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4 July 2013

ECJ issues decision in Argenta case

The Court of Justice of the European Union (CJEU) has, this morning of 4 July 2013, issued its judgment in the **Argenta Spaarbank case (C-350/11)**.

The CJEU followed the Advocate-General's advice and decided that the freedom of establishment principle is violated by a rule for calculating the notional interest deduction (NID). This rule states that the net assets of a permanent establishment (PE) located abroad, the income of which is tax exempt in Belgium, have to be excluded from the NID calculation basis.

The facts

Article 205*ter* ITC allows corporate taxpayers to claim NID on their net equity. Certain items however, have to be excluded from this net equity, such as the value of net assets invested in a PE located in a country with which Belgium has a tax treaty, thereby exempting the PE income in Belgium.

Notwithstanding this exclusion, Argenta Spaarbank claimed NID on its Dutch PE's net assets for tax year 2008. The tax authorities refused to grant this NID and the case was brought before the Antwerp Court of First Instance. On 24 June 2011, the Antwerp Court referred a prejudicial question to the CJEU, i.e. whether the exclusion of the Dutch PE's assets violates the freedom of establishment principle laid down in Article 43 of the EC Treaty (now Article 49 in the Treaty on the Functioning of the European Union).

Against the taxpayer and the Commission, the Belgian Government argued during the proceedings that there is no violation; even if there would be one, it would be justified by the need to preserve the Belgian tax system's coherence and equal distribution of taxation power among Member States.

In his opinion to the CJEU, issued on 19 September 1992, Advocate-General Mengozzi suggested that the NID rule's violation of the freedom of establishment principle was a viable conclusion. On the one hand, taxpayers with a PE in Belgium (or a PE from which the income is not exempt in Belgium) are treated differently to taxpayers with a PE in another Member State and from which the income is exempt in Belgium. On the other, there is no sufficient justification for such restriction on freedom of establishment.

The CJEU

The CJEU has followed the Advocate-General's opinion and found the provision contrary to EU law. The decision should not only impact Belgian companies with a PE in another EU Member State but also those with a PE in 2 of the 3 EEA Member States, Iceland and Norway.

The judgment does not contain any limitations as to its temporal scope of application.

Based on the court's reasoning, it seems likely that the provision excluding real estate (that is not part of a PE), located abroad and from which the income is exempt in Belgium, would also be considered contrary to EU law. It remains to be seen how and when the Belgian Government will adapt its legislation to comply with this decision. The day before yesterday, 2 July 2013, in reply to an oral question, the Minister of Finance stated in the Finance Committee of the House of Representatives, that the CJEU decision needs to be examined in detail before commenting on its consequences.

Please get in touch with your usual Deloitte contact for further information.

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