

French Supreme Court Affirms Non-Comparability of Tax Treatment Between France and Other States for EU Law Purposes

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The French Supreme Administrative Court (*Conseil d'État*) has ruled that France and other states cannot be considered to be in a comparable situation for the purposes of EU law (Decision No. [463599](#)). Therefore, even though a foreign state may be subject to higher taxation than that applicable to France, the foreign state cannot argue that this breaches the EU free movement of capital.

In the case at hand, a French partnership wholly owned by the Kuwait Investment Office realized a capital gain from the sale of French immovable property in 2011. The gain was subject to tax in France.

Under French domestic law, such capital gains are, in principle, subject to tax in France, except when realized by certain sellers such as foreign states (article 244 bis A of the General Tax Code). Based on this provision, the partnership first asked for a refund of the tax. The lower courts upheld this claim, but the Supreme Administrative Court considered that the exemption only applied to direct ownership, not to indirect ownership, of the French real estate (see [Capital gains on immovable property – foreign state not exempt in case of indirect ownership \(3 February 2020\)](#)).

After the case had been sent back to the lower court, the partnership argued that the capital gain would have been fully exempt if the French state had been the sole partner. According to the taxpayer, the fact that the partner was a foreign state should not justify different treatment. The lower court agreed and granted a full refund of the tax to avoid violating the free movement of capital guaranteed by EU law.

The French tax authorities again appealed the lower court's decision before the Supreme Court. The Supreme Court ruled that the situation of foreign states is not comparable to that of the French state in terms of tax treatment applicable under French tax law. Therefore, a foreign state contesting French taxes may not invoke a breach of free movement of capital merely because it is treated less favourably than the French state, had this latter realized the same transaction.

The Supreme Court again annulled the lower court's judgement. This second judgement from the Supreme Court is final and may not be contested.

