

## **Insurance premium tax: Request for a preliminary ruling on location of risk**

In case A Ltd (C-74/18) the Finnish court has requested the Court of Justice of the European Union ('CJEU') for a preliminary ruling on where risk is located for insurance premium tax purposes. The case concerns insurance policies for M&A transactions. The CJEU judgment could affect many types of cross-border insurance policies, in particular where these insurance policies also cover the shareholder.

### **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 the shares and the right to insure the purchase price paid by the purchaser when certain predetermined circumstances occur.

### **2. Questions for which a preliminary ruling is sought**

This Finnish court wants clarity from the CJEU about the location of the risk associated with these types of insurance policies, when this involves parties in several countries. What the Finnish court wants to know in this respect is 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 make a further distinction between the situation where the vendor is the policyholder and the situation where the purchaser is the policyholder. A distinction is also made between the acquisition of a business undertaking and the acquisition of shares.

### **3. Practical consequences**

Many insurance policies have a cross-border character. 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%.

To date, there have only been two CJEU judgments about 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 is levied. In practice, this did not usually cause any problems and this was also the case here. When a shareholder risk is covered, for example by way of a financial interest clause, then insurance premium tax is currently usually levied in the country where the shareholder resides. The CJEU judgment in the case now pending could disrupt this established practice.

For multinationals this could impact worldwide insurance programs, where there is often 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. Such a premium allocation is not always applied consistently. There is now an additional uncertainty for multinationals. With regard to the shareholder risk, the question now is whether for insurance premium tax purposes this must also be allocated to the countries to which it relates.

In addition, in the Dutch practice the question arises whether security provided for business acquisitions always qualifies as insurance and is 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. Because the taxability of insurance is not uniformly regulated throughout the EU, it is quite likely that this question will not be addressed.

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

Meijburg & Co  
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