Impact ruling European Court of Justice on Dutch fiscal unity regime

February 22, 2018

Today the Court of Justice of the European Union (CJEU) issued an important judgement ruling in case C-398/16, which affects the working of the Dutch fiscal unity regime. Dutch resident companies and foreign companies with a Dutch permanent establishment can form a fiscal unity for Dutch corporate income tax (CIT) purposes. Within a fiscal unity, intra-group transactions are in principle not visible for Dutch CIT purposes. As a result, certain provisions (e.g. certain interest deduction limitations) of the Dutch Corporate Income Tax Act (CITA) do not apply.

The ruling of the CJEU is in line with the conclusion of AG Campos Sánchez Bordona of 25 October 2017 and relates to the compatibility of the Dutch fiscal unity regime with EU law regarding the freedom of establishment.

The CJEU determined that in the case at hand, applying an interest deduction limitation to an intra-EU transaction, whereas that same interest deduction limitation would not have been applied in a purely domestic situation, is in breach with the EU freedom of establishment.

While the case at hand only concerns one certain ‘element’ of the Dutch fiscal unity regime, it calls into question the compatibility with EU law of many other elements of the fiscal unity regime.

Considerations

We advise companies to review their corporate structures in the Netherlands as they could be affected immediately by the CJEU ruling due to the retroactive effect of the announced measures that are described in more detail below. Furthermore, revocable CIT assessments relating to fiscal years up to 2017 should be carefully reviewed and if necessary objections can be submitted to the Dutch tax authorities.

Background of case C-398/16

Case C-398/16 concerns a Dutch company, X BV, that acquired an interest-bearing loan from a Swedish member of the same group. X BV contributed capital in an Italian subsidiary. X BV deducted the interest paid to the Swedish company in its CIT return. However, the Dutch tax authorities did not allow the deduction with reference to the interest deduction limitation of article 10a of the Dutch CITA. X BV argued that interest deduction would have been allowed if X BV were permitted to form a fiscal unity with its Italian subsidiary. X BV therefore claimed that applying the interest deduction limitation rules is in breach with the freedom of establishment of articles 49 and 54 TFEU.

The CJEU referred to the judgement in X Holding (C-337/08) and Groupe Steria (C-386/14) and stated that the situation of a resident parent company that wants to form a fiscal unity with its resident-subsidiary is objectively comparable to a resident parent company that wants to form a fiscal unity with its non-resident subsidiary. According to the CJEU there were no justifications for the difference in treatment (such as the balanced allocation of power to

impose taxes, the coherence of the Dutch fiscal unity regime and the need to prevent tax evasion). The CJEU therefore ruled that the Dutch legislation is not in accordance with the EU freedom of establishment, since it prohibits the deduction of interest in the case of a parent company with a subsidiary resident in another Member State (without having a permanent establishment in the Netherlands), whereas the deduction would have been possible if the subsidiary were a resident of the Netherlands.

Measures announced by the Dutch State Secretary

On 25 October 2017 at 11:00 am, right after the conclusion of AG Campos Sánchez Bordona was published, the Dutch State Secretary made an announcement in which he anticipated an unfavorable decision for the Netherlands by the CJEU. The announcement contained measures that eliminate certain advantages of the Dutch fiscal unity regime in domestic situations that are not available in intra-EU situations. The measures would only apply if the CJEU would rule in favor of the taxpayer. Therefore, the Dutch fiscal unity regime would be in accordance with EU law. Hence, since the CJEU ruled in favor of the taxpayer, the measures retroactively apply as of 25 October at 11:00 am. Since the measures are announced legislation, the Dutch Parliament still has to approve the enactment of these measures. However, it is expected that the Parliament will approve these measures.

Consequently, certain provisions of the Dutch CITA, that did not apply because of the application of the fiscal unity regime, do apply as of 25 October 11:00 am as if there were no fiscal unity. For example transactions within the scope of the interest deduction limitation of article 10a CITA conducted between two Dutch resident entities that are part of the same fiscal unity, will become visible.

Criticism conditional nature announced measures

The Dutch association of tax advisors criticized the conditional nature of the announced measures and the way in which the measures were announced, since these circumstances give rise to legal uncertainty for taxpayers. In addition, taxpayers are not able to prepare for these measures by altering their corporate structure as these measures retrospectively enter into force. As a result, the administrative burden of many companies will increase. Not only does this affect multinationals, it also affects pure domestic businesses that structured their business using multiple entities.

Your Key Contacts

Heico Reinoud
Partner, Amsterdam
D +31 20 795 34 14
heico.reinoud@dentons.com

Jurjen Bevers
Partner, Amsterdam
D +31 20 795 34 13
M +31 6 46 40 21 74
jurjen.bevers@dentons.com

Marnix Veldhuijzen
Partner, Amsterdam
D +31 20 795 34 10
M +31 6 46 23 31 27
Marnix.Veldhuijzen@dentons.com

Paul Halprin
Partner, Amsterdam
D +31 20 795 34 11
M +31 6 46 29 67 87
paul.halprin@dentons.com