E-NEWS

KPMG'S EU TAX CENTRE

E-News from the EU Tax Centre
Issue 56 – October 1, 2015

Please see our website for earlier editions

- Latest CJEU, EFTA and ECHR
- Referrals to CJEU
- State Aid
- EU Institutions
- OECD
- Local Law and Regulations
- Local Courts

Latest CJEU, EFTA and ECHR

France – Groupe Steria SCA v. Ministère des Finances et des Comptes publics (C-386/14)

On September 2, 2015 the Court of Justice of the European Union (CJEU) rendered its decision in the Group Steria case, concluding that the different tax treatment of dividends received by parent companies of tax integrated groups is contrary to EU law. The tax treatment is dependent on the location of the establishment of subsidiaries and the judgment held that the French rules, which allow a French parent company a full exemption in respect of dividends received from domestic subsidiaries within a tax group, while effectively taxing up to 5% of dividends received from shareholdings in EU subsidiaries, are in breach of the freedom of establishment.

For more information, see Euro Tax Flash.

Netherlands – Joined cases Miljoen, X, and Société Générale (C-10/14 , C-14/14, C-17/14)

On September 17, 2015 the CJEU ruled on the question whether Dutch WHT levied on certain non-resident portfolio investors was contrary to EU law. The case concerned WHT levied on dividends distributed to individual portfolio shareholders resident in Belgium and a corporate portfolio shareholder resident in France.

The Court ruled that although the WHT levied on dividends was in principle at the same rate for residents and non-residents, the comparison should take the corporate or personal income tax position of residents into account. In comparing the tax burden, only costs directly related to the collection of the dividends may be taken into account. The court ruled that a provision in a tax treaty can neutralize the discrimination if it results in a full credit of WHT.

For more information, see Euro Tax Flash.

Germany – Timac Agro Deutschland (C-388/14)

On September 1, 2015 the Advocate General of the CJEU gave his opinion in the case of *Timac Agro Deutschland* (Case C-388/14). The Advocate General was of the opinion that the losses of a foreign permanent establishment (PE), which had previously been offset against profits of the German head office, could be recaptured when the PE was transferred, without infringing EU law. He distinguished this case from the Nordea case (C-48/13) on the basis that Germany could not tax the profits of the foreign PE and so did not have to tax the PE in the same way as a domestic PE. Insofar as the foreign PE was comparable with a domestic PE, he considered the recapture to be justified. He also took the view that the 'Marks & Spencer' exception did not apply if the losses remained available to the vendor following the sale of the PE to another group entity.

Sweden – Pensioenfonds Metaal en Techniek v. Skatteverket (C-252/14)

On September 10, 2015 the Advocate General gave his opinion in the case of *Pensioenfonds Metaal en Techniek* (Case C-252/14). The AG concluded that Article 63 and Article 65 do not preclude national legislation which subjects dividend payments to non-resident pension funds to a flat rate withholding tax of 15% while Swedish resident pension funds are subject to a notional yield tax calculated on the net assets of the pension fund. The object of the regime was to ensure uniform taxation over different classes of assets and different economic periods.

The AG considered it fundamental that the objective of the tax regime be considered when deciding if the situation for residents and non-residents was comparable. The AG stated that the objectives of the tax regime for residents would not be fulfilled if the same regime were applied to non-resident investors in Swedish equities and the situations were therefore not comparable.

For more information, see Euro Tax Flash.

Austria – F.E. Familienprivatstiftung Eisenstadt (C-589/13)

On September 17, 2015 the CJEU gave its decision in Case C-589/13 concerning the interim taxation of a private foundation in Austria. The Austrian tax authorities refused to allow the resident private foundation to deduct from its taxable base the amount of gifts made to beneficiaries resident in Belgium and Germany, as the beneficiaries were exempt from Austrian tax under the applicable double taxation conventions. The gifts would have been deductible if the gifts were made to resident beneficiaries who were subject to Austrian tax.

