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CONTENTS

ECJ CASES

NATIONAL DEVELOPMENTS

Netherlands	District Court rules that the refusal to extend Dutch fiscal unity to cross-border situations is not contrary to the freedom of establishment
Netherlands	District Court of The Hague refunds withholding tax on payments to a foreign football organisation
Portugal	Supreme Administrative Court follows the ECJ's Hollman ruling
Portugal	Tax reductions for the free zone of Madeira for the period 2007-2020
Sweden	Swedish Advance Ruling Board rules that Swedish group relief system is not compatible with EC Law

EU DEVELOPMENTS

Estonia and Germany	European Commission starts infringement proceedings regarding the taxation of dividends paid to foreign pension fund
Germany	European Commission formally requests Germany to end its discriminatory rules applied to non-resident taxpayers - mainly artists, sportsmen and journalists
Germany	European Commission formally requests Germany to end its discriminatory depreciation rules applied to buildings situated abroad
Italy	European Commission refers Italy to ECJ over discriminatory taxation of outbound dividends
Latvia	European Commission takes steps against Latvia regarding its discriminatory taxation of dividends paid to non-resident individuals
Lithuania	European Commission takes steps against Lithuania regarding its discriminatory taxation of outbound interest
Spain	European Commission sends Spain a formal request to amend its discriminatory anti-abuse rules in the Corporate Income Tax
Switzerland and EU	Update on bilateral dialogue on disputed Swiss company tax regimes

CCCTB - common consolidated corporate tax base

Update on release of two new Commission Working Papers (WP 63 and 64) and other items

STATE AID

Italy	European Commission authorises State aid for development of Italy's southern regions
Spain	European Commission authorises Spanish corporate tax deduction aimed at promoting R&D

ECJ CASES

Belgium – ECJ judgment on the recharacterisation of interest as dividends: Lammers & Van Cleeff case (C- 105/07)

On 17 January 2008, the ECJ decided that the Belgian thin capitalisation rule contravenes the freedom of establishment (Article 43 EC), as it applies to non-residents only.

According to a specific Belgian thin capitalisation rule, interest is recharacterised as a dividend and consequently is not tax deductible, if the interest is paid to a person who holds the position of director, liquidator or any similar position in the borrowing company. This recharacterisation applies if and to the extent that either the interest exceeds the market rate or the loan exceeds the sum of the taxed reserves at the beginning of the year and the paid-up capital at the end of the year. The thin capitalisation rule, however, does not apply if the lending company is resident in Belgium and subject to Belgian corporate tax.

In the case at hand, a Belgian subsidiary made interest payments to its Dutch parent company, which was one of its directors too. The interest was recharacterised as a dividend under the thin capitalisation rule. The Court of First Instance of Antwerp asked the ECJ to clarify whether this rule, which does not apply to interest payments made to directors being Belgian resident companies, is compatible with the freedom of establishment and/or freedom of capital.

The ECJ held that such a rule is in conflict with the freedom of establishment. Although such a rule could be justified by reasons of preventing abusive practices, the disputed rule lacks proportionality because it does not apply to artificial arrangements only. (See also EUDTG Newsalert NA 2008-003).

-- Olivier Hermand and Patrice Delacroix, Belgium; olivier.hermand@pwc.be

France – A-G opinion on the compatibility of the French Tax Code with the EU's Parent-Subsidiary Directive: Banque Fédérative du Crédit Mutuel case (C-27/07)

Article 4 of the Parent-Subsidiary Directive rules that when dividends received from a subsidiary benefit from the affiliation privilege and are consequently tax exempt, "management expenses" related to the said substantial shareholdings which must be added back to taxable profits may not exceed 5% of the "profits distributed by the subsidiary".

The French tax code refers to this provision. Dividends from subsidiaries which are eligible for the affiliation privilege are tax exempt, but the French parent company must add back to taxable income 5% of the gross dividend received, i.e. including tax credit. Administrative guidelines state explicitly that "tax credits" include both French and foreign tax credits levied at source pursuant to double tax treaties (DTTs) concluded by France.

Banque Fédérative du Crédit Mutuel requested nullification of the guidelines arguing that the inclusion of foreign tax credits in the basis of calculation for the 5% notional taxation does not comply with Article 4 of the Parent-Subsidiary Directive. The Conseil d'Etat referred the question to the ECJ.

On 24 January 2008, A-G Sharpston concluded that it is not contrary to Article 4 of the Directive to compute the 5% notional taxation on the basis of the gross dividend distributed i.e. including any foreign tax credit. The A-G does not see why "profits distributed" should not correspond to the amount of dividend actually received, increased by the amount of tax credit corresponding to the tax withheld at source. The A-G looks at this case from the perspective of the subsidiary: if the subsidiary declares a dividend of €100, the distributed profit is €100, irrespective of whether or not a tax is withheld at source. (See also EUDTG Newsalert NA 2008-008).

-- Jacques Taquet and Nicholas Jacquot, France; jacques.taquet@fr.landwellglobal.com

Germany – A-G opinion on whether a German tax uplift is allowed under the Parent-Subsidiary Directive or is an infringement of the EC Treaty: Burda case (C-284/06)

Burda, a German resident company, which was owned by a Dutch resident shareholder (BV) as to 50%, distributed dividends in 1998 mainly out of taxed equity. Under the former German imputation system, the distributable equity of a resident corporation was divided into taxed and non-taxed equity baskets. Depending on which equity basket was utilised, the corporate tax of the distributing company was reduced (taxed basket) or uplifted (EK02) to 30%. In order to avoid double taxation, shareholders were granted an imputation credit of 3/7 of the dividend. Non-resident shareholders, however, were not entitled to this imputation credit. Due to a tax audit, the taxed equity basket was reduced retroactively with the effect that the former distribution had to be financed out of EK02. The tax was uplifted in order to safeguard the matching of the imputation credit and the corporate tax burden. *Burda* appealed against the tax assessment. The German Supreme Tax Court referred the case to the ECJ and asked whether the tax uplift was allowed under the Parent-Subsidiary Directive or infringed the fundamental freedoms.

