

Newsalert

EU Direct Tax Group

NA 2005 - 010



14 September 2005

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.

Judgment of the European Court of Justice in Case C-512/03 (Blanckaert): different tax treatment of residents and non-residents actually not contributing to national security schemes

According to Dutch social insurance legislation, residents are insured persons under the Dutch social security schemes except for residents who derive their employment income in another EU Member State. Non-residents are insured persons under that system only if they derive employment income in the Netherlands. Insured persons are liable to pay social security contributions, which are calculated on the basis of the insured person's taxable income from employment and then subject to fixed levy rebates (so called "heffingskorting"). To the extent the rebate cannot be set off against the social security contributions due, it can be offset against the income tax due. The levy rebate is also available for insured residents who only have income from savings and investments and – in absence of taxable income from employment – do not actually pay social security contributions. Non-resident taxpayers are entitled to the same rebate provided they are insured persons under the Dutch social security system.

Mr Blanckaert is a Belgian resident and derives less than 90% of his worldwide income in the Netherlands. The only taxable income he received was income from immovable property which is subject to income tax in the Netherlands as income from savings and investments. Mr Blanckaert is not insured under the Dutch social security system because he does not derive income from employment in the Netherlands. Upon appeal by Mr Blanckaert against the income tax assessment 2001, the Dutch *Gerechtshof* of 's-Hertogenbosch requested a preliminary ruling from the ECJ on 14 December 2003 on a number of questions, the most relevant one was whether it is compatible with Community Law that a non-resident/non-insured/non-contributing taxpayer is not entitled to a levy rebate for national insurance schemes, whereas a resident/insured/non-contributing taxpayer is entitled to that rebate, taking into account that both taxpayers actually do not pay contributions to those schemes. The Advocate-General of the ECJ opined in favour of the Dutch regulations on 12 May 2005.

In its judgment of 8 August 2005, the ECJ first established that investments in immovable property in Member States by non-residents qualify as capital movements as meant in Art. 56 EC. The ECJ then held that the criterion chosen by the Dutch legislator – only insured persons are entitled to a levy rebate for social security schemes – favours residents as under that system non-insured taxpayers are more often non-residents. Such legislation might deter non-residents from investing in immovable property in the Netherlands and is therefore capable of hindering the free movement of capital as it is laid down in Art. 56 EC. Art. 58 EC, however, permits unequal tax treatment of taxpayers who are not in the same situation with regard of their place of residence. That exception is only accepted if the difference in treatment applies to situations which are not objectively comparable or are justified by overriding reasons of general interest. The ECJ ruled that there is an objective difference between the objective situation of a non-resident such as Mr Blanckaert and that of a resident who, in the same way as Mr Blanckaert, derives in the Netherlands only taxable income from savings and investments. The ECJ used the following arguments. Firstly, as the grant of rebates is directly and exclusively linked to insured persons under the national social security schemes, both residents and non-residents who are insured under those schemes are entitled to those rebates, whereas residents and non-residents who are not insured under those schemes are not entitled thereto. Secondly, granting a rebate to taxpayers not contributing to the national security schemes would result in an equal treatment of unequal situations. Non-insured/non-residents would always automatically be entitled to a tax credit, whereas insured residents can only apply for a credit in the exceptional situation that the rebates exceed the contributions. Moreover, the ECJ confirmed that the Dutch provisions under decision are consistent with the EC Regulation 1408/71.

* 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.

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

Frank Engelen

+31 (0)10 407 53 02

frank.engelen@nl.pwc.com

Should you be interested in receiving the free bi-monthly newsletter, then please send an e-mail to eudtg@nl.pwc.com with "subscription EU Tax News".