The CJEU held that the difference of treatment according to whether or not the beneficiaries of the gifts are subject to Austrian tax, leads to an unjustified restriction of free movement of capital. Having relinquished its authority to tax gifts to persons residing in other Member States through double taxation conventions, the CJEU stated that Austria cannot rely on a balanced allocation of powers of taxation in order to levy a specific tax on foundations that make gifts to such persons on the basis that they are not subject to its tax jurisdiction. The CJEU also denied a justification on the grounds of the coherency of the national tax regime.

Back to top

Infringement procedures & Referrals to CJEU

Referrals to CJEU

Luxembourg

On June 19, 2015 the Administrative Tribunal of Luxembourg referred a case to the CJEU (C-300/15) concerning the Luxembourgian tax treatment of pension income received by Luxembourgian residents from the Netherlands. Luxembourgian tax legislation provides for a special tax credit for pensioners, applicable to pensions taxable in Luxembourg. The legislation further provides that the credit can only be granted when the taxpayer is able to present a special tax deduction form which is, however, not issued to the taxpayer in the case of a pension payment received from a foreign country. The question referred to the CJEU is whether the principle of free movement of workers precludes the said provisions of Luxembourgian tax legislation, insofar as they restrict eligibility for the tax credit established there to persons in possession of a tax deduction form.

Infringement procedures – Reasoned Opinion

France

On September 24, 2015 the European Commission announced that it had requested France to amend procedural rules regarding the refund of tax deducted at source which was not due on dividends. Since non-residents are entitled to a shorter period for filing an application for reimbursement of withholding tax on dividends than residents for filing an application for reimbursement of income tax paid on dividends, the Commission considers the provisions to be contrary to the principles of equivalence and effectiveness established by the CJEU. The request was sent in the form of a reasoned opinion and may be followed by a referral of France to the

CJEU if France fails to notify the Commission about measures taken for a correct application of EU law within two months.

For more information see the EC Press Release.

Infringement procedures – Referral

Netherlands

On July 26, 2015 the Dutch Supreme Court referred case C-317/15 (*X, Staatssecretaris van Financiën*) to the CJEU. The referred questions were whether an individual resident in Spain whose work-related income is taxed in the Netherlands and Switzerland may deduct his negative income in respect of his property in Spain from his work-related income in the Netherlands, where the Spanish income received is too low for tax relief in the state of residence.

If so, must every Member State in which a citizen earns part of his income take into account the full amount of this negative income, or should there be a partial deduction in each state and how should the deduction be determined? Finally, if income is earned in a third country does this change the determination of the deduction available?

Back to top

State Aid

Commission finds Italian tax reductions for companies in areas affected by natural disasters in breach of State aid rules

On August 14, 2015 the European Commission found certain Italian measures reducing company taxes and social security contributions in areas affected by natural disasters to be incompatible with EU rules on State Aid. Since the companies were neither required to establish how much damage they had suffered nor whether they had suffered any damage at all, the Commission found that the measures under assessment were not “well targeted for the purpose of compensating companies for damages suffered from natural disasters”. The Commission declared that companies that received compensation without having suffered any damage or received excess compensation were granted an undue economic advantage over their competitors, which was in breach of EU state aid rules.

For more information, see EC press release.

Actions in Case T-252/15 – Ferrovial and others v Commission, Case T-253/15 – Sociedad General de Aguas de Barcelona v Commission and Case T-256/15 – Telefónica v Commission

On May 21 and 22, 2015 three Actions were brought against the

Commission Decisions on State aid implemented by Spain (T-252/15, T-253/15 and T-256/15). The contested decision is the same as that in Case T-826/14, *Spain v Commission*, and Case T-12/15, *Banco de Santander and Santusa v Commission* and the pleas and main arguments relied upon are similar to those already raised in those cases. The applicants argue that in finding the Spanish scheme for tax amortization of financial goodwill for foreign shareholding acquisitions to constitute unlawful state aid, the Commission has committed errors of law and assessment in examining the administrative interpretation adopted by the Spanish tax administration. The pleas in law include the failure to state reason; infringement of Article 108 (3) TFEU, as the measure is argued to not constitute new, unlawful and incompatible aid; the failures to limit and to exclude indirect operations from the recovery order; the misuse of powers and an infringement of the principles of equality and legitimate expectations.

