EU Tax News

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EU Court of Justice (CJEU) Cases

Austria – CJEU referral on the amortization of goodwill within a tax group

On 10 February 2014, the Administrative High Court of Austria asked the CJEU in Case C-66/14 whether the Austrian goodwill amortization system - which provides for a 15 years straight-line amortization of goodwill resulting from the acquisition of domestic tax group members with an active business - is in line with EU law, in particular with the freedom of establishment (Art. 49-54 TFEU), and also whether the provision constitutes illegal State aid, which was not part of the discussions at the level of the Independent Fiscal Senate (see also: EU Tax News Issue 2013 – 003).

Specifically, the fact that only corporations which purchase participations in domestic companies (and establish a tax group) are eligible for the goodwill amortization might make the scheme selective. In addition, the general exclusion of individuals, partnerships, corporations not eligible for group taxation (e.g. foundations) and corporations with shareholdings below 50 % could also raise selectivity issues. If the CJEU confirms the selectivity of the goodwill scheme, it is questionable whether the approach can be justified or not.

If the CJEU were to conclude that the Austrian goodwill amortization scheme violates both the EU freedom of establishment and the State aid rules, the legal consequences are unclear. While an infringement of fundamental freedoms tends to be resolved by extending the scope of the measure, an infringement of the State aid rules in most cases entails the recovery of the benefits received by the beneficiaries.

-- Richard Jerabek, PwC Austria; richard.jerabek@at.pwc.com

United Kingdom – CJEU Judgement on UK cross-border consortium relief rules: Felixstowe

On 1 April 2014, the CJEU published its judgement in Case (C-80/12) Felixstowe Dock and Railway Company Ltd and Others v HMRC. The Court held that the former requirement in the UK consortium relief rules that the link company (see below) must be UK resident or carry on a trade in the UK through a permanent establishment (PE) is, where the link company is an EU/EEA non-UK company, an unlawful restriction of the freedom of establishment (Art.49-54 TFEU). This is despite the fact that the group in question had non EU/EEA country companies in the ownership chain of the link company and the UK claimant companies, and the ultimate parent of the group is also a non EU/EEA company.

Under the UK consortium relief rules, losses of one company can be offset against the profits of another company where one of these companies is owned by a consortium and the other is in the same group as one of the consortium members. This consortium member is referred to as the “link company” (i.e. the company which is both a member of the group and of the consortium).
Prior to Finance (No 3) Act 2010, it was a necessary requirement for the link company to be either UK resident or to carry on a trade in the UK through a PE. In the Felixstowe case, Hutchison 3G UK Ltd was a loss making UK company which was owned by a consortium. One of the consortium members was Hutchison 3G UK Investments Sarl, a Luxembourg company which was a member of the same group as Felixstowe and other UK companies. These UK companies sought to set the losses of Hutchison 3G UK Ltd against their profits, but these claims were denied by the UK Tax Authorities on the basis that Hutchison 3G UK Investments Sarl (the link company) was not resident in the UK and did not have a PE in the UK.

At the First Tier Tribunal, a question was referred to the CJEU as to whether the former UK consortium relief legislation was compatible with the freedom of establishment. In its judgement of 1 April 2014, the CJEU ruled that the UK residence/PE condition for the link company gave rise to a difference in treatment between resident companies connected by a UK company and resident companies connected by a company in another EU Member State (without a UK PE) which constitutes a restriction of the freedom of establishment which cannot be justified.

This case returned to the UK First Tier Tribunal to determine how to apply the CJEU decision to Felixstowe’s facts, which decided the EU law point in favour of the taxpayer on 12 May 2014. Following this judgement, groups with similar structures should consider making claims for relief, if they have not already done so.

-- Peter Cussons, Juliet Trent and Chloe Paterson, PwC United Kingdom; peter.cussons@uk.pwc.com

United Kingdom – CJEU judgement on UK action against Council decision authorising enhanced cooperation in the area of FTT: United Kingdom v Council

On 30 April 2014, the CJEU dismissed the UK’s request to the CJEU to annul a Council decision authorising eleven Member States to use the enhanced cooperation procedure to set up a financial transaction tax (‘EU FTT’). The UK considered that the contested decision authorises the adoption of an FTT which produces extraterritorial effects. It further maintained that, read together with other directives on mutual assistance and administrative cooperation in the area of tax, the FTT would impose costs on non-participating EU Member States.

