ECJ in brief

GERMANY

ECJ decision on foreign pension funds (C-600/10)

On November 22, 2012, the ECJ decided in the case '*COM vs. Germany* ' (C-600/10) concerning dividend taxation of foreign pension funds in favour of Germany.

Scope of the infringement procedure: bank fees

According to German tax law, dividends received by foreign pension funds are subject to a final withholding tax on the gross amount, whereas domestic pension funds could set off business expenses and technical reserves.

In 2009, the Commission launched an infringement procedure against Germany, but only with respect to the business expenses like bank and transaction fees. Technical reserves were explicitly not focused on in this procedure.

ECJ decision regarding bank fees

The ECJ has now rejected the claim with respect to the deduction of bank and transaction fees, as the Commission did not prove that such costs actually occur for foreign funds.

Way forward concerning technical reserves

However, the decision is silent on the question whether or not the German taxation of dividends received by foreign pension funds is in line with EU law in all respects. The infringement procedure did not consider the fact that pension funds all around Europe are liable to build technical reserves and that such reserves become only deductible from the tax base for German pension funds.

With respect to deducting technical reserves by foreign funds as well, the authors estimate the chances of success to be quite good, especially after the decision of the ECJ in the case *COM vs. Finland* (C-342/10). It is not clear yet whether and if so, which steps the Commission is going to take next.

Recommendation

It is highly recommended to foreign pension funds to consider filing the so called *Fokus Bank claims* in Germany in order to safeguard their rights under the EU law.

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LUXEMBOURG

ECJ rules on Net Wealth Tax Reserves legislation

The European Court of Justice (ECJ) rendered a decision on the Luxembourg legislation dealing with Net Wealth Tax (NWT) Reserves. The ECJ considered that the current Luxembourg legislation was not in line with the EU Law, and therefore should be amended. Paragraph 8a of the NWT Law states that companies based in Luxembourg can obtain a reduction in NWT if they allocate an amount which is equal to 5 times the requested reduction, to a NWT reserve. This reserve must then be kept for a period of at least 5 tax years.

The ECJ ruling was based on a case where LuxCo, a company in Luxembourg, allocated funds to a NWT reserve, in order to benefit from NWT reduction. In 2006, LuxCo then transferred its operations to Italy, where they later merged with an Italian company. The new merged company kept the NWT reserve on its accounts for 5 years, as required by the NWT law.

The Luxembourg tax authorities taxed the company's NWT reserve because the LuxCo had transferred its operations to Italy within the 5-year time period and was therefore no longer based in Luxembourg. The Luxembourg Tribunal decided that the NWT reduction was conditional on Luxco being in Luxembourg for the 5-year period, and moving the company meant breaking the contract. LuxCo argued that the taxation of its NWT Reserve, owing to its migration, was against the principle of freedom of movement within the EU.

The case was then brought to the ECJ, who ruled in favour of LuxCo, stating that the Luxembourg Tribunal's findings were not in line with the EU law.

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