

Newsalert

EU Direct Tax Group

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AG's opinion in the Geurts and Vogten case, C-464/05 Flemish inheritance tax relief for participations in family companies contrary to the freedom of establishment.

On 15 February, Advocate General Kokott opined on a reference for a preliminary ruling by the Court of First Instance of Hasselt (Belgium) with respect to the compatibility of a Flemish inheritance tax relief.

Since an inheritance tax on controlling interests in family companies which could threaten the continuation of those undertakings following the death of the director, the Flemish Region of Belgium exempts such shareholdings. This exemption is however only granted if the undertaking employed at least 5 workers in Flanders in the 3 years prior to the death of the deceased.

In the case at hand the deceased, a resident of Flanders, owned 100% of the shares of two Dutch companies that employed more than 5 persons in the 3 years preceding his death. However, since these employees were not employed in Flanders but in the Netherlands, the specific Flemish inheritance tax relief as mentioned above was not granted to the heirs who inherited the shares of the Dutch companies.

On 21 December 2005, the Court referred a preliminary ruling to the ECJ to clarify whether a provision granting an inheritance tax relief on shares of family companies to the heirs on the condition that the company has employed at least 5 workers in a particular region of that Member State (in casu, the Flemish Region) in the 3 years prior to the death of the director, is incompatible with the articles 43 (freedom of establishment) and 56 (free movement of capital) of the EC Treaty.

According to the Advocate General the provision essentially relates to the freedom of establishment and needs to be assessed according to that criterion alone.

Although there is no direct discrimination on the basis of nationality, the contested provision favours only interests in companies which continuously employ five workers in the Flemish Region, thus treating them more favourably than interests in undertakings which do not meet this criterion. In most cases, only those undertakings which are established in the Flemish Region fulfil the condition as to employment of workers in that region. Therefore a rule such as the contested provision relating to inheritance tax constitutes a restriction on the freedom of establishment.

Since the Belgian federal government could not provide any justifications for the restriction, the Advocate General concluded that the Belgian provision infringes the freedom of establishment.

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For more detailed information, please do not hesitate to contact your local PwC contact person or a member of the EUDTG.

Patrice Delacroix
Olivier Hermand

+32 02 710 74 01
+32 02 710 44 16

patrice.delacroix@pwc.be
olivier.hermand@pwc.be

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