EU Tax News

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This bi-monthly newsletter is prepared by members of PwC’s pan-European EU Direct Tax Group (EUDTG) network. To receive this newsletter and our newsalerts automatically and free of charge, please send an e-mail to: eudtg@nl.pwc.com with “subscription EU Tax News”. For previous editions of PwC’s EU Tax News see: www.pwc.com/eudtg

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**CJEU Cases**

**Germany – CJEU referral of German dividend withholding tax regime in the case of a Canadian pension fund**

On 23 October 2017, the Fiscal Court of Munich referred the question to the CJEU whether the German regime of dividend withholding tax (WHT) imposed on a Canadian pension fund is compatible with the free movement of capital provided in Article 63 TFEU.

The plaintiff is a Canadian pension fund in the legal form of a common law trust. The fund, which received dividends from German stock corporations, was faced with 25% WHT. Pursuant to the Canadian-German double taxation treaty, WHT in the amount of 10% of the dividend was refunded to the fund. The fund, thus, suffered a final WHT of 15%.

The fund applied for a refund of the remaining 15% but the claim was dismissed by the German tax authorities, as German law does not provide for such reimbursement. The fund brought the case before the Fiscal Court of Munich arguing that the dismissal of the refund claim was discriminatory because a German pension fund would be allowed to deduct technical reserves taking account of its future pension liabilities when determining the income basis.

The Fiscal Court of Munich considers the Canadian pension fund to be comparable to a pension fund under German law. Moreover, the court is of the view that there is a direct link between the dividend income received by a pension fund and its technical reserves, which reflect its obligation to pay out the largest part of the income to its insured pensioners (as required by the CJEU e.g. in *Commission vs. Finland* (C-342/10)). In addition, the court does not see any reason why the discrimination under German law could be justified. However, the referring court assumes that Germany’s taxation of the plaintiff, which is a resident of a third country, could be compatible with the free movement of capital pursuant to Article 64 TFEU (standstill clause). In this context, the Fiscal Court of Munich raises the question whether Article 64 TFEU allows discrimination in the given case as Germany only changed the taxation regime of its domestic funds after 31 December 1993 whilst foreign funds have always been treated in the same way; also whether the restriction involves financial services in the sense of Article 64 TFEU as it is rather linked to the investments made by the Canadian pension fund than to the services it provides to its pensioners.

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**Germany – AG Opinion on the compatibility of German Trade Tax exemption with EU law**

On 20 September 2016, the Fiscal Court of Muenster referred the EV vs. FA Lipstadt case to the CJEU concerning the German Trade Tax participation exemption laid down in Sec. 9 No
7 of the German Trade Tax Act (GTAA, Gewerbesteuergesetz). On 7 February 2018, AG Wathelet published his Opinion in this case (C-685/16).

The case deals with a German parent company that holds shares in a subsidiary located in Australia. The German tax authorities treated the dividends received from the subsidiary as exempt from German corporate tax. However, the dividends were added back to the taxable base for German Trade Tax purposes. The authorities refused the application of the German Trade Tax participation exemption under Sec. 9 No. 7 GTTA since the activity requirements contained in the legislation for third country sourced dividends were not met. The referring court argued that the activity requirements are not in line with the free movement of capital and that the standstill clause is not applicable.

In his Opinion, the AG pointed out that the activity requirements are not in line with EU law. He concludes that the provision constitutes a restriction of the free movement of capital. The standstill clause does not hinder the application of the free movement of capital since substantial legal adaptations were made since 1993. Furthermore, the AG opines that the restriction is not justified by the prevention of tax abuse in the underlying case. Referring to the Cadbury Schweppes (C-196/04) jurisprudence on artificial arrangements, the AG pointed out that the law does not give the taxpayer the opportunity to prove that the arrangement was not artificially set up for the purpose of avoiding taxes even though sufficient exchange of information possibilities are in place and fiscal supervision is not restricted.

-- Arne Schnitger, Franziska Leich and Ronald Gebhardt, PwC Germany; ronald.gebhardt@pwc.com

**Netherlands – CJEU judgment on compatibility of Dutch group taxation regime with EU fundamental freedoms**

On 22 February 2018, the CJEU issued its judgment in *X BV and X NV v Staatssecretaris van Financiën* (Joined Cases C-398/16 and C-399/16).

