Deloitte.

Global Tax Update

Netherlands

Deloitte Tohmatsu Tax Co.

January 2015

1. Netherlands Tax court confirms CJEU decision on fiscal unity regime

The Tax Court Amsterdam confirmed the conclusions reached by the Court of Justice of the European Union (CJEU) that the fiscal unity regime is incompatible with the freedom of establishment principle in the Treaty on the Functioning of the European Union.

The Court of Appeal of Amsterdam issued a decision on 11 December 2014 on the compatibility of the Dutch fiscal unity regime with EU law. The court confirmed the conclusions reached by the CJEU in a 12 June 2014 decision, in which the CJEU held that the fiscal unity regime in the Netherlands Corporate Income Tax Act is incompatible with the freedom of establishment principle in the Treaty on the Functioning of the European Union. The case was referred back to the Amsterdam court to issue a final decision in the case.

(1) Background of cases

In three cases relating to the fiscal unity regime — all involving group structures and having the common feature that some companies in each group were established in another EU member state — the issue was whether denial of a fiscal unity would infringe EU law. These cases primarily involved two fact patterns:

- ➢ A Dutch resident company held 100% of the shares of another EU company, which, in turn, held 100% of the shares in a second Dutch resident company; and
- ➢ Multiple Dutch resident sister companies were held by the same EU parent company.

In all cases, the fiscal unity requests were limited to the Dutch resident companies; the connecting EU companies and the nonresident parent company were not included. The Dutch tax authorities denied the requests.

The more detailed facts of the cases are as follows:

1) A Dutch parent company held 100% of the shares of its German subsidiary that, in turn, held 99% of the shares of a Dutch subsidiary. The Dutch parent submitted a request to the Dutch tax authorities to form a fiscal unity with its Dutch (second tier) subsidiary, without including the German intermediary company. The tax authorities denied the request because the Dutch corporate income tax law requires that all intermediary companies be included in a fiscal unity. In the case, however, the German intermediary company could not be included because it was a resident of another EU member state and did not have a PE in the Netherlands.

2) Sister companies established in the Netherlands were held, directly or indirectly, by a common German parent company that did not have a PE in the Netherlands. The sister companies filed an application to form a fiscal entity without the German parent; the application was denied for the same reasons as above.

The situation in 1) is similar to the fact pattern that led to the 2008 CJEU decision in the Papillon case, which involved France's tax consolidation regime. Under French rules, a parent company could form a group to consolidate the profits and losses of group companies and, like the Dutch tax law, the French rules required all companies in the consolidated group to be resident in France and any intermediary companies also to be part of the group (meaning they must be French resident companies as well). The French parent in Papillon held all of the shares in its French sub-subsidiaries through its Dutch intermediary company. The French tax authorities denied the consolidation of the French sub-subsidiaries. The CJEU ruled that a denial of a tax consolidation in this situation violated the freedom of establishment principle in EU law because, had the intermediary company been a French resident company, the results of the French parent company and its sub-subsidiary could have been consolidated (including the results of the French intermediary company).

Following this decision, the European Commission initiated an infringement procedure against the Netherlands on the grounds that the Dutch law disallowing a fiscal unity between two sister companies (without consolidation of the joint parent company that is a resident of another EU member state) infringed EU law. At the same time, a taxpayer brought another similar case before the Dutch lower tax courts.

When the cases mentioned above were brought before the Court of Appeal of Amsterdam, the taxpayers argued that the denial of a fiscal unity between (i) the Dutch parent and its resident lower-tier subsidiary, and (ii) the Dutch sister companies is incompatible with the freedom of establishment. The court then referred the cases to the CJEU to determine whether the denial of a fiscal unity between the Dutch resident companies violates EU law.

(2) CJEU decision and final decision of Dutch tax court

The CJEU decision mainly followed the earlier Papillon decision. The court determined that the denial of the requested fiscal unities in all three cases is incompatible with EU law.