The CJEU held that, in the context of an action for the annulment of a decision which authorises enhanced cooperation, the CJEU’s review is related to the issue of whether the granting of such authorisation is valid. That review must not be confused with the review which may be undertaken, in the context of a subsequent action for annulment, of a measure adopted for the purposes of the implementation of the authorised enhanced cooperation.

The CJEU found that the contested decision does no more than authorise the establishment of enhanced cooperation, but does not contain any substantive element on the EU FTT itself. It ruled that the elements of a future EU FTT challenged by the UK are
in no way constituent elements of the contested decision. They are solely contained, at this stage, in the European Commission’s proposals of 2011 and 2013.

The CJEU also found that the contested decision contains no provision on the issue of expenditure linked to the implementation of enhanced cooperation. That issue can therefore not be examined before the introduction of the EU FTT.

That being the case, the CJEU considered that the two arguments put forward by the UK are directed at elements of a potential EU FTT and not at the authorisation to establish enhanced cooperation, and that consequently those arguments must be rejected as premature and the action must be dismissed.

-- Peter Cussons, PwC United Kingdom, and Bob van der Made, PwC Netherlands; peter.cussons@uk.pwc.com

**National Developments**

**Belgium – Belgium ends discriminatory treatment of foreign-held regulated savings deposits**

The CJEU rendered its decision in Case C-383/10 *Commission v Kingdom of Belgium* on regulated savings deposits on 6 June 2013. According to that regime, the Belgian Income Tax Code exempted withholding tax interest on Belgian regulated savings deposits below a threshold of EUR 1,250 per annum (EUR 1,880 for tax year 2014). Above this threshold, a withholding tax of 15% was levied (instead of the common tax rate of 25%).

The CJEU considered this withholding tax exemption to be discriminatory since it was not applicable to interest arising from regulated savings deposits held with a financial institution established outside of Belgium.

On 23 January 2014, the Constitutional Court (Case 7/2014, judgment Kleynen) ruled that the reduced withholding tax of 15% discriminated against foreign financial institutions.

The Belgian legislator issued the Act of 25 April 2014, which was published in the Belgian Official Gazette of 7 May 2014, in order to comply with the CJEU’s and Constitutional Court’s decisions. The Belgian Income Tax Code now specifies that the withholding tax exemption and rate reduction (when the threshold is not met) on savings deposits also apply to savings deposits held with financial institutions from EU/EEA Member States provided that the savings deposits characteristics are similar.

-- Patrice Delacroix and Olivier Hermand, PwC Belgium, patrice.delacroix@be.pwc.com
Germany – Federal Fiscal Court decision on tax deductibility of donations made to a foreign charity

On 12 March 2014, the German Federal Fiscal Court published its decision I R 16/12 of 17 September 2013 by which the judges denied the tax deductibility of a EUR 10,000 donation made by a German GmbH to an Italian charity. The charity’s purpose was to build a Russian Orthodox Church in Rome, to promote the teachings of this religion and provide social aid to the members of the Russian Orthodox community.

Under the German corporate income tax act a donation made by a German corporation to a charity with its seat in a foreign EU/EEA member state is - besides other requirements - only tax deductible if the foreign charity fulfils all conditions which an entity with taxable income from Germany must meet to be qualified as a personally tax exempt charity.

One of the requirements for a tax exempt charity is a stipulation in its articles providing that in case the entity is dissolved or its purpose no longer pursued, all assets exceeding the contributions of the members must be used for a tax-privileged purpose or transferred to another entity with such purpose.

However, the articles of the Italian charity did not fulfil these requirements. So the Federal Fiscal Court held that the donation was not tax deductible at the level of the donor. Moreover, the court found that the requirements of German corporate income tax law concerning the articles of the charity did not infringe the free movement of capital (Art. 63 TFEU) since they would also apply in a purely domestic situation and the CJEU decisions in the Persche (C-318/07) and Stauffer (C-386/04) cases did not oblige a member state to modify its laws on the tax benefits connected with charitable organisations in cross-border situations.

