Case C-749/18, *B and Others*

The CJEU clarifies the application of the freedom of establishment to tax consolidation regimes

Today, the Court of Justice of the European Union ("**CJEU**") issued its judgement in case C-749/18, *B and Others*, dealing with the Luxembourg tax consolidation regime. The case involved Luxembourg companies (the "**Applicants**") controlled by a French parent and part of a tax consolidation in Luxembourg. The Applicants requested to include in the tax consolidation the profits and losses of their "sister companies" (i.e., companies that were controlled by the same French parent company of the Applicants). However, Luxembourg tax authorities rejected the request.

The CJEU had to answer three preliminary questions asked by the Luxembourg tax court, the first two of which appear worth of the following brief analysis.

The first question dealt with compatibility of the Luxembourg rules with the freedom of establishment, given that such rules allowed the tax consolidation of sister companies (i.e. horizontal tax consolidation) only insofar as the non-resident controlling entity maintained a permanent establishment in Luxembourg, through which the shareholdings in the controlled companies were held. In this respect, the CJEU referred to its judgment of 12 June 2014 (*SCA Holding,* joined cases C-39/13, C-40/13 and C-41/13) and concluded that such difference in tax treatment led to a restriction of the freedom of establishment that could not be justified. The CJEU reiterated that a non-resident company with a permanent establishment in a Member State and a non-resident company without a permanent establishment therein are in comparable situations. Thus, it must be ensured that the objective of tax neutrality pursued by the tax consolidation regime is achieved in both situations.

The second question addressed the compatibility with the freedom of establishment of Luxembourg rules dealing with changes in the perimeter of a tax consolidation. Indeed, in a domestic situation, changes in the perimeter of a tax consolidation, which arise when a controlled entity enters for the first time in the tax consolidation (or withdraws from that regime at the end of the minimum period fixed by Luxembourg tax law) do not generally entail an interruption of the regime. However, when a "sister" company becomes part of an existing tax consolidation, i.e. when an ordinary tax consolidation ("vertical" tax consolidation) becomes a "horizontal" tax consolidation with a non-resident controlling entity, the regime is immediately interrupted. In addition, that interruption may lead to an adjustment of the tax position of the companies belonging to the group on the basis of a stand-alone approach.

In this respect, the CJEU stressed that Luxembourg tax law entails a restriction of the freedom of establishment of non-resident controlling companies not having a permanent establishment in Luxembourg. The restriction, in particular, may occur when the consolidating entity of the vertical tax consolidation is also the consolidating entity of the subsequent horizontal tax consolidation. Also in this case, the CJEU found that the two situations were objectively comparable and no justification applied. It is worth mentioning, in this respect, that the conclusion reached by the CJEU conflicts with the position previously taken by the Italian tax authorities in a similar case.

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