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Supreme Court rejects fiscal unity between Dutch sister companies with a joint non-EU parent company

In deviation from the Court of Appeals Arnhem-Leeuwarden (see our report from May 2016), but in line with the Advocate General's Opinion, the Supreme Court ruled on December 15, 2017 that when the joint parent company is established in a third country (a country outside the European Union (EU) or European Economic Area (EEA)) a request to create a fiscal unity between Dutch sister companies does not have to be granted. This is in spite of non-discrimination provisions in most tax treaties concluded by the Netherlands that prohibit the higher taxation of companies if the shareholder is not established in the Netherlands.

Limited effect of EU law

The earlier case law, which made it possible to form both a fiscal unity between sister companies and a 'Papillon fiscal unity' (see for example our report from December 2014), was based on the EU law principle of the freedom of establishment. However, this only applies within the EU and the EEA. In the statutory provisions that have resulted from this case law, parent companies and intermediate holding companies established in the Member States are thus correctly regarded as qualifying top and intermediate companies. Although the EU law principle of the free movement of capital does cover third countries, it cannot – to put it briefly – be invoked against national rules that only apply to shareholdings which allow the shareholder to exercise decisive influence on the policy of the subsidiary, such as is the case with the fiscal unity due to the 95% requirement. EU law therefore does not solve the problem of a parent company or intermediate holding company that is established in a third country.

Tax treaties may provide solution

The Court of Appeals Arnhem-Leeuwarden ruled in April 2016 however that by invoking the non-discrimination clause of the tax treaty concluded between the Netherlands and Israel in 1973, a request for a fiscal unity also had to be granted in the case of four Dutch companies (partly sister companies) with a joint ultimate parent company that was established in Israel (without a permanent establishment in the Netherlands). It is significant that this non-discrimination clause is almost identical to Article 24(5) of the OECD Model Convention (OMC). From the wording of this clause and the accompanying OECD Commentary, the Court ultimately inferred that the fiscal unity must be allowed.

In its judgment of December 15, 2017, however, the Supreme Court, following the Opinion of the Advocate General, ruled that the fiscal unity does not have to be allowed, because if the Dutch (sister) companies had had a resident parent company, they would also not have been able to form a fiscal unity with one another without including the parent company. The Supreme Court thus implied that the non-discrimination provision does apply to consolidation tax regimes. With respect to the farther-reaching assertion of the taxpayer, the Supreme Court concluded that, since companies resident in Israel are not subject to corporate income tax in the Netherlands, they cannot be part of the fiscal unity (no cross-border fiscal unity).

Practical consequences
Objections filed in similar cases can now be dismissed in accordance with this judgment. We should point out that the present case concerned a non-discrimination provision without a most-favored-nation clause.

While earlier developments led to changes to the fiscal unity regime, see the Papillon case law in this respect, or were reason to announce changes to it, see our recent report on the 'per element' approach, the present judgment will not require further amendment of the regime.

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