

Insurance premium tax: CJEU decision on location of risk

On January 17, 2019, the Court of Justice of the European Union ('CJEU') rendered judgment in a case that dealt with the location of risk for insurance premium tax purposes (case no. C-74/18). The case concerned insurance policies for M&A transactions. The CJEU ruled that the place of risk for insurance covering the contractual risks associated with the value of the shares and the fairness of the purchase price paid is the place where the policyholder is established. The CJEU judgment provides a welcome clarification for many other insurance programs.

1. The case

The taxpayer, A Ltd (hereinafter: 'insurance company'), offers insurance products and has its head office in the United Kingdom. The insurance company is active in Finland, but does not have a separate physical branch there. The insurance company offers its clients insurance products, including an insurance policy for business acquisitions. This primarily concerns a warranty and indemnity insurance policy taken out by the vendor, a warranty and indemnity insurance policy taken out by the purchaser and an insurance policy for tax liability. The insurance policies are intended to cover the risk associated with the value of shares and the right to insure the purchase price paid by the purchaser when certain predetermined circumstances occur.

2. Request for a preliminary ruling

The Finnish court sought clarity from the CJEU about the location of the risk associated with these types of insurance policies, when this involves parties in several countries. The Finnish court wanted to know whether Finnish insurance premium tax is payable if the policyholder is a Finnish company and the target company is a foreign legal entity and vice versa. The questions referred for a preliminary ruling made a further distinction between the situation where the vendor is the policyholder and the situation where the purchaser is the policyholder. A distinction was also made between the acquisition of a business undertaking and the acquisition of shares.

The challenge in this particular case was that there were multiple countries involved in the insurance and that a policyholder could seek coverage for a risk triggered by an event occurring in another country. For insurers and policyholders it is thereby important to determine in which country insurance premium tax is payable. The amount of tax payable can be considerable. Some countries do not have insurance premium tax, while others have rates above 20%.

3. The CJEU judgment

In determining the location of risk for insurance premium tax purposes, the CJEU took into consideration the place where the activity is carried out, whose risk is covered by the insurance contracts. In the case at hand, the risk is associated with the value of shares and the policyholder is covering itself against the risk that this value would

decrease. In that respect, it appears to be irrelevant that such a decrease in value could be the result of an event occurring at or within a target company situated in another Member State.

What appears to have been decisive for the CJEU is that A Ltd offers insurance covering the contractual risks associated with the value of the shares and the fairness of the purchase price paid by the buyer when acquiring an undertaking. The CJEU ruled that an insurance contract concluded in that context is only subject to the indirect taxes of the Member State where the policyholder is established.

To date, there have only been two CJEU judgments on where risk is located for insurance premium tax purposes and these did not provide the desired clarity for each type of insurance policy as regards where insurance premium tax should be levied. It was clear from these judgments that global insurance programs could be subject to insurance premium tax in multiple countries where risks in multiple countries are covered. The position on the insurance premium tax treatment of risks associated with shareholdings seemed less clear. The latest judgment by the CJEU provides more clarity on such types of risks.

In practice, multinationals often have a combination of risks at the country level and shareholder risks, with premiums being allocated for insurance premium tax purposes between the various countries and the shareholder. Based on the CJEU judgments to date, these risks would have to be allocated to the various countries and to the country where the shareholder is located. The challenge is to ensure that such an allocation is appropriate and applied consistently.

We would like to point out that a question that arises in the Dutch practice is whether security provided for business acquisitions always qualifies as insurance and is thus subject to 21% insurance premium tax. The argument here is that sometimes it is not an uncertain event that is covered, but rather damages as a result of a still unknown defect. As this is not a matter of EU law, it has never been referred to the CJEU.

The tax advisors of Meijburg & Co's Financial Services Group would be pleased to help you identify the potential implications of this CJEU judgment. Please feel free to contact one of them or your regular contact at Meijburg & Co.

Meijburg & Co
January 2019

The information contained in this memorandum is of a general nature and does not address the specific circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.