-- Björn Bodewaldt and Jürgen Lüdicke, PwC Germany; bjoern.bodewaldt@de.pwc.com

Germany – Federal Fiscal Court decision on final losses

On 5 February 2014 (published 23 March 2014), the German Federal Fiscal Court (Bundesfinanzhof, BFH) rendered its judgment in the case I R 48/11 about final losses. The claimant was a German GmbH with a PE in Belgium. In the fiscal year in dispute (1999), the GmbH sold the PE intra-group to a Belgian NV. Both the sale and the activities of the PE led to a loss in the year in dispute. The GmbH claimed that the losses incurred in 1999 were “final” in the sense of Lidl Belgium. The Lower Fiscal Court shared this view and decided in favour of the plaintiff. In the appeal proceedings, the BFH upheld the decision and added some clarifications to its own former judgments dated 9 June 2010 (I R 100/09, I R 107/09).

1. The “randomness” of loss deduction

The German Tax Authorities argued that the taxpayer is able to choose in which state the losses can be deducted by “artificially” creating final losses. The BFH stated that the general anti abuse regulation (Sec. 42 of the German General Tax Code) is applicable but
in the specific case there was no implication to assume an abuse. Even the intra-group sale of the PE does not hinder the fact that the losses are final.

2. *In abstracto possibility of reopening another PE*

The second argument of the tax authorities was that the GmbH is able to open another PE to make the losses usable in Belgium. The BFH decided that the taxpayer is obliged to prove the fact that the losses are final. In the case at hand there was no evidence that the GmbH planned to reopen another PE nor that the GmbH had actually reopened another PE. Thus, the losses had to be considered as final. It should be noted, however, that German law provides the possibility for the tax authorities to reassess the tax in the future without any time limit if the losses become usable again in Belgium.

-- Ronald Gebhardt and Jürgen Lüdicke, PwC Germany; ronald.gebhardt@de.pwc.com

**Italy – Provinical Tax Court decision on taxing of capital gains on shares realized by non-resident taxpayers**

In March 2014 the Provincial Tax Court of Pescara concluded that the tax regime that Italy applies on the capital gains on shares realized by non-resident taxpayers is in breach of EU law. Based on the Italian law, capital gains realized by foreign shareholders upon the sale of Italian shares are taxable in Italy. However, under most of the double tax treaties (DTT) concluded by Italy, they are taxed only in the State of residence of the shareholder.

The case concerned a French resident company that owned a full participation in an Italian company. The French parent sold the shares and in line with the Italian tax code and the DTT between France and Italy paid corporate income tax on 40% of the capital gain thereby realized. The taxpayer thereupon filed a refund claim for the tax paid arguing that the Italian legislation infringed the freedom of establishment because, had he been a resident in Italy, he would have benefited from the participation exemption regime, meaning a payment of the corporate income tax only on 5% of the capital gain realised.

Since the tax authorities did not reply to the refund claim within the prescribed deadline, the company filed an appeal with the Provincial Tax Court of Pescara. That Court upheld the taxpayer’s arguments and ordered the Italian Tax Authorities to refund the French parent company the difference between the tax actually paid and the tax it would have paid had it been resident in Italy plus late payment interest. The Tax Court, therefore, applied the reading down approach.

-- Claudio Valz and Luca la Pietra, PwC Italy; claudio.valz@it.pwc.com

**Sweden – Advance Tax Ruling Board decision on EU law compatibility of interest deduction limitation rules**

Sweden introduced tightened interest deduction limitation rules on 1 January 2013. As previously reported (see [EU Tax News Issue 2013 - nr 003](#)), the European Commission has doubts whether the rules are compatible with the freedom of establishment (Art. 49-
54 TFEU). This matter was debated heavily in Sweden. It is still unknown what the final position of the Commission will be.

In two rulings dated 16 April 2014 (case no 71-13/D) and 29 April 2014 (case no 80/13-D), the Swedish Advance Tax Ruling Board concluded that interest deductions on two loans from two EU companies (located in Belgium) would not be granted under the new rules. The reason for this was the circumstances surrounding the loans, and the fact that the corresponding interest income would be effectively taxed below the Swedish corporate income tax rate (22%). The effective tax rate of the two Belgian companies would be either 13.3% or below 10%. The Advance Tax Ruling Board concluded that this made it likely that the loans had been put in place mainly for tax reasons. The interest deductions were therefore rejected.

