

# Newsflash

## EU Direct Tax Group

NF 2009 / 035



27 October 2009

### EU Direct Tax Group

The EUDTG is one of PwC's Thought Leadership Initiatives and embedded in 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 EU law.

#### AG: Dutch elective taxpayer status regime cannot justify breach of EC Treaty

On 27 October 2009 Advocate General (AG) Ruiz-Jarabo Colomer published his Opinion in the case of *Gielen* (C-440/08), who was represented by PricewaterhouseCoopers. This case concerns the effect of the Dutch regime for elective taxpayer status under Art 2.5 of the Dutch Individual Income Taxation Act 2001 (hereafter: "IITA").

Pursuant to Art 2.5 IITA, which was introduced by the Netherlands in response to the ECJ's *Schumacker* judgement (C-279/93), a non-resident taxpayer can for Dutch tax purposes choose to be taxed as a resident taxpayer. The elective taxpayer status regime is intended to ensure compliance of the Dutch income tax act with EC Law.

The facts of the *Gielen* case can be summarised thus. A German resident who qualifies as a non-resident taxpayer for Dutch tax purposes, was denied a deduction for Dutch income tax purposes pursuant to a discriminatory rule of Dutch national law. Had the taxpayer elected to be taxed as a Dutch resident taxpayer in accordance with Art 2.5 IITA, the deduction would have been available, according to the Dutch tax authorities (*Gielen* argued, however, that the deduction would not have been available or at most only a part thereof).

This raises the question whether the *prima facie* restriction caused by the measure of Dutch national law (i.e. the denial of the deduction) can be neutralised by the fact that the taxpayer could have opted to be taxed as a Dutch resident taxpayer (in which case he would have had access to the deduction).

The AG resolutely rejects this position, arguing that at a fundamental level the mere fact that a taxpayer can choose between a legitimate and an illegitimate option cannot suffice to rectify a discriminatory treatment under national law.

Furthermore, the administrative costs associated with Art 2.5 IITA (e.g. the need to submit a tax return in two Member States) mean that, even if the taxpayer had opted for elective taxpayer status, he would not have been in the same position as a Dutch resident taxpayer. For this reason too, the *prima facie* restriction cannot *in casu* be justified by Art 2.5 IITA.

The AG further concludes that the inclusion of Art 2.5 IITA does not in itself render the Dutch income taxation act in line with the requirements of the *Schumacker* judgement. This maximalist approach suggested by the Netherlands would, in the AG's view, have the perverse effect that any measure in breach of EC Law might be justified by the possibility of elective taxpayer status. The AG considers this outcome undesirable. In his closing remarks, he observes that the *Gielen* case only concerns whether Art 2.5 IITA can serve as a justification of a *prima facie* restriction. The elective taxpayer status regime itself, which the AG regards as having positive elements, is not under discussion.

#### \* connectedthinking

© 2009 PricewaterhouseCoopers. All rights reserved. PricewaterhouseCoopers refers to the network of member firms of PricewaterhouseCoopers International Limited, each of which is a separate and independent legal entity. \* connectedthinking is a trademark of PricewaterhouseCoopers.

While every attempt has been made to ensure that the contents of this Newsalert is correct, PricewaterhouseCoopers advises that this Newsalert is provided for general guidance only and does not constitute the provision of legal advice, accounting services, investment advice, written tax advice or professional advice of any kind. The information provided should not be used as a substitute for consultation with professional tax, accounting, legal or other competent advisers.

For more detailed information, please do not hesitate to contact your local PwC contact person or a member of the EUDTG.

Sjoerd Douma

+ 31 10 407 5675

sjoerd.douma@nl.pwc.com

Anna Gunn

+ 31 10 407 5224

anna.gunn@nl.pwc.com