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ECJ: Refusal of advantages for group taxation in case of ‘non-controlling’ permanent establishment

The European Court of Justice must currently review an Italian regulation that prevents certain companies from benefiting from a more favorable rule regarding the deductibility of interest expenses in the case of a cross-border group taxation scheme solely because their common parent company is resident in another Member State. Advocate General Juliane Kokott presented her Opinion on the matter and suggests the court decide that such national legislation is not hindered by the freedom of establishment under Articles 49 and 54 TFEU.

Background (in brief)

A French undertaking is attempting to secure the benefit of cross-border group taxation after the national deadline for applying for it has expired (that is, retrospectively). Relying on EU law, it claims that interest payments to the French parent company, which is not part of the group in question, should be treated in the same way as interest payments to a parent company established in Italy which is part of such a group.

Specifically, it must be clarified, first, whether the refusal to grant the advantages of group taxation in the present case infringes the fundamental freedoms and, if so, secondly, whether it is then the case that, under EU law, the benefit of group taxation is available retrospectively and without the need to comply with the application deadline actually laid down.

The tax administration submits, first, that the conditions of group taxation are not met. It states, secondly, that group taxation comes into effect not by operation of law but only on application. However, such an application is subject to a time limit and, that time limit having expired, was no longer possible in this instance.

In principle, the referring court wishes to ascertain whether the freedom of establishment under Article 49 TFEU precludes the Italian group taxation legislation because it does not permit group taxation involving a parent company established in another country (a ‘non-resident parent company’) whereas group taxation is possible in the case where there is a parent company established in national territory (a ‘resident parent company’).

The Advocate General proposes that the Court decide as follows:

The principles of the freedom of establishment do not prevent certain companies from benefiting, under the national group taxation scheme, from a more favourable regime of deductibility of interest payments, on the sole ground that the common parent company (including the shareholdings controlled by it) is not subject to domestic tax sovereignty.

From the perspective of the GA, this is supported by the judgment in *SCA Holding* (C?39/13, C?40/13, C?41/13), purportedly also in the situation where the benefit of that more favorable deductibility regime is available if the shareholdings in those companies are to be attributed to a resident parent company or a resident permanent establishment of the non-resident parent company and are thus also subject to domestic tax sovereignty.

In this context, a permanent establishment can, as a dependent entity, take on the function of a controlling parentcompany for the purposes of vertical integration in the Member State concerned. This, however, is subject to the condition that, in much the same way as a resident parent company, it represents the non-resident parent company in national territory (by means of a qualified permanent establishment). That condition is not met, however, where shareholdings are attributed not to the permanent establishment but to the head office in another State. The fact, as is the case in Italy, that payments to a

simple permanent establishment are treated as payments to a non-resident third party is therefore consistent with tax law.

Lastly, the GA concludes that the principles of equivalence and effectiveness do not preclude legislation of a Member State providing for a tax integration scheme under which an application to benefit from such integration may be filed only within a certain time limit. (Opinion, paragraphs 57 through 69).

Note: The current Opinion is consistent with the ECJ's earlier judgment of 25 February 2010 in the case **C?337/08** *X Holding BV* according to which the tax advantage concerned lies in the possibility granted to resident parent companies and their resident subsidiaries to be taxed as if they formed a single tax entity, any extension of that advantage to cross-border situations would have the effect of allowing parent companies to choose freely the Member State in which the losses of their non-resident subsidiary are to be taken into account. Such a tax scheme which prevents the formation of such a single tax entity with a non-resident subsidiary must therefore be regarded as being proportionate to the objectives which it pursues.

Source:

ECJ, Opinion of 26 March 2026 **C?592/24** *Société Générale and Others*.

Keywords

interest deduction, tax consolidation group