The Advance Tax Ruling Board also concluded that the deductions that were denied in these two cases did not breach EU law. The Advance Tax Ruling Board referred to the Supreme Administrative Court’s similar conclusion in five judgments (HFD 2011 ref. 90 I-V) regarding older rules (see EU Tax News Issue 2012 – nr 001). In those judgments the Supreme Administrative Court said that the Swedish rules treated interest payments to Sweden and abroad in the same way and under the same set of rules. The Advance Tax Ruling Board made the same assessment for the 2013 rules. CJEU case law of a later date, in particular C-318/10, SIAT and C-282/12, Itelcar) did not change the Board’s view. Appeals against the Board’s rulings have been lodged with the Swedish Supreme Administrative Court.

-- Fredrik Ohlsson and Gunnar Andersson, PwC Sweden; gunnar.andersson@se.pwc.com

United Kingdom – High Court judgement on Littlewoods compound interest claim

The High Court has recently found for the taxpayer in the case of Littlewoods Retail Ltd and Others [2014] EWHC 868 (Ch), ruling that the taxpayer’s claim for compound interest succeeded in full.

Littlewoods Retail Limited and Others claimed a refund of overpaid VAT in respect of commissions on mail order sales. This VAT was repaid together with simple interest due under VAT Act 1994. The taxpayer then argued that the simple interest they received was not adequate and that they were entitled to compound interest both as a matter of EU law and also as a matter of English domestic law.

The matter of whether EU law required payment of compound interest was referred to the CJEU which in summary ruled that under EU law the taxpayer is entitled to an "adequate indemnity" for being out-of-pocket for the unlawful tax, in addition to the San Giorgio right to the recovery of the unlawful tax itself. Accordingly the matter of whether the UK’s interest provisions comply with general EU principles was then returned to the UK High Court, which found on 28 March 2014 that "adequate indemnity" necessitated an amount of interest which reflects Littlewoods' loss of the use of the value of the overpaid tax, and accepted compound interest at the government’s borrowing rate as a
proxy for this. The High Court also said that the VAT Act 1994 simple interest provisions could not be "read down" so as to give an entitlement to compound interest, and accordingly the VAT Act 1994 prohibition on claims for repayment of VAT being other than to HMRC under the VAT Act 1994 had to be disapplied, allowing a common law claim for the compound interest to be made.

HMRC has received permission to appeal the judgement to the Court of Appeal. It is anticipated that this case will probably go on to the Supreme Court, so it will be 2-3 years until we have finality from even a VAT perspective. However, because of time limitation periods, it is important that clients review historic VAT claims that they have made, particularly Fleming claims, and consider whether they have adequately protected their position so that compound interest would be available. We also consider that a similar analysis can be applied to direct tax, where generally currently the only route to a repayment of direct tax overpaid including on TFEU law grounds is via the Taxes Acts and with only simple interest.

-- Peter Cussons, Juliet Trent and Chloe Paterson, PwC United Kingdom; peter.cussons@uk.pwc.com

UK – High Court Order in the CFC & Dividend GLO

Following the judgement in the Prudential test case for the CFC and Dividend GLO, Judge Henderson's order on tax charged (the former Schedule D Case V) on foreign (mainly portfolio) dividends has come to our attention. Paragraph 1 includes the following key points:

"B: The legislation should be interpreted so as to entitle the Claimant to a tax credit to set against DV tax charged on Portfolio Dividends.

C: The appropriate amount of the tax credit is credit for underlying tax actually paid or credit at the foreign nominal rate whichever is the higher up to the limit of the DV tax charge after a credit for withholding tax thereby reducing (and placing a cap on) the amount of the charge available to be set off by the foreign tax credit."

The precise application of the gross-up based on the above order and the corresponding judgement is currently being further considered in the FII GLO case in the High Court, but should in our view result in no incremental UK tax where the foreign nominal rate is greater than or equal to the UK rate, before taking any withholding tax into account.

