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Tax groups not broken by foreign parent or intermediate holding

The ECJ has held that the Dutch legislation allowing members of a tax group to consolidate their results must include local sub-subsidiaries of non-resident intermediate parents as well as associated companies held by a common parent in another member state.

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Dutch tax law allows group companies to consolidate their results on the parent with elimination of inter-company gains and losses. However all members of the group must be local entities linked with a 95% shareholding. Sub-subsidiaries may join a group, but only if their immediate parents are also group members. Sub-subsidiaries held by a foreign parent are thus excluded by definition, as are associated companies held by the same parent in another member state. The ECJ has now handed down a joint judgment on three cases before it involving Dutch/German cross-border investment.

In two of the cases the Dutch parent held operating subsidiaries in Holland and Germany. Some of the German subsidiaries held their own subsidiaries in Holland. These sub-subsidiaries applied to join the tax group of their ultimate parent, but were refused because their immediate parents were not, and could not be, group members. Since they were in a comparable position to Dutch sub-subsidiaries of purely national groups, the court held that their exclusion was a breach of their freedom of establishment. Attempts by the government to justify the restriction by the necessity to prevent abuse – a loss double-dip by deducting the loss of a sub-subsidiary once through the group consolidation and a second time through a write-down of the investment in its foreign parent – came to nought, once it became clear that Dutch law in any case excluded gains and losses on the sale of 95% investments from the tax computations.

In the third case, involving two Dutch subsidiaries of the same German parent, the court came to the same conclusion that the refusal to allow them to form their own Dutch group was a restriction on their freedom of establishment in an otherwise comparable situation. The government attempt at justification with the need to protect the tax system from abuse was unsubstantiated and ignored.

The ECJ case references are (sub-subsidiaries of German subsidiaries) C-39/13 *SCA* and C-41/13 *MSA* and (German parent) C-40/13 *X*, joint judgment of June 12, 2014.

Schlagwörter

consolidate, tax group