

Newsalert

EU Direct Tax Group

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Gerechtshof of Amsterdam refers Dutch dividend withholding tax case to the ECJ (Case 04/01252)

This case is similar to the one described in our Newsalert of 13 October 2005 (NA 2005 – 011), in which the *Gerechtshof of 's-Hertogenbosch* decided that the Dutch internal dividend withholding tax exemption is in breach of Article 56(1) EC. Contrary to the case described below, this case was not referred to the ECJ. The Dutch tax authorities have recently filed an appeal to that decision with the Dutch Supreme Court. In view of the case described below, it is likely that the Supreme Court will uphold its decision until the ECJ has handed down its judgment.

X S.G.P.S., incorporated under the laws of Portugal and resident of Portugal for tax purposes, owns 14% of the shares in D B.V., incorporated under the laws of the Netherlands and resident of the Netherlands for tax purposes. D B.V. distributed dividends to X S.G.P.S. in 2002, which were subject to 25% Dutch dividend withholding tax. X S.G.P.S. claims for an exemption from Dutch dividend withholding tax with respect to the dividend received from D B.V., arguing that the Dutch levy is in breach of Community Law.

The Dutch Dividend Withholding Tax Act (*Wet op de dividendbelasting 1965*) provides for two exemptions in parent-subsidiary relations. The first exemption applies to dividend distributions by Dutch subsidiaries to Dutch parent companies, to which, for Dutch corporation tax purposes, the participation exemption applies. The second exemption applies to cross-border dividends which are covered by the Parent-Subsidiary Directive. Since the interest X S.G.P.S. held in D B.V. was less than 25%, the dividend did not qualify for an exemption from withholding tax pursuant to the Directive. The internal exemption did not apply since X S.G.P.S. was a resident of Portugal and the shares in D B.V. could not be attributed to a Dutch permanent establishment of X S.G.P.S. in the Netherlands.

The *Gerechtshof of Amsterdam* is of the opinion that the internal exemption makes a distinction between resident taxpayers, unlimitedly subject to Dutch corporation tax, and non-resident taxpayers which are not, or only limitedly, subject to Dutch corporation tax. However, it has to be examined whether this distinctive tax measure can be justified under Article 58 EC.

According to the *Gerechtshof*, it is questionable whether the ECJ's restrictive interpretation of Article 58 EC in the *Lenz* and *Manninen* cases, concerning *inbound* dividends, is also valid in the present case which concerns *outbound* dividends. After all, *Manninen* and *Lenz* relate to shareholders which are unlimitedly subject to tax in the state of residence. The present case concerns a tax treatment distinguishing between shareholders which are unlimitedly subject to corporation tax in the source state (i.e. the Netherlands) on the one hand, and shareholders which are not, or only limitedly, subject to tax in the source state on the other hand. Those respective shareholders are not in comparable situations from the point of view of the purpose of the internal exemption. The internal exemption serves the purpose of administrative simplification: without the exemption, dividend withholding tax levied, would have to be refunded if the dividends are tax exempt for corporation tax purposes in the hands of the shareholder, pursuant to the Dutch participation exemption. According to the *Gerechtshof*, such an administrative simplification is not practicable with regard to non-resident shareholders, as they are not liable to Dutch corporation tax. The *Gerechtshof* therefore fails to see why non-resident shareholders, such as X S.G.P.S., are arbitrarily discriminated against, especially when the possibility for X S.G.P.S. to credit the Dutch dividend withholding tax against Portuguese corporation tax is taken into account.

The *Gerechtshof* is also of the opinion that the differential treatment of resident and non-resident shareholders at hand can be justified under Article 58 EC. Since the internal dividend withholding tax exemption is closely connected to the Dutch participation exemption from corporation tax, the differential treatment of resident and non-resident shareholders can be justified by the need to safeguard the cohesion of the Dutch tax system.

According to the previous considerations, the *Gerechtshof* is temporarily of the opinion that the differential treatment of resident and non-resident shareholders receiving dividends from a Dutch resident company can be justified under Article 58 EC. However, the *Fokus Bank* judgement of the EFTA Court leads to reasonable doubt about the correctness of the *Gerechtshof's* temporary opinion. Therefore, the *Gerechtshof* refers the present case to the ECJ for a preliminary ruling on the following questions:

1. Is the Dutch internal dividend withholding tax exemption in accordance with the EC provisions concerning the freedom of capital movement, whereas the exemption only applies to dividend distributions to (a) residents of the Netherlands for corporation tax purposes and (b) non-resident taxpayers with a permanent establishment in the Netherlands to which the shares in the distributing company can be attributed, and provided that the Dutch participation exemption from corporation tax applies to the dividend distributions?
2. Does the answer to the first question depend on whether the non-resident shareholder/company can obtain a full credit of Dutch dividend withholding tax in its state of residence?

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