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## **ECJ CASES**

### **Belgium – ECJ judgment on Belgian withholding tax on foreign dividends: Damseaux case ([C-128/08](#))**

On 16 July 2009, the ECJ ruled that Belgium's withholding tax treatment of foreign sourced dividends received by a Belgian resident individual does not infringe the free movement of capital (Art. 56 EC). Since the facts are almost the same, the Damseaux judgement is in line with *Kerckaert-Morres* ([C-513/04](#); see also [EUDTG Tax News 2006 - nr. 005](#)) which was handed down by the ECJ on 14 November 2006.

Mr Damseaux', a Belgian resident individual, received dividends from a French resident company. A 15% French withholding tax was levied on said dividends in accordance with the Belgian-French Double Tax Treaty (DTT). Since the Belgian legislation no longer provides for a foreign tax credit as referred to in Article 19 A of the DTT, Mr Damseaux also suffered a 15% withholding tax in Belgium. As a consequence, Mr Damseaux' French dividends were taxed at a higher rate than Belgian dividends.

Mr Damseaux's claim against the assessments issued was rejected by the Belgian tax authorities. He brought an action before the Court of First Instance of Liège, which referred the following question to the ECJ: is the DTT, which allows partial double taxation of French-sourced dividends to subsist and which renders the taxation of those dividends more onerous than Belgian withholding tax alone applied to Belgian-sourced dividends distributed to a Belgian resident shareholder, contrary to the free movement of capital?

The ECJ answered that it does not have jurisdiction to rule on a possible infringement of provisions of bilateral conventions entered into by Member States in order to eliminate or to mitigate the negative effects of the coexistence of national tax regimes.

Nevertheless, the ECJ deduced from the wording of the referring court's question that the latter should be understood as seeking to know whether the free movement of capital precludes a bilateral tax convention under which the dividends distributed by a company established in one Member State to a shareholder residing in another Member State are liable to be taxed in both Member States, and which does not unconditionally oblige the Member State of residence to prevent the resulting double taxation.

In this respect, the ECJ considered that as each Member State is free to organise its system for taxing distributed profits, as long as this is done in compliance with EC Law, any disadvantages arising from the parallel exercise of tax competences by different Member States, to the extent that such an exercise is not discriminatory, do not constitute restrictions prohibited by the EC Treaty. Moreover, according to the ECJ, in the absence of harmonisation at EU level in this respect, it is not necessarily for the Member State of residence to prevent the double taxation within the EU resulting from the said parallel exercise of tax competences (even if such an attribution of powers would comply with the OECD rules).

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**Belgium – ECJ referral on a supplementary municipal charge levied only on foreign sourced movable income payments without the intervention of a Belgian financial intermediary: Dijkman v. Belgische Staat ([C-233/09](#))**

In Belgium, some “municipal charges” are levied only on income taxes due according to the annual income tax return filed by individuals. Belgian individual taxpayers are normally due to declare their taxable income, including movable income (interest, dividends, etc.) in an annual income tax return filed with the Belgian tax authorities. According to Article 313 of the Belgian Income Tax Code (“BITC”) however, taxpayers are not required to declare their movable income for which a Belgian withholding tax has already been retained and paid to the Belgian tax authorities.

As regards Belgian source movable income, the withholding tax is automatically retained by the Belgian debtor. Belgian individual taxpayers are therefore not required to mention movable income from Belgian source in their annual tax return.

As regards foreign sourced movable income (in the present case, from the Netherlands) a withholding tax is only retained if a Belgian financial intermediary intervenes in the movable income payment. Without the intervention of a Belgian financial intermediary, the foreign source movable income must be declared in the annual tax return by the Belgian individual taxpayer.

Given the withholding tax rate and the tax rate applicable to movable income mentioned in the annual tax return are the same (e.g. 15% for interest) the function of Article 313 BITC is to avoid an unnecessary reporting of movable income for which income taxation has already been suffered in Belgium.

According to Article 465 BITC, municipal authorities have the right to levy an additional charge on the individual income tax. This additional charge is only levied on the income tax due according to the annual tax return filed by the individuals. As a result, municipal charges can be levied when foreign source movable income is paid directly to a Belgian individual taxpayer without the intervention of a Belgian financial intermediary.

