



Tax Bulletin

Gibraltar – EU State Aid Case

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PwC Tax

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State Aid Opinion on case *Commission and Spain v. Gibraltar and the UK*

On 7 April 2011, the EU Advocate General Jääskinen published his Opinion in the case of the European Commission and Spain v. the Government of Gibraltar and the UK (joined cases C-106/09 P and C-107/09 P).

Background

This case concerns reforms to the corporate income tax system of Gibraltar. This system would have applied to all companies established in Gibraltar and consisted of (i) a payroll tax, (ii) a business property occupation tax and (iii) a registration fee. In 2004, the European Commission decided that this reform constituted unlawful State aid. This decision was subsequently overturned by the Court of First Instance (CFI) in 2008. The Commission and Spain have challenged this outcome before the European Court of Justice (ECJ). A-G Jääskinen's Opinion pertains to the appeal before the ECJ. The Gibraltar Government have subsequently said that the reforms will not go ahead in the form challenged by the Commission.

Issues in the present case

The Commission and Spain put forward two main arguments in favour of their position that the Gibraltar regime constituted unlawful State aid.

(i) Regional selectivity

Firstly, it is argued that the system would grant a benefit to Gibraltar companies as compared to UK companies ('regional selectivity'). The question becomes whether the comparison which the Commission makes between UK companies and Gibraltar companies is pertinent. Specifically, it must be determined whether the UK and Gibraltar

should for present purposes be considered a one single system of reference, or whether they are in fact two separate systems. With reference to the ECJ's judgment in the case of the Azores (C-88/03), the Advocate General agrees with the position taken by the CFI that the latter interpretation should be adopted. The Gibraltar measures can therefore not be regarded as regionally selective.

(ii) Material selectivity

Secondly, the Commission argues that the Gibraltar measures are materially selective. Under the present case law the concept of material selectivity is understood to mean that a facet of a national tax system (i.e. a special regime) benefits a particular category of taxpayers. This is determined with reference to the general tax system ('system of reference').

The CFI had previously concluded that the Commission had, *in casu*, not demonstrated that the measures deviated from the 'normal' tax regime of Gibraltar. By contrast, the Commission submits that as the system will effectively benefit offshore companies, it can be regarded as 'inherently discriminatory'.

The Advocate General rejects the arguments of the Commission. He notes that although the Gibraltar regime might be regarded as harmful tax competition in the sense of the Code of Conduct on business taxation, it does not automatically fall within the European regime on State aid.

Conclusion

The Advocate General rejects the arguments put forward by the Commission and Spain, and so concludes that the judgment of the CFI should be upheld.

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