

## Brazil Desk Email Bulletin

*This email bulletin is issued by the Brazil Desk of Loyens & Loeff. It is intended to provide you on an ad hoc basis with news flashes or background information on topical corporate, finance and tax law issues in the Benelux.*

### Year End Tax Bulletin: EU case law and regulations

#### Content

- Cartesio ruling triggers discussion on tax consequences of corporate emigration
- Glaxo ruling reduced certainty on applicable treaty freedom
- Deduction of input VAT attributable to sale of subsidiaries
- VAT package enters into force

#### Cartesio ruling triggers discussion on tax consequences of corporate emigrations

On 16 December 2008, the ECJ rendered its decision in the Cartesio case. In question was the Hungarian 'siège réel' company law system (under which a company is incorporated and exists by virtue of having its corporate seat within Hungarian territory). The ECJ held that a Member State is not required to allow a company incorporated under the company law of that Member State, which subsequently emigrates to another Member State (i.e. transfers its corporate seat to abroad), to continue its corporate existence and legal personality under the company laws of the Member State of incorporation. Nevertheless, that Member State is not allowed to make it impossible or unattractive for that respective emigrating company to convert itself into a company (i.e. continue its corporate life and retain its legal personality) under the company laws of the country of migration (destination country). Hence, the Member State of emigration may not require the emigrating company to be wound up or liquidated upon emigration as far as this company is able to continue its existence and retain its legal personality under the company laws of the destination country.

In its Cartesio ruling, the ECJ paved the way for cross-border transfers of corporate seats in combination with a change of applicable company law. In this respect, Loyens & Loeff is the first firm to have successfully tried and tested this interpretation in practice. Moreover, the ruling triggered discussion on the corporate tax consequences of corporate emigrations as Member States may possibly infringe EU law with respect to:

#### Brazil Desk Email Bulletin # 10d 18 December 2009

Loyens & Loeff is an independent Benelux law firm with over 900 lawyers and offices in the main financial centres around the world. Loyens & Loeff combines an integrated corporate law, regulatory and tax practice.

In order to be able to give the best advice possible to our clients, Loyens & Loeff formed the Brazil Desk.

The members of the Brazil Desk strongly focus on Brazilian clients that invest or trade in Europe or other regions, as well as on international companies and financial institutions that want to expand their businesses to Brazil. In many cross border (including cross Atlantic) transactions, benefits can be derived by investing through the Benelux (Belgium, Netherlands and Luxembourg).

The team comprises members from various Loyens & Loeff practice groups. Members of the Brazil Desk visit Brazil three to four times a year.

Members of the Brazil Desk speak the Portuguese language.

Although this email bulletin has been prepared with great care, Loyens & Loeff accepts no responsibility for the consequences of any reliance upon this email bulletin without the further involvement of Loyens & Loeff.

Unsubscribe from this newsletter mail to: [brazil.desk@loyensloeff.com](mailto:brazil.desk@loyensloeff.com)

Loyens & Loeff N.V.

Fred. Roeskestraat 100  
1076 ED Amsterdam  
T: +31 20 578 57 85  
F: +31 20 578 58 20

Millenniumtoren  
Weena 690  
3012 CN Rotterdam  
T: +31 10 224 62 24  
F: +31 10 412 58 39

- The exit tax levied upon corporate emigration: It can be argued that the corporate income tax on goodwill, hidden reserves and tax reserves which becomes due upon corporate emigrations (exit tax) is incompatible with EU law. Member States are currently put under some pressure by the European Commission to replace their exit tax systems for lesser restricting alternatives.
- The unlimited corporate tax liability for companies incorporated under relevant company law: The Cartesio ruling also lays a foundation for arguing the incompatibility with EU law of the unlimited corporate tax liability for companies incorporated under relevant company law that move abroad. For instance, companies incorporated under Dutch company law are deemed to reside in the Netherlands for corporate income tax purposes irrespective of their actual place of effective management. Such companies are in principle subject to unlimited tax liability. Consequently, upon emigration they may still be confronted with a dual residency for corporate tax purposes.

The Cartesio ruling may encourage companies that have been confronted with an exit tax to challenge their tax liability. In addition, it can be argued that companies should be able to shake off their deemed (e.g. Dutch) tax residency upon emigration, which may encourage emigrating companies to challenge their dual residency for tax purposes.

### **Glaxo ruling reduced certainty on applicable treaty freedom**

On 17 September 2009, the ECJ rendered its decision in the Glaxo case. In question was the German legislation disallowing the deduction of losses from a write-down on the value of participations that were acquired from non-German resident sellers. The court held that the German deduction limitation is compatible with the freedom of capital, subject to the condition that the measure is appropriate and proportional for the purposes of countering tax avoidance.

