

Fiscal unity developments

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Developments concerning the fiscal unity for Dutch corporate income tax purposes – opportunities!

Following a decision rendered by the Court of Justice of the European Union on June 12, 2014, the Amsterdam Court of Appeals ruled in three cases on December 11, 2014 that certain elements of Dutch legislation on the fiscal unity for corporate income tax purposes are contrary to the European freedom of establishment. In response to this, the Deputy Minister of Finance, by Decree of December 16, 2014, amended an earlier Decree on the fiscal unity. In anticipation of legislation, the amendment contains an approval whereby requests may now also be granted if it concerns a fiscal unity between (in short):

- Dutch resident companies whose shares are held by a **'top company'** (parent company resident in another Member State of the EU/EEA);
- a Dutch resident parent company and a Dutch resident sub-sub-subsidiary whose shares are held by an **'intermediate company'** (intermediate holding company resident in another Member State of the EU/EEA).

These developments have given rise to more opportunities for entering into a fiscal unity for corporate income tax purposes. This offers opportunities to, for example, international companies that are active in the Netherlands with several companies.

Potential benefits of the fiscal unity for Dutch corporate income tax purposes

By entering into a fiscal unity, Dutch resident companies can be treated as a single taxpayer for corporate income tax purposes. There are a number of potential benefits resulting from this, including:

1. Dutch gains and losses can be offset.
2. In the case of transactions/reorganizations within the fiscal unity, no realization of profits takes place for corporate income tax purposes or realization of profits can be deferred for corporate income tax purposes.
3. Companies within the fiscal unity can more easily be liquidated or merged.
4. Classification provisions are applied at the consolidated level (classification as a service entity or holding and financing company, for example).
5. Anti-abuse rules are not applied, are applied more moderately or are applied to a lesser extent at the consolidated level (deduction limitation for excessive participation interest or loss compensation rules, for example).
6. Only one Dutch corporate income tax return has to be filed each year.

Please note: the creation of a fiscal unity may also have adverse effects. In addition, the law includes several specific provisions against abuse of a fiscal unity.

Current legislation

On the basis of current legislation, a fiscal unity can only be created if a Dutch resident parent company directly or indirectly holds the legal and economic ownership of at least 95 percent of the shares in the nominal paid-in capital of a Dutch resident subsidiary (the ownership requirement). This requirement has been relaxed by the Decree. In addition, a fiscal unity between a Dutch resident parent company and a Dutch resident sub-sub-subsidiary is only possible if the sub-sub-subsidiary is held by a Dutch resident company that is also part of the fiscal unity.

More possibilities resulting from the case law and Decree!

As a result of the aforementioned court judgments and the Decree, there are now more possibilities for entering into a fiscal unity. In anticipation of legislation, the Decree elaborates upon the main scenarios and provides for conditions. A number of aspects are outlined below.

Fiscal unity between sister companies

When requesting a fiscal unity between sister companies, the taxpayer in principle chooses which of the sister companies is regarded as 'parent company'. Various factors may be relevant when making this choice. These may for example include possible future restructurings, application of anti-abuse rules and consequences in the field of administrative interest, late payment interest and tax interest. Since the choice cannot be reversed once the fiscal unity has been created, the choice should be carefully considered.

If the fiscal unity is created during the financial year, all sister companies (thus including the designated parent company) close the current financial year. This may have implications for the loss compensation deadlines.

Fiscal unity between parent company and sub-subsidiary/sub-subsidiaries

With this variant of the fiscal unity, the activities and equity of the sub-subsidiary form part of the activities and equity of the parent company, leading to a tax-exempt equity increase for that parent company. This means there is no 'pure consolidation': the participation of the parent company in the intermediate company remains on the balance sheet of the parent company. For this variant, the Decree does not require the parent company to close its financial year when entering into a fiscal unity during the financial year.

Requesting a fiscal unity? Meijburg & Co will be happy to be of assistance with the analysis

The Decree offers opportunities but also raises questions, partly because specific laws and regulations in the current legislation apply mutatis mutandis to the situations covered by the Decree. For an answer to many of the questions raised, we will have to wait for the forthcoming legislation. At the same time, it should be noted that a fiscal unity can be entered into with retroactive effect up to a maximum of three months. To fully utilize the opportunities for creating a fiscal unity, the Dutch Tax Authorities will therefore – after making an analysis - have to be approached in time. Meijburg & Co can be of assistance in this respect with tailor-made services. Please contact your Meijburg & Co tax advisor or one of the following specialists.

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