PRICEWATERHOUSECOOPERS

Flash News

Tax credit for investment ("bonification d'impôt pour investissement")

ECJ decision dated 22 December 2010 (Tankreederei, C-287/10)

With respect to the Luxembourg investment tax credit ("bonification d'impôt pour investissement"), the European Court of Justice ruled on 22 December 2010 that limiting the benefit of the Luxembourg investment tax credit to domestic investments is contrary to the freedom to provide services. This decision opens interesting doors to Luxembourg taxpayers having eligible investments used in another EU Member State.

Factual background

On 10 June 2010, a reference for a preliminary ruling was filed by the Administrative Tribunal of Luxembourg in Tankreederei / SA v. Directeur de l'Administration des Contributions Directes (case C-287/10).

In the case at hand, the Luxembourg tax authorities disallowed the right of a tax credit for investment to a Luxembourg company, which owns shipping vessels used in the harbours of Antwerp and Amsterdam. The Luxembourg tax authorities strictly applied the Luxembourg tax law (article 152 bis), according to which the investment must in principle be physically operated in Luxembourg in order to be eligible for the incentive, unless the investment consists of shipping vessels operating in international traffic (which was not the case here). In addition, the benefit of the tax credit is limited to investments that are made within a Luxembourg business establishment and that are intended to be used permanently in Luxembourg.

The Administrative Tribunal of Luxembourg decided to refer to the European Court of Justice (ECJ) whether the above-mentioned conditions are in breach of the freedom to provide services (article 56 of the Treaty on the Functioning of the European Union, "TFEU") and the free movement of capital (article 65 TFEU).

In its judgment dated on 22 December 2010, the ECJ rules that article 56 TFEU is to be interpreted as precluding a provision of a Member State pursuant to which the benefit of a tax credit for investment is denied to an undertaking which is established in that Member State on the sole ground that the capital goods, in respect of which that credit is claimed, are physically used in the territory of another Member State.

Analysis of the ECJ decision

In case the income derived from the eligible assets used outside Luxembourg is exclusively taxable in Luxembourg (e.g. it is not attributed to a EU tax-exempt Permanent Establishment (PE) of the Luxembourg taxpayer), the current Luxembourg tax law (article 152bis LITL) is contrary to the freedom to provide services (article 56 TFEU). This is the situation analysed by the Court in the Tankreederei decision.

The Court did not analyse the situation where the income derived from the eligible assets used outside Luxembourg is not taxable in Luxembourg (e.g. it is attributed to a EU tax-exempt PE of the Luxembourg taxpayer). The allocation of tax powers between Member States (MS) may most likely justify the difference of treatment, as profits derived from the investment would be taxable in the MS of the PE, while the tax credit for investment is asked for in Luxembourg (i.e. MS of Luxembourg Head Office).

Conclusion

Further to this decision, the requirement that the asset entitling the taxpayer to an investment tax credit in Luxembourg be physically used in Luxembourg, should be **extended to eligible assets also used in any other EU Member State without creating there a taxable presence of the Luxembourg taxpayer.**
This decision will be more than welcomed by the Luxembourg operational companies having international activities/investments as well as by Luxembourg Banks participating to international asset finance transactions.

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