

Newsalert

EU Direct Tax Group

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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.

OPINION OF THE ADVOCATE GENERAL IN CASE C-292/04 (MEILICKE): IMPUTATION CREDIT ON FOREIGN DIVIDENDS

Meilicke was a German resident individual who received dividends from Dutch and Danish companies in the years 1995 through 1997. No imputation credit was granted on the dividends, as the former German imputation system only allowed for an imputation credit on dividends from German companies. The claimants (the heirs of Meilicke) objected against the denial of an imputation credit and argued that this constitutes a breach of the free movement of capital, as it makes the investment in foreign companies less attractive than in German companies. The Tax Court of Cologne shared these doubts and referred the case to the ECJ.

In his opinion of November 10, Advocate General Tizzano concluded that - as in the ECJ judgment of September 2004 in the Finnish Manninen case - the granting of an imputation credit only on dividends from domestic companies is a non-justifiable breach of the free movement of capital in Art. 56 EC. He further opined that the *actually* paid foreign underlying tax has to be credited.

The AG went on to give his proposal for a temporal restriction of the forthcoming ECJ judgment. According to ECJ case law, a time restriction on its judgments is only accepted in exceptional circumstances, i.e. where a lack of temporal restriction would have grave economic consequences and there is an objective and important uncertainty in respect of Community law application. The European Commission had indeed in 1995 pointed out to the German government that the German rules are infringing Community law. However, the AG opined that the fact that the Commission took no further measures after 1995 until the German system was abolished in 2001 might have led to an uncertainty on the question of a Community law breach. Moreover, the German government estimated the refunds due, should a positive judgment be restricted to dividends paid after 1998, to approx. 5 bn EURO. The AG held that, should this calculation be correct, this might constitute such a considerable amount that the requirement of grave economic consequences is fulfilled.

The AG thus proposed, in line with the German government's alternative request, to limit the effect of the judgment to dividends paid after June 6, 2000 when the ECJ judgment in *Verkooijen* was announced. This judgment was the first to deal with the free movement of capital and direct taxation. Before this, the implications of the free movement of capital on direct taxes were uncertain. Accordingly, the right to an imputation credit on foreign dividends received after this date remains intact. However, the AG equally proposed that taxpayers who received dividends before June 6, 2000 and safeguarded their positions before the Meilicke referral was published in the Official Journal of the European Union will still be able to benefit from the judgment.

Apart from the many questions that arise after the opinion, e.g. why Germany shall enjoy preferential treatment compared to Finland that was not granted temporal restriction in the Manninen judgment on (basically) the same issue, the opinion gives an indication of how taxpayers are expected to behave if they want to benefit from ECJ judgment in the future:

If the ECJ follows the opinion and introduces temporal restrictions on its judgments, it is advisable for taxpayers to safeguard their positions under domestic procedural law in respect of claims based on EU law before a national referral regarding this very question is published in the Official Journal of the European Union.

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