On 31 January 2008, A-G Mengozzi gave his opinion in the *Burda* case. On the issue of compliance with the Parent-Subsidiary Directive, the A-G is of the opinion that the tax uplift did not fulfil the requirements of a withholding tax, because it was a tax burden of the subsidiary rather than of the parent company.

Regarding the fundamental freedoms, the A-G considered the taxation at the company level only. As the tax burden of the company due to the tax uplift did not depend on the place of residence of the shareholders, the A-G did not perceive an unequal treatment. Furthermore, he denied an infringement by an equal treatment of unequal situations. He opined that the mere fact that non-resident shareholders were not entitled to an imputation credit was not a result of the referred provision and therefore not crucial. Thus, he concluded that the tax uplift did not infringe the freedom of establishment. (See also EUDTG Newsalert NA 2008-007).
-- Gitta Jorewitz and Juergen Luedicke, Germany; juergen.luedicke@de.pwc.com

Germany – A-G opinion on compatibility with EC Law of German denial to offset foreign PE losses with domestic profits if foreign PE income is exempted by a double tax treaty: Lidl Belgium case (C-414/06)

The German resident claimant *Lidl Belgium GmbH & Co. KG* conducted trade and retail business in Luxembourg through a PE. In the year under review (1999), the permanent establishment (PE) generated losses which the claimant sought to offset against its German profits. The German tax authorities, however, denied this on the grounds that income of a Luxembourg PE is exempted under Germany's double tax treaty with Luxembourg and it is hence not possible to offset those losses against domestic profits. The tax authorities further argued that although a previous provision of the German Income Tax Code allowed for an offsetting of foreign losses with a recapture of subsequent foreign profits, this provision had been abolished with effect as of 1999. The Federal Tax Court expressed doubts as to whether the non-recognition of the Luxembourg losses is compatible with the principles established in the *Marks & Spencer* judgment, and referred the case to the ECJ.

On 14 February 2008, A-G Sharpston gave her Opinion. She considers an infringement of the freedom of establishment to be at hand, since a German company with a Luxembourg PE is not able to take into account its Luxembourg losses and is thus treated less favourably than a German company with losses from a domestic PE. As the A-G viewed the foreign PE loss situation to be 'clearly' analogous to the foreign subsidiary loss scenario, she went on to test the justification arguments that were accepted by the ECJ in the *Marks & Spencer* judgment, namely the balanced allocation of taxing rights between the Member States, the danger of a double use of losses and the risk of tax avoidance. Although she regarded only the first two of these to be relevant in a PE case,the non-recognition of foreign PE losses could principally be justified by the balanced allocation of taxing rights and the risk of a double loss deduction.

However, the A-G held that an outright prohibition of a loss offset is disproportionate. A less restrictive approach - comparable to the above mentioned abolished German provision - would be to allow for immediate deduction of losses with a corresponding recapture in case of future profits. Consequently, the A-G considered the current German legislation to be disproportionate with regard to the objectives of preserving the balanced allocation of the power to impose taxes and of avoiding the danger that losses would be used twice. (See also EUDTG Newsalert NA 2008-011)
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Germany – ECJ judgment on non-deductibility of currency losses from foreign exempt PEs restricts the freedom of establishment: Deutsche Shell case (C-293/06)

In its judgment of 28 February 2008, the ECJ held that it is contrary to the freedom of establishment (Article 56 EC) both to exclude currency losses on repatriation of capital from a permanent establishment (PE) in another Member State as well as to allow a currency loss to be deducted only insofar as the PE in the other Member State does not derive profits that are tax exempt in Germany.

Deutsche Shell GmbH had a PE in Italy. The allotted capital and PE results were shown in DM in the German books and in Italy, in Lire. In 1992, the PE assets were sold and the amount obtained was repatriated to Germany. Thereby, Deutsche Shell suffered a currency loss of roughly DM 123 million. This was not deductible, as Germany attributed it to the PE, which was exempt under the tax treaty. Further, even if the loss had been included in the tax base, it would have been deductible only insofar as it exceeded the exempt PE income, due to a rule under which expenses directly economically linked to exempt income are not deductible. In Italy, the loss naturally was not recognised. Thus, the loss was not deductible anywhere. The Tax Court of Hamburg referred the case to the ECJ.

The ECJ held that the German system increases the economic risk for a company that sets up a body in a Member State with a different currency than Germany, as it faces an additional fiscal risk. Deutsche Shell suffered a loss that was deducted nowhere for tax purposes, due to the fact that it set up an Italian PE. This constitutes an obstacle to the freedom of establishment.

The ECJ dismissed Germany's arguments to justify the national rule. Regarding coherence (neither currency losses nor currency gains are considered), the comparison between currency losses and gains is irrelevant: the non-deductibility of the loss was not offset by a tax advantage for Deutsche Shell. As to the allocation of taxing powers, the ECJ held that Member States' competence to decide taxation criteria e.g. through tax treaties also implies that they do not have to deduct negative foreign PE results solely because these cannot be deducted in the PE State. However, as the tax disadvantage relates to a loss that can only be deducted in Germany, itt is unacceptable to exclude losses from the head office's tax base which, by its very nature, can never be suffered by the PE.