-- Peter Cussons, Juliet Trent and Chloe Paterson, PwC United Kingdom; peter.cussons@uk.pwc.com
EU Developments

EU – Update review of EU Parent-Subsidiary Directive

On 2 April 2014 the EU Parliament adopted its final Opinion on the EU Commission’s revision proposal for the PSD in its plenary sitting (see adopted texts on page 306). The European Economic and Social Committee (ECOSOC) adopted its own Opinion on 26 March 2014. The consultations of both the EU Parliament and ECOSOC are mandatory under the special legislative procedure but their Opinions are not binding on the Council (i.e. the EU-28 Member States) as this concerns EU tax policy, which requires unanimity among all EU-28. After the formal procedural requirement of getting the consultative Opinions of the EU Parliament and ECOSOC, the Council subsequently had to negotiate and agree on a final compromise with the European Commission.

On 8 April 2014, the EU-28 met in the technical Council Working Party on Tax Questions (Direct Taxation) to discuss the way forward with the PSD (Commission officials were also present). The WG discussed a Greek Council Presidency proposal for a "split" proposal whereby the PPLs/hybrids proposal would be adopted in Council in June still, whereas the GAAR proposal would be dealt with under the next Italian EU Presidency, without suspensive effect for the PPLs proposal. There is legal precedent for such a "split" proposal for a Directive: the EU’s VAT Anti-fraud package.

The Council’s High Level Working Party met on 14 April 2014 and provided further guidance on the way forward with the revised PSD whereby a consensus was growing on accepting the "split".

It is understood that after the inconclusive 6 May 2014 ECOFIN Council political debate on the PSD and the equally inconclusive following COREPER II meeting of 3 June 2014 at EU-28 ambassador level, the PPLs/hybrids proposal (Part 1 of the revised PSD) will go straight to the ECOFIN Council of 20 June 2014. Finance Ministers are expected to endorse the Greek EU Presidency’s final compromise text and reach political agreement, with a view to adopting the PSD, after linguistic and legal finalisation, as an "A" item on the agenda of a forthcoming Council.

EU Member States must bring into force the laws, regulations and administrative provisions necessary to comply with the PSD by 31 December 2015 at the latest.

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

EU – Code of Conduct Group (business taxation) meeting of 18 March 2014

Agenda:
1. Work Package 2011: Links to third countries – Switzerland
2. Notification of Standstill and Rollback returns
5. Work Package 2011 - Administrative practices – Model instruction
6. Any Other Business.
NB: There are no official meeting minutes or public announcements of these 2-monthly meetings.
-- Bob van der Made, PwC Netherlands; bob.van.der.made@nl.pwc.com

EU – European Parliament and Council agree to postpone EU (as opposed to OECD BEPS) country-by-country tax reporting

On 15 April 2014, the European Parliament adopted its agreement with the Council on the European Commission proposal on a Directive on disclosure of non-financial and diversity information by large companies and groups.

Under the agreement, multinational companies concerned will need to disclose information on policies, risks and results as regards environmental matters, social and employee-related aspects, respect for human rights, anti-corruption and bribery issues, and diversity on boards of directors, on a comply-or-explain basis.

On a report to be delivered by 21 July 2018 by the European Commission, the possibility of introducing an obligation requiring large undertakings to produce, on an annual basis, a country-by-country report for each EU Member State and Third (i.e. non-EU) Country in which they operate, containing information on profits made, taxes paid on profits and public subsidies received, must be considered. The report will take into account developments to increase transparency in financial reporting carried out at international level.

The Council also needs to formally adopt this agreement after which it will be published in the Official Journal of the European Union.
-- Bob van der Made, PwC Netherlands; bob.van.der.made@nl.pwc.com

EU – European Commission launches steps to tackle tax obstacles that hinder the cross-border activity of individuals

On 10 April 2014, the European Commission issued a press release to announce the launch of two public consultations and the creation of an Expert Group to gather ideas on how to tackle any tax obstacles that hinder the cross-border activity of individuals in the Single Market. At the same time, the Commission has launched new web pages aimed at providing useful tax information to individuals who are active across borders. These three initiatives follow the review announced in 2012 (IP/12/340) and (IP/14/31) earlier this year to identify discriminatory tax rules in EU Member States.

