CJEU RULING MAY JEOPARDIZE FISCAL UNITY REGIME IN THE NETHERLANDS

RECENT DEVELOPMENTS

The Court of Justice of the European Union ("**CJEU**") ruled that the Dutch fiscal unity regime was in breach with the freedom of establishment on 12 June 2014 (SCA Group Holding BV and others, Joined Cases C-39/13-C-41/13). The (Dutch) fiscal unity regime – simplified and summarized – allows a (parent) company and its subsidiaries, in which it directly or indirectly holds at least 95% of the capital, to form a consolidated group for corporate income tax ("**CIT**") purposes, a "fiscal unity". The fiscal unity may file one single CIT return and may calculate its CIT on a consolidated basis.

As a response to the decision, the Dutch Secretary of State released an administrative decree allowing Dutch companies which are linked through an intermediate company situated in an EU (European Union) or EEA (European Economic Area) Member State to opt for the Dutch fiscal unity regime in December 2014. Under the new Decree, two Dutch subsidiary companies can form a fiscal unity with each other if their parent company is situated in another EU or EEA Member State. The same is possible now for a Dutch grandparent company and its Dutch second-tier subsidiary, when it is held by an EU / EEA intermediate. The Decree is a part of the new Dutch legislation.

However, before be able to issue new legislation, the Dutch government may need to amend its proposals again as the CJEU followed Advocate General Kokott in her opinion on the French taxation of EU-source dividends today. The CJEU stated in paragraph 40 of the Groupe Steria ruling (Case C-386/14) that: "*[…] the answer to the question raised is that Article 49 TFEU must be interpreted as precluding rules of a Member State that govern a tax integration regime under which a tax-integrated parent company is entitled to neutralisation as regards the add-back of a proportion of costs and expenses, fixed at 5% of the net amount of the dividends received by it from tax-integrated resident companies, when such neutralisation is refused to it under those rules as regards the dividends distributed to it from subsidiaries located in another Member State, which, had they been resident, would have been eligible in practice, if they so elected.*" .

In the light of the ruling, it would be possible for a company to benefit from certain elements (benefits) of the Dutch fiscal unity regime or a similar regime within the European Union without being part of a fiscal unity. This could result in an unintended outcome such as cherry-picking (claim or retain benefits of the fiscal unity, without the downsides), extensive and complicated administrative burdens and additional implementing measures for the Dutch tax authorities. New legislation may be expected in the Netherlands and other countries within the EU. On 16 April 2015, Advocate General Kokott also (silently) used the 'per element' approach in the Finanzamt Linz-Case (C-66/14).

FISCAL UNITY BENEFITS

A fiscal unity for Dutch CIT purposes has certain tax benefits. One of the benefits is for example the setting off the carry forward tax losses of one company against the profits of another group company in the same fiscal year, the filing of one consolidated tax return for the whole group and calculating CIT on a consolidated basis. Also intragroup transactions are ignored for Dutch tax purposes, which make reorganisation within a group easier from a CIT perspective. Unfortunately, there are also some downsides to a fiscal unity, such as settlement of internal debts (when entering), or joint liability for tax debts of the fiscal unity and (when breaking-up) the anti-avoidance clause may kick in when assets with hidden reserves are transferred within the group. However, it can be concluded that the Dutch fiscal unity generally offers an attractive package for corporate groups.

POSSIBLE CONSEQUENCES FOR THE DUTCH FISCAL UNITY REGIME

In the light of the CJEU settled case law in connection with the (cross border) fiscal unity, the Dutch legislator has a hard time amending the Dutch fiscal unity regime to any changes and is not enthusiastic to make changes as they are reluctant to import foreign tax losses (despite that previous CJEU cases should prevent this). The Dutch legislator may introduce new anti-abuse legation in order to prevent the risk of double tax losses within the EU and EEA and “other possible” adverse tax consequences. This also may be the case for other and similar fiscal unity regimes within the EU / EEA.

However, given the position of the Dutch representative during the hearings of the joined cases SCA Group Holding BV and others, and the delay in progress when working on draft proposed legislation, we understand that there may be a risk that the Groupe Steria ruling may have adverse consequences for the existence of the fiscal unity under the current Dutch CIT. The Ministry of Finance has not responded on the Groupe Steria ruling yet.

The Dutch legislator may be reluctant to make changes to the Dutch fiscal unity again and could – as an alternative which we do not hope and expect – also decide to abolish this regime. As it would be possible for a company to benefit from certain elements (benefits) of the Dutch fiscal unity regime without being part of a fiscal unity which could result in cherry-picking, this risk is real. The fact that extensive and complicated administrative burdens and additional implementing measures for the Dutch tax authorities may be expected.

WHAT SHOULD BUSINESSES CONSIDER?

Due to the Group Steria ruling changes to the Dutch fiscal unity regime and other similar regimes within the EU / EEA are to be expected. Therefore, it is advisable to look at the consequences which an adjustment or abolishment of the fiscal unity regime in The Netherlands or other EU / EEA country could have for you / your fiscal unity. Obviously, Mazars would be pleased to assist you in this research and is very well placed to assist you herewith.

If you have any questions or comments with respect to this Tax Letter or require any additional information, please feel free to contact Dick van Sprundel – International Tax Partner at Mazars / Assistant Professor International and European Tax Law at +31 (0)88 277 16 17 / +31 (0)6 27 466 898 or your regular contact at Mazars.