Deloitte.

URL: http://www.deloitte-tax-news.de/german-tax-legal-news/commission-decision-on-german-sanierungsklausel-annulled-by-european-court-of-justice.html

12.07.2018

German Tax and Legal News

Commission decision on German Sanierungsklausel annulled by European Court of Justice

Update: Legislative procedure to reinforce the German Sanierungsklausel has started

The European Court of Justice has ruled that the Commission decision on the State aid status of the so-called restructuring clause ('Sanierungsklausel') in Section 8c (1a) of the German Act on Corporate Tax is null and void. For the Commission, this decision is a serious setback, with potentially far-reaching consequences. The main reasons of the Court can be inferred from the Opinion of Advocate General Vahl, who denies the selectivity of the restructuring clause in the present case because it only restores the general ability to offset loss as the reference system in cases of companies in need of restructuring.

With the ECJ ruling on the restructuring clause, the Commission has suffered a painful defeat. The ECJ rejected the "abbreviation" of the determination of the selectivity of a fiscal rule according to whether a tax-privileged scheme is not open to all companies in a legally and actually comparable situation, and re-established the classic three-stage review. The ECJ stressed that the "reference system" must be determined in a broad approach. According to this, an exception to a restricting rule (here, the end of loss offset after a change in shareholders) only restores the general principle of loss offsetting.

In 2011, the European Commission issued a decision ruling that the so-called Restructuring Clause in Section 8c (1a) of the German Act on Corporation Tax constitutes prohibited State aid. The consequence was the recovery of the relevant tax savings as a result of the offsetting of losses with subsequent profits.

The insolvency administrator of the now insolvent Heitkamp BauHolding GmbH appealed, along with many other companies and the German Federal Government, against the Commission's decision and was now successful in second instance by the European Court of Justice (ECJ). The European Court as first instance had followed the European Commission.

Exceptionally, under certain circumstances, the Restructuring Clause allows for full offsetting, in spite of the otherwise harmful shareholder change of more than 25%, if the purchase of the shares is part of a restructuring. The exclusion of loss offsetting should prevent trade in loss carryforwards ("shell purchase"). The Commission and the subsequent European General Court considered that this favored firms in need of restructuring who were in a "comparable legal and factual situation" with regard to the possibility of offsetting losses, like other companies not in need of restructuring. The reference system and thus a benchmark for a preferential treatment should have been the restriction of loss offsetting in the case of a change of shareholders.

Contrary to that, Advocate General Vahl, whom the ECJ followed in its decision of 28th June 2018, qualified the generally admissible loss carryforward as reference system, which is restricted by Section 8c of the German Act on Corporate Tax in the event of a change in the shareholders. As an exemption to the exemption, only the basic rule of loss offsetting is restored. Since the Commission had thus wrongly determined the reference system, the ECJ annulled the Commission decision.

However, it is unclear whether the ECJ has confirmed that the restructuring clause is not aid. The latter would, however, be necessary in order for the restructuring clause to be applicable again retroactively and automatically pursuant to section 34 (6) sentence 2 no. 1 of the German Act on Corporate Tax. Although the ECJ has clearly recognized the nullity of the Commission decision, it has not explicitly stated that the restructuring clause is not aid. This was also not possible given the nature of the action for annulment under Article 263 TFEU. However, in view of the very clear ECJ rationale for determining the reference system, it seems difficult for the Commission to maintain its assessment of selectivity and thus again to adopt a State aid decision. In order to reinstate the restructuring clause, it is necessary to publish the ECJ ruling in the Federal Law Gazette (BGBl.). Hopefully this should be done

soon.

Also in other recent cases of the Commission's tax initiative, the practice of the Commission to determine the selectivity is a bone of contention. With the current decision, the ECJ has made it clear that selectivity must be carefully and independently examined, and that the reference system must be determined on the basis of the broader legal framework. As a consequence, it might be questionable whether the exceptions identified by the Commission as possible State aid in the UK rules on foreign controlled companies ("CFC Rules") also 'only' restore the non-taxation of the foreign activities of the companies concerned.

German Summary

Contacts

Dr. Alexander Linn
Partner
allinn@deloitte.de
Tel.: +49 89 29036 8558

Dr. Michael Stopper
Senior Manager
mstopper@deloitte.de
Tel.: +49 40 378538 21