

# Newsalert

## EU Direct Tax Group



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#### OPINION OF ADVOCATE GENERAL LÉGER IN CASE C-513/03 (VAN HILTEN): DUTCH "DEEMED RESIDENCE"-RULE FOR INHERITANCE TAX PURPOSES DOES NOT RESTRICT FREE MOVEMENT OF CAPITAL BETWEEN THE NETHERLANDS AND SWITZERLAND WITHIN THE MEANING OF ARTICLE 56(1) OF THE EC TREATY

Mrs. Van Hilten-Van der Heijden, a Dutch national, emigrated from the Netherlands to Belgium in 1988 and three years later, in 1991, emigrated from Belgium to Switzerland, where she lived until her death in 1997. Her estate consisted of immovable property situated in the Netherlands, securities listed in Belgium, Germany, the Netherlands, Switzerland and the United States, and bank accounts with the Dutch and Belgium branches of several banks in the EU. Since she was a Dutch national and lived in the Netherlands less than ten years before her death, Mrs. Van Hilten-Van der Heijden was deemed to be resident in the Netherlands for Dutch inheritance tax purposes. As a result, the four heirs were liable to Dutch inheritance tax for their share in the inheritance, with a credit for the Swiss inheritance tax paid in accordance with the provisions of the Netherlands-Switzerland Inheritance Tax Convention.

The Dutch *Gerechtshof* of 's-Hertogenbosch was of the opinion that the "deemed residence"-rule for inheritance tax purposes restricted the free movement of capital between the Netherlands and Switzerland within the meaning of Article 56(1) EC, and doubted whether this restriction was in accordance with Article 57(1) EC, according to which certain restrictions of the free movement of capital between EU Member States and third countries are grandfathered, or Article 58(1) and (3) EC, according to which EU Member States may apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested, provided that this does not constitute a means of arbitrary discrimination or a disguised restriction of the free movement of capital. In particular, the *Gerechtshof* expressed doubts as to the legal effects of the Declaration on Article 73d (now Article 58) EC adopted on the occasion of the signature of the Final Act and Declarations of the Intergovernmental Conferences on the European Union on 7 February 1992 and, therefore, decided to stay the proceedings and refer the matter to the ECJ for a preliminary ruling.

On 30 June 2005, Advocate General Léger delivered his opinion in this case. He concludes that there is no need to deal with the questions asked by the *Gerechtshof* regarding the interpretation of Articles 57 and 58 EC, because those questions build on the false presumption that the Dutch "deemed residence"-rule for inheritance tax purposes constitutes a restriction of the free movement of capital. According to the Advocate General, only the inheritance of the estate of Mrs. Van Hilten-Van der Heijden can be considered a capital movement within the meaning of Article 56(1) EC, not her emigration to Belgium and Switzerland, respectively. Since the inheritance of the estate would not have been taxed more favorably in the Netherlands if and when Mrs. Van Hilten-Van der Heijden had lived in the Netherlands at the time of her death, the Advocate General is of the opinion that there is no restriction of the free movement of capital between the Netherlands and Switzerland within the meaning of Article 56(1) EC. For similar reasons, the Advocate General considers that the Dutch "deemed residence"-rule does not restrict the right of citizens of the EU to move and reside freely within the territory of the Member States (Article 18(1) EC) either. In particular, the Advocate General is of the opinion that this right does not include the right to be taxed more favorably than nationals staying at home. Finally, the Advocate General points out that using nationality as a criterion for fiscal jurisdiction does not constitute discrimination on grounds of nationality within the meaning of Article 12 EC, referring to international practice and the Commentaries on the OECD Model Convention.

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

Frank Engelen +31 10 407 53 02

[frank.engelen@nl.pwc.com](mailto:frank.engelen@nl.pwc.com)

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