

Direct taxation: The European Commission formally requests the Netherlands to stop the discriminatory taxation of non-resident charities holding real estate in the Netherlands

The European Commission has formally requested the Netherlands to change tax rules which exempt domestic charities and church organisations who do not carry on an enterprise from taxation on income from real estate in the Netherlands and tax such income when received by foreign charities or church organisations. The Commission considers these rules contrary to the freedom of movement of capital.

Article 2.1.e. of the Corporate Income Tax Act 1969 (CITA) stipulates that charities which are resident in the Netherlands are only taxable in so far as they carry on an enterprise. On the basis of Article 3 of the CITA, charities resident outside the Netherlands (and church organisations ("kerkgenootschappen")) are taxable as non-resident taxpayers in so far as they earn Dutch income. Dutch income is defined in Article 17 CITA. On the basis of Article 17a.1.a CITA real estate and rights concerning real estate in the Netherlands are deemed to constitute part of an enterprise carried on in the Netherlands by foreign charities and church organizations (the income of which is taxable in the Netherlands, in accordance with article 17.3.a CITA).

On the basis of these provisions charities and church organisations which are resident in the Netherlands but which do not carry on an enterprise are not subject to corporation tax. By contrast, foreign charities and church organisations which do not carry on an enterprise will pay corporation tax on their income from real estate located in the Netherlands.

The Commission considers that this difference in treatment restricts the freedom of establishment of Articles 63 TFEU and 40 EEA, in line with the ruling by the Court of Justice in *Stauffer*, Case C- 386/04 of 14 September 2006.

The Commission is aware of the "Besluit Staatssecretaris van Financiën van 5 januari 2006, nr. IFZ2005/784M", in which the State Secretary of Finance approves that, in anticipation of a proposal to change the law, foreign charities and church organisations which do not carry on an enterprise are not taxed on their income from Dutch real estate, if they fulfil a number of conditions. However, in *Biehl II*, Case C-151/94 of 26 October 1995, the Court of Justice held in paragraph 18 that the incompatibility of provisions of national law with provisions of the Treaty, even those directly applicable, can be definitively eliminated only by means of binding domestic provisions having the same legal force as those which require to be amended.

The Commission thus considers that the decision of the State Secretary is not capable of eliminating the incompatibility of Article 17a.1.a CITA with Articles 63 TFEU and 40 EEA.

Background

The request takes the form of a reasoned opinion (the second step of the infringement procedure provided for by Article 258 of the Treaty on the Functioning of the EU (TFEU)). If there is no satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the matter to the Court of Justice of the European Union.

The Commission's case reference number is 2008/4577.