The Second Instance Tax Court of Amsterdam agreed with the CJEU and considered it irrelevant that, in a purely domestic situation with Dutch connecting companies, it also would not have been possible to form a fiscal unity between the Dutch resident parent company and its sub-subsidiary or between the Dutch sister companies. In those situations, however, as the CJEU previously noted, it at least would have been possible to form a fiscal unity by including the connecting entities; in contrast, this would not be possible where the connecting entity was established in another EU member state.

Unlike the CJEU, the Second Instance Tax Court noted that such an infringement of the freedom of establishment could be justified by an overriding reason in the public interest. Restrictive conditions aimed at protecting the coherence of the Dutch tax system and preventing the risk of double loss deductions could — under certain circumstances — justify the restriction of the EU fundamental freedoms. However, in the instant cases, the restriction is not justified because the conditions are more restrictive than what is necessary to achieve the objective of the fiscal unity regime; the Amsterdam tax court considers the restriction disproportionate. The court explained that the legislature is entitled to create more narrowly tailored anti-abuse measures to avoid potential double loss relief and to safeguard the coherence of the tax system.

(3) Comments

The Amsterdam tax court's decision that in both parent- (sub-)subsidiary situations and in sister company situations fiscal unities between Dutch resident entities should be allowed, was not unexpected. The Ministry of Finance has indicated it will not submit an appeal with the Supreme Court against the judgment of the Amsterdam Tax Court. A bill will be presented in the first half of 2015, to align the fiscal unity regime with European law. In anticipation of this bill the State Secretary will publish a policy decision shortly, outlining the conditions subject to which a fiscal unity between the companies established in the Netherlands is possible in "foreign country situations" and the consequences this will entail.

2. Dutch position in European tax developments

The Dutch Ministry of Finance has determined its position on the amendment to the Parent Subsidiary Directive and related topics.

On 3 December 2014, the House of Representatives debated on the ECOFIN meeting of 9 December 2014, during which the proposed amendment to the EU Parent Subsidiary Directive was among the topics discussed. In the run-up to the parliamentary debate the Dutch Ministry of Finance determined its position on the amendment to that Directive and related topics.

The proposed amendment to the Parent Subsidiary Directive regards the introduction of an anti-abuse provision. The Dutch Ministry of Finance has stated it would support this amendment to the Directive. When the Netherlands is to chair the Council of the European Union though (first half of 2016) it might be considered whether an amendment is necessary and desirable, for example in view of aligning more closely with the OECD BEPS project. The ECOFIN meeting indeed reached political agreement on the amendment to the Directive.

The Ministry has likewise responded to the German-British compromise proposal on the requirements that patent or innovation boxes would have to satisfy. This proposal was up for discussion in the ECOFIN meeting, too. The Dutch Ministry agrees to the proposal insofar as it concerns the requirement of substance in the country where the box is applied. The Dutch innovation box has the same requirement. The current Dutch innovation box, though, also has the option to tax profits from innovative activities at the lower corporate income tax rate (effectively 5%) without these innovative activities having been patented or having a similar protection. These are activities for which a so-called R&D statement has been obtained (for payment reduction on payroll taxes for employees working in the Netherlands). Particularly for software development, but for the SME sector as well, this forms a major incentive for innovation. Since the Netherlands wants to preserve this innovation box component it insists on amending the compromise proposal.

Finally the Ministry states it will support a proposal for more transparency and ruling exchange with treaty partners and it will encourage other countries to follow this example. The Netherlands thus wants to put in place a significant basis for cooperation between tax authorities.

Newsletter Archives

To see past newsletters, please visit our website.

www.deloitte.com/jp/tax/nl/eu

Contacts

Deloitte & Touche (Amsterdam)

Kazuki Fujio, Manager KaFujio@deloitte.nl

Misaki Kawabata MiKawabata@deloitte.nl

Issued by

Deloitte Tohmatsu Tax Co.

HQ･Tokyo Office

Shin-Tokyo Building 5F, 3-3-1, Marunouchi, Chiyoda-ku, Tokyo 100-8305, Japan

TEL: +81-3-6213-3800

email: tax.cs@tohmatsu.co.jp

URL: www.deloitte.com/jp/en/tax