

Newsflash

EU Direct Tax Group

NF 2010 / 039



23 December 2010

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Luxembourg – Limiting the benefit of the Luxembourg investment tax credit to domestic investments is contrary to the freedom to provide services (ECJ decision in request for preliminary ruling C-287/10)

On June 10, 2010, a reference for a preliminary ruling was filed by the Administrative Tribunal of Luxembourg in *Tankreederei I SA v. Directeur de l'Administration des Contributions Directes* (case C-287/10).

The Luxembourg tax authorities disallowed the deduction of a tax credit for investment against Corporate Income Tax to a Luxembourg company, which owns shipping vessels used in the ports of Antwerp and Amsterdam.

According to the Luxembourg Income Tax Law (article 152bis), it is required that the investment must be physically operated in Luxembourg in order to be eligible for the incentive, unless the investment consists of shipping vessels operating in international waters (which was not the case here). In addition, it should be noted that the benefit of the tax credit is limited to investments that are made within a Luxembourg business establishment and that are intended to be used permanently in Luxembourg.

The Administrative Tribunal of Luxembourg decided to ask the European Court of Justice ("ECJ") whether the above-mentioned conditions can be considered to be in breach of the free movement of capital (article 65 of the Treaty on the Functioning of the European Union, "TFEU") and the freedom to provide services (article 56 TFEU).

In its judgment, the ECJ rules that article 56 TFEU is to be interpreted as precluding a provision of a Member State pursuant to which the benefit of a tax credit for investments is denied to an undertaking which is established in that Member State on the sole ground that the capital goods, in respect of which that credit is claimed, are physically used in the territory of another Member State. Therefore, the requirement that the asset entitling the taxpayer to an investment tax credit in Luxembourg be physically used in Luxembourg should be extended to any Member State. The ECJ considers that, due to this conclusion, there is no need to examine the request under the free movement of capital.

The decision is in line with the *Jobra Vermögensverwaltungs-Gesellschaft mbH* (C-330/07) case law, which was issued in December 2008 and the ECJ decision refers to that case several times. The impact for Luxembourg taxpayers is a significantly broader scope of investments qualifying for the investment tax credit where those investments are used in another Member State. Also, certain sectors (e.g. shipping, aircraft, etc) may particularly benefit from the decision.

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

Wim Piot

+ 352 49 48 48 5773

wim.piot@lu.pwc.com

Julien Lamotte

+ 352 49 48 48 3159

julien.lamotte@lu.pwc.com