The ECJ also held it contrary to the freedom of establishment to allow loss deduction only insofar as the foreign PE does not make tax exempt profits. Germany argued that the system avoids losses being deducted twice: If the currency loss were deducted, Deutsche Shell would enjoy a double advantage since the positive PE income is exempt in Germany and the loss cannot be deducted in Italy. The ECJ stated that a Member State that has waived its powers in a tax treaty cannot rely on its lack of power to tax the PE to justify a refusal of deducting expenditure which by its very nature cannot be deducted in the PE Member State. (See also EUDTG Newsalerts NA 2007 – 039 and NA 2008-012).
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Germany – ECJ judgment on compatibility with EC Law of German inheritance tax and valuation provisions relating to foreign and domestic agricultural land: Jaeger case (C-256/06)

On 17 January 2008, the ECJ held that specific German inheritance tax and valuation provisions, according to which foreign property in the form of agricultural land and forestry is valued and taxed more highly than comparable domestic property, are in breach of the free movement of capital (Article 56 EC).

In 1998, the plaintiff, Mr. Jaeger, a French resident individual, inherited his mother´s estate. The estate contained land situated in France which was used for agriculture and forestry. Due to his mother´s residence in Germany, the inherited French property was not only taxable in France but also in Germany. For German inheritance tax purposes the German agricultural land would be valued at only 10% of its fair market value, the heir would get a special tax-free amount and the remaining value would be assessed at 60%. In contrast to this assessment, the French agricultural land had been valued at full fair market value, the heir gets no special tax-free amount and the ´remaining´ value has been assessed at 100%. Although the French inheritance tax was partly credited against the German inheritance tax, the different assessment of foreign and domestic agricultural land resulted in a higher inheritance tax for Jaeger. Therefore, the Federal Finance Court referred to the ECJ.

First, the ECJ stated that the national rule restricts the free movement of capital because the inheritance tax on foreign assets is higher and reduces the value of the inheritance much more than the tax on domestic assets.

Secondly, the ECJ rejected the argument that the different assessments could be compatible with EC Law as it distinguishes between situations which are not objectively comparable. According to the ECJ the situations were comparable.

Lastly, the ECJ acknowledged in principle the public interest of a reduced tax burden in order to support the heir to carry on with the activities of agricultural and forestry establishments and to preserve jobs. As these objectives apply not only to domestic but also to foreign establishments, the ECJ denied a justification of this unequal treatment. (See also EUDTG Newsalert NA 2008-005).

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Portugal – EC referral to the ECJ on Portuguese discriminatory tax amnesty legislation (Case 2005/4932)

In 2005, the Portuguese Parliament approved a law that allows the disclosure and regularisation of undeclared funds held abroad by filing a confidential statement before 16 December 2005. For this purpose, the relevant law required resident individuals to pay a penalty equal to 5% of the value of the relevant investments; however, a reduced tax rate of 2.5% was established to apply to Portuguese Government bonds and any amount of other investments reinvested in Government bonds at the occasion of the regularisation procedure.

The European Commission considered that this measure constituted a restriction on the free movement of capital, guaranteed by Article 56 EC, as it dissuades resident individuals from keeping their regularised assets in other forms than Portuguese government bonds. Accordingly, in May 2007 the Commission sent a Reasoned Opinion to Portugal to eliminate this violation of the EC Treaty, by applying the same fiscal treatment to all regularisations made in 2005. As Portugal did not reply satisfactorily to this request, the Commission has now referred Portugal to the ECJ on this matter.

-- Leendert Verschoor and Jorge Figueiredo, Portugal; jorge.figueiredo@pt.pwc.com

Back to top

NATIONAL DEVELOPMENTS

Belgium – Court of First Instance of Brussels confirms Belgian tax treatment of pension capital is discriminatory

On 5 July 2007, the ECJ ruled that both Article 59 of the Belgian Income Tax Code (BITC), which denies the deduction of employers' contributions of supplementary pension and life assurance paid to a foreign insurance undertaking or welfare institution, and Article 145/3 of the BITC, denying the tax reduction for personal supplementary pension and life assurance contributions on the same ground, constitutes a restriction of the freedom to provide services and the free movement of persons (see also EU Tax News 2007 - no. 005).

In its judgement of 4 October 2007, the Brussels Court of First Instance considered that the Belgian exit tax applicable in the case of a transfer of a pension capital outside Belgium is discriminatory and it relied on the arguments used by the European Commission in the aforementioned ECJ case.
-- Olivier Hermand and Patrice Delacroix, Belgium; olivier.hermand@pwc.be

Belgium – Hearing in referral regarding the Belgium participation exemption (C-48/07)

Following the request for a preliminary ruling from the Court of Appeal of Liège on 5 February 2007, the ECJ has held a first court hearing in the case regarding the compliance of the conditions to benefit from the Dividend Received Deduction (DRD) regime with the Parent-Subsidiary Directive (see also EU Tax News 2007 - no. 003).
-- Olivier Hermand and Patrice Delacroix, Belgium; olivier.hermand@pwc.be

Germany – Amendments to the taxation of foreign family foundations

After having been formally requested by the European Commission on 23 July 2007 to change its system of taxation of non-resident family foundations (see EU Tax News 2007 - no. 005), on 14 January 2008, the German Government informed the Commission via a notice how Germany intends to change its legislation.

