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By PwC Deutschland | 27. Februar 2014

Exclusion of domestic sub-subsidiaries from tax group conflicts with freedom of establishment?

An ECJ advocate general has suggested the court hold that the Dutch provisions on tax groups are in conflict with the freedom of establishment insofar as they do not allow domestic sub-subsidiaries of a foreign subsidiary or domestic subsidiaries of a foreign parent to join or form a Dutch tax group.

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Under Dutch law a domestic parent may form a tax group with its domestic subsidiaries or with a domestic permanent establishment of a foreign subsidiary. However, sub-subsidiaries may not join a tax group without their parent. In consequence, neither the Dutch sub-subsidiary of the German subsidiary of a Dutch parent could join the tax group of the latter, nor could three Dutch subsidiaries of a German parent pool their results in their own Dutch tax group. These two questions have been combined in three joined cases before the ECJ. The advocate general has now issued her opinion.

In all three cases the Dutch domestic units of the group were prevented from joining a Dutch tax group simply by virtue of their foreign parents. This contrasted with the position that would have obtained, had their parents themselves been subject to Dutch taxation through a permanent establishment. It also contrasted with the position of purely domestic groups, since the group would have had a free choice as to the inclusion of each subsidiary with its own sub-subsidiaries. These contrasts were a restriction on the freedom of establishment of all concerned. The restriction could not be justified by the need to prevent a double deduction of losses (once directly and once through the write-down of the investment in the books of the foreign parent), since that “danger” existed regardless of the existence of the Dutch tax group. In any case, it was primarily a matter for the foreign state to allow or disallow the write-down of its own taxpayer. It could also not be justified by the need to preserve the coherence of the tax system, since only domestic companies were at issue. If Dutch permanent establishments of foreign companies could be included successfully in a Dutch tax grouping, then so could the Dutch sub-subsidiaries of foreign parents. The advocate general also dismissed Dutch (and German) government objections to the grouping of three subsidiaries without their (foreign) parent. Arguments that this led to a group without a taxpayer were purely technical or administrative and could easily be resolved.

The ECJ case references are C-39/13 *SCA* and C-41/13 *MSA* (sub-subsidiaries) and C-40/13 *X AG* (subsidiaries of foreign parent) opinion of February 27, 2014.

Schlagwörter

freedom of establishment, sub-subsidiaries, tax group