

Newsflash

EU Direct Tax Group

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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.

ECJ judgement on free movement of capital: Société Etablissement Rimbaud case (C-72/09)

On 28 October 2010, the ECJ delivered its ruling in Société Etablissement Rimbaud, which concerned the French 3% tax due by foreign entities owning real estate in France. In the case at hand, the foreign entity was resident in Liechtenstein which is a party to the EEA Treaty. The 3% tax is an annual tax assessed on the fair market value of French properties owned directly or indirectly by French and foreign entities. It is intended to be a substitute for French wealth tax (normally due by French and non-French resident individuals owning French properties), when such properties are owned indirectly through an interposed entity (or interposed entities). Foreign entities can however avoid paying the annual 3% tax by either making an annual disclosure regarding the name and location of the ultimate shareholders, or by committing to do so at the request of the French Tax Authorities. This exemption applies if and only if the French tax authorities can verify the accuracy and completeness of the information provided.

In Elisa (C-451/05), the ECJ decided that the automatic liability to the 3% tax of a 1929 Luxembourg Holding company was a restriction on the free movement of capital. The ECJ ruled that the restriction was not proportionate even though France was unable to obtain the required information from Luxembourg, whether on the grounds of the EU's Mutual Assistance Directive 77/79/EC regarding exchange of information or on the grounds of the France-Luxembourg DTT. The ECJ took the view that for any interposed EU entity, France would first be required to request proof of accuracy and completeness of information provided from the interposed entity. It is only in the event that the interposed entity fails to provide such evidence, that the 3% tax could then subsequently be validly collected in France. In the Rimbaud case, the entity subject to the 3% tax was not from the EU, but was in fact a Liechtenstein company which invested in French properties. At that time, no exchange of information treaty had been concluded between France and Liechtenstein (this was done later in September 2009 although this treaty is not yet in force). The claimant argued that automatic liability to the 3% tax was actually a restriction of the free movement of capital principle provided for in the EEA Treaty. The ECJ did not replicate the Elisa ruling but instead applied the solution that is relevant for non-EU countries (A. case, C-101/05), i.e. that when no exchange of information procedures exist, then tax authorities can deny a tax benefit where this is dependent on information that can only be verified through an exchange of information procedure.

This means that for non-EU countries, where an exception to an anti-abuse rule is actually conditional upon certain requirements, one is entitled to deny such benefits if the tax authorities are not in a position to verify the accuracy and completeness of information supplied.

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