



Reports of Cases

Case C-292/16 Proceedings brought by A Oy

(Request for a preliminary ruling from the Helsingin hallinto-oikeus)

(Reference for a preliminary ruling — Freedom of establishment — Direct taxation — Corporation tax — Directive 90/434/EEC — Article 10(2) — Transfer of assets — Non-resident permanent establishment transferred, in the course of a transfer of assets, to a receiving company also non-resident — Right of the Member State of the transferring company to tax that establishment's profits or capital gains resulting from the transfer of assets — National legislation providing for immediate taxation of the profits or capital gains in the year of transfer — Collection of the tax due as revenue of the tax year in which the transfer of assets took place)

Summary — Judgment of the Court (First Chamber), 23 November 2017

Freedom of movement for persons — Freedom of establishment — Restrictions — Tax legislation — Common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States — Directive 90/434 — Transfer of assets — Transfer of a non-resident permanent establishment to a receiving company also non-resident — Taxation of the profits or capital gains of the permanent establishment — National legislation providing for immediate taxation of the profits or capital gains in the year of transfer — Lawfulness — Collection of the tax due in the tax year of the transfer with no possibility of deferral — Not permissible — Justification — None

(Art. 49 TFEU; Council Directive 90/434, Art. 10(2))

Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, where a resident company, in the course of a transfer of assets, transfers a non-resident permanent establishment to a company that is also non-resident, first, provides for the immediate taxation of the capital gains resulting from the transfer and, second, does not allow deferred collection of the tax, whereas in an equivalent national situation such capital gains are not taxed until the disposal of the transferred assets, in so far as that legislation does not allow the deferred collection of the tax.

That assessment cannot be called in question by the fact that the legislation, pursuant to Article 10(2) of the Mergers Directive, gives relief for the tax that, but for the provisions of that directive, would have been charged on such capital gains in the Member State in which the non-resident permanent establishment is situated, given that the disproportionality of that legislation does not derive from the amount of tax due but from the fact that it makes no provision for the taxpayer to defer the time at which it is collected (see, to that effect, judgment of 14 September 2017, *Trustees of the P Panayi Accumulation & Maintenance Settlements*, C-646/15, EU:C:2017:682, paragraph 60).

As regards the justification based on the need to ensure the effective collection of tax, raised by the German and Swedish Governments, it should be observed that, while the Court has previously accepted that it may constitute an overriding reason of the public interest capable of justifying a

restriction of the freedoms of movement guaranteed by the FEU Treaty (see, to that effect, judgment of 19 June 2014, *Strojírny Prostějov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 46 and the case-law cited), the legislation at issue in the main proceedings is not appropriate for attaining it, so that that objective cannot, in a case such as that in the main proceedings, justify an impediment to freedom of establishment. As the Commission observed, for a Member State to allow a resident transferring company to opt for deferred payment of tax would not affect that Member State's possibility of requesting from that company the necessary information for collecting the tax due or of proceeding effectively to collecting it (see, by analogy, judgment of 19 June 2014, *Strojírny Prostějov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraphs 49 to 53).

(see paras 38-40, operative part)