

EU Court of Justice decision blows Dutch corporate tax consolidation regime wide open

On 12 June, the EU Court of Justice ('ECJ') issued groundbreaking judgments regarding the Dutch fiscal unity (*fiscale eenheid*) or tax consolidation regime.

Under the current tax consolidation regime, only Dutch companies can form a fiscal unity, and only if there is a direct link between the companies, ie that of parent and subsidiary. It is (a) generally not possible to consolidate two Dutch sister companies (without also consolidating their joint Dutch parent company) and (b) not possible to consolidate a Dutch parent company with its Dutch second-tier subsidiary (without also consolidating the relevant first tier Dutch subsidiary).

The Court ruled that in EU (or EEA) situations, both (a) and (b) can be in conflict with European law, and the Netherlands may not categorically refuse tax consolidations between such Dutch companies, solely because the parent company or the subsidiary company is a foreign (tax) resident. This judgment follows the conclusion of the Attorney-General Kokott and is also in line with prior rulings, more specific in line with the ruling in *Papillon* (C-418/07).

How does this affect Dutch resident companies?

The Dutch tax authorities have previously unlawfully denied applications to consolidate the companies described under (a) and (b) above in a Dutch fiscal unity, based on the argument that the parent or subsidiary company was not a Dutch resident. Going forward, this could mean that such consolidations should under current law be allowed. It is at this point however unclear how the Ministry of Finance and the Dutch tax authorities will respond to this ECJ ruling.

What should I do now?

Typically Dutch companies part of a larger group are held through a single Dutch company allowing for a fiscal unity. But where Dutch sister companies are held through a common foreign EU (or EEA) company or where there is an EU (or EEA) company between two Dutch companies, this decision leaves no doubt that the Dutch tax consolidation regime ie a fiscal unity can be successfully claimed. If not

yet done at an earlier stage, we recommend, where appropriate, to submit a request to form a fiscal unity within three months from the date of the decision.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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