On 26 June 2009, the Antwerp Court of Appeal referred the following questions for a preliminary ruling to the ECJ:

“Is it an infringement of Article 56(1) of the EC Treaty for residents of Belgium who invest in other countries, such as the Netherlands, with a view to avoiding the supplementary municipal tax due under Article 465 (BITC) to be obliged to use a Belgian intermediary for the payment out of income from moveable assets, whereas residents of Belgium who invest in Belgium always benefit from the system of withholding tax relief under Article 313 (BITC) and are thus able to avoid the supplementary municipal tax provided for in Article 465 (BITC), since withholding tax on movable assets has already been withheld at source?”

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## France – ECJ referral on the interpretation of the avoir fiscal and précompte mechanisms: Accor case ([C-310/09](#))

On 3 July 2009, the Conseil d'Etat (Supreme Court) referred the ACCOR case to the ECJ.

The case deals with the old mechanism of “avoir fiscal” and “précompte” that was removed as from 2005. At that time, French companies distributing dividends were transferring to their shareholders a tax credit (“avoir fiscal” equal to 50% of the dividend) to be offset against their income tax liability. The tax credit was set up to prevent double economic taxation upon distribution of retained earnings. Where profits distributed had not been subject to corporate tax, a special tax called “précompte” was due by the distributing entity and withheld on retained earnings (equal to 50% of the dividend paid).

French source dividends which were subject to the affiliation privilege were not taxable. On the other hand, their redistribution was subject to “précompte”. The French parent could however offset “avoir fiscal” received from the French subsidiary against “précompte” due. No such tax credit mechanism was available when the French parent company was redistributing dividends received from EU subsidiaries so that the redistribution of EU source dividends was more costly and penalising investments in EU Member States. ACCOR considered that the lack of any tax credit attached to EU source dividends was a difference in treatment and a breach of the EC Treaty.

First, the Supreme Court considers that the taxpayer should prove that the profits distributed by EU subsidiaries comply with the narrow definition of “dividends” as meant under French tax law.

In addition, despite the similarities with the fact patterns in the *Manninen* case ([C-319/02](#)) and *Meilicke* ([C-292/04](#)) and probably because it is financially a sensitive case for the French Government (€ 3,5 b), the Supreme Court referred the case to the ECJ and raised the following questions:

- Is the difference in treatment in breach of the free movement of capital and freedom of establishment, i.e. does it hinder French companies to invest in other Member States or does it make it less attractive for foreign investors to invest in French companies having subsidiaries in other Member States?
- Should the legislation be in breach of EC law, considering that the “précompte” is an expense of the shareholder, can the French tax authorities refuse to reimburse the précompte to the distributing entity as this would lead to an “unjust enrichment” of the latter? If the answer is negative, is the fact that the précompte was not a tax and accounting charge for the distributing entity - but resulted in a lower distributable amount to the shareholders – a valid argument for the French Tax Authorities to deny the repayment to the distributing entity of the précompte levied in breach of the EC Treaty?

- Can the French tax authorities, in the light of the principle of effectiveness and equivalence of EC Law, condition the granting of the “avoir fiscal” to information from the taxpayer for each EU source dividend concerning the local tax rate and the amount of tax effectively paid locally in connection with the dividends distributed by EU affiliates, even where such proof would not be required in a pure domestic situation since such information is already in the hands of the French Tax Authorities?

Lastly, the Supreme Court asked the ECJ to apply the accelerated procedure provided for by article 104 bis of its Rules of procedure.

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**Germany – AG opinion on German provision to prevent tax abuse of imputation credits and wholly artificial arrangements: Glaxo Wellcome case (C-182/08)**

On 9 July 2009, AG Bot opined that a former German provision to prevent tax abuse of imputation credits is compatible with the free movement of capital insofar as it covers only wholly artificial arrangements.

