

Newsalert

EU Direct Tax Group

NA 2006 – 009



6 April 2006

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.

Opinion of Advocate General Geelhoed in the Test Claimants in the FII Group Litigation V Commissioners of Inland Revenue (Case C-446/04)

The Test Claimants in the UK FII GLO are claiming that the UK's taxation of inter corporate foreign dividend income from companies resident elsewhere in the EU, as compared with exemption of UK to UK intercorporate dividend income, is contrary to Articles 43 (freedom of establishment) or Articles 56 (free movement of capital) and incapable of justification.

In addition, the claimants claim that the now repealed UK Advanced Corporation Tax (ACT) system and the continuing shadow ACT regime are contrary to Articles 43 or 56, insofar as dividends from EU non-UK companies cannot constitute Franked Investment Income ("FII") capable of reducing the recipient UK resident company's liability to ACT (on distributions prior to 6th April 1999) or shadow ACT (on dividends after 5th April 1999 for those groups still with surplus ACT then).

The claimants also contend that the inability to surrender surplus ACT to an EU non-UK resident subsidiary constitutes a separate breach of Article 43 of the EC Treaty.

Furthermore, the claimants contend that the 1994 to 1999 foreign income dividends ("FID") regime, in requiring ACT on a FID to be paid 14 days after the end of the relevant calendar quarter in which the dividend was paid, and only being repaid when mainstream corporation tax was due, was a further breach of Articles 43 or 56.

The AG's opinion is in favour of the claimants on all of the above points.

Only in relation to the claimant's contention that the Article 57 standstill provision should not be available in respect of the 1994 FIDs regime did the AG recommend that the ECJ rule against the claimants.

Moreover, as regards third country portfolio dividends on shareholdings which do not give the shareholder "lasting and direct links" with the investee company, the AG opined that Article 57 standstill relief would not be available, hence taxation of such dividends would appear to be in breach of Article 56, albeit potentially capable of justification.

The opinion, if followed in all material respects by the judgment of the Grand Chamber of the ECJ, for which no date has been set, will have major consequences for the UK government's corporation tax regime. Presumably, further consideration will now be given to extending the UK to UK inter corporate dividend exemption to dividends received from elsewhere in the EU and EEA and the position of portfolio third country dividends appears to require particularly careful consideration.

UK groups who have foreign dividend income from elsewhere in the EU/EEA, particularly where the full credit is less than the UK rate, and UK groups in the shadow ACT regime should review their positions and ensure appropriate Taxes Act and if necessary GLO claims are in place.

* connectedthinking

© 2006 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.

Peter Cussons

+44 207 804 52 60

peter.cussons@uk.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".