

# Newsalert

## EU Direct Tax Group

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#### **OPINION IN CASE C-494/03 (SENIOR ENGINEERING INVESTMENTS B.V.): DIRECT CAPITAL CONTRIBUTION BY A PARENT COMPANY TO ITS SUB-SUBSIDIARY IS NOT SUBJECT TO CAPITAL DUTY AT THE LEVEL OF THE DUTCH SUBSIDIARY.**

Senior Engineering Investments B.V. (hereinafter: 'SEI BV') is a private limited liability company incorporated under Dutch law and established in the Netherlands. All of the shares in SEI BV are held by a company established in the United Kingdom (hereinafter: 'the parent company'). SEI BV is the sole shareholder of a company established in Germany (hereinafter: 'the sub-subsidiary'). In 1997 the parent company made a capital contribution to the share premium account of the sub-subsidiary. This capital contribution was not subject to capital duty in Germany, as Germany has chosen not to levy capital duty in its jurisdiction. In the Netherlands, capital duty was due by SEI BV. The Dutch tax authorities regarded the capital contribution to the sub-subsidiary as an indirect capital contribution to SEI BV. The company first raised an objection with the Dutch tax authorities, then brought an appeal before the *Gerechtshof 's-Gravenhage* (Regional Court of Appeal of The Hague), and finally appealed before the *Hoge Raad*, which decided to stay proceedings and request the European Court of Justice for a preliminary ruling. The *Hoge Raad* asked whether it is compatible with Council Directive 69/335 EEC (concerning indirect taxes on the raising of capital) to levy capital duty on SEI, and whether such a levy is incompatible with the freedom of establishment, since capital duty would not have been due had the sub-subsidiary been resident in the Netherlands.

On 14 July 2005, Advocate General *Maduro* delivered his opinion in this case. He is of the view that the capital contribution to the sub-subsidiary should not be regarded as two separate transactions through SEI BV into the sub-subsidiary, but as a single transaction. The fact that SEI BV indirectly benefits from the capital contribution to the sub-subsidiary is generally not a taxable event. If a transaction qualifies as a taxable transaction for the purposes of the Directive, it shall only be taxable in one Member State and cannot simultaneously give rise to the levy of capital duty in another Member State. The fact that Germany does not levy capital duty does not change this.

If one transaction cannot simultaneously qualify as a taxable event in two different Member States, it must be established whether the Netherlands or Germany has the right to levy capital duty in the situation at hand. The Advocate General is of the view that only Germany has the right to tax the capital contribution to the sub-subsidiary in this case. The sub-subsidiary is the direct recipient of the contribution and is, therefore, as a general rule subject to capital duty. Only if SEI BV were the real recipient of the contribution and this contribution was made for consideration, the Netherlands would have the right to levy capital duty from SEI BV. Although the assets of SEI BV are increased as a result from the capital contribution into the sub-subsidiary, the parent company has not received rights in SEI BV in exchange. As a result, the capital contribution directly to the share premium account of the sub-subsidiary may be subjected to capital duty in Germany only. It is contrary to the Directive on the raising of capital to levy capital duty from SEI BV in the Netherlands.

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