Under the former imputation system, distributed profits of resident corporations were taxed at 30%. In order to avoid economic double taxation, shareholders were granted an imputation credit of 3/7 of the distributed dividend. This credit was basically only granted to *resident* shareholders. Instead of receiving dividends without the imputation credit, it could accordingly be more attractive for a foreign shareholder to dispose of shares in a German corporation with retained earnings to a German resident and to be compensated for the underlying imputation credit via a high purchase price. After the distribution of dividends, the former shareholder could re-buy the shares for a highly reduced price. The interim resident shareholder would be granted an imputation credit on the one hand and a deductible write-down on shares or a capital loss on the other hand. To avoid this tax abuse when shares were bought from a non-resident, write-downs or capital losses were not tax deductible at the level of the resident shareholder up to the difference between the purchase price and the nominal share value (blocked amount).

In 1995, the German resident Glaxo-GmbH acquired all the shares of the German resident W-GmbH from a UK resident shareholder. This caused a blocked amount at the level of Glaxo-GmbH. W-GmbH was then merged upstream into Glaxo-GmbH, which itself was converted into a limited partnership. The restructurings released losses that were not deductible due to the blocked amount being tracked through the transactions. The German Federal Finance Court referred the case to the ECJ.

The AG opines that in consideration of the special facts of the case and scope of the provision, only the free movement of capital is applicable. The AG then states that the resident shareholder is treated differently depending on whether he bought the shares from a resident or a non-resident vendor. This constitutes a restriction as this different treatment may dissuade shareholders from buying shares from a non-resident. Nevertheless, with reference to the decision in the case *ACT* (C-374/04), the AG points out that Germany is not obliged to

grant the imputation credit to non-residents. Therefore, this restriction is justified by the need to safeguard the imputation credit, as otherwise non-residents could effectively get one via a high capital gain which is, by the way, not taxable in Germany. However, the AG doubts whether the measure meets the principle of proportionality, as it should only cover wholly artificial arrangements. With reference to the statement of the German Government, the re-buying of shares for a highly reduced price within a short time frame constitutes such a wholly artificial arrangement.

As the AG is not sure whether the provision is only applicable to wholly artificial arrangements, he refers this issue back to the Federal Finance Court in order to assess the proportionality of the provision itself.

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### **Italy – AG opinion on Italian withholding tax on outbound dividends: Commission v. Italy case ([C-540/07](#))**

On 16 July 2009, AG Kokott delivered her opinion concerning the compatibility with the EC Treaty and EEA Agreement of the Italian withholding tax applying on dividends paid out by an Italian tax resident company to a company tax resident in another EU Member State or EEA country.

Pursuant to the Italian tax legislation in force until 31 December 2007, such outbound dividends, except those within the scope of the Directive 90/435/EEC (Parent-Subsidiary Directive), were subject to a 27% withholding tax, or a reduced rate in the case a DTT between Italy and the EU/EEA State of residence applied. By contrast, dividends paid out by an Italian tax resident company to another Italian tax resident company (“domestic dividends”) were only taxed on 5% of their gross amount at the 33% tax rate then in force.

The European Commission considered that the Italian tax rules (including DTT rules) on outbound dividends compared to domestic dividends were in breach of the free movement of capital (Art. 56 EC and Art. 40 EEA) as well as the freedom of establishment (Art. 43 EC and Art. 31 EEA). Subsequently, the Commission decided to open an infringement procedure against Italy and, as the latter failed to comply with the Reasoned Opinion sent on 4 July 2006 (C(2006)2544) within the 2-months’ deadline, on 30 November 2007 the Commission referred Italy to the ECJ.

The AG argues that the Italian tax legislation is in breach of Art. 56 EC. Firstly, the AG states that the Italian tax rules constitute a *prima facie* restriction of the free movement of capital, and that this restriction cannot be justified by the non-comparability of Italian resident and non resident shareholders. Indeed, as soon as Italy, either unilaterally or through a DTT, imposes a charge not only on resident shareholders but also on non-resident shareholders in respect of dividends which they receive from an Italian company, the position of those non-resident shareholders becomes comparable to that of resident shareholders.

Secondly, the restriction cannot be justified by the existence of a tax credit provided for by a DTT executed by Italy and the Member State of residence of the recipient and granted by the

latter with reference to the withholding tax levied in Italy. Indeed, all DTTs executed by Italy with other Member States provide an ordinary (not full) tax credit for the Italian withholding tax, up to the taxes due on the same dividends in the State of residence of the recipient.

