

Newsalert

EU Direct Tax Group

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Advocate General Stix-Hackl's opinion in case C-76/05 (Schwarz / Gootjes-Schwarz) and C-318/05 (Commission vs. Germany): Tax deduction for school fees

On Thursday, 21 September 2006, AG Stix-Hackl handed down her opinion concerning a German provision that states a tax deductibility of school fees only for certain German schools.

The case was brought to the ECJ by the Tax Court of Cologne. The claimants who live in Germany have two daughters attending an International School in Scotland. This school charges annual fees of a considerable amount. Under the German Income Tax Act, 30 % of the fees paid to certain schools may be deducted from the income tax base as special expenses, provided that the schools concerned are recognised as providing public education according to the German Constitution or to German State law. However, since no foreign schools are subject to the German jurisdiction, fees paid to a foreign school cannot be deducted for tax purposes. The Tax Court therefore requested a preliminary ruling of whether or not this non deductibility is in conflict with the right to free movement, Articles 18, 39 and 43 EC, and the freedom to provide services, Article 49 EC (here, the right of the parents to make use of the services that the foreign school provides). The case has been joined with an infringement proceeding by the Commission against Germany on the same subject.

AG Stix-Hackl started by stating that the question here is if a balance between the protection of the national competences, especially with respect to direct taxation and national educational policy and the requirements of the Single European Market can be obtained.

Concerning the freedom to provide services (the freedom applicable in this case), she firstly pointed out that according to previous ECJ case law, the providing of education can be characterised as a service according to Article 49, if the educational institution is capitalised primarily by private resources and aims at making a profit. She further stated that it is irrelevant that the providing of education is a public duty in Germany for which as a general rule no, respectively no cost-effective fees are charged: The ECJ has in a recent ruling stated that as long as the service is provided in one Member State in a profit-oriented way, the freedom to provide services according to Article 49 will be applicable (*Watts*, C-372/04). Although stressing that this ruling creates a liberalisation obligation that seems to be critical considering the Member States' sovereignty, the AG does not expect an overruling judgement by the ECJ, since the *Watts* decision was given just a few months ago. Even though German schools generally operate without the aim to make a profit, there are exceptions, so that they in certain circumstances do provide services in the sense of Article 49. Consequently, the AG considered the non deductibility of fees for foreign schools as discriminatory, since the tax deductibility is dependent on the school's residence in Germany. This discrimination cannot be justified with the loss of revenue that would occur, should fees paid to foreign schools be deductible. The complete exclusion of the deductibility of fees to foreign schools is disproportionate and thus constitutes a breach of the freedom to provide services.

In respect of the Commission's proceeding against Germany (i.e. the second case), the AG concluded in accordance with the above stated that foreign private schools' freedom to provide services is infringed, as these are set at a disadvantage in comparison to schools residing in Germany. Moreover, individuals' rights to reside, work and establish themselves in other EU Member States (Articles 18, 39 and 43) are violated, since both individuals who move to Germany but whose children still attend foreign private schools, as well individuals who have moved abroad while remaining subject to unlimited tax liability in Germany and whose children attend a foreign private school, are worse off than those who send their children to a German school.

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