the profits from a sale of shares in a limited company established in another Member State are immediately taxable in a given year where the seller had held, either directly or indirectly, a share of at least 1% of the company's capital within the previous five years, whereas the profits from the sale of shares in the same circumstances, in a limited company established in that first Member State subject to unlimited corporation tax were subject to tax in that given year only in the case of a substantial shareholding of at least 10%.

Such a difference in treatment on the basis of the place of investment of the capital has the effect of discouraging a shareholder from investing his capital in a company established in another State and also has a restrictive effect on companies established in other States in that it constitutes an obstacle to their raising capital in the Member State concerned. It is insignificant, in that regard, that the difference in treatment existed only for a limited period of time, since that fact alone does not preclude the difference in treatment from having significant effects or, therefore, from giving rise to a genuine obstacle to the free movement of capital.

Such a difference in treatment cannot be justified by the need to ensure full taxation, which is similar to the need to maintain the coherence of the tax system, since there is no direct link, for a shareholder, between the tax advantage concerned and the offsetting of that advantage by a particular tax levy. Nor does that difference in treatment appear to be justified by the margin of discretion claimed by Member States in the setting up of a provisional system in order, in the long term, to bring the national corporate tax system into line with Community law and to remove any possible discrimination. That margin of discretion must always be limited by compliance with fundamental freedoms, and in particular the free movement of capital. Even if a provisional system may, in respect of the taxation of profits from the sale of shares in resident companies, be understood as a legitimate concern to ensure a smooth transition from the old to the new system, such a factor does not, by itself, justify the said difference to the detriment of the taxation of the profits made from sales of shares in non-resident companies.

(see paras 14, 15, 26, 27, 32, 33, 35, operative part)