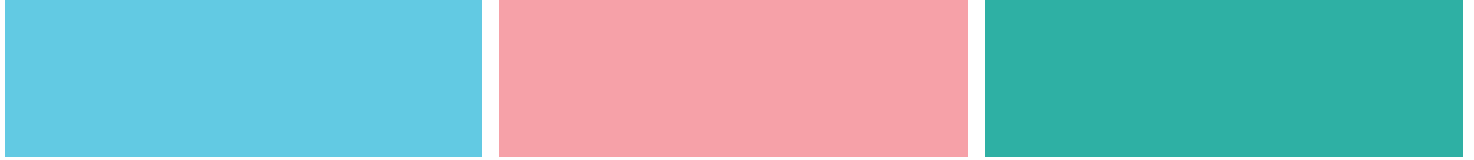


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ECJ publishes its judgment in the case “X Holding” (C-337/08)

1. THE DECISION

On 25 February, the ECJ decided that the Dutch group taxation system, which gives a resident company the option to form a tax group with its domestic subsidiaries but not with its non-resident subsidiaries is in conformity with EU law.

2. FACTS

X Holding, a Netherlands company, was the sole shareholder of a company resident in Belgium. Both companies requested to be treated as a group (tax entity) for Netherlands tax purposes. The Netherlands Tax Authorities rejected that request on this basis that the Belgian company was not established in the Netherlands.

3. LEGAL CONTEXT

According to Netherlands tax group regime, separately calculated profits and losses of companies belonging to a tax group maybe aggregated if the parent company owns at least 95% of the shares in the subsidiary. One of the requirements for the application of the tax group regime is that all group companies have to be resident in the Netherlands.



4. REASONS FOR THE JUDGMENT

The ECJ stated that the situation of a resident parent company wishing to form a single tax group with a resident subsidiary and the situation of a resident parent company wishing to form a single tax group with a non-resident subsidiary are objectively comparable as in both scenarios the advantages of such a scheme are sought. For this reason the court came to the result that the difference in treatment violates the freedom of establishment. However, this violation is justified by the overriding reason of the general interest, to safeguard the balanced allocation of taxing powers.

One of the main arguments that the ECJ has taken into account was the fact, that the Netherlands group taxation system is in practice *optional* and gives the possibility to every individual group company to dissolve the group taxation scheme from one year to the next. In a cross-border situation this flexibility would open the doors for tax optimization by giving the parent company the chance to “choose freely the Member State in which the losses of that subsidiary are to be taken into account”.

The argument of X Holding that, by way of analogy, non-resident subsidiaries could, in the context of a cross-border tax entity, be treated in the same way as foreign permanent establishments, was rejected by the ECJ. A foreign subsidiary is not comparable with a foreign permanent establishment and the fact that a Member State like the Netherlands decided to permit the temporary offsetting of losses incurred by a foreign permanent establishment does not mean that that possibility must also be extended to non-resident subsidiaries.

5. COMMENT

As expected, this judgment is unfortunate for X-Holding and a great success for the Netherlands tax authorities. It makes clear that the Netherlands are not obliged to open their group taxation system for cross-border situations within the EU.

However, this does not mean that the ECJ has retracted its judgment in the case “Marks & Spencer” which made it possible to use final losses of a foreign subsidiary. According to the facts of X-Holding the Belgian subsidiary still exists and the losses incurred can be used in Belgium in future years. The subsidiary has not been liquidated. Therefore the judgment gives no answers to the question whether or not a domestic group taxation system has to care for a possibility to transfer at least final losses of a foreign subsidiary. We are convinced of the fact the even in case of the non-applicability of a cross-border group taxation system, final losses of a foreign subsidiary have to be taken into consideration by the parent company.

However, an interesting question is whether this judgment only applies to the Netherlands group taxation system or whether it is also relevant for other, restricted to resident companies, group taxation schemes (such as Cyprus, Ireland, Latvia, Malta, Finland, Germany, Luxembourg, Poland, Portugal, Slovenia and Spain).

From our point of view this depends on the question how comparable the national tax schemes of the other countries are to the Netherlands’ regulations.

For example the German group taxation system - which is already different regarding the formal conditions - requires a profit and loss transfer agreement with a minimum period of at least five years and does not give the possibility to opt into and out of the system very easily year by year without any negative tax consequences in former years. Therefore, the flexibility to use such a cross-border regime for tax planning activities would be much smaller.

Therefore, this judgement does not necessarily mean that all other existing European group taxation systems which are restricted to domestic companies are without any doubt compatible with EU law. It is not impossible that the ECJ would come to a different conclusion with regard to certain other group taxation systems like for instance the German Organschaft. In individual cases, it might be worth to take appropriate actions against the respective group taxation system.

However, we assume that this judgment takes any “pressure” from the Member States (if there was any) to extend their domestic group taxation systems to foreign subsidiaries.

If you would like to consider your company’s situation with regard to a (cross-border) group taxation, feel free to contact your personal BDO advisor or send an e-mail to EUDT-CoE@bdo.de.

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