**Case C-398/16 (interest deductibility)**

This case dealt with the non-deductibility of interest on a loan received by a Dutch company from a Swedish group company to equity finance the acquisition of an Italian shareholding. The non-deductibility results from the application of Article 10a of the 1969 Dutch Corporate Income Tax Act (CITA). Within the Dutch group taxation regime, pursuant to Article 15 CITA, the capital contribution would not be recognised and, as a result, the rule would not be applicable. The taxpayer argued that if it had been permitted to have its Italian subsidiary take part in the Dutch group taxation regime, it could have deducted the interest on the loan. Because the right to take part in a Dutch group taxation regime is however reserved for Dutch resident companies, the taxpayer argued that its freedom of establishment had been restricted. The CJEU has now ruled in favour of the taxpayer holding that there was a
restriction on the freedom of establishment, which could not be justified based on the balanced allocation of taxing rights, the need to maintain the coherence of the fiscal unity regime or the need to prevent tax avoidance and tax evasion. Consequently, the Dutch group taxation regime, in combination with the rule on interest deductibility, is in breach of EU law.

Case C-399/16 (currency losses)

This case concerned a Dutch company, which was part of a Dutch group taxation regime and which held the shares of a UK subsidiary. These shares were subsequently contributed to another UK subsidiary. As a result of exchange rate fluctuations, the Dutch company incurred a currency loss on its contributed UK subsidiary, the deduction of which was denied by the Dutch tax authorities under the participation exemption. The taxpayer claimed that, had it been permitted to have its UK subsidiary take part in the Dutch group taxation regime, it would have been able to deduct the currency loss incurred. Because that right was however reserved for Dutch resident companies, the taxpayer argued that its freedom of establishment had been restricted due to Article 13 CITA, laying down the rules for the participation exemption pursuant to which neither the advantages derived from a shareholding nor the consideration when that shareholding is sold or purchased are taken into account. However, Article 13 CITA is not applicable within the Dutch group taxation regime. The CJEU ruled that the two situations were not comparable since a Dutch resident company with a Dutch subsidiary cannot in principle suffer any currency losses, except for highly particular cases in which the participation would be expressed in a different currency. However, even in that exceptional case, the participation exemption was, according to the CJEU, fiscally neutral. Lastly, the CJEU reiterated that it cannot be inferred from the TFEU that Member States would be required to exercise their taxing powers asymmetrically so as to permit the deduction of losses from operations whose results, if they were positive, would not in any event be taxed.

-- Hein Vermeulen and Mart van Hulten, PwC Netherlands; hein.vermeulen@pwc.com

Spain – European Commission opens infringement procedure against Spanish state liability regime

On 15 June 2017, the European Commission opened an infringement procedure against Spain by sending a letter of formal notice to the Spanish authorities on the grounds that its national rules on State liability for a breach of EU law are contrary to the EU law principles of equivalence and effectiveness.

The current national provisions limit in time the reimbursement of damages arising from a breach of EU law to five years prior to publication of a CJEU judgment declaring the aforementioned infringement. Likewise, the current national provisions require the claimant to have previously appealed against the application of Spanish law that is in breach of EU law and to have alleged the existence of such infringement.
In addition, there are less favourable conditions for liability for a breach of EU law than for liability due to a breach of the Spanish Constitution insofar as it is required to attest to the fulfilment of the requirements established by the CJEU's jurisprudence. Among others, the claimant must prove that the infringement can be qualified as “sufficiently serious”.

The contested national provisions render State liability for a breach of EU law excessively difficult therefore having a negative impact on the effectiveness of EU law.

On that basis, in January of 2018, the Commission sent a reasoned opinion to Spain requesting the amendment of the regime on State liability for a breach of EU. Spain has now two months to reply to the arguments raised by the Commission; otherwise, the Commission may decide to refer the case to the European Court of Justice.

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**National Developments**

**Italy – Italian court rules on incompatibility of presumption of abuse/tax evasion with EU freedom of establishment**

On 16 January 2018, the Reggio Emilia Tax Court of First Instance issued a decision (n. 2-2-2018) concerning tax abuse with respect to the establishment of two holding companies in Luxembourg, whose only activity was managing shares in Italian subsidiaries.

The Italian Tax Authorities argued that the two companies were established in Luxembourg for the only purpose of benefiting from the more favourable domestic tax regime and that they were effectively managed in Italy (thus, resident therein) since:

- the only activity performed was to manage the shares in their Italian subsidiaries;
- they did not have any employees;
- the registered office was at a service company’s premises;
- the place of effective management was in Italy.

Conversely, the taxpayers affirmed their right to freely choose where to establish their legal seat even if that was mainly driven by tax reasons and that the burden of proof as regards the place of effective management was with the Tax Authorities, which did not adequately prove their claims.
The Tax Court upheld the taxpayers’ counterarguments affirming first that an entrepreneur is always free to choose a State where the tax burden is minimized and establish its tax residence therein as long as the transfer is real, the activities performed are consistent with the statutory purpose, and the structure itself cannot be considered as a purely artificial arrangement. Second, the Tax Court rejected the Italian Tax Authorities objections as regards the place of effective management on the basis of mere shareholdings’ management activity and the absence of personnel in its premises. The corporate activity performed by the two companies was indeed “holding” shares in their subsidiaries in accordance with their statutory company’s purposes and this could not be considered abusive as such. Furthermore, the absence of personnel and the registered office being at a service company’s premises could not be considered as abusive since they are intrinsic to the activities performed which, in fact, neither require the use of employees nor a fixed place of business. Finally, the Court rejected the argument put forward by the Italian Tax Authorities with respect to the fact that the companies’ place of effective management was in Italy because the Authorities had not adequately proved it.