One of the public consultations covers tax problems which citizens who are active crossborder face. It includes questions on problems that arise when individuals work or invest in other EU Member States, as well as questions on measures already in place in certain Member States to facilitate tax compliance. The other consultation focuses on problems related to inheritance taxation. The period of consultation is from 10 April 2014 to 3 July 2014.
The Expert Group will bring together stakeholders to look principally at elements of direct taxation that may affect an individual’s cross-border activity in the Single Market. Personal income taxation and inheritance taxation will be particularly focused on. However, the Expert Group may also look at other taxes that affect the mobility of persons, such as the taxation of vehicles and the taxation of e-commerce.

-- Robin Hiemstra and Frederik Boulogne, PwC Netherlands; frederik.boulogne@nl.pwc.com

Netherlands – European Commission request to end the discriminatory taxation of Dutch sourced dividends paid to EU/EEA insurance companies

On 16 April 2014, the European Commission asked The Netherlands to end the discriminatory taxation of Dutch sourced dividends distributed on shares held by insurance companies established in another Member State or an EEA country (Norway, Liechtenstein and Iceland).

Dutch insurance companies are effectively not taxed on dividends received on shares held in the framework of unit-linked insurances. They can deduct the increase of the obligation to pay the dividends on to their policyholders from the dividends received. This reduces the corporate tax base concerning these dividends to zero, while any withholding tax is credited.

However, The Netherlands taxes insurance companies established in the EU/EEA receiving Dutch dividends on shares held in the framework of unit-linked insurance on the gross dividends, without the possibility of a credit.

In line with case C-342/10 Commission v Finland, the Commission considers the higher taxation of insurance companies established elsewhere in the EU/EEA incompatible with the freedom of capital movement under Art. 63 TFEU and Art. 40 EEA.

The request is in the form of a reasoned opinion. The purpose of the reasoned opinion is to set out the Commission’s position on the infringement and to determine the subject matter of any action, requesting the Netherlands to comply within two months. In the absence of a satisfactory response within two months, the Commission may refer the Netherlands to the CJEU.

A positive outcome of the infringement procedure will no doubt lead to a significant increase of the chances of success of obtaining a refund of Dutch dividend withholding tax for EU/EEA insurance companies in respect of their unit linked products. In our view, the same reasoning should apply to non EU/EEA insurance companies with respect to unit linked products, provided that sufficient possibilities of information exchange are available. A positive outcome of the infringement procedure may also provide additional arguments for a refund of Dutch sourced dividends with respect to non-unit linked products as in these cases also higher taxation of foreign insurance
companies is the rule. This infringement procedure may also be relevant for other EU Member States.

-- Robin Hiemstra and Frederik Boulogne, PwC Netherlands; frederik.boulogne@nl.pwc.com

**Fiscal State aid**

EU – European Commission orders Luxembourg to deliver information on tax practices

On 24 March 2014, the European Commission stated it had called on Luxembourg to submit information that the Commission needs in order to assess whether certain tax practices favour certain companies, in breach of EU State aid rules. As Luxembourg failed to adequately answer previous requests for information according to the Commission it adopted two information injunctions ordering Luxembourg to deliver the requested information within one month. Should Luxembourg persist in its refusal, the Commission may refer the issue to the CJEU.

The Commission is currently gathering information on both tax ruling practices (i.e. decisions for individual companies on specific tax matters) as well as intellectual property (IP) tax regimes in EU Member States, to assess their compliance with EU State aid rules. For this purpose, it sent information requests to several Member States, including Luxembourg. According to the Commission, in both inquiries, Luxembourg refused to respond fully to the requests, invoking fiscal secrecy:

- Regarding its tax ruling system, Luxembourg only provided general information but failed to provide a specific overview of rulings it took in 2011 and 2012.

- Luxembourg also refused to deliver certain information on the usage of the IP tax regime, including the details of the 100 largest companies falling under the regime.

The Commission is entitled to request any information it deems necessary for a State aid investigation and EU Member States are under a duty to respond. It has said that confidential fiscal information remains adequately protected, as the Commission is itself bound by rules of confidentiality, and that, to be able to treat all Member States equally, the Commission needs a full picture and must therefore use all available means to enforce its requests for information. The non-confidential version of the Commission Decisions will be made available under the case numbers SA.37267 (tax rulings) and SA.37657 (IP tax regime) in the State Aid Register on the EU’s competition website.

