CJEU decides two Italian cases: Italian FTT does not breach the free movement of capital; taxation of emigrant pensioners is compatible with EU law

Case C-565/18, *Société Générale S.A.*

CJEU finds Italian FTT on transfers of derivative instruments compatible with primary EU law

Today, the Court of Justice of the European Union ("**CJEU**") issued its judgement in case C-565/18, *Société Générale S.A* ("**SG**"), dealing with the Italian financial transaction tax ("**FTT**"). The case concerned an action brought by the Italian branch of SG against the denial of refund of the FTT paid in Italy. The Regional Tax Court of Lombardy (second-tier Court) requested a preliminary ruling to the CJEU regarding the interpretation of Articles 18, 56 and 63 of the TFEU. In particular, the Italian court asked whether those provisions should be interpreted as precluding the application of the domestic rules charging the FTT on the transfers of derivative instruments where the underlying financial instruments are issued by a company that has its registered office in Italy.

In line with the opinion delivered by the Advocate General Hogan on 28 November 2019 [see EU Tax Alert 2019/10 - https://www.maisto.it/it/newsletter/eu-tax-alert--75.html], the CJEU held that the case at stake might theoretically fall within the scope of both the freedom to provide services and the free movement of capital. However, as the FTT applies regardless of whether the transaction entails the provision of a service (e.g. hedging services), the CJEU concluded that the case should be examined in the light of the free movement of capital.

The CJEU denied the existence of a breach of the relevant freedom. The Court highlighted that the FTT applies (i) regardless of the location where the transaction is undertaken and of the residence of the parties/intermediaries involved and (ii) depending only on the amount of the transaction and on the type of investment made. In light of the above, the CJEU concluded that the FTT does not infringe the free movement of capital.

With regard to the procedural obligations imposed on the taxpayers, the CJEU held that no restriction may be found insofar as: (i) those obligations are equally charged on both resident and non-resident persons; and (ii) they strictly relate to the enforcement of the FTT and are proportionate to the objective of ensuring its collection.

Joined cases C-168/19, *HB v INPS*, and C-169/19, *IC v INPS*

CJEU holds that the allocation of taxing rights on pension payments between Member States, stemming from OECD Model-based tax treaties, does not infringe primary EU law

Today, the CJEU issued its judgment in joined cases C-168/19, *HB v INPS*, and C-169/19, *IC v INPS*. The cases concern two Italian nationals (the "**Taxpayers**"), tax residents of Portugal, who received public sector pensions from the Italian National Social Welfare Institute ("**INPS**"). The Taxpayers claimed that the tax regime applicable to such pensions, resulting from the application of the tax treaty between Italy and Portugal ("**Treaty**"), entailed a discrimination contrary to Article 18 and 21 TFEU.

The Treaty is consistent with the OECD Model Tax Convention and allocates the taxing rights on the pensions based on whether the recipients had been employed in the private sector or in the public sector and, in the latter case, on whether the recipients are nationals of the Member State of residence. The Taxpayers argued that a discrimination arose as a consequence to the application of the Treaty, since their pensions were subject to tax in Italy, while no tax would have been levied in Italy on Italian private sector pensions paid to Portuguese tax residents, nor on Italian public sector pensions paid to Portuguese nationals tax resident of Portugal.

The CJEU denied the existence of a violation of Article 18 and Article 21 TFEU. According to the Court, the different tax treatments referred to by the Taxpayers stemmed from the criteria chosen by Portugal and Italy for the purpose of allocating their taxing rights under the Treaty and from the disparities existing between their respective tax systems. In this respect, the Court referred to its established case law, according to which, within the framework of tax treaties, Member States are free to lay down the criteria for the allocation of their taxing rights, including the source of the payments and the nationality of the recipients.

For further information: **Maisto e Associati**

Milan
Piazza F. Meda 5
20121
T: +39.02.776931

Rome
Piazza d'Aracoeli 1
00186
T: +39.06.45441410

London
2, Throgmorton Avenue
EC2N 2DG
T: +44.207.3740299