Request for preliminary ruling concerning tax exemptions for postal services in Spain

On June 19, 2015 the Spanish judicial review court of Tarragona submitted a request for a preliminary ruling to the CJEU in the Correos y Telégrafos Case (C302-15). The referring court addressed the question whether the granting of tax exemptions in relation to activities of universal postal services is in breach of Article 107 TFEU and Article 7 of the Directive 2008/6/EC with regard to the full accomplishment of the internal market of Community postal services.

Recovery of State aid – CJEU finds compound interest applicable in the Italian Case C-89/14

On September 3, 2015, the CJEU decided on the application of either simple or compound interest to the recovery of State aid in the Italian Case C-89/14. A Commission decision in 2002 declared beneficial tax measures granted by Italy to certain companies in the early 1990s to constitute unlawful State aid and ordered Italy to recover the aid. Italy required one of the companies to repay the State aid received with compound interest. The company contested the application of compound interest.

The CJEU noted in its decision of September 3, 2015 that at the time the Commission ordered recovery of the State aid, EU law did not regulate whether interest should be calculated on a simple or compound basis. It was Commission practice to refer, on that point, to domestic law. Hence, it was for the Italian courts to apply the simple or compound interest method. The CJEU held that the principle of legal certainty precludes a regulation from being applied retroactively to situations which came about before the legislation in question came into force. However, since the incompatible aid at issue had not been recovered or assessed on the date the Italian legislation providing for compound interest entered into force, the provision for application of compound interest has no retroactive effect. Moreover, the Court stated that in consideration of the long delay between the Commission decision in 2002 and the tax assessment issued in 2009, compound interest is particularly appropriate to neutralize the competitive advantage granted.

Appeal in Case C-164/15 P – Aer Lingus and Case C-165/15 P – Ryanair

On April 9, 2015 the European Commission appealed against the judgment of the General Court in Case T-473/12, Aer Lingus Ltd. v European Commission and Case T-500/12, Ryanair Ltd. v European Commission. The Commission requested the judgment be set aside insofar as it held that the Commission decision 2013/199/EU on State aid was annulled regarding the recovery of the aid from the beneficiaries for an amount of EUR 8 per passenger in recital 70 of that decision. As the single ground of appeal, the Commission argues that the General Court has violated Article 108 (3) TFEU and Article 14 of Regulation 659/1999 by creating a new economic test to determine the recoverable amount of granted unlawful State aid.

Action in Case T-314/15 – Greece v Commission

On June 2, 2015 Greece brought an Action against the Commission decision on State aid SA.28876. In Case T-314/15, the Hellenic Republic claims the annulment of the decision on various grounds: infringement of the rights of defense; misinterpretation and misapplication of Article 107 (1) TFEU in relation to the concept of State aid; erroneous, deficient and contradictory statement of reasons with respect to the determination of State aid; misinterpretation and misapplication of Article 107 (3) TFEU in relation to the compatibility of the aid with the internal market and erroneous quantification of the aid as well as infringement of general principles of EU law at the stage of recovery of the aid.

Back to top

EU Institutions

Luxembourg Presidency roadmap for future work on BEPS

On July 8, 2015 the Luxembourg Presidency published the final version of the Presidency roadmap, setting out future work in the Council during the coming months in the field of Base Erosion and Profit Shifting (BEPS).

For more information, see the Presidency roadmap.

Spanish government defends ruling practice to European Parliament Special Committee on Tax Rulings (TAXE)

With its letter of July 15, 2015 the Spanish government defended its ruling practice in reply to an information request from TAXE. The government stated that Spain has already taken significant measures in respect of transparency and exchange of information, as well as anti-base erosion.

For more information, see the reply by the Spanish government.

