

# Newsalert

## EU Direct Tax Group

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**JUDGMENT 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 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 12 January 2006 the ECJ handed down its judgment in which it essentially followed the Opinion delivered by the Advocate General Poireres Maduro (see our Newsalert of 18 July 2005, No. 2005-006). The ECJ considered that, according to the scheme and structure of the Directive, capital duty is to be levied on the capital company receiving the contribution in question. The recipient is normally the company to which the resources or services in question are physically given. It is only exceptionally that that is not the case and that it is necessary to seek to identify the 'real recipient' of the resources or services in question. Furthermore, it follows from the preamble to and Article 2 of Directive 69/335 that duty on the raising of capital should be charged only once. Since the contribution in question was paid to the sub-subsidiary in non-exceptional circumstances, it is necessary to consider whether, under Directive 69/335, the contribution in question is subject to capital duty payable by the sub-subsidiary. If so, that same contribution could not be the subject of duty levied on another company.

The ECJ subsequently observed that the contribution in question does not fall within the scope of Article 4(1)(c) of the Directive since the 'increase in the capital' referred to in that Article means a formal increase in the company's capital by means either of an issue of new shares or by an increase in the nominal value of the existing shares. The contribution does fall, however, within the scope of Article 4(2)(b) of the Directive, because i) the payment of the contribution entailed an 'increase in the assets' of the sub-subsidiary, ii) the contribution was one that 'may increase the value of the company's shares', and iii) the contribution is a 'provision of services by a member' because the contribution must be attributed to SEI BV.

It follows that, under Directive 69/335, the contribution at issue is subject to capital duty payable by the sub-subsidiary. Given that a contribution to a company may be taxed only once (in the Community), that contribution cannot be subject to taxation a second time, payable on that occasion by SEI BV.

It is of little importance that the contribution may possibly have also increased the assets of SEI BV. As the Advocate General had observed, such an increase cannot constitute anything more than an automatic and incidental economic repercussion of the contribution made to the sub-subsidiary. Similarly, it is of little importance that the Member State with the authority to tax the sub-subsidiary (Germany) did not in fact do so, because capital duty has been abolished there since 1 January 1992. The Member States are free to exempt contributions to companies from capital duty, without such exemption entailing the consequence that another Member State is entitled to tax them.

In view of the answer given to the first preliminary question, the ECJ did not consider it necessary to reply to the second regarding the compatibility of the levy on SEI BV with the freedom of establishment.

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