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Spain – Appeal at the Spanish Supreme Court against Andalusian tax on deposits on financial entities

The Spanish Supreme Court has admitted the appeal brought by a financial entity against the Andalusian Law 11/2010, which established the tax on deposits on financial entities in the region of Andalusia, considering that it could be in breach of EU Law.

The appellant argued that the regulations of the aforementioned tax are in breach of the EU freedom of establishment, EU freedom to provide services and EU free movement of capital (respectively Articles 49, 56 and 63 of the TFEU), Article 1 of Council Directive 88/361/EEC and Articles 401 and 135.1.(d) of VAT Directive.

The Supreme Court concluded that the following matters related to EU Law need to be assessed:

- determine whether Articles 49, 56 and 63 of the TFEU should be interpreted as contrary to a regime as the one established in Andalusian Law 11/2010 which is more beneficial for entities whose headquarters are established in Andalusia, and entities which are almost exclusively established in Andalusia (i.e. regional “savings banks” and regional “credit cooperatives”);
- determine whether the tax on deposits on financial entities should be considered as an indirect tax despite the direct character that Article 6.2 of Andalusian Law 11/2010 attributes to it and, in that case, determine whether it is compatible with Articles 401 and 135.1.(d) of VAT Directive 2006/112/EC.
The Supreme Court also stated that the decision may require the intervention of the CJEU, so a preliminary ruling could be raised in the next few months regarding the compatibility of this tax with EU law.

-- Antonio Puentes and Roberta Poza, PwC Spain; antonio.puentes@es.pwc.com

**Spain – Appeal at the Spanish Supreme Court on the rules to eliminate international double taxation**

The Spanish Supreme Court has admitted an appeal to analyse whether Article 32 of the Spanish corporate income tax (CIT) law, which establishes a tax credit to eliminate international double taxation on dividends distributed by an entity resident in another EU Member State, may be contrary to the freedom of establishment.

The Spanish Tax Administration considered that dividends paid by a Dutch company could not benefit from the exemption regime provided for in Article 21 of the CIT law because they did not arise from income obtained in the Netherlands but from dividends received from the Spanish operating subsidiaries. Therefore, the right to apply the tax credit (Article 32 of CIT law), which only allows subtracting the tax actually paid, was recognized.

The appellant maintains that the application of the tax credit system determines the existence of a discriminatory tax treatment compared with the exemption or full credit systems. In the first place, the limited credit requires the taxation of the difference between the nominal rate and the effective rate, which makes it less favorable than the other systems. Secondly, this discriminatory treatment is due exclusively to the fact that the intermediate investee is not resident in Spain but in another EU State so it could be in breach of the EU freedom of establishment.

Therefore, there could be an unlawful discrimination caused by the fact that dividends could not benefit from exemption or full credit because they were paid by a non-resident entity. At the same time, there could be discrimination in the treatment of dividends indirectly arising from a Spanish source due to the fact that there was an intermediate company that was not resident in Spain.

It is foreseeable that the future judgment of the Spanish Supreme Court will follow the CJEU jurisprudence in cases *Test Claimants in the FII Group Litigation II (C-446/04)* and *Papillon (C-418/07)*, among others, declaring Article 32 of the CIT law to be in breach of EU law.

-- Antonio Puentes and Roberta Poza, PwC Spain; antonio.puentes@es.pwc.com

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EU Developments

EU – European Commission publishes Roadmap on Evaluation of Administrative Cooperation in Direct Taxation

According to the Commission, the purpose of this evaluation is to assess the EU Directive on administrative cooperation in the field of taxation and to develop recommendations to amend the current rules if they prove to be too burdensome or ineffective. The evaluation of the Directive will focus on the following criteria: “effectiveness, efficiency, and continued relevance, coherence with the other policy initiatives and priorities, as well as its EU added value”. The period under evaluation spans from January 2013 till the end of June 2018.

The Commission states that the main stakeholders are the tax administrations of all the Member States that are the direct users of the tools provided for by the Directive. Taxpayers carrying out or managing cross-border operations in the single market are considered as secondary stakeholders, e.g. investment entities, multinational companies, banks and cross-border workers.