According to the present provisions, a non-resident family foundation is deemed to have distributed its annual income to the beneficiaries irrespective of whether it has actually distributed benefits. The deemed benefit is taxed at the level of the beneficiaries. By contrast, beneficiaries of domestic family foundations are only taxed on actual benefit distributions. The Commission is of the opinion that the disadvantageous taxation is in breach of the free movement of capital and the free movement of persons.

According to the notice, the new German provision, Sec. 15 par. 6 AStG, family foundations that are situated within the EU/EEA will be treated the same as domestic family foundations if:

- the beneficiaries are deprived of the foundation property; and
- there is an agreement on the mutual exchange of information that is essential for the taxation between Germany and the State in which the foundation is situated.

According to the notice, the German Government will launch the legislative procedure in the Spring of 2008, but so far it has not taken any steps in this direction.
-- Gitta Jorewitz and Juergen Luedicke, Germany; juergen.luedicke@de.pwc.com

Hungary – Supreme Court confirms that EC law has direct effect and takes precedence over national law in case of non-compliant local legislation

A recent Hungarian Supreme Court decision concerning VAT has brought a breakthrough in Hungarian legal procedures. Up to this stage, the Tax Authority has defended itself by saying that it is merely a law enforcement body, whose responsibility is only to enforce Hungarian laws, whether or not they are in line with the EU legislation in effect. The Tax Authority's standpoint was that it is not required to interpret laws, or give an opinion on them, and that it does not have to take into account whether or not a Hungarian law it is enforcing has been questioned as to its compliance with EU legislation.

The Supreme Court has decided that the Tax Authority must follow EU rules and regulations if Hungarian rules that have been challenged do not fully comply with EU legislation. The decision will have wide-ranging effects because, for the first time in history, the Supreme Court has declared that EU rules and regulations take precedence over Hungarian laws and can be referred to directly.
-- Gabriella Erdős, Budapest, Hungary; gabriella.erdos@hu.pwc.com

Netherlands – Supreme Court rules that the non-deductibility of costs relating to lower tier subsidiaries in third countries held through EU intermediate subsidiaries is compatible with the freedom of establishment (Case 43083)

On 8 February 2008, the Dutch Supreme Court gave its judgment on the question of whether participation costs relating to (sub)subsidiaries located outside the EU should be deductible. The Supreme Court held that the non-deductibility of participation costs related to profits realised in third countries does not constitute an infringement of the freedom of establishment or free movement of capital (Articles 43 and 56 EC).

Until 1 January 2004 the Dutch Corporation Tax Act provided that gains acquired from a participation (at least 5% of the shares) in a subsidiary were not taxable. Costs relating to the participation were deductible only insofar they were indirectly instrumental in making profit that is taxable in the Netherlands. In Case C-168/01 (*Bosal*) the ECJ held that this requirement infringes the Parent-Subsidiary Directive (90/435/EEC), interpreted in the light of the free movement provisions, as a Dutch parent company might be dissuaded from carrying on its activities through a subsidiary established in another Member State since, normally, such subsidiaries do not generate profits that are taxable in the Netherlands.

The present case concerns the application of the *Bosal* judgment to intermediate holdings established within the EU with subsidiaries in third countries. The Court of Appeal of Amsterdam held that costs which are indirectly related to the lower tier subsidiaries in third countries also relate to the intermediate EU subsidiaries. On these grounds, it ruled in favour

of the taxpayer and decided that the costs are deductible (freedom of establishment in the EU). The Supreme Court has now overturned this judgment. It observed that costs which are indirectly related to lower tier subsidiaries in third countries are not deductible at the level of the parent company regardless of the place of residence of the intermediate subsidiary (either the Netherlands or another EU Member State). Therefore, there is no unequal treatment on the basis of the place of residence of the intermediate subsidiary and, consequently, no infringement of either Article 43 or 56 EC. See also EUDTG Newsalert NA 2008-010).
-- Jaap Pronk and Frank Engelen, The Netherlands; frank.engelen@nl.pwc.com

Netherlands – District Court rules that the refusal to extend Dutch fiscal unity to cross-border situations is not contrary to the freedom of establishment

On 17 January 2008, the District Court of Haarlem decided on the compatibility of the Dutch fiscal unity system with EC Law. The taxpayer (X BV), a limited liability company incorporated and resident in the Netherlands, and its 100% subsidiary J GmbH, incorporated and resident in Germany, requested the application of the Dutch fiscal unity regime. Under this form of group taxation, the results of the companies that form part of the unity are calculated on a consolidated basis, which (among others) implies that:

- losses of one company can be offset against profits of another company
- intercompany transactions between fiscal unity companies are not visible for tax purposes
- all the companies part of the fiscal unity can file one corporate income tax return for the entire entity.

This beneficial system is, however, limited to resident companies or to non-resident companies that conduct business in the Netherlands through a permanent establishment. As a result, the request to consolidate X BV's profits with the losses of J GmbH, was rejected. X BV objected to this rejection arguing that the exclusion of non-resident companies infringed the freedom of establishment.