Proposal for Council decision on amendments to the Savings Agreement with Liechtenstein

On August 7, 2015 the Council published a proposal for amendments to the Savings Agreement with Lichtenstein to ensure it is in line with EU and international developments following adoption of the proposal to repeal the EU Savings Directive (2003/48/EC) from 1 January 2016.

For more information, see the Proposal for a Council Decision.

Speech on the State of the European Union by President Jean-Claude Juncker

On September 9, 2015 the President of the Commission Jean-Claude Juncker gave his speech before the European Parliament on the State of the Union 2015. The President referred to the Commission's Action Plan of June 2015 with respect to the fight against tax evasion and also referred to the Commission's work on a Common Consolidated Corporate Tax Base (CCCTB) and on an agreement on the automatic exchange of information on tax rulings, with the aim of combating tax avoidance.

For more information, see Press Release by the Commission.

EU Commission Country by Country Reporting – public consultation responses published

On September 23, 2015 the EU Commission published the responses submitted in reply to its public consultation on corporate tax transparency in the EU. The aim of the consultation was to gather more information and stakeholder opinions on whether requiring companies to disclose more information about the taxes that they pay in the countries where they operate could help tackle tax avoidance and aggressive tax practices within the EU. A response was also submitted on behalf of the EU resident member firms of KPMG EMA following extensive discussions.

For more information, and a copy of the response submitted by KPMG, see the EU Commission website.

Back to top

OECD

Common Reporting Standard (CRS) implementation handbook

On August 7, 2015 the Organisation for Economic Co-operation and Development (OECD) released three reports to help jurisdictions, government officials and financial institutions implement the global standard for the automatic exchange of financial account information. The reports include the Common Reporting Standard Implementation Handbook as well as reports concerning offshore voluntary disclosure programs and a model protocol for a tax information exchange agreement (TIEA).

For more information, see TaxNewsFlash-Europe.

Global Forum on Transparency and Exchange of Information for Tax Purposes - New compliance ratings

On August 3, 2015 the Global Forum on Transparency and Exchange of Information for Tax Purposes issued new peer review reports regarding the implementation of global standards on transparency and exchange of information for tax. The reports were issued for 12 countries and jurisdictions, including Lithuania.

For more information, see the OECD webpage.

Update on voluntary disclosure programmes handbook

On August 7, 2015 the OECD published the Update on Voluntary Disclosure Programmes: A Pathway to Tax Compliance. The second edition of the handbook reflects the practical experience gained by 47 countries in relation to voluntary disclosure programmes.

Tax Administration 2015 – Tax collection trends in 56 tax administrations

An OECD report – Tax Administration 2015 – reveals information about tax collection among 56 tax administrations. The report notes that tax administrations continue to face challenges of improving their performance.

For more information, see TaxNewsFlash-Europe and the OECD webpage.

IFA 69th Annual Congress in Basel

The International Fiscal Association (IFA) held its 69th Annual Congress in Basel, Switzerland from August 30 to September 3, 2015. The topics included “Tax incentives on research and development (R&D)”, which was discussed in a plenary session commencing the congress, and “The taxation of expatriates”.

For more information, see the IFA congress webpage.

Back to top

Local Law and Regulations

Belgium

Reporting obligations clarified for payments to tax havens, including Cyprus, Luxembourg, Seychelles and British Virgin Islands

On September 3, 2015 the Belgian tax authorities issued an addendum on the circular letter of November 30, 2010 on the reporting obligation for payments to residents in tax havens and the deduction prohibition of those payments in the case of failure to comply with the set standards (see e-Tax Flash December 2010).

This addendum is relevant with regard to Cyprus, Luxembourg and the British Virgin Islands, as Belgium operates an effective exchange of information for tax purposes with these countries, and will also become relevant for the Seychelles, when the Belgium – Seychelles Income Tax Treaty (2006) enters into force.

For more information, see the Belgium e-Tax Flash.