The restriction can neither be justified by an overall evaluation of the Italian tax system on dividends nor by the need to guarantee the fiscal coherence or by the distribution of the taxing powers among Member States nor by the need to guarantee the effectiveness of the fiscal supervision.

The AG states that the Italian tax legislation at hand is not in breach of Art. 31 EEA and Art. 40 EEA. The restriction on the latter article is justified by the need to guarantee the effectiveness of the fiscal supervision, as Directive 77/799/EEC cannot apply in this context and no similar legislation providing for the exchange of information with EEA States is available.

NB: Italy's 2008 Budget Law was amended to make the tax legislation compliant with EC Law. See also [EUDTG Tax News 2009 - nr. 004](#).

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**Italy – AG opinion on Sardinia's tax on private jets and boats: Presidente del Consiglio dei Ministri v. Regione autonoma della Sardegna case ([C-169/08](#))**

On 2 July 2009, AG Kokott delivered her Opinion in a case concerning the regional tax (so-called "luxury tax"), imposed by the Italian Autonomous Region of Sardinia, on certain stopovers of private jets and boats in its territory operated by companies and individuals who, for tax purposes, are resident outside that Region. The tax was imposed mainly for environmental protection purposes.

This tax, laid down in section 4 of the Regional Law Nr. 4 of 2006 of the Region of Sardinia (repealed in 2009), was not charged to individuals and undertakings, which had their tax residence therein, carrying on the same activities.

A referral to the Italian Constitutional Court (so-called Corte Costituzionale) was made to establish whether the aforementioned Regional Law was in breach of the Italian Constitution.

On 21 April 2008, the Italian Constitutional Court referred four questions for a preliminary ruling to the ECJ, mainly asking whether the tax at issue was in breach of the freedom to provide services (Art. 49 EC), and/or constituted a forbidden State aid (Art. 87 EC).

With respect to the freedom to provide services, the AG affirmed that the measure at hand:

- constituted a restriction to the freedom to provide services as non-residents were discouraged by making stopovers, and therefore provide services, in Sardinia; and
- the restriction, based on the different treatment existing between residents and non-resident, could not be justified by the purpose of health and environmental protection

pursued by the same measure because private jets and boats operated by residents also polluted the environment.

- With respect to the State Aid definition, the AG affirmed that the tax at hand also constituted a State aid, within the meaning of Article 87 EC, as it was:
- granted an advantage, being the exclusion from the subjective scope of the measure of certain undertakings;
- selective, as the advantage was conferred only to undertakings tax resident in Sardinia;
- granted by means of Regional resources because, conferring the advantage only to residents in its territory, Sardinia indirectly renounced to its tax revenues;
- able to distort competition within the internal market and affect trades between Member States.

It is important to point out that the AG considers the tax at hand in breach of the freedom to provide services as well as forbidden State aid.

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### **Spain – ECJ judgment on Spanish capital tax rules: Commission v. Spain case (C-397/07)**

On 9 July 2009, the ECJ ruled that Spain's legislation concerning indirect taxes on the raising of capital (i.e. the version in force up to 31 December 2008) is incompatible with Directive 69/335/EEC. The EU Commission had referred Spain to the ECJ on the grounds that Spain had failed to fulfil its obligations under Directive 69/335/EEC concerning capital taxes, by:

- Subjecting the application of a mandatory exemption from capital tax with regard to restructuring transactions (mergers, spin-offs, exchange of shares and transfers of business activities) to 'special' conditions; it applied only if the special tax regime for reorganisations, regulated by the Spanish Corporate Income Tax Act, was applicable and notified to the Ministry of Finance;
- Imposing a capital tax on the transfer of the effective centre of Management or the registered office of a company from another EU Member State to Spain, for those companies which had not been subject to a similar tax in their country of origin;
- Subjecting to capital tax the contributions used to finance Spanish branches or Spanish permanent establishments of companies that were resident in another EU Member State that did not apply a capital tax similar to the Spanish one.

