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KPMG'S EU TAX CENTRE

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CJEU Decision in the SCA Group Holding joined cases

Freedom of establishment – loss relief – coherence of the tax system - double use of losses

On June 12, 2014, the Court of Justice of the European Union (CJEU) rendered its decision in the SCA Group Holding joined cases (C-39/13, C-40/13, and C-41/13). The Court concluded that Dutch legislation that denies tax consolidation (fiscal unity) between on the one hand a Dutch parent and its Dutch sub-subsidiary and on the other hand two Dutch sister subsidiaries, on the grounds that, in the first case, the subsidiary, and in the second case, the parent company is not resident in the Netherlands, is in breach of the freedom of establishment. The decision is in line with the earlier opinion of the Attorney-General Kokott.

Background

The case concerns two basic situations. The first involves a Dutch parent with an indirectly held Dutch subsidiary (sub-subsidiary) whereby the sub-subsidiary was held by a German subsidiary of the Dutch parent. The second involves a German parent holding three Dutch (sister) subsidiaries. In both cases the Dutch companies had applied to form a fiscal unity (a kind of group consolidation) for

corporate tax purposes and in both cases this had been rejected. In the first case this was because the intermediate (subsidiary) company was resident in Germany, and in the second case because the parent company was resident in Germany. In both cases a fiscal unity would have been possible between all the companies involved if they had all been resident in the Netherlands.

The CJEU's decision

The CJEU held that a Dutch parent with a non-Dutch subsidiary was treated worse than a Dutch parent with a Dutch subsidiary because, in the latter case, the Dutch parent has the ability to elect for a fiscal unity with its Dutch sub-subsidiary resulting in a cash flow advantage for the companies concerned. For these purposes the CJEU did not consider it relevant that, even in the case of a Dutch parent with a Dutch subsidiary, a fiscal unity between the Dutch parent and its Dutch sub-subsidiary was only possible if the Dutch subsidiary was also included in the fiscal unity.

The CJEU applied a similar analysis to the case of the three Dutch sister subsidiaries: the German parent was disadvantaged over a Dutch parent at least to the extent that the Dutch subsidiaries could otherwise be included in a fiscal unity.

The CJEU considered but rejected a number of possible justifications for the above restrictions. In particular the CJEU rejected the argument based on the need to preserve the coherence of the Dutch tax system related to the prevention of the double use of losses. In the case of the Dutch parent with the Dutch sub-subsidiary this was because Dutch legislation already prevented this, and in the case of the Dutch sister companies there was no direct link between the advantage of fiscal unity treatment and an offsetting tax charge. Tax avoidance was also rejected as a possible justification as this could only be applied if the rules in question have a specific objective of combating wholly artificial arrangements which do not reflect economic reality and the purpose of which is to escape tax normally due.

EU Tax Centre Comment

The CJEU's decision is largely based on its previous case law and to that extent was generally anticipated. KPMG in the Netherlands was involved in litigating one of the cases in this joined procedure and can provide support for similar cases where necessary.

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor.

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