Germany

Proposals for investment taxation, disposals of portfolio investments

On July 22, 2015 Germany's Federal Ministry of Finance released a discussion draft of a law for the reform of investment taxation, which included a fundamental reform of Germany's investment taxation regime. Under the discussion draft, closed-ended investment funds or comparable foreign investment vehicles would be covered by the investment tax law. The current fiscal investment restrictions for investment funds would be waived, at least for mutual funds. The change would especially be intended to provide for separate taxation of investment funds and investors.

For more information, see TaxNewsFlash-Europe and German e-Tax Flash.

Greece

Fulfillment of conditions of Parent-Subsidiary Directive and Interest and Royalties Directive

On July 23, 2015 the Public Revenue Authority of Greece published a circular (POL 1166/2015) concerning the fulfillment of the conditions of the legislation implementing the Parent-Subsidiary Directive and the Interest and Royalties Directive. The circular provides that Greek legal entities paying or receiving dividends, interest or royalties to or from subsidiaries resident in another Member State are required to substantiate that the requirements as laid down in the Directives are met. Based on the circular, the competent Greek body for assessment of the documents is the local office of the tax authority under which the Greek legal entity falls.

Ireland

Irish Revenue publishes update on automatic exchange of information

On August 18, 2015 the Irish Revenue released an update concerning the automatic exchange of information. The update covers issues initiated by the Foreign Tax Compliance Act (FATCA) agreement signed with the US, the national implementation of the Common Reporting standards (CRS), the national implementation of EU Directive on Administrative Cooperation (2011/16/EU) and the repealing of the EU Savings Directive.

For more information, see the Irish Revenue webpage.

Taxation of unit trusts and offshore funds

On September 11, 2015 the Irish Revenue released a newsletter on the updates in the Tax and Duty Manual (TDM), as regards the taxation of unit trusts and offshore funds. Based on the Manual, payments from a distributing fund are subject to income tax and payments by such funds in respect of a disposal are subject to capital gains tax, whereas payments by non-distributing funds in respect of a disposal are subject to income tax.

For more information, see Irish Revenue's eBrief 87/15.

Luxembourg

Corporate tax changes proposed for 2015–2016

The text of a corporate tax bill proposing changes to Luxembourg's corporate tax regime was published on August 5, 2015. The proposed changes include the national implementation of the amendments made to the EU Parent-Subsidiary Directive with special regard to the domestic participation exemption regime and the refusal of a withholding tax exemption in cases of "abuse of law". Other proposed changes concern the domestic rules on tax groups and investment tax credit.

For more information, see Luxembourg e-TaxFlash.

Guidance and rules for issuing tax residence certificates to Luxembourg investment funds

The Luxembourg Tax Authorities have issued a circular (L.G.- A. n°61) regarding the new rules on the issuance of tax residence certificates and the access to a double tax treaty for Luxembourg Undertakings for Collective Investment (UCIs) and Specialized Investment Funds. The circular confirms that if a double tax treaty is applicable to a SICAV/SICAF, a certificate can be issued on that ground. For SICAVs/SICAFs not entitled to treaty benefits, the Circular provides a new opportunity to obtain a certificate based on Luxembourg domestic tax law when their statutory seat or central administration is located in Luxembourg. The new circular provides an opportunity for FCPs to obtain a certificate in the context of some DTTs which consider them as individuals or residents.

For more information, see Luxembourg e-alert – Issue 2015-07.

Netherlands

Dutch budget proposal for 2016

On September 15, 2015 the Dutch Cabinet presented its budget proposal ('2016 Tax Plan') to the Lower House. The Cabinet's aim is for many of the proposed measures to take effect on January 1, 2016.

The Plan provides for the national implementation of the anti-hybrid and general anti-abuse provisions recently added to the EU Parent-Subsidiary Directive. The proposed amendments are not limited to the EU/EEA. Furthermore, the Plan contains a proposal on the implementation of Action 13 of the OECD/BEPS project, concerning new documentation and reporting obligations for multinational enterprises, and the corresponding amendments in the EU's Mutual Assistance Directive. The Plan also provides for the transposition of the EU and OECD initiated Common Reporting Standards (CRS) into national legislation.