The following companies may benefit (only for operations until 31 December 2008):

- Companies with appealed tax assessments challenging the Spanish tax authorities' right to apply the special tax regime;
- Entities that had paid the corresponding Spanish capital tax for carrying out any of these transactions (restructuring transactions under the general tax regime, transfer of the registered office from another EU Member State to Spain, setting up of permanent establishments in Spain from another EU Member State or additional contributions) in periods covered by the statute of limitations; and

- Permanent establishments set up in Spain by EU based entities.

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## **NATIONAL DEVELOPMENTS**

### **Austria – Austrian Government amends legislation to end discrimination of foreign EU pension funds**

Up to 17 June 2009, the income of Austrian pension funds was under certain circumstances tax exempt from Austrian Corporate Income Tax (CIT). In October 2008, the European Commission sent a letter of formal notice to the Austrian Government stating that the tax exemption which is granted only to Austrian pension funds was not in line with EC Law. The Commission requested Austria to end its discriminatory treatment of foreign EU and EEA based pension funds by amending the law. As a consequence, Austria decided to extend the favourable tax treatment explicitly to those EU and EEA pension funds which have been approved in their resident EU Member State or EEA country according to EU Directive 2003/41/EC.

The new Austrian legislation came into force on 18 June 2009.

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### **Czech Republic – Recent experience with the Czech Ministry of Finance in respect of the acceptance of ECJ cases in the area of direct taxes**

Based on the ECJ ruling in the case C-105/07 NV Lammers & Van Cleeff, PwC Czech Republic tried to challenge the similar provisions included in the local Income Taxes Act. In the cited decision, the ECJ concluded that Articles 43 EC and 48 EC preclude Belgian Income Tax Code provisions under which interest payments made by a company resident in a Member State to a director being a company established in another Member State are reclassified as dividends and are, on that basis, taxable, whereas, under the same circumstances, interest payments made to a director being a company established in the same Member State, are not reclassified as dividends and are, on that basis, not taxable. According to the ECJ, the difference in treatment between resident companies based on residency constitutes an obstacle to the freedom of establishment.

Section 22 on the Czech source income of the Czech Income Taxes Act includes almost identical provisions as the Belgian Income Tax Code challenged in case C-105/07 and also leads to a different treatment between resident and non-resident taxpayers. The interest exceeding the ratio given by thin capitalisation rules is reclassified as a deemed distribution of dividends and is subject to withholding tax, but only in respect of cross-border payments. There are no similar provisions leading to the reclassification, more precisely, to taxation of the respective interest as dividends in respect of domestic payments.

However, the Ministry of Finance denied PwC arguments where we wanted to confirm the possibility of claiming back the withholding tax on "deemed dividends" paid to EEA states through an almost identical ECJ case, arguing that:

1. According to Article 94 EC, direct taxes are generally not harmonised, and therefore there are 27 different tax systems in existence within the EU. ECJ cases in the area of direct taxes have only a "recommendatory character", as the direct tax law in each EU Member State is different and unique.
2. The ECJ ruling is binding for the parties of the dispute only. Therefore, in order to declare the incompatibility of the provisions of the Czech Income Taxes Act with EC law, the individual decision of the ECJ against the particular provisions of the Czech Income Taxes Act is necessary. Therefore, the Ministry of Finance is not willing to consider the contradiction between national law and EC Law and, consequently, is not willing to consider refraining from withholding tax on reclassified interest payments to non-residents.

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### **Finland – Ministry of Finance issues regulation introducing a binding “black list” for Finnish CFC purposes**

On 8 July 2009, the Finnish Ministry of Finance issued a regulation introducing a binding “black-list”, which forms part of its amendments to the Finnish CFC legislation. The regulation contains a list of tax treaty countries where the general level of corporate taxation is not considered to be sufficiently equivalent to the Finnish one. The countries included in the “black list” are Barbados, Bosnia-Herzegovina, Georgia, Macedonia, Malaysia, Moldova, Montenegro, Serbia, Singapore, Switzerland, United Arab Emirates and Uzbekistan. A company resident in a “black list” country can escape being considered as a CFC for Finnish tax purposes, if it can be shown that the effective tax payable by the company exceeds the required 3/5 of the tax to be paid in Finland. More information on the amendment of the Finnish CFC legislation can be found in [EUDTG Tax News 2008 – nr. 005](#).