-- Bob van der Made, PwC Netherlands; bob.van.der.made@nl.pwc.com
Spain – Decision of the European Commission on Spanish tax lease regime

On 17 July 2013, the European Commission adopted a Decision which established that the Spanish tax lease regime constitutes State aid to the EIGs and their investors.

This regime was unlawfully put into effect by Spain since 1 January 2002, allowing an accelerated tax amortization of vessels during their construction. Spain must recover this State aid from the EIG investors that have benefited from it. However, in compliance with legitimate expectations and legal certainty principles, no recovery will take place in respect of aid granted before 30 April 2007.

The Spanish Tax Authorities issued a report regarding this State aid procedure, in relation to those cases where the “Tax Lease structures” have not yet ended. The Government has passed a new provision in the corporate income tax Law, which regulates a transitory tax regime applicable to Tax Lease structures which have not yet transferred the ship. This regulation does not permit this existing structure to apply to the Tonnage Tax Regime or the advance depreciation of the lease contract.

The interpretation of this new provision has provoked huge controversy, due to the fact that this provision not only infringes the principle of legal certainty but it might place the existing structures in a more prejudicial situation to those already finished (which are allowed to reduce the incompatible State aid with the part of the maritime regulation that is considered compatible with European Law).

To balance both regimes, the Spanish Tax Authorities have interpreted the referring provision as follows:

1) The current structures must calculate the State aid during the whole period when the structure is operating, reducing this amount in the part considered as compatible according to maritime regulations;

2) Up until the ship is sold, the structures can still apply the advance and accelerated depreciation and the tonnage regime in the same terms as the request approved by the Spanish Tax Authorities;

3) The tax credits to be transferred to the partners in each tax period in which the structure remains in force, should be reduced in the amount regarded as incompatible following the calculation method referred to in point (i) above.

The Commission’s Decision was published in the Official Journal of the European Union on 16 April 2014. From that moment on, the two-month period to file an annulment appeal before the Court started to run. This two month period ends on 17 June 2014.

-- Antonio Puentes, Carlos Concha and Celso Cañizares, PwC Spain;
antonio.puentes@es.pwc.com

PwC EU Tax News
Spain – European Commission investigation into four Spanish professional football clubs

Since 17 December, 2013, the European Commission is investigating possible tax privileges for certain Spanish football clubs (Real Madrid CF, Barcelona CF, Athletic Club Bilbao and Club Atlético Osasuna). The activities carried out by professional sport clubs are of a commercial nature and, although they concern sports, they are subject to EU competition law.

The tax privileges derived from the Sports Act of 1990, which allowed these football clubs to be treated as non-profit entities instead of limited liability companies (as the rest of the Spanish football clubs are treated). Under the Spanish CIT Act, they are taxed on their income at a rate of 25%, instead of the general tax rate of 30% (35% until 2006 and 32.5% until 2007). In addition, the CIT Act established the exemption of certain income received for these entities.

The Commission has stated that this lower taxation rate constitutes an advantage in the form of foregone income on the part of the State. According to the Commission, Spain is selectively favouring certain undertakings compared with other undertakings which are in a comparable legal and factual situation and which perform an identical activity.

In a letter sent to the Spanish Government, the Commission considers that these domestic regulations may involve forbidden State aid under Article 107(3)c TFEU. Interested parties could file their observations within one month after the publication of the letter in the Official Journal (publication dated 7 March 2014).

-- Antonio Puentes, Carlos Concha and Celso Cañizares, PwC Spain; antonio.puentes@es.pwc.com
PwC’s EUDTG:
Are you ready to talk EU tax law? If you are, we are!

EUDTG is PwC’s pan-European network of EU law experts. We specialise in all areas of direct tax: the fundamental freedoms, EU directives, State aid rules, and all the rest. You will be only too well aware that EU direct tax law is moving quickly, and it’s difficult to keep up. But, this provides plenty of opportunities to taxpayers with an EU or EEA presence.