- DG TAXUD will launch an open public consultation related to this initiative for all stakeholders to provide their views on the problems and opportunities related to the DAC.
- The Commission will furthermore complement the public consultation with more targeted consultations to be organised under the accompanying external study.

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EU – European Commission announces comprehensive fitness check on public reporting by companies within the EU

On 8 February 2018, the European Commission’s DG FISMA – Unit B.3 "Accounting and financial reporting" published an evaluation roadmap entitled: "Fitness check on public reporting by companies".

The Commission announced that an open consultation would be launched in Q1 of 2018 “for a period of at least 12 weeks”. The final deliverable would be a Staff Working Document to be published in Q2 of 2019.

Excerpts of Roadmap: "Fitness check on public reporting by companies":

Purpose and scope
According to the Commission, there is an increasing demand for public reporting on a broader range of topics by a wider audience. Corporate reporting on sustainability issues has acquired increasing importance as a means to enable financial market participants to properly assess companies' long-term value creation and their sustainability risk management. As part of this
Fitness check, the Commission will as required by the Non-Financial Reporting Directive review its functioning taking into account the recent developments on Sustainable Finance. In addition, the Commission will also look at other reporting requirements such as the reports on payments to governments by extractive/logging industries.

The Commission also considers that there are ongoing market developments to address the interaction and integration of the different sets of public reporting by companies (financial, non-financial and other reports).

Lastly, the Commission states that digitalisation also raises important long-term challenges as well as opportunities. With investors and the public at large calling for enhanced public access to information, technological developments could lead to important simplifications for public reporting and reduction of the administrative burden for companies.

For this Fitness Check, companies mean limited liability companies of the type listed in the Accounting Directive and companies that have issued securities on an EU regulated market as well as banks and insurance companies subject to the Bank and Insurance Accounts Directives.

This Fitness check will cover in a holistic manner the Accounting Directive including Non-Financial Reporting, the Regulation on International Accounting Standards (IAS Regulation), the Transparency Directive (TD), the Banks Accounts Directive, and the Insurance Accounts Directive. The recent evaluation of IFRS will also “be factored in”.

-- Bob van der Made, PwC Netherlands; bob.vandermade@pwc.com

EU – European Parliament sets up TAXE 3 Special Committee on financial crimes, tax evasion and tax avoidance

On 7 February 2018, the European Parliament established the "TAXE 3 - Special Committee on financial crimes, tax evasion and tax avoidance", which will build on and complete the work carried out by the TAXE 1 and TAXE 2 special committees and by the PANA inquiry committee. MEPs decided that the TAXE 3 Special Committee should take into account in its work the Paradise Papers revelations on 5 November 2017 and “any relevant developments within the remit of the Committee that emerge during its term”. TAXE 3 will have 45 members, and the term of office of this temporary committee will be 12 months.

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**About the EUDTG**

EUDTG is PwC’s pan-European network of EU law experts. We specialise in all areas of direct tax, including the fundamental freedoms, EU directives and State aid rules. You will be only too well aware that EU direct tax law is moving quickly, and it’s difficult to keep up. But, it is crucial that taxpayers with an EU or EEA presence understand the impact as they explore their activities, opportunities and investment decisions.

**So how do we help you?**

- Our experts combine their skills in EU law with specific industry knowledge by working closely with colleagues in the Financial Services and Real Estate sectors.
- We have set up client-facing expert working groups to address specific key topics such as EU State aid & BEPS and CCCTB.
- Through our Technical Committee we constantly develop new and innovative EU law positions and solutions for practical application by clients.
- We closely monitor direct tax policy-making and political developments on the ground in Brussels.
- We input to the EU and international tax debate and maintain regular contact with key EU and OECD policy-makers through our EU Public Affairs capability.
- Our secretariat in the Netherlands operates an EU tax news service, keeping clients up to date with developments as soon as they happen.

**And what specific experience can we offer for instance?**

- Our PwC State Aid Working Group helps clients identify and manage EU State Aid risks.
- Together with our Financial Services colleagues, we have assisted foreign pension funds, insurance companies and investment funds with dividend withholding tax refund claims.
- We have assisted clients before the CJEU and the EFTA Court in landmark cases e.g. Marks & Spencer (C-446/03), Aberdeen (C-303/07), X Holding BV (C-337/08), Gielen (C-440/08), X NV (C-498/10), A Oy (C-123/11), Arcade Drilling (E-15/11), SCA (C-39/13), X (C-87/13) and Kieback (C-9/14).
- We have carried out a number of tax studies for the European Commission.

Find out more on: [www.pwc.com/eudtg](http://www.pwc.com/eudtg) or contact the EUDTG’s Network Driver Bob van der Made (+31 6 130 96 296, or: bob.vandermade@pwc.com) or contact any of the EUDTG country contacts listed on the previous page.