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### **Germany – Questionable Federal Finance Court decision on withholding tax levied on dividend payments to Swiss resident shareholders**

The German Federal Finance Court has published a decision of 22 April 2009 held that the levying of German withholding tax on dividend payments to a Swiss resident shareholder does not infringe the free movement of capital.

The claimant, a Swiss resident company, held 10.5% of the share capital of a German resident company which distributed dividends in 2002, which were subject to a withholding tax. In order to avoid double taxation, German tax law foresees the participation exemption for residents. Therefore, the withholding tax is refunded to resident corporate shareholders, whereas non-residents only get a reduction according to the applicable double tax treaty (DTT). The remaining withholding tax is final. The claimant was of the opinion that this different treatment infringed the free movement of capital and took action.

The Federal Finance Court acknowledged that the final withholding tax may constitute a different treatment. However, applying the principles laid down in the *ACT Class IV* case ([C-374/04](#)), the Court concluded that, from the perspective of the source state, the situation of a resident shareholder was not comparable to that of a non-resident shareholder. In the case of a non-resident, the source state was not obliged to avoid double taxation, as it would otherwise be deprived of its taxing right. Referring to *Denkavit* ([C-170/05](#)) and *Amurta* ([C-379/05](#)), the Court stated that due to the lack of harmonisation, the Member States were still free to define their own connecting factors of taxation and to conclude DTTs in order to avoid double taxation. The Court concluded that not the source state, but the foreign state of residence was obliged to avoid the double taxation of dividends. In the case at hand, the underlying DTT reduced the double taxation in Switzerland by either crediting the withholding tax or exempting the dividends. In the Court's view, a remaining double taxation/ withholding tax was due to the existence of two separate taxing rights which were compatible with EC Law. The Court is of the opinion that the pending referral against Germany (initiated by the Commission) regarding the withholding tax on foreign companies (see [Newsletter 2009/003](#)) has no relevance, as this referral would only consider cases without an applicable DTT. As the Court has no doubts concerning the interpretation of EC Law, and similar cases had ostensibly already been dealt with by the ECJ, the case at hand had not been referred to the ECJ or even suspended until the ECJ has decided on the pending referral against Germany.

In our view, this decision is doubtful for several reasons:

- 1) The reference to *ACT Class IV* is not appropriate.
- 2) In *Denkavit* and *Amurta*, the ECJ decided that the source state is not allowed to discriminate against non-residents, unless, according to a DTT, the double taxation is effectively offset in the state of residence.
- 3) The pending case against Germany is of high relevance, especially in case a DTT exists.

The decision without referral to the ECJ or suspension may constitute a breach of German constitutional law.

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### **Germany – Federal Fiscal Court decision on the deductibility of retirement contributions**

On 24 June 2009, the German Federal Fiscal Court decided on the compatibility with EC law of the German limited deductibility of retirement contributions.

In the case at hand, a German resident worked in France and paid retirement contributions to the French retirement system. According to the DTT, the taxing right for work income is allocated to Germany, while future retirement payments are subject to tax in France.

In Germany future retirement payments will be taxed as to the profit share of the annuity, while contributions are only partially deductible during the payment phase. In France

however, future retirement payments will be fully taxable, while contributions are fully deductible during the payment phase. The plaintiff argued that the German regulations discriminate against cross border situations, as contributions are only partially deductible while future payments will be fully taxable.

The Court, referring to the *Kerkhaert and Morres* case ([C-513/04](#)), denies a violation of the principle of free movement of workers, arguing that the limitation of deductibility had to be assessed regardless of the previous or successive tax treatment of the payments in other Member States. In the Court's view, the disadvantageous treatment results from the different allocation of taxing rights, which the Member States are not obliged to adjust at the current state of harmonisation in the field of direct taxation.

