

# Newsalert

## EU Direct Tax Group

NA 2005 - 002



6 July 2005

### EU Direct Tax Group

The EUDTG is one of PricewaterhouseCoopers' 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.

\* **connectedthinking**

© 2005 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.

### JUDGMENT OF THE EUROPEAN COURT OF JUSTICE IN CASE C-376/03 (D): MOST FAVOURED NATION TREATMENT TURNED DOWN!

Mr. D resides in Germany. As at 1 January 1998, 10% of his wealth consisted of real property situated in the Netherlands, while the remainder was held in Germany. He was liable to Dutch wealth tax as a non-resident taxpayer and, as such, not entitled to the personal allowance to which not only Dutch residents were entitled, but also Belgian residents pursuant to the provisions of Article 25(3) of the Belgium-Netherlands Tax Treaty. Relying upon principles of Community law, Mr. D nonetheless applied for the allowance. His application was, however, rejected by the tax inspector.

Mr. D appealed against this rejection before the Dutch *Gerechtshof* of 's-Hertogenbosch. The *Gerechtshof* decided to stay proceedings and referred the following questions to the ECJ for a preliminary ruling:

1. Does Article 56 EC preclude legislation under which a domestic taxpayer is always entitled to deduction of a tax allowance in respect of wealth tax, whereas a non-resident taxpayer has no such entitlement in the case where the assets are situated predominantly in its State of residence, which State does not impose a wealth tax?
2. If not, does it make a difference that the Netherlands has, under a bilateral Tax Treaty, granted to residents of Belgium, who in all other respects are in comparable circumstances, entitlement to the tax allowance (no wealth tax being levied in Belgium either)?

In its judgment of 5 July 2005 the ECJ considered with respect to the first question that a taxpayer who holds only a minor part of his wealth in a Member State other than the State where he is resident is not, as a rule, in a situation comparable to that of residents of that Member State. Therefore, the refusal to grant him the allowance to which residents are entitled cannot be regarded as discrimination. The fact that Germany does not impose a wealth tax does not alter this analysis. According to the ECJ, the case of Mr. D should be distinguished from that of *Wallentin* (Case 169/03). This surprising and restrictive interpretation of its judgment in the recent case of *Wallentin* was not expected, to say the least, and is contrary to the opinion of Advocate General Ruiz-Jarabo Colomer in this case.

The answer to the second question on Most Favoured Nation Treatment can be called extraordinary. Again contrary to the Opinion of its Advocate General, the Grand Chamber of the ECJ dismissed without reservation the argument based on this doctrine. In a remarkably short reasoning, the ECJ ruled that the Netherlands is – even within its own fiscal jurisdiction – allowed to treat residents of Germany less favorably than residents of Belgium, if this disadvantageous treatment results from a tax treaty. This ruling, which implies a serious setback in the completion of the internal market in the field of direct taxation, seems difficult to reconcile with the principles developed in the case law of the ECJ so far. Perhaps the Member States have found a willing ear for their complaints after all, and this landmark decision may therefore herald a new era in the field of direct taxation and Community law.

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

Frank Engelen +31 10 407 53 02

[frank.engelen@nl.pwc.com](mailto:frank.engelen@nl.pwc.com)