



Case C-405/18, AURES Holdings

The CJEU upholds that freedom of establishment does not require a Member State to take into account tax losses accrued by a company in the Member State of prior tax residence

The Court of Justice of the European Union (“**CJEU**”) issued its judgment in the case C-405/18, *AURES Holdings*.

The case concerned a Dutch company that, in tax year 2007, incurred tax losses in the Netherlands for an amount exceeding 2 million Euro. In 2009, the company transferred its place of effective management to the Czech Republic and became tax resident therein. After the change in the tax residence, the company sought to use Dutch losses to offset Czech taxable income. Czech tax authorities denied the use of the losses arguing that Czech tax law only allowed the use of losses originated in Czech Republic and computed in accordance with Czech tax law.

The CJEU stated that the denial to use the losses incurred while the company was resident in another State constitutes a difference in the tax treatment (para. 34). However, such difference in treatment was not in breach of the freedom of establishment because it concerned two situations that are not comparable in light of the objectives pursued by Czech tax rules, i.e. preserving the allocation of taxing power between the Member States and preventing the risk of double deduction of losses (para. 38).

According to the CJEU a company that is tax resident of the same Member State, both when losses are incurred and when they are used, is not comparable to a company which incurs tax losses in one Member State and, then, transfers its tax residence to another Member State. In the latter case, the Member State where the use of the losses is claimed lacks taxing jurisdiction over the losses that were incurred in a different Member State and there is a risk that the losses are taken into account twice (paras. 39-42).

The CJEU further confirms that such conclusion holds true even if the losses are final pursuant to the decision in the case *Bevola* (C- 650/19). Different from *Bevola*, in the case at stake, the State of residence of the company (Czech Republic) does not have taxing jurisdiction over the losses that are accrued while the company was subject to the taxing jurisdiction of another Member State (paras. 46-49).

Finally, the Court also pointed out that the conclusion is consistent with its decision in *National Grid Indus* (C-371/10) since the freedom of establishment does not oblige the new Member State of residence to take into account losses which, being realised in another Member State, fall outside its tax jurisdiction (paras. 51-52).

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