The Tax Plan 2016 contains no proposals in respect of amendments to the Dutch fiscal unity regime, despite the recent bill that serves to widen the scope of the fiscal unity to also cover fiscal unities between sister companies and those between a parent and a sub-subsidiary. The bill was initiated by case law rendered by the CJEU and the Amsterdam Court of Appeals, and the Dutch Council of State also recently issued an opinion on this. The presentation of the bill to the Lower House may have been delayed due to CJEU's recent judgment in the *Groupe Steria* case (C-386/14), which provides possibilities for claiming, in cross-border situations, certain benefits available under the fiscal unity regime. Until the bill has been presented and enters into force, the approvals given in a decree dating from the end of 2014 can be relied on.

For further information see the following memorandum prepared by the KPMG member firm in the Netherlands.

UK

KPMG launches discussion document on a common framework for disclosing tax information

KPMG in the UK has published a discussion document "Developing a common framework for disclosing tax information" which sets out a potential framework for companies to consider when publishing tax information. It is the result of a series of discussions KPMG has held with a number of leading UK-headquartered multinational groups on this issue. The document discusses whether a standard approach to present tax data might be possible. It identifies some issues with simply making public the soon-to-be-mandatory OECD Country-by-Country Reporting template and considers whether accounting rules could be changed to include country-by-country reporting, acknowledging pros and cons of either approach.

For more information, please see the discussion document prepared by the KPMG member firm in the UK.

KPMG AEOI tool

The OECD Common Reporting Standard (CRS) for the Automatic Exchange of Information (AEOI) will see a significant increase in the customer due diligence and reporting obligations of financial institutions across the world. This will be implemented across the EU through the Directive on Administrative Cooperation (DAC). KPMG in the UK has invested in a global AEOI technology solution designed to cut the cost, resource and the risk of complying with new regulations. The technology solution is designed to provide a comprehensive platform whereby financial institutions can manage the different reporting requirements for multiple jurisdictions and entities across their business, while dealing with concerns faced in respect of the security of customer data.

Further information on the KPMG AEOI tool can be found here.

US

Washington DC to enact list of tax havens

Washington DC has issued a statutory list of jurisdictions that are designated as tax havens for state tax purposes, by enacting the Combined Reporting Clarification Amendment Act of 2015. The listed tax haven jurisdictions include Luxembourg and Malta. Pursuant to the Budget Support Act, the list will be reviewed by the Washington DC Council semiannually or as needed.

For more information, see Title VII, Subtitle P in the Fiscal Year 2016 Budget Support Act.

Back to top

Local Courts

Finland

German real estate investment fund tax exempt in Finland

In August 2015, the Helsinki Administrative Court granted a withholding tax refund to a German real estate investment fund. The fund was an open-ended, non-UCITS fund (*Spezial-Sondervermögen*) established under German law. The Court concluded that the fund was objectively comparable to a Finnish real estate investment fund, tax-exempt under Finnish tax legislation. Thus, levying a tax from the German fund on its Finnish-sourced real estate investment income was considered to be contrary to the free movement of capital. The Court also pointed out that the Finnish tax could not be credited in Germany due to the income being tax-exempt under German rules. The ruling clarifies the Finnish tax position of German real estate investment funds and other foreign non-UCITS investment funds, although comparability to Finnish tax-exempt funds is analyzed on a case-by-case basis.

For more information, see TaxNewsFlash-Europe.

France

Applicability of French social security legislation to a Dutch employee

On July 27, 2015 the Supreme Administrative Court issued its follow-up decision in CJEU's *De Ruyter* case (C-623/13). The Court ruled that only the legislation of a single Member State applies in matters concerning social security. As the taxpayer was employed by a Dutch company without a branch or a permanent establishment in France, he was considered to carry out his activities in the Netherlands. Thus, only the Dutch social security legislation was applicable even though he lived, and was a tax resident, in France.

Back to top

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