

CJEU: Member State registration ownership of vessel may levy insurance premium tax

On April 15, 2021 the Court of Justice of the European Union ('CJEU') rendered judgment in The North of England P&I Association Ltd. case (case no. C-786/19). The CJEU ruled that the Member State where seagoing vessels are registered in the ownership register may levy insurance premium tax. According to the CJEU, this is no different if a vessel (temporarily) sails under the flag of another country. This is in accordance with Dutch rules, but deviates from the practice in several other countries. This judgment is not only important for the insurance of seagoing vessels, for which an exemption applies in the Netherlands, but also for the insurance of other vessels (such as inland barges and recreational craft), which are subject, as starting point, to 21% insurance premium tax in the Netherlands.

Background and points of law

This case concerns the so-called 'place of risk'. The place of risk has been harmonized in the European context for indirect taxes and parafiscal charges on insurance premiums ('insurance premium tax'), on the basis of the Solvency II Directive and its predecessors. On that basis, the place of establishment or residence of the policyholder is generally used. However, if this concerns the insurance of vehicles (including seagoing vessels) the 'Member State of registration' must be used. Exemptions, taxable amounts, rates, tax liability and suchlike have not been harmonized with regard to insurance premium tax.

The German interpretation of 'Member State of registration' was cause for a dispute between The North England P&I Association Ltd. ('North England P&I'), an insurance company established in the United Kingdom, and the German federal tax authorities. North England P&I had concluded insurance contracts with 14 companies established in Germany to insure their seagoing vessels. The coordinating German shipowner and the Maltese and Liberian bareboat charterers were also the policyholder of or co-insured parties to the insurance contracts. The case shows that the insurance covered for civil liability, legal protection, war risks and various types of damage to ships ('casco' coverage). The seagoing vessels in question temporarily flew the flag of another country (Malta and Liberia) with the permission of the German authorities, but all remained registered in the ownership register in Germany.

In dispute between North England P&I and the German federal tax authorities was whether Germany has the power to tax in this case. This ultimately resulted, in short, in a request for a preliminary ruling from the German court to the CJEU on the following question: is the 'Member State of registration', which has the power to tax, the state where the seagoing vessels are registered in the ownership register (Germany) or the state whose flag is flown by the vessels, i.e. de flag state (Malta and Liberia)?

CJEU judgment

The CJEU ruled in an extensive judgment that the 'Member State of registration' must be interpreted as the Member State where the vessel is registered in the ownership

register. Germany thus has the power to tax, despite the fact that the vessels temporarily flew the flag of another country.

The CJEU noted thereby that neither the wording of the Directive and the various language versions of it nor the legislative history of this Directive make clear how the 'Member State of registration' must be interpreted. According to the CJEU, it must be inferred from the context and the objective of the Directive that the place where the risk is situated can be determined on the basis of concrete and physical criteria rather than primarily on the basis of legal criteria. After all, the objective is that a concrete factor can be linked to each insured risk, on the basis of which the place of risk can be determined.

The choice to harmonize the place of risk within the European context is the result of the wish to rule out the danger of both double taxation and tax avoidance. The CJEU noted that most Member States exclude the possibility that a vessel is registered in the ownership register in multiple Member States. Although the UN Convention on the Law of the Sea stipulates that a vessel may only sail under one flag, the CJEU considers the ownership register to be a better reference point for the place of risk. The owner is firstly responsible for the risks linked with a vessel and its operation, and for that reason takes out an insurance contract to cover those risks in order to protect their equity interests in that vessel. Moreover, that is also the Member State of which the owner of the vessel has the nationality and/or where they reside or are established. The CJEU assumed that the temporary flagging-out has no impact on the insured risks, which is something the German court will have to verify.

Importance for the Dutch practice

In Dutch legislation, the 'Member State of registration' is already interpreted as the Member State of registration of ownership. The Dutch ownership register is kept by the Cadastre, Land Registry and Mapping Agency. If the ownership of a vessel is registered in a third country (such as Liberia or Curaçao), the Dutch rules may require that the Member State where the policyholder is established/resides is used, so that the insurance can still fall under the scope of Dutch insurance premium tax. However, the Netherlands has an exemption for the insurance of seagoing vessels, which means that in many cases no insurance premium tax is payable. Both the place of risk and the application of the exemption depend on the cover offered by the insurance. The insurance of inland barges and recreational craft is not exempt. If the place of risk is situated in the Netherlands and no exemption applies, 21% Dutch insurance premium tax is payable.

In the Solvency II Directive and its predecessors the place of risk is harmonized. For (seagoing) vessels, the 'Member State of registration' is used, without any explanation of what type of registration (ownership/flag) that must be. We understand that, in practice, a number of insurers relate to the flag state and apply the same interpretation throughout the entire European Economic Area.

In Germany, among other countries, there is no exemption for the insurance of seagoing vessels. In situations where no exemption applies and a vessel sails under the flag of a country other than the country where the ownership is registered, double (non-)taxation may arise. Certainly now that, in some cases, the flag state is used in practice. The starting point is that vessels that are registered in the Netherlands with the Cadastre, Land Registry and Mapping Agency fly the Dutch flag, but – just like in Germany – it is also possible in the Netherlands to have a vessel (temporarily) fly the flag of another country.

We recommend examining the place of risk, certainly if vessels are registered in different countries in respect of ownership and flag or if a vessel is registered in a third country. Insofar as the place of risk is situated in the Netherlands, we recommend assessing whether the exemption can be applied. In this respect, it is also advisable to review which risks are exactly insured.

The tax advisors of KPMG Meijburg & Co's Indirect Tax Financial Services Group would be pleased to help you identify the potential insurance premium tax implications of this judgment. Feel free to contact one of them or your regular advisor for more information.

KPMG Meijburg & Co
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