Tax News Bulletin
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European Court of Justice: Dutch fiscal unity regulations constitute restrictions of the freedom of establishment

On 12 June 2014, the European Court of Justice ("ECJ") held that unjustified restrictions of the freedom of establishment occur, in cases where the Dutch corporate income tax regulations preclude consolidated tax treatment (fiscal unity) because (a) the shares in resident sister companies are held by a common parent company being resident in another Member State and not having a permanent establishment in the Netherlands, or (b) an indirect subsidiary is held via one or more foreign companies.

Refusal to include resident sister companies in a fiscal unity because their shares are held by a common parent company resident in another Member State, not having a permanent establishment in the Netherlands (C-40/13)

X is a company which has its seat in Germany. It owns directly or indirectly the companies X3, D1 and D2 which have their seat in the Netherlands. By joint request, X3, D1 and D2 asked to form a Dutch fiscal unity for corporate income tax ("CIT") purposes. The request was denied on the ground that their common parent company, X, was neither established in the Netherlands nor had a permanent establishment there. The Court of Appeal requested a preliminary ruling whether denying the fiscal unity to them constitutes a restriction of the freedom of establishment.

The Dutch regulations create a difference in treatment between:

- on the one hand, parent companies of which the seat is in the Netherlands, which thanks to the fiscal unity regime can immediately set off the losses of their loss-making subsidiaries against the profits of their profit-making subsidiaries; and,

- on the other hand, parent companies which also own subsidiaries in the Netherlands but have their seat in another Member State without a permanent establishment in the Netherlands, which are excluded from benefitting from the fiscal unity and, therefore, from the cash-flow advantage which the fiscal unity provides.

To the extent that, from a taxation perspective, they put Community situations at a disadvantage compared with purely domestic situations, the provisions of the CIT Act constitute a restriction which is, in principle, prohibited by the provisions of the Treaty relating to freedom of establishment (in line with the *Papillon* case, EU:C:2008:659, paragraph 32).

Next, the ECJ ruled that this difference in treatment is neither justified by an objective difference of situation, nor by an overriding reason in the public interest based on the coherence of the tax system, relating to the prevention of double use of losses.

On those grounds, the ECJ ruled that in Case C-40/13, Articles 49 TFEU Treaty and 54 TFEU Treaty must be interpreted as precluding legislation of a Member State under which fiscal unity is granted to a resident parent company which holds resident subsidiaries, but is precluded for resident sister companies the common parent company of which neither has its seat in that Member State nor has a permanent establishment there.

Refusal to include an EU subsidiary in a fiscal unity because its shares are held via one or more foreign companies (C-39/13 and C-41/13)

SCA Group Holding BV (SCA BV) and MSA International Holdings BV (MSA BV) are companies which have their seat in the Netherlands. They own companies which have their seat in Germany, either directly or indirectly through other companies also established in Germany. Those companies themselves own companies which have their seat in the Netherlands.

SCA BV and MSA BV and their respective sub-subsidiaries established in the Netherlands requested to form Dutch fiscal unity for CIT purposes. However, since their intermediate companies were established in Germany their requests were refused by the Tax inspector. The Court of Appeal requested a preliminary ruling whether denying fiscal unity to them constitutes a restriction of the freedom of establishment.

Regarding the existence of a restriction, the ECJ analysed the Dutch regulations and concluded that they create a difference in treatment since the ability to elect for the fiscal unity regime depends on whether the parent company holds its indirect stakes through a subsidiary established in the Netherlands or in another Member State (like in case C-418/07 *Papillon*).

The ECJ ruled that it is irrelevant that, even in a purely internal situation, no parent company can form a tax entity with sub-subsidiaries without also including the intermediate subsidiary. To the extent that they put cross-border situations at a disadvantage compared with domestic situations, the provisions of the CIT Act thus constitute a restriction which is, in principle, prohibited by the provisions of the TFEU Treaty relating to freedom of establishment.

Next, the ECJ ruled that this difference in treatment is neither justified by an objective difference of situation, nor by an overriding reason in the public interest based on the coherence of the tax system, including the prevention of double use of losses.

On those grounds, the ECJ ruled that in Cases C-39/13 and C-41/13, Articles 49 TFEU Treaty and 54 TFEU Treaty must be interpreted as precluding legislation of a Member State under which a resident parent company can form a fiscal unity with a resident sub-subsidiary where it holds that sub-subsidiary through one or more resident companies, but cannot where it holds that sub-subsidiary through non-resident companies which do not have a permanent establishment in that Member State.