The District Court observed that the exclusion can indeed be regarded as an impediment to resident companies establishing themselves in another Member State since, contrary to losses of domestic companies, losses of foreign companies cannot be consolidated. Referring to the decision of the ECJ in the *Marks & Spencer* case, the District Court held that this impediment can be justified as J GbmH had not fully used its possibilities of loss-compensation in Germany. The Court decided to leave it up to the Supreme Court to refer the Dutch fiscal unity regime to the ECJ if necessary, as there is already a similar case pending with the Supreme Court. In that case (case 43 484) Dutch Supreme Court A-G Wattel has given his opinion that the Dutch fiscal unity regime should be referred to the ECJ because serious doubts exist as to the compatibility of that regime with Article 43 EC (see EUDTG Newsalert NA 2007 – 025). The Supreme Court's is expected to hand down its decision shortly.
-- Sjoerd Douma and Frauke Davits, The Netherlands; sjoerd.douma@nl.pwc.com

Netherlands - District Court of The Hague refunds withholding tax on payments to a foreign football organisation

In its judgment of 27 December 2007 (No. AWB 06/5581/LB), the District Court of the Hague decided that the former Dutch wage withholding tax ("*loonbelasting*") on payments to a foreign football organisation infringes the freedom to provide services (Article 49 EC). The Court based its reasoning on the fact that no withholding tax was levied on payments to national organisations. According to settled case law, restrictions may be justified if a legitimate objective is pursued and reasons of public interest are concerned. The aim of the application of a withholding tax on payments to (groups of) foreign artists and sportsmen was to ensure that their income which is attributable to the Netherlands can be properly taxed. However, the Court found it disproportionate to apply a withholding tax only to cross-border payments since Council Directive 76/308/EEC, as amended by Council Directive 2001/44/EC, provides that a Member State may request the assistance of another Member State in the recovery of debts relating to certain taxes, including those on income and capital.
-- Sjoerd Douma and Jaap Pronk, The Netherlands, sjoerd.douma@nl.pwc.com

Portugal – Supreme Administrative Court follows the ECJ's Hollman ruling

On 28 September 2006, the Supreme Administrative Court sent a request for a preliminary ruling to the ECJ concerning Portuguese provisions applicable to the taxation of capital gains. According to Article 43 (2) of the Personal Income Tax Code, a 50% reduction of the capital gain applies, among others, to the taxation of capital gains realised by residents concerning the transfer of immovable property (rights) and the disposal in contract of rights related to immovable property. No such reduction of the taxable base applies to capital gains realised by non-residents, including residents of other Member States.

On 11 October 2007, the ECJ ruled in *Erika Hollmann v Fazenda Pública* (Case C-443/06) that Article 56 EC (free movement of capital) precludes national legislation such as the Portuguese provision on the reduction of taxation of capital gains realised by residents, considering that such reduction is not applicable to non-residents, as the difference of treatment does not concern situations that are not objectively comparable, nor is justified by overriding reasons in the public interest ('Rule of Reason Doctrine").

Following the ECJ's *Hollmann* ruling, the Portuguese Supreme Court issued a judgement on 16 January 2008 (case 0439/06) annulling the additional tax assessment raised by the Portuguese Tax Authorities applying taxation on the total amount of capital gains realised by a non-resident individual resident in Germany.
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Portugal – Tax reductions for the free zone of Madeira for the period 2007-2020

On 27 June 2007, the European Commission approved a scheme providing tax reductions until 2020 to companies setting up in the free zone of Madeira between 2007 and 2013. According to the scheme, companies, licensed as of 2007 and until 2013, will be subject to a corporate tax rate of 3% (2007 - 2009), 4% (2010 – 2012) and 5% (2013 – 2020), as long as they comply with specific eligibility criteria. Accordingly, Decree Law 13/2008 has changed the

Portuguese Tax Benefits Code in accordance with the approved scheme. This new regime is in force since 1 January 2007.
-- Leendert Verschoor and Jorge Figueiredo, Portugal; jorge.figueiredo@pt.pwc.com

Sweden – Swedish Advance Ruling Board rules that Swedish group relief system is incompatible with EC Law

The Swedish group relief system (*"koncernbidrag"*, group contribution) is designed in such a way that a profitable Swedish company may take a tax deduction for a transfer of funds to another Swedish company, provided that this other company reports the funds received as taxable income. Typically, this other company has incurred a loss and so the tax consolidation effect is achieved. However, the transfer is not deductible where the recipient is not liable to tax in Sweden. The ECJ judgment in *Marks & Spencer* (C-446/03) led to several advance rulings in Sweden indicating that a Swedish parent's transfer of funds (group contributions) to an EU subsidiary was deductible where the subsidiary could not use its losses.

The question then was whether the *Oy AA* case (C-231/05) from last summer would mean that these rulings for Sweden were “wrong", at least going forward. *Oy AA* was denied a deduction in Finland for a group contribution to its UK parent, and the ECJ found that this was not in breach of the freedom of establishement laid down in the EC Treaty.

In September 2007, the Swedish Government concluded that the ECJ judgment in the *Oy AA* case meant that not only the Finnish but also the Swedish group relief system did not in any respect come into conflict with EC Law. Hence, there was no need for an amendment of the Swedish system, the Swedish Government said. This view has recently been shared by the Finnish Supreme Administrative Court in a decision on 31 December 2007 (see EUDTG Newsalert NA 2008-002). The Finnish court was so sure of its correct interpretation that it found it unnecessary to ask the ECJ for any further guidance.

It is thus very interesting to see that on 28 January 2008, the Swedish Board of Advance Rulings came to a completely different conclusion in a similar case. The Board upheld its previous ruling practice and issued a ruling whereby it disagrees with the Swedish Government (and the Finnish Supreme Administrative Court). The losses in a German subsidiary should be offsettable against the taxable profits in the Swedish parent company by way of a group contribution from Sweden to Germany. The Board concluded that the contribution would become deductible upon liquidation of the German subsidiary. The same effect would be achieved if the German company was merged into its Swedish parent, the board stated. Such mergers will become possible under Swedish company law as from 15 February 2008.
-- Fredrik Ohlsson and Sven Erik Holmdahl; Sweden; gunnar.andersson@se.pwc.com

Back to top

EU DEVELOPMENTS

Estonia and Germany - European Commission starts infringement proceedings regarding the taxation of dividends paid to foreign pension fund

On 31 January 2008, the European Commission announced that it has sent Letters of Formal Notice (the first step of the Article 226 infringement procedure under the EC Treaty) to Germany and Estonia about their rules under which dividends (and in the case of Germany also interest) paid to foreign pension funds may be taxed more heavily than dividends (and interest) paid to domestic pension funds. The Commission considers the different treatment incompatible with the free movement of capital and the freedom to provide services. Germany and Estonia are asked to reply within two months.

