

# Newsalert

## EU Direct Tax Group

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### EU Direct Tax Group

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#### **OPINION IN CASE C-265/04 (BOUANICH): DIFFERENT TAXATION OF CAPITAL GAINS FOR RESIDENT AND NON-RESIDENT INDIVIDUALS**

Mrs. Bouanich is a French resident who held shares in Förvaltnings AB Ratos, a Swedish company. The company repurchased shares from its shareholders, which in Sweden triggers a capital gains tax of 30 %. Swedish residents are taxed on the gain after deduction of base cost and expenses. The gain of a non-resident, on the other hand, is according to Swedish law treated as a dividend and subject to a 30 % withholding tax, without deduction of base cost and expenses. The double tax treaty between Sweden and France provides for a reduced rate of withholding tax on dividends of 15 % and this rate was applied to the gross selling price. Mrs. Bouanich appealed against this and asked for a reduction to zero and secondly, that the tax on the par value of the shares be repaid (the latter was granted by the tax authorities). The District Court of Sundsvall referred the case to the ECJ and asked if a) the different treatment of residents and non-residents in respect of capital gains is in accordance with the free movement of capital in the EC treaty, b) it is consistent with the free movement of capital to apply the provisions of the double tax treaty between Sweden and France where this treaty reduces the tax rate on the capital gain and moreover, grants a deduction of the par value of the shares and c) if the treatment is allowed under the freedom of establishment of the EC treaty?

Advocate General *Kokott* delivered her Opinion on July 14, 2005. She concluded that the different treatment under Swedish national law of residents and non-residents regarding the taxation of capital gains is a restriction of the free movement of capital, since it can both prevent non-residents from investing in Swedish companies and restrict Swedish companies from raising capital outside Sweden. The restriction cannot be justified.

As to whether the position post the application of a tax treaty should be considered under the free movement of capital, AG *Kokott* asserted that the provisions of a tax treaty have to be considered when deciding whether a treatment is allowed under the EC treaty or not (as the treaty can neutralise the discrimination). She went on to say that it has to be analysed in the individual case whether the treaty has the effect that the disadvantage suffered by non-resident compared to resident shareholders is eliminated. It is for the Swedish Court to assess if this applies to Mrs. Bouanich's situation, i.e. if her tax is higher than that of a Swedish resident. Insofar as the treaty does not result in an equal treatment, it is not to be applied.

Since nothing in the present case indicates that Mrs. Bouanich had a definite influence over the Swedish company, AG *Kokott* stated that the freedom of establishment is not applicable and the third question thus does not have to be answered.

In our view, it is of particular interest that AG *Kokott* distinguishes the situation of Mrs. Bouanich from the *Avoir Fiscal* case, i.e. that the fundamental freedoms of the EC Treaty cannot be made subject to the content of a treaty with another State. Relevant though, is the statement that even if a tax treaty provides for a reduced tax rate, there can still be discrimination in the source State if its residents are allowed deductions that lead to a lower tax than for a non-resident, who is taxed on the gross amount. Rather surprisingly, AG *Kokott* does not deal with the fact that non-residents are suffering a cash flow disadvantage compared to residents as a result of the withholding tax, since residents are taxed on their capital gain by way of assessment.

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