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EU Direct Tax Group

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The EUDTG is one of PwC's Thought Leadership initiatives and is embedded in the International Tax Services Network. The EUDTG is a pan-European network of EU tax law experts and provides assistance to organisations, companies and private persons to help them to fully benefit from their rights under EU law.

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ECJ judgment in the case Holböck, C-157/05 – taxation of dividends from third countries

On 24 May 2007, the ECJ handed down its judgment in the Holböck case (C-157/05). The claim was brought by Austrian resident Mr. Holböck and regards the taxation of dividends he received from a company established in a non-member country (i.e. in Switzerland). Mr. Holböck held two thirds of the share capital in Swiss company and received dividends from this company in the years 1992 to 1996.

Under Austrian tax law as it was in those years the taxation of dividend income in the hands of an Austrian resident individual varied according to whether the dividend was of Austrian or of foreign origin. With respect to domestic dividends, the taxpayer had the right to choose between a tax rate of 25% and half the average tax rate applicable to his total income. By contrast, dividends from a foreign company were taxed at the full progressive rates of income tax (i.e. up to 50%).

The Holböck case is almost identical to the Lenz case (C-315/02) except that in the Lenz case, the dividends were paid by EU based companies to an individual shareholder resident in Austria. In the Lenz judgement, the ECJ held that the unequal treatment of domestic dividends and dividends from other Member States infringes EU law, specifically with regard to the free movement of capital (Article 56 EC Treaty).

In the present Judgement, the Court first dealt with the question whether the case should be considered under Article 43 (freedom of establishment), under Article 56 (free movement of capital) or under both. The free movement of capital is the only freedom to directly apply with respect to third countries so this question was of great relevance. The Court referred to the purpose of the concerned legislation which was not intended to apply only where the shareholder has a definite influence on the company's decisions and activities and held that the case should be considered under both freedoms.

Since the freedom of establishment does not apply vis-à-vis third countries, the Court went on to consider the principle of free movement of capital. Under the "Stand-Still-Clause" of Article 57(1), Member States have the right to retain national restrictions for certain types of capital movements in relation to non-member countries, provided that those restrictions were in force at the end of 1993. The Court held that dividend payments relating to holdings acquired with a view to establishing or maintaining lasting and direct economic links between the shareholder and the company, and which allow the shareholder to participate effectively in the management or control of the company, are to be regarded as 'movements of capital involving direct investment or establishment' in the sense of Article 57(1). Austria changed its tax laws in 1995 and 1996 but these changes were only minor and did not alter the legal position with regard to taxation of dividends as compared to the legal position at the end of 1993. The Court therefore held that the "Stand-Still-Clause" was applicable and Austria was therefore allowed to continue to impose the same (less favourable) tax regime on foreign-source dividend income even if received after 1993.

As a result, the Court ruled that the concerned legislation, though restricting the free movement of capital, was not precluded by the provisions governing the basic freedoms of the EU Treaty. By the way: Austria has in the meantime adjusted its tax laws so that at present foreign-source dividend income of a natural person shareholder is taxed the same reduced (i.e. half) rate as dividends from domestic shareholdings.

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

Friedrich Roedler +43 1 50188 3601 friedrich.roedler@at.pwc.com
Robert Pfeiffer +43 1 50188 3324 Robert.pfeiffer@at.pwc.com

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