

## Israel Desk E-mail Bulletin

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### **Levy of VAT from passive holding companies may be incompatible with EC law**

In pursuance of a judgment of the European Court of Justice (ECJ), the levy of VAT from passive holding companies may be incompatible with EC law. As a result, considerable VAT savings could potentially be achieved for passive holding companies that procure the services of among others consultants, lawyers and accountants from outside the EU. A passive holding company is a company that exclusively holds shares in one or more companies and whose income is exclusively comprised of dividends and capital gains.

### **The Dutch rules**

Pursuant to the Dutch VAT Act 1968, VAT is due by Dutch companies if they procure services from companies outside the EU. This only applies to a number of specified intangible services, such as telecom and advertising services and services of consultants, lawyers, accountants and suchlike. Even if a company is not held to charge VAT (for instance a passive holding company) it nonetheless needs to remit VAT at a rate of 19% to Dutch Revenue on such purchased services if the place of actual use and actual exploitation of those services is in the Netherlands. Because such companies are not held to charge VAT, they cannot deduct the VAT due as input VAT as a consequence of which they actually need to pay the VAT to the Revenue. In practice it is often difficult to determine where the actual use and exploitation of a service takes place. It is generally assumed that this is the place where the recipient of the service is established.

These rules were introduced in 1991 to prevent for instance Dutch holding companies and municipalities, for whom VAT is part of their procurement costs, from avoiding VAT charges by procuring their services from companies outside the EU instead of inside the EU.

### **The Athesia Druck judgment**

On the basis of the ECJ's Athesia Druck judgment it could be concluded that the Dutch rules described above are not compatible with EC law. In the Athesia Druck judgment a company established outside the EU purchased advertising services from an Italian company to subsequently resell these to EU and non-EU customers. Despite the fact that according to the ECJ the actual place of use of these services was in Italy, Italy could not charge VAT on the resale of the services by the non-EU company to its customers inside and outside the EU.

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The experience of the members as regards the Israeli market is combined with their extensive knowledge of international tax law, corporate structuring, banking and securities law, regulatory law, employment law. In addition to being part of the Israel Desk, the members also participate in Loyens & Loeff teams that focus on specific industries and sectors, such as energy, real estate, private equity, fund structuring, corporate finance, and financial products.

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Unsubscribe from this newsletter  
<mailto:israel.desk@loyensloeff.com>

Loyens & Loeff  
Fred. Roeskestraat 100  
1076 ED AMSTERDAM  
T: +31 20 578 57 85  
F: +31 20 578 58 20



In doing so the ECJ appears inter alia to say that the levy of VAT in Italy based on the actual use of advertising services in Italy cannot take place insofar the service provider and customer are established outside the EU.

Although the case underlying the Athesia Druck judgment differs from the situation that is generally common for holding companies, the reasonings of the ECJ have been formulated in such a general manner that there are good arguments to also apply these reasonings to the procurement of services from non-EU companies by companies that are not held to charge VAT.

### **Consequences for the Dutch practice**

The position could be taken that the Dutch rules, pursuant to which companies that are not held to charge VAT such as passive holding companies must pay VAT on non-EU costs because of the actual use of the services in the Netherlands, is incompatible with the EC VAT Directive. This would mean that such companies would not need to report VAT on advisory services and suchlike procured from outside the EU.

Incidentally, the above applies to the tax return periods up to 2010 that have not yet been determined irrevocably. As of 2010 the EC VAT directive, and accordingly the Dutch rules, will be amended in connection with the simplification measures of the so-called VAT package. From that date onwards Dutch companies that are not held to charge VAT must in principle report and pay VAT for intangible services purchased from outside the EU.

Members of the Israel Desk visit Tel-Aviv on a regular basis. If you would like to make an appointment or would like to receive more information with respect to the above, please feel free to contact [jeroen.janssen@loyensloeff.com](mailto:jeroen.janssen@loyensloeff.com) or any other member of the Israel Desk.

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