

**Euro Tax Flash**

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## **Euro Tax Flash from KPMG's EU Tax Centre**



### **CJEU decision in joined cases X BV and TBG Limited**

Overseas territory – standstill clause

On June 5, 2014 the Court of Justice of the European Union (CJEU) in Luxembourg rendered judgment in two joined cases (Case [C-24/12](#), [C-27/12](#)) that both involve profit distributions made by Dutch companies to their respective parent companies resident on Curaçao. At issue in both cases was a dividend distribution made in 2005, respectively 2006, by a Dutch company to a 100% parent company – a public limited company incorporated under Netherlands Antilles law and established on Curaçao – from which 8.3% dividend withholding tax was withheld and remitted pursuant to the Tax Regulations for the Kingdom of the Netherlands (*Belastingregeling voor het Koninkrijk*, “BRK”). The parent companies argued that the levying of dividend withholding tax was contrary to the free movement of capital which, under the EC Treaty (“ECT”), is also applicable to capital transactions from and to third countries. On the basis of this, the withholding exemption should be granted to both parent companies. To obtain assurance about the accuracy of this statement, the Supreme Court submitted a number of questions to the CJEU.

### **The judgment rendered by the CJEU**

The CJEU concluded that restrictions on dividend payments between the European Union and the Overseas Countries and Territories (“OCT”), which also includes Curacao, are in principle prohibited. The CJEU did not, however, examine the free movement of capital in the ECT, as the AG at the CJEU did, but rather the prohibition of restrictions on the movement of capital in the OCT decree. This includes an exclusion clause that relates to the prevention of tax evasion.

By virtue of this clause, the CJEU has now ruled that 8.3% dividend withholding tax may be levied, provided this tax is indeed intended to prevent tax evasion and that this goal is effectively and proportionately pursued with the 8.3% tax rate. It is now up to the Dutch Supreme Court to assess whether these conditions have been met.

### **EU Tax Centre Comment**

Because the CJEU, contrary to previous case law in which the status of the OCT played a role, examined the national restriction with respect to the OCT decree, the standstill clause enshrined in the ECT is not relevant. Therefore, in such cases no comparison has to be made between the effective tax rate on the dividend in the year in question and the tax burden resulting from the rules that applied as at the end of 1993. The Supreme Court and the AG at the CJEU did, however, assume that this comparison had to be made.

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor. Click [here](#) for KPMG's FTT contacts.

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