GT GreenbergTraurig

ALERT

Tax | June 2014

Dutch Fiscal Unity Regime in Breach of EU Law

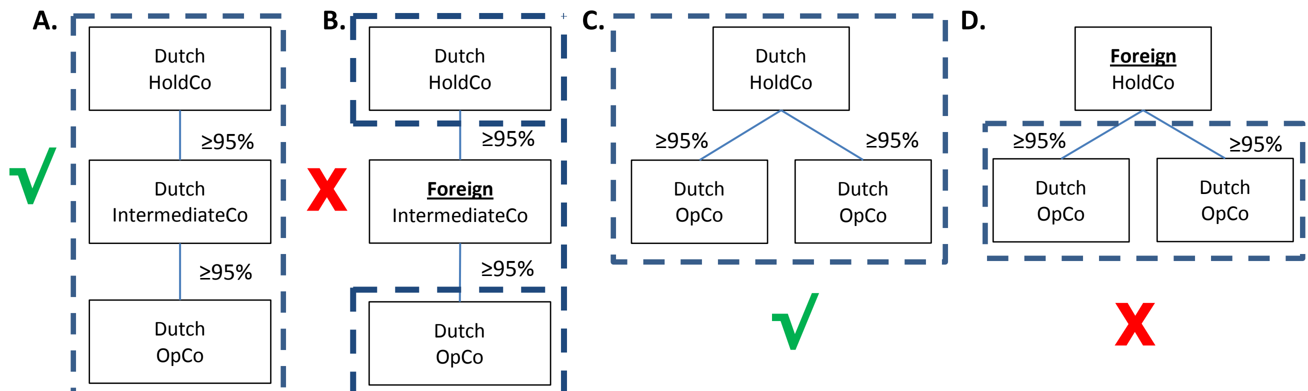
On June 12, 2014, the European Court of Justice (ECJ) ruled that, for corporate income tax purposes, the Dutch fiscal unity regime is in breach of EU law.

The Dutch fiscal unity regime

The fiscal unity regime provides for the tax consolidation of companies within a group by means of the filing of one consolidated tax return. As a consequence, the losses of one company can be offset against the profits of another group or company in the same fiscal year. Furthermore, transactions between group companies that are joined in fiscal unity are not recognized, because the fiscal unity is treated as one taxpayer. Therefore, the assets of the fiscal unity can in principle be transferred within the group without corporate income tax being levied.

However, only Dutch resident entities of a group are allowed to form a fiscal unity. More specifically, a fiscal unity is solely possible if it involves Dutch-based companies that are held directly or indirectly for at least 95 percent. Indirectly held companies may solely be consolidated in the fiscal unity when the intermediate company has been consolidated in the fiscal unity as well.

Examples:



Three consolidated EU cases

The following consolidated cases were brought before the ECJ with the request to determine whether the Dutch conditions to form a fiscal unity are aligned with EU law. The three cases involved two types of fiscal unity requests (both requests were denied by the Dutch tax authorities):

(i) Similar to example B *(see above)* - an incorporated parent company and tax resident in the Netherlands, holding an intermediate Dutch company tax resident in Germany, in turn holding a second-tier subsidiary also incorporated and tax resident in the Netherlands; and

(ii) Similar to example D *(see above)* - two sister companies that are incorporated and tax residents in the Netherlands, both directly held by a joint parent company that is tax resident in Germany.

What did the ECJ rule?

Violation of the freedom of establishment

The ECJ ruled the Dutch legislation to be a violation of the EU freedom of establishment. This is because in a domestic context, a fiscal unity is possible between a Dutch parent and Dutch lower-tier subsidiaries. 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 also joined in the same fiscal unity does not change that conclusion, according to the ECJ. On the basis of comparable reasoning, fiscal unities between two Dutch subsidiary companies in the same group, held by a foreign parent company also constitute a violation of the EU freedom of establishment.

No valid justification

A violation of the freedom of establishment may be justified under certain circumstances. The Dutch government argued that the restriction was justified by the need to avoid double loss deduction. The ECJ did not agree, among others reasons, because the risk of double loss deduction remains also if the fiscal unity was denied. The ECJ added that the risk of double loss deduction should in any case be dealt with through custom-made legislation and, therefore, cannot justify an automatic exclusion of the fiscal unity regime. The court finally ruled that it found no valid justification for this violation of the EU freedom of establishment.

Conclusion

As a result of this judgment, the Netherlands must allow fiscal unities between: (i) companies established in the Netherlands, even if the intermediate entity is established in other EU Member States *(see example B, above)*; and (ii) companies established in the Netherlands, even if the mutual parent company is established in other EU Member States *(see example D, above)*. These foreign companies will, then, not be included in the tax consolidation.

Unfortunately, the judgment otherwise does not necessarily extend to situations where the intermediate or parent company is a tax resident of a non-EU Member State, such as the United States. Nevertheless, larger multinational corporate clients are particularly expected to benefit from this ECJ ruling significantly.

Source: *Court of Justice EU, 12 June 2014, consolidated cases C-39/13, C-40/13 and C-41/13 (SCA Group Holding B.V., X and MSA International Holdings B.V.)*

This *GT Alert* was prepared by **Thomas van der Vliet** and **Job Leusink**. Questions about this information can be directed to:

- Thomas van der Vliet | +31 20 30 17 387 | tvv@gtlaw.com
- Job Leusink | +31 20 30 17 361 | leusinkj@gtlaw.com
- Or your Greenberg Traurig attorney

Albany
+1 518.689.1400

Amsterdam
+31 (0) 20 301 7300

Atlanta
+1 678.553.2100

Austin
+1 512.320.7200

Boca Raton
+1 561.955.7600

Boston
+1 617.310.6000

Chicago
+1 312.456.8400

Dallas
+1 214.665.3600

Delaware
+1 302.661.7000

Denver
+1 303.572.6500

Fort Lauderdale
+1 954.765.0500

Houston
+1 713.374.3500

Las Vegas
+1 702.792.3773

London*
+44 (0) 203 349 8700

Los Angeles
+1 310.586.7700

Mexico City+
+52 (1) 55 5029 0000

Miami
+1 305.579.0500

New Jersey
+1 973.360.7900

New York
+1 212.801.9200

Northern Virginia
+1 703.749.1300

Orange County
+1 949.732.6500

Orlando
+1 407.420.1000

Philadelphia
+1 215.988.7800

Phoenix
+1 602.445.8000

Sacramento
+1 916.442.1111

San Francisco
+1 415.655.1300

Seoul∞
+82 (0) 2 369 1000

Shanghai
+86 (0) 21 6391 6633

Silicon Valley
+1 650.328.8500

Tallahassee
+1 850.222.6891

Tampa
+1 813.318.5700

Tel Aviv^
+972 (0) 3 636 6000

Warsaw~
+48 22 690 6100

Washington, D.C.
+1 202.331.3100

Westchester County
+1 914.286.2900

West Palm Beach
+1 561.650.7900

Tax Advice Disclosure: To ensure compliance with requirements imposed by the IRS under Circular 230, we inform you that any U.S. federal tax advice contained in this communication (including any attachments), unless otherwise specifically stated, was not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any matters addressed herein.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. *Operates as Greenberg Traurig Maher LLP. **Greenberg Traurig is not responsible for any legal or other services rendered by attorneys employed by the strategic alliance firms. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2014 Greenberg Traurig, LLP. All rights reserved.*