The Commission's decision follows a complaint lodged with the Commission in December 2005 by the European Federation for Retirement Provision (EFRP). Based on a study by PwC's EUDTG, the EFRP concluded that a large number of Member States discriminate against foreign pension funds as they are subject to higher (withholding) taxes on dividends and interest than domestic pension funds. If a Member State acts in such a way it may dissuade foreign pension funds from investing in that Member State. Equally, it makes it more difficult for companies to attract capital from foreign pension funds. The Commission has already sent similar letters to the Czech Republic, Denmark, Finland, Italy, Lithuania, The Netherlands, Poland, Portugal, Slovenia, Spain and Sweden, and it is still examining the French situation
-- Gitta Jorewitz and Juergen Luedicke, Germany; juergen.luedicke@de.pwc.com

Germany - European Commission formally requests Germany to end discriminatory rules applied to non-resident taxpayers - mainly artists, sportsmen and journalists

On 31 January 2008, by means of a Supplementary Reasoned Opinion under Article 226 EC (the second step of the infringement procedure under the EC Treaty), the European Commission has formally requested Germany to modify the withholding tax system applied at source on the income of certain categories of non-resident taxpayers – particularly artists, journalists and sportsmen. Following the Reasoned Opinion of March 2007 (see also EU Tax News 2007 - no. 003), Germany introduced in April 2007 a restricted possibility to deduct business expenses from the gross income and increased the withholding tax rate from 25% to 40% where business expenses were allowed for deduction. On the other hand, similar German resident tax payers are allowed to declare their net (deduction of business expenses taken into account) income annually. The Commission considers that the new restricted possibility to deduct business expenses and the increased withholding tax rate are incompatible with the principle of freedom to provide services in the EU. If the relevant national legislation is not amended in line with EC Law, the Commission may refer the matter to the ECJ.
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Germany - European Commission formally requests Germany to end its discriminatory depreciation rules applied to buildings situated abroad

On 31 January 2008, the European Commission announced that it has sent a Reasoned Opinion to Germany requesting it to modify its legislation on reducing-balance ("degressive") depreciation for wear and tear on buildings. According to German law (Sec. 7 (5) EStG), reduced balance depreciation is only applicable to buildings situated in Germany. The Commission considers this limitation incompatible with the principle of free movement of capital. Although the provision was repealed for all buildings acquired or constructed after 1 January 2006, the Commission's continuing the infringement procedure as depreciation for wear and tear pursuant to Sec. 7(5) EStG have an effect for a period up to 18 years. If the national legislation is not amended in line with EC Law, the Commission may decide to refer the matter to the ECJ.
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Italy – European Commission refers Italy to ECJ over discriminatory taxation of outbound dividends (C-540/07, Commission v Italy) case

Italy has been referred to the ECJ by the European Commission for the discriminatory taxation of dividends distributed to companies resident in the EU and the EEA compared to the taxation of dividends paid out to companies resident in Italy. The Commission's action follows the Reasoned Opinion C(2006)2544 that was sent to Italy on 28 June 2006.

Pursuant to the Italian tax legislation in force until 31 December 2007, dividends paid out to foreign companies, except those within the scope of Directive 90/435/EEC, were subject to a withholding tax equal to 27% of the gross amount (this rate was reduced to a lower percentage in the case of application of a Tax Treaty concluded by Italy and the State of residence of the beneficiary). However, domestic dividends were taxed on only 5% of their gross amount at the ordinary tax rate of 33% (the levy on these dividends was, therefore, equal to 1.65% of their gross amount).

The Commission considered that the Italian tax rules providing for a heavier taxation of the outbound dividends compared to domestic ones may be in breach of the free movement of capital (Article 56 EC and Article 40 EEA), since they may have the joint effect of discouraging EU/EEA entities to invest their capital in Italian companies and make it more difficult for the same Italian companies to raise capital abroad. Moreover, the Commission held that the Italian rules may also be in breach of the right of establishment under Article 31 EEA, as the 27% withholding tax is also applicable to dividends paid out to companies established in EEA States with a participation granting the control in Italian companies (in cases where the Parent-Subsidiary Directive does not apply).

It should be borne in mind that, to remove the incompatibility of the legislation with EC Law, on 24 December 2007, the Italian Parliament enacted the Financial Bill of 2008 which provides for, amongst other things, some amendments to the Italian legislation on outbound dividends. In particular, the Financial Bill provides for the application of a 1.375% withholding tax (instead of the 27% withholding tax) on dividends distributed to non-resident companies or entities which are (i) subject to corporate income tax in their State of residence and (ii) resident in a EU State or EEA State included in a “white list” based on the exchange of information criterion (to be issued by Ministerial Decree).

The new regime will be applied to profits accrued starting from the tax period subsequent to 31 December 2007. Therefore, with reference to companies and entities having the tax period of the calendar year, the 1.375% tax-rate will apply to profits accrued from 1 January 2008 and generally distributed from 1 January 2009.