Interestingly, the Glaxo ruling reduces certainty on the question of which treaty freedom applies with respect to majority shareholdings because the ECJ concludes that the freedom of capital applies. It bases this on the objective and purpose of the respective Member State's tax legislation at hand (functional approach). This is however different from other rulings (e.g. the Baars and Burda cases) where the ECJ adopts a factual approach by applying the freedom of establishment exclusively in scenarios where the shareholder in fact has a controlling shareholding. Hence, the ECJ seems to inconsistently decide between looking into the objective and purpose of the respective Member State's tax legislation (functional approach) and looking at the facts and circumstances (factual approach). This leads to uncertainty in scenarios where third countries are involved as the scope of application of the EU treaty freedoms extends to non-EU countries only with respect to capital movements.

The Dutch Supreme Court follows the ECJ's factual approach. However, it is uncertain whether the Dutch Supreme Court follows the proper lead. As a result of this, the Glaxo ruling encourages taxpayers who find themselves in such scenarios to challenge any obstacles imposed by the Dutch tax legislation.

## **Deduction of input VAT attributable to the sale of subsidiaries not always limited**

On 29 October 2009, the ECJ delivered its judgement in the AB SKF case on the question whether an active holding company can deduct the input VAT on costs incurred in connection with the sale of a subsidiary. AB SKF is the parent company of an international industrial group. Besides holding shares of subsidiaries, AB SKF renders VAT taxed services to its subsidiaries and is considered an active holding company. As part of a group reorganisation, AB SKF intends selling shares of subsidiaries. For these sales, AB SKF received services from third parties.

The ECJ ruled that under circumstances the sale of shares may constitute a transfer of a business going concern. However, if such sale does not qualify as a transfer of a business going concern, the sale of shares by an active holding company is exempt from VAT. On that basis, the input VAT on any expenses directly and immediately attributable to such sale to EU-based purchasers cannot be deducted and, therefore, form a cost for the seller. On the other hand, the input VAT incurred on the sale of shares by an active company to a purchaser residing outside the EU could be deducted. Further, the ECJ ruled that expenses that are not directly and immediately attributable to the sale of shares, but that incurred in light of the general business activities, should be regarded as general expenses. The input VAT on such expenses is generally pro rate deductible calculated on the basis of the overall ratio of VAT-taxed economic activities performed by a VAT-taxable person.

## **VAT package enters into force**

In 2010, the VAT package will enter into force in all EU Member States with a wide range of changes for VAT taxable persons. The main change consists of the introduction of a new general VAT rule for the supply of 'business to business services'. As of 1 January 2010, services performed to VAT-taxable persons are in principle subject to VAT in the country of residence of the recipient of the services by means of the reverse charge mechanism, i.e. the VAT obligations are shifted from the service provider to the service recipient, including the obligation to report the amount of reverse charge VAT.

Under the revised VAT rules, special place of supply rules will remain in force / be introduced for (among others) services connected to immovable property, restaurant services, passenger transport, the hiring of means of transport, as well as cultural, educational and sporting services. In addition, the Member States have the option to treat services performed outside the EU as being performed within their territory based on the regular rules of supply, provided that the effective use and enjoyment of such services takes place within their territory. Suppliers of services will, further, have to submit a listing of all services that are subject to VAT in other Member States by means of the reverse charge mechanism.

Finally, as of 1 January 2010, EU-based VAT taxable persons will have to file requests for a refund of VAT in other EU Member States electronically with the tax authorities in their country of residence.

We trust to have fully informed you. Should you have any questions, please do not hesitate to contact us.

Michiel van Kempen

T: +31 10 224 63 96

[michiel.van.kempen@loyensloeff.com](mailto:michiel.van.kempen@loyensloeff.com)

Jeroen Janssen

T: +31 20 578 54 00

[jeroen.janssen@loyensloeff.com](mailto:jeroen.janssen@loyensloeff.com)

Juliana Dantas (Portuguese speaker)

T: +31 20 578 51 67

[juliana.dantas@loyensloeff.com](mailto:juliana.dantas@loyensloeff.com)

Peter Adriaansen

T: +31 10 224 62 32

[peter.adriaansen@loyensloeff.com](mailto:peter.adriaansen@loyensloeff.com)

*For more information about the Loyens & Loeff Brazil Desk please see:*

[www.brazildesk.nl](http://www.brazildesk.nl)