

Breaking Tax News Tackling taxes



ECJ ruling „Philips Electronics UK Ltd“ - impact on the Austrian group taxation

In the past, the ECJ has already held in the case “Papillon” (27.11.2008, C-418/07) that it must be allowed from an EU legal perspective to include domestic subsidiaries of foreign group members in domestic tax groups in accordance with Sec 9 KStG (Corporate Income Tax Act). The ECJ has recently ruled in the case “Philips Electronics UK Ltd” (06.09.2012, C-18/11) that also **income of domestic permanent establishments of foreign group members** must be **included** in the results of the **domestic tax group**:

Facts

The British Philips Electronics UK Limited (PE UK) intended to balance its earnings via the British group taxation with the losses of the British permanent establishment of another company of the group, the Dutch LG Philips Displays (LG PD). However, such an **attribution of losses is not possible** under UK tax law solely because LG PD is based in the Netherlands (and not in the UK). The UK tax authorities justified this restriction on the freedom of establishment with the argument of avoiding the multiple use of losses in several Member States and the preservation of balanced allocation of taxation rights between Member States.

Legal Perspective of the ECJ

The ECJ held that this restriction **infringes the freedom of establishment**. The restriction is not an appropriate means of avoiding the multiple use of losses in several Member States and the preservation of balanced allocation of taxation rights between Member States.

Impact on the Austrian group taxation

The Court’s judgment is also applicable to the Austrian legislation with respect to the **tax treatment of domestic income of foreign group members**. The attribution of domestic losses of foreign group members is only conditionally permitted under Sec 9 para 6 Z 6 KStG (attribution only possible in the case of total loss of the foreign group member and depending on the participation of the parent group member; losses are subject to redemption, etc.) additionally, domestic **profits are entirely disregarded** for in the tax group according to the Austrian Ministry of Finance (BMF). Instead they are taxed separately under the limited tax liability of the foreign company (KStR 2001, Rz 423). Consequently, the Austrian group taxation disadvantages a domestic source of income solely because the activity is carried out by a foreign group member.

Therefore, in light of this recent ECJ ruling, the current tax treatment of domestic income of foreign group members is to be regarded as a **violation of the freedom of establishment** not in line with EU-law.

It remains to be seen how the BMF responds to the ECJ’s Court’s judgment. Like already in the case of “Papillon”, one would expect a **change in the guidelines** of the BMF (KStR).

Your Deloitte Tax Advisor will be happy to answer your questions.