The amendments do not completely remove the discriminatory effects produced by the legislation in force until 31 December 2007, as they do not apply to the profits accrued before 2008. In addition, for profits accrued starting from 2008, it seems that some EU/EEA entities, such as investment funds and pension funds, can not benefit from the new reduced tax-rate.
-- Claudio Valz, Italy; claudio.valz@it.pwc.com

Latvia – European Commission takes steps against Latvia regarding its discriminatory taxation of dividends paid to non-resident individuals

On 28 February 2008, the European Commission announced that it has sent a request for information in the form of a Letter of Formal Notice (the first step of the infringement procedure under Article 226 EC) to Latvia about its rules under which dividends paid to non-resident individuals may be taxed more heavily than dividends paid to residents. Latvia exempts domestic dividends paid to resident individuals from taxation. However, dividends paid to non-resident individuals are subject to a withholding tax of 10%. The Commission considers that there may be a breach of the free movement of capital, as protected by Article 56 of EC Treaty and Article 40 EEA. Latvia has two months to reply to the Commission. If the Commission deems the action taken by Latvia unsatisfactory, it may decide to take further legal steps under Article 226.
-- Zlata Elksnina, Latvia; zlata.elksnina@lv.pwc.com

Lithuania – European Commission takes steps against Lithuania regarding its discriminatory taxation of outbound interest

On 28 February 2008, the European Commission announced that it has sent a Reasoned Opinion (the second step of the infringement procedure under Article 226 of the EC Treaty) to Lithuania about its rules under which interest paid to foreign companies, investment funds and pension funds is taxed more heavily than interest paid to comparable domestic recipients. Since the Lthuanian Government has notified a change to the rules concerning the taxation of dividends paid to non-resident recipients after it had received a Letter of formal notice already, the Commission’s action is only concerned with incompatible rules regarding the taxation of interest. Lithuania has two months has two months to reply to the Commission. If the Commission deems the action taken by Lithuania unsatisfactory, it may decide to refer the Member State to the ECJ.
-- Kristina Bartuseviciene, Lithuania; kristina.bartuseviciene@lt.pwc.com

Spain – European Commission sends Spain a formal request to amend its discriminatory anti-abuse rules in the Corporate Income Tax

On 28 February 2008, the European Commission announced that a formal request to amend discriminatory anti-abuse rules had been sent to Spain, arguing that Spain taxes more heavily certain incomes from specific Member States than domestic income. The Commission considers that these rules are not compatible with the freedoms of the EC Treaty. The request is in the form of a Reasoned Opinion and, if Spain does not amend its Law within two months, the Commission may refer the case to the ECJ.

Spanish tax implications for inbound dividends
Under the Spanish Corporate Income Tax (CIT) Act, the current situation can be summarized as follows:

- *Domestic dividends*: 100% tax credit when an interest of at least 5% is held for 12 months. Otherwise, 50% tax credit would apply
- *EU inbound dividends*: Full participation exemption when:
  - (i) a Spanish company owns, for 12 months, more than 5% of the capital in an EU company
  - (ii) that company is subject to a tax analogous to the Spanish CIT (requirement fulfilled when the subsidiary benefits from a double tax treaty with Spain with an exchange of information clause); and
  - (iii) the distributed dividends are derived from active business activities outside of Spain. If only requirement (i) is met, a tax credit could apply.

The abovementioned participation exemption and credit do not apply in the case of EU tax haven subsidiaries. The Commission considers that this different treatment constitutes a restriction on the movement of capital in violation of Article 56 of the EC Treaty.

Other discriminations: CFC rules and non-deductibility of depreciation provision
Under certain conditions, the profits of a subsidiary established in an EU tax haven are included in the Spanish company's taxable base as these profits arise (Spanish CFC rules). However, in the case of a subsidiary established in Spain or other EU Member State, profits would only be taxed as they are distributed.

Regarding the portfolio depreciation provision, Spanish legislation allows the deductibility of depreciation provisions on participations in subsidiaries, except where such subsidiaries are tax haven residents, unless such entities consolidate their accounts with those of the Spanish parent.
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Switzerland and EU – Update on bilateral dialogue on disputed Swiss company tax regimes

On 23 January 2008, representatives from Switzerland and the European Union resumed their dialogue in Brussels on the EU's assessment of certain corporate tax rules in the Swiss cantons. The EU considers these tax rules to be state aid and incompatible with the Free Trade Agreement between Switzerland and the EU of 1972 (FTA). The parties still agree to disagree.

The Swiss delegation emphasised its point of view according to which the FTA is not applicable to the cantonal tax rules in question and that these corporate tax rules do not distort cross-border competition as they are only available to companies which have no or at most subordinate business operations (which are taxed normally). In addition, the working of holding company taxation was discussed in detail. The Swiss delegation considers these rules not to be discriminatory as domestic and foreign revenues are being taxed the same way. The EU delegates in turn provided the representatives from Switzerland with information about forms of company taxation which are accepted by the EU and used in EU member states. A further meeting is likely to take place after Easter.
-- Armin Marti and Robert Desax, Switzerland; armin.marti@ch.pwc.com

CCCTB - common consolidated corporate tax base

Commission issues new Working Papers 63 and 64

Since our EUDTG Newsalert NA 2008-004 of 25 January 2008, the Commission has released Commission Working Papers ('WP') 63 and 64. Both Working Papers summarise the last CCCTB Working Group meetings which were held in Brussels on 10/11/12 December 2007. WP 63 summarises discussions of the Commission with Member State experts on 12 December, while WP 64 summarises the consultations which the Commission held on the two preceding days with business representatives and academics and with Member State experts present as observers only.

