

# Newsalert

## EU Direct Tax Group

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#### ECJ in Truck Center: Belgian withholding tax on interest payments to non-resident companies compatible with freedom of establishment

On 22 December 2008 the ECJ delivered its judgment in the case "Truck Center" (C-282/07). The Belgian tax legislation provides for a withholding tax ("WHT") on Belgian sourced interest paid to non-Belgian resident companies (not having a Belgian permanent establishment). In this situation, the WHT suffered constitutes the final tax in the hands of the foreign companies. A WHT exemption, however, applies to Belgian sourced interest paid to Belgian resident companies. In this situation, the interest income is only subject to Belgian corporate income tax in the hands of the Belgian company that receives the interest payment. The latter is taxed through its assessment notice after having filed an income tax return.

According to the ECJ, the freedom of establishment and the free movement of capital do not preclude a national WHT on interest payments towards non-resident companies, while exempting from that WHT interest payments towards resident companies, the income of which is taxed in the corporate income tax of those Belgian beneficiaries. As such, the ECJ judgment goes in the same direction as AG Kokott in her opinion of 18 September 2008.

In order to arrive at its conclusion, the Court mainly develops two arguments:

- First of all, it is stated that the situations of resident and non-resident companies in the case at hand, are not objectively comparable. The ECJ develops its position as follows:
  - On the one hand, when both the company paying the interest and the company receiving that interest are Belgian residents, the Belgian State acts in its capacity as the State of residence. On the other hand, in case the interest is paid to a non-resident, the Belgian State acts in its capacity as the State in which the interest originates.
  - Moreover, the payment of interest by a resident company to another resident company and the payment of interest by a resident company to a non-resident company give rise to two distinct charges (i.e. corporate income tax and withholding tax) which rest on separate legal bases.
  - In addition, the Belgian State has much less recovery power on non-residents than on Belgian residents for which it requires the assistance of the tax authorities of the other Member State.
- Secondly, and in addition to the fact that resident and non-resident companies are not in an objectively comparable situation, it is held that the difference in treatment resulting from the tax legislation at issue does not necessarily procure an advantage for resident recipient companies. In this respect, the ECJ notes that:
  - the Belgian recipient company is obliged to make advance payments of corporate income tax and
  - the amount of WHT deducted from the interest paid to a non-resident company is significantly lower than the corporate income tax charged on the income of the resident companies which receive interest.

The ECJ concluded that the WHT which is levied solely on cross-border interest payments does not violate Community law.

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