So how do we help you?
• Through our EUDTG Technical Committee, we play a leading role in developing new and innovative EU law positions and solutions for practical application by clients.
• 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 hot topics such as State aid, the CCCTB and BEPS.
• We closely monitor direct tax policy-making and political developments in Brussels.
• We input to the debate by maintaining regular contact with key EU and OECD policy-makers through our EU Public Affairs capability and PwC-facilitated “EBIT” business initiative (www.pwc.com/ebit) in Brussels.
• Our secretariat in the Netherlands operates a daily 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?
• We have assisted clients before the CJEU and the EFTA Court in a number of high-profile cases such as 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) and SCA Group Holding (C-39/13).
• Together with our Financial Services colleagues, we have assisted foreign pension funds, insurance companies and investment funds with their dividend withholding tax refund claims.
• We have carried out a number of tax research studies for the European Commission.

For more information about the EUDTG contact Bob van der Made, EUDTG network driver: e-mail: bob.van.der.made@nl.pwc.com; Tel: +31 6 130 962 96, or one of the listed contacts below.
EUDTG KEY CONTACTS:

Chair: Axel Smits
axel.smits@pwc.be

Network Driver, EU Public Affairs – Brussels, Member of all EUDTG WGs:
Bob van der Made
bob.van.der.made@nl.pwc.com

Member Technical Committee and State Aid WG, Chair of CCCTB WG:
Peter Cussons
peter.cussons@uk.pwc.com

Co-Chair, Chair State Aid WG, Member Technical Committee:
Sjoerd Douma
sjoerd.douma@nl.pwc.com

Chair Technical Committee:
Juergen Luedicke
juergen.luedicke@de.pwc.com

Chair of FS-EUDTG WG:
Patrice Delacroix
patrice.delacroix@pwc.be

Chair of Real Estate-EUDTG WG:
Jeroen Elink Schuurman
jeroen.elink.schuurman@nl.pwc.com

EUDTG COUNTRY LEADERS:

Austria  Richard Jerabek  richard.jerabek@at.pwc.com
Belgium  Patrice Delacroix  patrice.delacroix@pwc.be
Bulgaria  Krasimir Merdzhov  krasimir.merdzhov@bg.pwc.com
Croatia  Lana Brlek  lana.brlek@hr.pwc.com
Cyprus  Marios Andreou  marios.andreou@cy.pwc.com
Czech Rep.  Peter Chrenko  peter.chrenko@cz.pwc.com
Denmark  Soren Jesper Hansen  sjh@pwc.dk
Estonia  Iren Koplimets  iren.koplimets@ee.pwc.com
Finland  Jarno Laaksonen  jarno.laaksonen@fi.pwc.com
France  Emmanuel Ragneard  emmanuel.ragneard@fr.landwellglobal.com
Germany  Juergen Luedicke  juergen.luedicke@de.pwc.com
Gibraltar  Edgar Lavarello  edgar.c.lavarello@gi.pwc.com
Greece  Vassilios Vizas  vassilios.vizas@gr.pwc.com
Hungary  Gergely Juhasz  gergely.juhasz@hu.pwc.com
Iceland  Fridgeir Sigurdsson  fridgesigurdsson@is.pwc.com
Ireland  Carmel O’Connor  carmel.oconnor@ie.pwc.com
Italy  Claudio Valz  claudio.valz@it.pwc.com
Latvia  Zlata Elksnina  zlata.elksnina@lv.pwc.com
Lithuania  Kristina Krsicuniute  kristina.krsicuniute@lt.pwc.com
Luxembourg  Ilaria Palieri  ilaria.palieri@lu.pwc.com
Malta  Edward Attard  edward.attard@mt.pwc.com
Netherlands  Sjoerd Douma  sjoerd.douma@nl.pwc.com
Norway  Steinar Hareide  steinar.hareide@no.pwc.com
Poland  Camiel van der Meij  camiel.van.der.meij@pl.pwc.com
Portugal  Leendert Verschoor  leendert.verschoor@pt.pwc.com
Romania  Mihaela Mitroi  mihaela.mitroi@ro.pwc.com
Slovakia  Todd Bradshaw  todd.bradshaw@sk.pwc.com
Slovenia  Nana Sumrada  nana.sumrada@si.pwc.com
Spain  Carlos Concha  carlos.concha.carballido@es.pwc.com
Sweden  Gunnar Andersson  gunnar.andersson@se.pwc.com
Switzerland  Armin Marti  armin.marti@ch.pwc.com
UK  Peter Cussons  peter.cussons@uk.pwc.com

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