

Newsalert

EU Direct Tax Group

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ECJ judgment in Kerckhaert-Morres (case C-513/04)

On 14 November 2006, the ECJ ruled against the taxpayer in the Kerckhaert-Morres case.

In 1995 and 1996, Mr and Mrs Kerckhaert-Morres, two Belgian resident individuals, received dividends from a French resident company. A 15% French withholding tax was levied on both the dividend and the imputation credit. Mr and Mrs Kerckhaert-Morres declared the dividend in their Belgian income tax return and claimed a tax credit for French dividend withholding tax based on the Belgian-French Double Tax Treaty. The dividend was taxed according to Belgian tax law at a uniform rate of 25% and the foreign tax credit was refused since the tax credit was abolished in Belgian tax legislation. A Belgian Lower Court (*Rechtbank van eerste aanleg te Gent*) referred the question whether a provision in the income tax legislation of a Member State which subjects dividends from resident companies and dividends from companies resident in another Member State to the same uniform tax rate, without in the latter case providing for the setting off of tax levied at source in that other Member State, is contrary to the free movement of capital.

The ECJ argued that the *Kerckaert-Morres* case is different from the *Verkooijen*, *Lenz* and *Maninnen* cases. Indeed, in those cases, the ECJ found that the laws of the Member States at issue did not treat dividend income from companies established in another Member State in the same way, thereby denying recipients of the latter dividends the tax benefits granted to the others.

However, in the *Kerckaert-Morres* case, the ECJ claims that the case differs since Belgian tax legislation does not make any distinction between dividends from companies established in Belgium and dividends from companies established in another Member State. Under Belgian tax law, both are taxed at a uniform rate of 25%.

The ECJ continues that the adverse consequences which might arise in this case result from the exercise in parallel of their fiscal sovereignty by two Member States. Community Law, in its current state, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the Community. As a result, it is for the Member States to take the measures necessary to prevent situations such as in the case at hand, by following international tax practise in the allocation of taxing rights.

The ECJ answered to the question that Community Law does not preclude legislation of a Member State such as Belgian tax legislation which applies a uniform tax rate to dividends from resident companies and those from companies located in other EU Member States without providing for the possibility of setting off tax levied by deduction at source in that other Member State.

Although the Advocate-General Geelhoed briefly touched upon the question whether it should not be investigated if there could be discrimination in the source state instead of the resident state, the ECJ did not mention the issue.

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