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### **Germany – Federal Fiscal Court decision on the taxation of PE profits under former imputation system**

According to the former German imputation system, business profits of an EU based corporation conducting its business through a German PE were taxed at a higher rate than profits of a subsidiary. In its judgment in the *CLT-UFA* case ([C-253/03](#)) see [EUDTG Newsalert 2006 - 06](#)) the ECJ decided that such differentiation according to the legal form of an undertaking infringes the freedom of establishment.

The German Federal Fiscal Court subsequently decided that income deriving from a German PE has to be taxed at the same tax rate that is applicable to subsidiaries that fully distribute their profits. However, according to a decree from the German Tax Authorities, non-deductible expenses shall still be taxed with the higher tax rate that is due for retained earnings, as this kind of income would not be available for a deemed distribution.

The Lower Fiscal Court of Berlin and Brandenburg on 2 April 2009 expressed serious doubts whether the application of a higher tax rate for non-deductible expenses is in line with EC Law. In its order, the Court only decided on the suspension of execution of the tax assessment notice. The matter itself is still pending. The suspension of execution has to be granted when the tax assessment could seriously be doubted lawful. As the decision about the suspension only deals with the question if these doubts are serious ones or not (and not with the matter itself), the Court is not obliged to refer to the ECJ.

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### **Portugal – Changes in Portuguese legislation concerning the taxation of lottery winnings**

Following the formal request of the European Commission, on 18 September 2008, in relation to Portugal regarding the amendment of its discriminatory taxation of lottery winnings, and the consequent reference of the case to the ECJ (see also [EUDTG Tax News 2009 - nr. 003](#) (2007/2138), the Council of Ministers approved Decree-Law 175/2009, published in the Official Gazette dated 4 August 2009, introducing changes in the Personal Income Tax Code and the Stamp Tax Code regarding the taxation of lottery winnings.

These changes have as the main purpose the harmonization of the rules regarding the taxation of winnings derived from lotteries, either organised by resident entities or by entities resident in other EU Member States. According to the Decree-Law, winnings from any lotteries (*Euromilhões, Lotaria Nacional, Lotaria Instantânea, Totobola, Totogolo, Totoloto and Joker*) organized in Portugal by the *Santa Casa da Misericórdia de Lisboa*, an entity carrying out activities of social interest, as well as winnings from lotteries organized by similar entities residing in other EU Member States are no longer subject to Personal Income Tax in Portugal. Instead, the placement of bets regarding these lotteries will be subject to Stamp Tax in Portugal at the rate of 4.5%.

These changes entered into force from 1 September 2009.

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### **United Kingdom – Marks & Spencer plc cross-border loss relief case - Further hearing on quantum of losses**

As previously reported, in May 2009 the UK Special Commissioners found in favour of *Marks & Spencer plc* in relation to cross-border group relief claims for losses of its Belgian and German subsidiaries. The Commissioners did not, however, determine the quantum of the losses available for group relief. A further hearing on this issue was held before the UK First-Tier Tribunal, which has now replaced the Special Commissioners, on 10 July 2009. The parties were unable to reach agreement on the quantum of the losses and thus the matter must now be determined by the FTT and a judgment is awaited, expected end September / early October 2009.

-- Peter Cussons and Chloe Paterson, United Kingdom; [peter.cussons@uk.pwc.com](mailto:peter.cussons@uk.pwc.com)

## ABOUT THE EUDTG

The EUDTG is one of PricewaterhouseCoopers' Thought Leadership Initiatives and part of the International Tax Services Network. The EUDTG is a pan-European network of EU tax law experts and provides assistance to organizations, companies and private persons to help them to fully benefit from their rights under EC Law. The activities of the EUDTG include organising tailor-made client conferences and seminars, performing EU tax due diligence on clients' tax positions, assisting clients with their (legal) actions against tax authorities and litigation before local courts and the ECJ. EUDTG client serving teams are in place in all 27 EU Member States, most of the EFTA countries and Switzerland. See the EUDTG website for more information: [www.pwc.com/eudirectax](http://www.pwc.com/eudirectax).

For further information regarding the contents of this newsletter or the EUDTG in general, please contact the EUDTG Secretariat through Bob van der Made (email: [bob.van.der.made@nl.pwc.com](mailto:bob.van.der.made@nl.pwc.com); or tel.: + 31 10 407 5688).

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