

Direct Taxation: Commission decides to refer Portugal to the Court over discriminatory taxation of outbound dividends

The European Commission decided to refer Portugal to the European Court of Justice for its rules under which certain dividend payments to foreign companies (outbound dividends) may be taxed more heavily than dividend payments to domestic companies (domestic dividends). The Commission considers that these rules are contrary to the EC Treaty and the EEA Agreement, as they restrict both the free movement of capital and the freedom of establishment.

The tax rules of Portugal may in certain cases lead to higher taxation of outbound dividends than of domestic dividends. While they provide for no or only very low taxation of domestic dividends, outbound dividends are subject to withholding taxes up to 20%.

In the *Denkavit* ruling of 14 December 2006 (Case C-170/05) the Court confirmed the principle that outbound dividends cannot be subject to higher taxation in the source State (the State where the subsidiary is established) than domestic dividends.

However, according to this ruling, it may be relevant to take into account whether the State of residence of the parent company gives a tax credit for the withholding tax levied by the source State. The Commission will take this recent ruling into account when drafting the applications to the Court. Up to now, the Commission followed the same approach as the EFTA Court in the Fokus Bank case (Case E-1/04), where it explicitly ruled that it was not relevant whether a tax credit was given in the residence State.

Background

The infringement procedure relates to the different articles of the Corporate income tax code (CIRC) including the following: 14, 46, 80, 88, 89 and 90A

The Commission already decided to refer Portugal to the Court on December 2006 (IP/07/66). However, Portugal amended later on its legislation. Taking into account these amendments, the Commission sent an Additional Reasoned Opinion on 14 April 2009. The Portuguese authorities refused to amend the new legislation..

The Commission's case reference number is (2004/4353).

For press releases on infringement cases in the taxation or customs field see:

http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/index_en.htm

For the latest general information on infringement measures against Member States see:

http://ec.europa.eu/community_law/index_en.htm