PRICEWATERHOUSECOOPERS

Newsalert

EU Direct Tax Group

NA 2009 – 021

9 October 2009

EU Direct Tax Group

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.

European Commission refers Portugal to the ECJ for its restrictive exit tax provisions for companies

According to articles 76-A and 76-B of the Portuguese Corporate Income Tax (CIT) Code, in case of a transfer of the seat and place of effective management of a Portuguese company to another Member State, or in case a permanent establishment of a non-resident entity ceases its activities in Portugal or transfers its assets located in Portugal to another Member State, the taxable base of that financial year will include any unrealized capital gains in respect of the company's assets, whereas unrealized capital gains from purely domestic transactions are not included in the taxable base. An exemption applies for assets that remain in Portugal and can be allocated to a Permanent Establishment of the Company.

Moreover, article 76-C of the CIT Code foresees that the shareholders of the company that transfers its seat and place of effective management from Portugal to another country are subject to tax on the difference between the company's net assets (value at the time of the transfer at market prices) and the acquisition cost of their participation. These exit charge rules were introduced in Portuguese tax legislation in January 2006.

In this context, companies that leave Portugal or transfer their assets abroad are subject to an immediate taxation, compared to companies which remain in Portugal or transfer their assets domestically. The Commission considers that this difference of treatment dissuades companies from exercising their right of freedom of establishment and, as a result, constitutes a restriction of Article 43 EC Treaty and article 31 of the EEA Agreement.

The Commission has sent Portugal a reasoned opinion in November 2008 regarding the Portuguese tax provisions which foresees immediate exit taxes when companies cease to be tax resident in Portugal or transfer their assets to another Member State. Since Portugal did not reply satisfactorily to the Commission nor has amended its discriminatory legislation, the Commission has now referred Portugal to the ECJ.

The Commission's opinion is based on the EC Treaty as interpreted by the Court of Justice of the European Communities in its judgment of 11 March 2004, in Case C-9/02, De Lasteyrie du Saillant, as well as on the Commission's Communication on exit taxation (COM(2006)825 of 19 December 2006).

The Commission's case reference number is 2007/2365.

* connectedthinking

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

Leendert Verschoor	+ 351 213 599 631	leendert.verschoor@pt.pwc.com
Jorge Figueiredo	+ 351 213 599 618	jorge.figueiredo@pt.pwc.com

Should you be interested in receiving the free bi-monthly newsletter, please e-mail to eudtg@nl.pwc.com, with "subscription EU Tax News".