EU Advocate General holds Dutch fiscal unity regime contrary to EU law

Executive summary

On 27 February 2014, Advocate General (AG) Kokott issued her opinion on the compatibility of the Dutch fiscal unity regime in the light of the freedom of establishment in the case SCA Group Holding BV and others. The Dutch fiscal unity regime allows groups of companies to file one single tax return and to calculate Dutch corporate income tax on a consolidated basis. This means that, for example, losses incurred by one company in the group can be offset against the profits of another.

No fiscal consolidation is possible, however, between a Dutch parent and a Dutch second tier subsidiary which is held by an EU intermediate company. Similarly, the regime does not allow two Dutch subsidiary companies held by an EU parent company to form a fiscal unity between themselves. This implies that Dutch companies which have their linking company in another Member State cannot benefit from the Netherlands group consolidation regime.

The AG has concluded that the Dutch regime infringes upon the freedom of establishment in both respects and that no valid justification ground is available.

Detailed discussion

Background

Under Dutch tax law, companies forming part of a group of companies are taxable on a stand-alone basis. This means that each company individually needs to file its own corporate income tax return, losses incurred by one group company cannot be offset against profits derived by another group company and that intragroup transactions can individually give rise to profits and losses. However, from the perspective of a
group of companies as a whole, taxation on a stand-alone basis may not always be feasible, as it increases compliance costs and may result in taxation of legal profits that have not been realized from an economic point of view of the whole group. For that reason, Dutch tax law provides for the fiscal unity regime, which allows groups of companies to file one single tax return and to calculate Dutch corporate income tax on a consolidated basis.

Forming a fiscal unity for Dutch corporate income tax purposes is subject to a number of requirements. One of the main requirements is that eligible companies should all be corporate tax resident in the Netherlands, or should at least have a sufficient nexus within the Netherlands territory by virtue of a branch situated in the Netherlands. In addition, the head of the fiscal unity should own at least 95% of the shares in other group companies that wish to opt for consolidation.

**Fiscal unity between a Dutch parent and second tier subsidiary which is held by an EU intermediate company**

From the above requirements, it follows that the current fiscal unity rules exclude fiscal unities between a Dutch parent and Dutch second tier subsidiary which is held by an EU intermediate company. In the *Papillon case* decided by the Court of Justice of the European (CJEU) Union in 2008, the CJEU ruled in a comparable case that a French parent company and a French second-tier subsidiary company should be able to benefit from the French tax consolidation rules, in spite of the intermediate subsidiary being situated in another Member State.

In two of the joint cases at issue, the taxpayers have requested of the Dutch tax authorities to form a fiscal unity between the Dutch parent and a Dutch lower-tier subsidiary that is held through an EU intermediate company. This request however, was rejected. The taxpayers subsequently argued before the Court, referencing the Papillon case, that this rejection is incompatible with the freedom of establishment.

AG Kokott agrees with this position. She concludes that the denial to form a fiscal unity constitutes a restriction of the freedom of establishment. This is because in a domestic context, a fiscal unity between a Dutch parent and Dutch lower-tier subsidiaries is possible. The fact that in a purely domestic context a fiscal unity between a Dutch parent and second-tier subsidiary can only be formed if the intermediate company is included as well does not change that conclusion.

This restriction cannot be justified by the need to avoid double loss deduction. One reason is that the risk of double loss deduction remains available also if the fiscal unity is denied. Another reason is that the risk of double loss deduction should in any case be dealt with through custom-made legislation and can therefore not justify an automatic exclusion of the fiscal unity regime. On the basis of similar considerations, the AG concludes that the restriction can neither be justified by the need to preserve the coherence of the fiscal unity regime. In this respect, the AG notes that under the current fiscal unity rules, it is actually possible to also include nonresident companies in the fiscal unity to the extent that they carry on a branch in the Netherlands. This means that in situations comparable to the cases at hand, the Netherlands already partly waived the coherence of the fiscal unity. Through specific rules, possible adverse consequences are then neutralized once they occur.

On this basis, the AG concludes that similar custom made rules would constitute a less restrictive measure for the taxpayers in the cases at hand compared to an automatic and full exclusion of the fiscal unity.
Fiscal unity between two Dutch sister companies
The current fiscal unity rules also exclude fiscal
unities between two Dutch subsidiary companies in
the same group, held by a foreign parent company.
In one of the joint cases at issue, the taxpayer has
requested the Dutch tax authorities to form a fiscal
unity between two Dutch subsidiary companies in the
same group, held by an EU parent company, which
request was denied. On the basis of a comparable
reasoning as set out above, the AG concluded that this
rejection constitutes a restriction of the freedom of
establishment as well for which no valid justification
is available.

Implications
The AG’s opinion is in line with the position of the
European Commission. The Commission also takes the
view that the current fiscal unity regime is incompatible
with the freedom of establishment. In June 2011,
the European Commission formally requested the
Netherlands to amend its fiscal unity regime. The final
word will now be with the CJEU. If the position of the
AG is sustained, this implies that the Netherlands
should amend its fiscal unity rules accordingly. This
could mean that the Netherlands will move towards a
more territorial based fiscal unity regime.

Endnotes
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EYG No. CM4214

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