PRICEWATERHOUSECOOPERS

Newsalert

EU Direct Tax Group

NA 2006 – 011

28 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.

Advocate General Geelhoed gave his opinion in the Denkavit French dividend withholding tax case (C-170/05) in favour of the tax payer.

Denkavit International BV (DI BV) held 99.9% of share capital of a French subsidiary Agro-Finances Sarl, (AF Sarl) which in turn held 50% of another French company Denkavit France Sarl (DF Sarl), the other 50% of DF Sarl being held directly by DI BV.

In the years 1987 to 1989 (before the Parent/Subsidiary Directive was in force), AF Sarl and DF Sarl paid dividends of 14.5 million French Francs to DI BV, from which 5% French withholding tax was deducted, in accordance with French domestic tax law and the Dutch/French double tax treaty.

The French Conseil d' Etat referred the case to the ECJ, asking whether the imposition of dividend withholding tax by France on dividends only to non-resident parent companies (including fellow members of the EU) as compared with, in almost all circumstances, the absence of French dividend withholding tax on dividends paid by similar French subsidiaries to a French parent company, was contrary to Article 43 (freedom of establishment) of the EC Treaty.

In addition, the Conseil d' Etat also asked whether the provisions of the Dutch/French tax treaty whereby a Dutch parent company was obliged to give a credit for the French dividend withholding tax up to the corresponding level of any Dutch tax, but in practice no such ordinary credit was given by the Netherlands because of the Dutch participation exemption altered the analysis.

AG Geelhoed held that the French imposition of economic double taxation (corporation tax on the French subsidiaries and French dividend withholding tax on the dividends from those subsidiaries to the Dutch parent company) as compared with the absence of such economic double taxation as regards distribution of profits of comparable French subsidiaries of a hypothetical French parent company was contrary to Article 43 of the EC Treaty and incapable of justification.

In addition, whilst in principle, he considered that the provisions of the Dutch/French tax treaty should be taken into account, if, in practice, these did not remove the economic double taxation, then the existence of the hypothetical ordinary tax credit in the Dutch/French double tax treaty would not obviate the fact that France had unjustifiably breached Article 43 of the EC Treaty in failing to remove the economic double taxation in the cross-border situation even after taking the double tax treaty into account.

Whilst the opinion deals only with freedom of establishment, it is considered highly likely that the outcome will be the same in a portfolio situation i.e. one covered by free movement of capital. It is therefore another indication that treating resident and non-resident shareholders differently for dividend withholding tax purposes is not in line with the free movement of capital. The conclusion supports for example the complaints PwC has submitted (together with the European Federation for Retirement Provision) claiming that dividend distributions to foreign pension funds should not be subject to a less favourable withholding tax treatment than dividend distributions to domestic pension funds.

* 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
Franck Le Mentec	+33 1 56 57 44 59	franck.le.mentec@fr.landwellglobal.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”.