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CONTENT

- EU compliance of the Danish rules on corporate joint taxation
- The Danish tax authorities were defeated in a recent TP case

EU compliance of the Danish rules on corporate joint taxation

The European Court of Justice recently ruled in a case concerning whether the Danish rules on joint taxation of companies comply with the EU rules on freedom of establishment.

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In the preliminary ruling, the European Court of Justice concluded, that rules on corporate joint taxation do not comply with the EU rules on freedom of establishment, if:

- The rules do not allow a resident company, which has not opted for an international joint taxation scheme, such as the Danish, to deduct losses from its taxable profits incurred by a permanent establishment in another EU member state, and
- Deduction is prohibited even though the company has exhausted the possibilities of deducting those losses under the law of the EU member state in which the permanent establishment is situated, and
- Even if the company has ceased to receive any income from that permanent establishment, so there is no longer any possibility of the losses being taken into account in the future in that EU member state, deduction is not allowed.

Whether the Danish rules on corporate joint taxation are indeed of the nature described above must be determined by the Danish High Court in the main proceedings.

Danish tax payers in similar situations may want to request a reassessment based on the verdict. The Danish tax authorities may issue guidance in this regard.

Background

In Denmark, national joint taxation between all Danish entities within a group is mandatory.

International joint taxation between all entities within a group is optional.

Election of international joint taxation is binding for a period of 10 years.

Income/loss from permanent establishments outside Denmark is excluded when calculating income of Danish companies, unless international joint taxation is elected.

A tax loss in a Danish permanent establishment can only be utilised within a joint taxation, if the loss cannot be utilised abroad.

The case before the European Court of Justice (C-650/16) concerned a Danish resident company, which is part of a Danish group.

The company's Finnish permanent establishment closed in 2009. The losses incurred by the Finnish permanent establishment were not and cannot be deducted in Finland following the closure.

In those circumstances, the company applied to deduct those losses from its taxable income in Denmark for the fiscal year 2009.

This was rejected by the Danish tax authorities, as it would require election of the international joint taxation scheme.

The company challenged this decision before the Danish High Court arguing that deduction would have been possible, had the losses been incurred by a Danish permanent establishment. Consequently, that difference in treatment constitutes a restriction of the freedom of establishment, which is non-compliant with EU law, according to the company.

Hence, the question presented to the EU Court of Justice was whether the rules such as the Danish rules on corporate joint taxation constitute a restriction on the freedom of establishment that is non-compliant with EU law.

The Danish tax authorities were defeated in a recent TP case

The case concerned whether a Danish company of a large multinational group had received payment at arm's length from a foreign group company for marketing services rendered.

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The case before the High Court was instigated by the Ministry of Taxation, already defeated in the matter at the National Tax Tribunal.

The High Court ruled that the transfer pricing documentation prepared by the Danish company was not prepared timely according to the rules.

However, the transfer pricing documentation was available when the Danish tax authorities reviewed the tax matters of the company and the High Court concluded that the documentation was sufficient to the extent that estimation of the company's income by the Danish tax authorities was not warranted.

The remaining question was whether the Ministry of Taxation had substantiated that the intra-group remuneration of the Danish company for marketing services rendered was at arm's length.

The Danish company was remunerated for marketing services rendered for a foreign group company based on sales invoiced in Denmark or at least costs plus a 15 pct. mark-up.

The Ministry of Taxation argued that the Danish company had not been remunerated based on sales to a multinational client based in Germany, which included the purchased products in its own products and in turn sold them to Danish end-customers.

However, the High Court ruled that this was not the case, as a German group company had been remunerated for marketing services rendered in Germany in this respect.

Consequently, the High Court ruled in favour of the Danish company and noted that any – incidentally non-measurable – effects on sales to multinational clients based in the US, which included the purchased products in their own products and in turn sold them to Danish end-customers, could not lead to another result.

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