

Newsalert

EU Direct Tax Group

NA 2005 - 018



19 December 2005

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OPINION OF THE ADVOCATE GENERAL IN CASE C-386/04 (CENTRO DI MUSICOLOGIA STAUFFER): GERMAN TAXATION OF RENTAL INCOME OF A FOREIGN CHARITABLE FOUNDATION

The claimant, Centro die Musicologia Stauffer (*Stauffer*) is a charitable foundation under Italian law resident in Italy. *Stauffer* owns business property in Germany and receives rental income. It has neither a branch nor any permanent office space or a subsidiary in Germany. *Stauffer* objected against its rental income being subject to German Corporate Income Tax (GCIT) in 1997 and argued that a German charitable foundation would not have been subject to GCIT with the rental income. Thus the income of a German charitable foundation would be tax exempt whereas the claimant would not benefit from a tax exemption since it is subject to limited tax liability and, therefore, not entitled to a tax exemption under German tax law. The German Supreme Tax Court doubted whether the relevant German tax law complies with the freedom of establishment, the free movement of capital and the freedom of services and referred the case to the ECJ.

In her opinion of December 15th, 2005, Advocate General *Stix-Hackl* concluded that as a first point the fundamental freedoms are applicable to the facts in question since the tax exemption is not a social advantage but a statutory tax exemption, which is, however, motivated by social considerations.

The AG was not of the opinion that the freedom of establishment would be applicable. Although she proposed in line with *Stauffer* that the claimant owns real estate in Germany and that the sole renting out of the property is sufficient for the application of the freedom of establishment. In this respect the AG mainly relied on the fact that the freedom of establishment has the purpose to protect every market participant without prejudice to the extent of its business activities as long as the activity is carried out for money. Thus a charitable foundation is covered by the freedom of establishment. However, the AG opined, since *Stauffer* had no permanent office space in Germany the freedom of establishment was not applicable after all.

The AG went on to emphasise that undoubtedly the free movement of capital is applicable to the facts. She disallowed Germany's argument that a foundation is not covered by the free movement of capital because it does not carry out necessary business activities on the grounds that the free movement of capital is independent from the characteristics of the individual market participant.

The AG carried on to point out that *Stauffer* is obviously treated differently in comparison to a comparable German charitable foundation since it cannot benefit from a tax exemption due to its limited tax liability, i.e. in consequence due to its residency in Italy.

Besides repelling the argument of non-comparability the AG brought forward that she cannot detect an automatism of mutual recognition of the foundation's charitable status neither in the EC law nor in bilateral conventions such as the DTC between Germany and the US, but she highlighted that the referring court already determined the charitable status. *Stauffer* is therefore comparable with a German charitable foundation. By this, the AG made clear that the breach of the free movement of capital is dependent on the recognition of the charitable status of the foundation in Germany and that in the absence of such a recognition *Stauffer* could not have claimed for relief.

The AG closed her opinion by disallowing the arguments of coherence, control of foreign foundations' status in general and the risk of loss of tax and consequently proposed to the ECJ to determine an unjustified breach of the free movement of capital by the relevant German tax law, but only where Germany recognises the charitable status according to national law.

The outcome of the case will be especially relevant for foreign charitable pensions funds deriving income from other Member States sources. If the ECJ rules in favour of *Stauffer* such pension funds may benefit from tax advantages granted to comparable domestic funds.

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