The main points coming out of WP63 are:

- The Commission's Services ('CS') confirmed that the administrative framework provisions would be included in the CCCTB directive and not adopted through a soft law instrument.
- Some experts favoured an approach including economic activity criteria for the definition of principal taxpayer ('PTP') as they were concerned about having a holding company based in a small MS where the resources could potentially be insufficient to deal with a pan European group. CS responded that in exceptional circumstances, another PTP could be designated by tax authorities (WP 61, para 25).
- As regards thresholds for consolidation, all speakers agreed that one single threshold for both opting and consolidation would be preferable.

The main points coming out of WP64 are:

- Comitology would be used to implement measures laid down in the directive and not to create new measures.
- As regards the possible central body for issuing interpretation of the directive, US experts believe that a single central body issuing common, uniform, even non-

binding, interpretation decisions made by true experts could be of enormous benefit, both to the taxpayer's community and also to tax authorities since different sources of interpretation from different MS would simply be unmanageable. The unique aspect of this body would be the expertise it would build up. It might also be an invaluable reference for domestic courts and the ECJ who will be in a position to issue binding decisions.

- Some clarification of the role of national courts and the European Court of Justice (ECJ) was requested. The CS confirmed that the working paper was suggesting that appeals against administrative decisions should be to the national courts of the principal taxpayer, i.e. those of the Principal Tax Administration. Final appeals would be to the ECJ.
- As regards the formulary apportionment, all speakers agreed that, theoretically intangibles should be included in the property factor of the formula however it is agreed that since the location of that factor is subject to manipulation and valuation is problematic, it would be advisable to exclude them from the formula.

Other items

On 22 and 23 February 2008, a conference to discuss the CCCTB was organised by the Vienna University of Business and Economics. This conference was attended by a number of academics and Mr Tom Neale of the European Commission presented an introductory session.

During this session Mr Neale confirmed that the Commission want the format of the CCCTB to be as simple as possible and all technical areas of the proposal are still work in progress. He also confirmed that there will be another meeting with Member State experts in April 2008 and it is expect that further anti-avoidance measures will be discussed at this meeting.

The remainder of the conference was devoted to a number of areas of conceptual difficulty including the use of comitology, methods of consolidation, interaction with 3rd countries etc.

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STATE AID

Italy – European Commission authorises State aid for development of Italy's southern regions

On 25 January 2008, the European Commission decided to authorise Italy to adopt a regional aid scheme in the form of automatic tax credits aiming to support initial investments made by companies in the "Mezzogiorno" regions of Italy. The Commission considered that such aid scheme is compatible with the EC Treaty State aid rules (Article 87 EC Treaty).

The regional aid scheme was introduced by the Financial Bill Law of 2007 (Law no. 296 of 27 December 2006) which established that taxpayers – excepting those operating in credit, finance, insurance and a few other sectors – are entitled to a tax credit for the purchasing of assets (also via leasing) linked to new investment projects resulting in the setting-up of a new establishment, the extension of an existing establishment, the diversification of the output of an establishment into new additional products or a fundamental change in the overall production process of an existing establishment.

The amount of the tax credit is established by the taxpayer himself by applying to the amount of the eligible costs carried out for the purchasing of assets in each fiscal year the regional aid ceiling provided in the Italian Regional Aid Map (which defines the regions of a Member State eligible for national regional investment aid for enterprises under EC Treaty state aid rules and establishes the maximum permitted levels of such aid in the eligible regions) in compliance with the regional aid Guidelines adopted by the European Commission.

The Financial Bill Law of 2007 also provided that the application of the new aid measures was subject to the authorisation of the Commission and, in the meantime, Italy notified the State aid scheme to the Commission, pursuant to Article 88, paragraph 3, of EC Treaty, in order to obtain its consent for the application of this regime. The Commission authorised Italy to apply the regime to the investment expenditure incurred from 1 January 2007 to 31 December 2013, in line with the validity of the Italian Regional Aid Map, approved by the same Commission on 28 November 2007 and entered in force as from 1 January 2007. After the approval by the Commission, Law no. 31 of 28 February 2008 modified the Financial Bill Law of 2007 providing that the State aid regime is applicable with retroactive effect starting from 1 January 2007.

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Spain – European Commission authorises Spanish corporate tax deduction aimed at promoting R&D

The European Commission has authorised, under the EC Treaty State Aid rules, a Spanish corporate tax deduction of 50% for revenues stemming from patents, designs, models, plans, secret formulas and processes. The Commission held that such tax incentive is a general measure rather than targeted at a particular type of company or region and therefore does not constitute State aid.

The Commission found that the tax credit would be open to all companies, irrespective of their size, sector or location, and that the public administration had no discretion in applying the measure, as the criteria for its application are objective and defined *ex-ante* in the implementing regulation. Moreover, the overall budget to be spent by the State for the measure is not limited and the scheme constitutes a reduction of the tax base rather than a reduction of the tax rate. Therefore, the Commission has concluded that the tax incentive is within the logic of the Spanish tax system.

The Commission's press release reference number is IP/216/08. The non-confidential version of the decision will be published under case number N 480/2007 in the State aid Register on the DG Competition website.

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ABOUT THE EUDTG

The EUDTG is one of PricewaterhouseCoopers' Thought Leadership Initiatives and part of 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 EC Law. The activities of the EUDTG include organising tailor-made client conferences and seminars, performing EU tax due diligence on clients' tax positions, assisting clients with their (legal) actions against tax authorities and litigation before local courts and the ECJ. EUDTG client serving teams are in place in all 27 EU Member States, most of the EFTA countries and Switzerland. See the EUDTG website for more information: www.pwc.com/eudirecttax.

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