

Newsalert

Tax Department

ECJ - Reduced transfer taxes on the purchase of properties by Italian real estate investment funds: Infringement of EU Law by the Italian rule which limits the tax benefit to Italian funds

On 16 December 2021 the Court of Justice of the European Union ("ECJ") issued its judgment in the joined cases C-478/19 and C-479/19 (UBS Real Estate KmbH – "UBS RE").

The joined cases concerned the potential infringement of EU law by the Italian tax rule which provides for the reduction by half (2% rather than 4%) of transfer taxes applicable to sales and purchases of commercial real estate assets if party of the transaction is a closed-ended real estate alternative investment fund established under Italian laws (Article 35(10-ter) of Law Decree no. 223/2006).

It is worth noting that Italian real estate funds may be set up only as "closed-ended".

The decision

The joined cases resulted from a proceeding between UBS RE, as fund manager of two open-ended real estate funds established under German law (namely UBS (D) Sector Real Estate Europe and UBS (D) Euroinvest Immobilien Real Estate Investment Fund) ("UBS Funds"), and the Italian Revenue Agency.

On 4 October 2006, UBS RE acquired, on behalf of UBS Funds, two commercial properties located in Italy, applying ordinary 4% transfer taxes. At a later stage, UBS RE became aware that Law Decree no. 223/2006 had entered into force prior to the acquisitions and thus requested the Italian Revenue Agency to refund half of the transfer taxes paid.

After the denial of the reimbursement by the Revenue Agency, it started a dispute with Italian tax Courts that finally led the Italian Supreme Court to refer to the Court of Justice to evaluate whether Art. 35(10-ter) of Law Decree no. 223/2006 – that limits to closed-ended funds the reduction of transfer taxes – is in contrast with EU principles of freedom of establishment and free movement of capital.

The CJEU stated that the alleged unequal treatment must be examined only from the perspective of the EU principle of free movement of capital (Article 63 of TFUE) (para. 33 of the Judgment).



According to the CJEU, the free movement of capital must be interpreted as precluding legislation of a Member State which restricts the benefit of the reduction in transfer taxes solely to closed-ended REIFs, to the exclusion of open-ended REIFs, provided that those two categories of fund are in objectively comparable situations, unless such a difference in treatment is justified by the objective of limiting systemic risks on the real estate market (para. 74 of the Judgement).

Preliminary remarks

The decision may affect the ways in which foreign investment funds structure their real estate investments in Italy: in light of such decision the reduced transfer taxes should apply also to sales and purchases of commercial real estate assets carried out by EU real estate funds irrespective of whether they are closed-ended or not under the laws of their EU State of establishment.

In principle, the CJEU's decision could allow EU real estate funds to file a request of refund to the Italian Tax Authority with respect to half (2%) of ordinary transfer taxes applied on the purchase of Italian real estate assets, if any.

However, such aspects should be further analyzed considering the view that will be adopted by the Italian Tax Authority and the other tax aspects related to the investment structure implemented by the foreign fund.

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