Executive summary

On 25 October 2017, the Advocate General (AG) of the European Court of Justice (ECJ) of the European Union (EU) issued an important opinion in two Dutch cases. The question before the ECJ is whether Dutch companies with a foreign subsidiary established and tax resident in the EU may apply the Dutch fiscal unity regime for certain (beneficial) elements only. According to the AG, certain benefits of the fiscal unity regime should also be granted in cross-border situations. For other benefits, however, this does not apply. If the ECJ follows the AG, the Dutch Ministry of Finance announced emergency response legislation with retrospective effect to 25 October 2017, 11 AM.

Detailed discussion

Fiscal unity regime

A group of Dutch companies (or permanent establishments (PEs) of foreign companies located within the Netherlands) can file a single tax return and calculate the Dutch corporate income tax on a consolidated basis by forming a fiscal unity. As such, the Dutch fiscal unity regime is not available for companies that are not tax resident in the Netherlands and that have no PE in the Netherlands.
A fiscal unity can have several benefits. For example, the losses of one group company can be offset against the profits of other group companies. In addition, intercompany transactions are ignored, as a result of which, assets can be transferred between group companies without direct tax consequences. Administrative simplicity is also an advantage; only a single corporate income tax return has to be filed. There are also disadvantages, such as joint and several liability for all corporate income tax liabilities and applicability of certain anti-abuse rules.

Current cases
In the two pending cases before the ECJ, the question is whether the Netherlands may restrict specific individual benefits of the fiscal unity regime to Dutch groups (per-element approach). The cases at hand concern Dutch companies with a foreign EU subsidiary. As the subsidiary is resident abroad, it currently cannot be included in a fiscal unity.

In the first case, the taxpayer, as a result of a cross-border transaction, is confronted with a Dutch base erosion rule (interest deduction limitation). This rule would not have applied if the taxpayer would have been able to form a fiscal unity. As a result, neutralization of the interest deduction limitation rule is an advantage resulting from the fiscal unity. The second case deals with a similar issue regarding a currency loss suffered with regard to a participation held in a UK subsidiary. In both cases, the question is whether the Netherlands may refuse to grant these individual advantages (interest deduction and deduction of the currency loss) of the fiscal unity regime in cross-border situations.

AG’s Opinion
The AG based his opinion on the Groupe Steria judgment, which was issued by the ECJ on 2 September 2015 (C-386/14). According to the AG, some benefits of the fiscal unity regime should also be granted in cross-border situations. For other benefits, however, this does not apply. Each element must therefore be evaluated separately. The fact that, in purely domestic situations, the fiscal unity is a matter of all or nothing, is not relevant here.

In the two current cases, this means that on the one hand, the interest deduction limitation must be eliminated. The AG based his opinion on the Groupe Steria judgment, which included a French interest deduction limitation in a comparable situation. As far as the second case is concerned, the AG sees no prohibited restriction of the freedom of establishment. On the basis of previous European case law (in particular Case X, which the ECJ ruled upon on 10 June 2015 (C-686/13)), the AG is of the opinion that the freedom of establishment does not require the Netherlands to deduct currency losses on participations.

Dutch Ministry of Finance’s response
Following the conclusion of the AG, the Ministry of Finance announced in a press release that it will issue emergency response legislation if the ECJ follows the opinion of the AG. These measures will be implemented into law with retroactive effect from 25 October 2017, 11:00 AM. The response measures are intended to basically provide an introduction of the “per-element approach” in certain domestic situations, with the aim to restrict certain benefits of the current fiscal unity regime. As a result, certain tax rules would be applied as if no fiscal unity exists. The Ministry of Finance hereby mentions the application of the interest deduction limitation rule to prevent base erosion (article 10a of the Dutch Corporate Income Tax Act 1969 (CITA 1969)), the participation exemption rules (article 13, paragraph 9 up to and including paragraph 15, as well as paragraph 17 CITA 1969), excessive participation debt rules (article 13l CITA 1969) and the loss relief rules in the case of a change in ownership (article 20a CITA 1969). Other advantages, such as the tax neutral transfer of assets and the transfer of tax losses within the fiscal unity, are not specifically mentioned to be restricted.

The Ministry of Finance furthermore announced that the emergency response measures should be replaced by a company tax group regime that is future proof both from a technical and legal perspective. With regard to the design and timing of the implementation of such a future regime, consultations will be held with the Dutch business community considering the tax investment climate for (foreign) companies.
Current fiscal unity structures - next steps

The announced emergency response measures may affect current fiscal unity structures, and it is therefore advisable to verify what the impact of the announced measures may be for existing structures. For the period prior to 25 October 2017, 11:00 AM, the announced measures would not have an impact. The same is true - both for the future and for the past - for fiscal unity benefits that are not listed in the proposed response measures (e.g., tax-free transfer of assets).

Furthermore, it is advisable to review whether a tax appeal to apply the per-element approach would be beneficial.

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