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Icelandic Ministry for Foreign Affairs
Rauðarárstígur25
IS-150 Reykjavík
Iceland

Dear Sir/Madam,

Subject: Request for Information concerning tax consolidations and relief from losses in Iceland

The Internal Market Affairs Directorate of the EFTA Surveillance Authority ("the Directorate") is in the process of examining whether Article 55 of the Income Tax Act No 90/2003 (lög nr. 90/2003 um tekjuskatt ("the ITA")) complies with Article 31 and 28 of the EEA Agreement, in light of recent judgments from the Court of Justice of the European Union ("the CJEU").

Article 55 ITA states that the Director of Internal Revenue can allow joint taxation of two or more limited companies, as noted in point 1 in paragraph 1 of Article 2.

Article 2 paragraph I ITA, on unlimited tax liability, applies to registered public limited companies and private limited companies, as well as associate limited companies, provided that the associate limited company has requested at the time of registration to be entered as an independent entity for tax purposes.

A permanent establishment is not defined in the ITA but it follows from Article 4(1) point 4 ITA that all entities who have a fixed place of business in Iceland or partake in running a fixed place of business have limited tax liability.

In light of this clear condition that only companies with unlimited tax liability in Iceland can obtain permission to be jointly taxed, it seems that joint taxation possibility is limited to situations where all the companies have their legal residence in Iceland. Companies domiciled in Iceland will thus not be granted permission to be jointly taxed with Icelandic permanent establishments of non-resident companies. This interpretation also seems to have been affirmed by the Icelandic Board of Internal Revenue in its ruling No 53/2009. [1]

In *Philips Electronics*,[2] the ECJ stated that the freedom of establishment entails *"[t]he freedom to choose the appropriate legal form in which to pursue activities in another Member State serves, inter alia, to allow companies having their seat in a Member State to open a branch in another Member State in order to pursue their activities under the same conditions as those which apply to subsidiaries"*.[3]

[1] Ruling No 53/2009, chapter II, paragraph 12.
[2] Case C-18/11 *Philips Electronics UK,* EU:C:2012:532.
[3] Ibid, paragraph 14.

Furthermore, the Court stated:

"The situation of a non-resident company with only a permanent establishment in the national territory and that of a resident company are, having regard to the objective of a tax regime such as that at issue in the main proceedings, objectively comparable in so far as concerns the possibility of transferring by means of group relief losses sustained in the United Kingdom to another company in that group."[4]

The Court also explained that, *"where the issue is that of transferring to a resident company the losses sustained by a permanent establishment situated in the territory of the same Member State, the power of that Member State to tax the profits (if any) arising from the activity, in its territory, of the permanent establishment is not affected."*[5]

For the purpose of this examination the Directorate requests the Icelandic Government to provide the following information:

1. In light of *Philips* case, does the Icelandic Government consider the fact that branches of non-resident companies are not eligible to be included in a joint taxation under Article 55 ITA to be a restriction on the freedom establishment?

2. If the previous question is answered in the affirmative, does the Icelandic Government consider such a restriction to be justified by a legitimate objective and, furthermore, be proportionate and necessary to obtain that objective?

Under Article 55, the joint taxation is conditioned upon that no less than 90% of the shares in subsidiaries are held by the parent company wishing to be jointly taxed, or other subsidiaries included in the joint taxation.

The Directorate notes that the joint taxation regime seems to exclude joint taxation of two companies domiciled in Iceland, if one or both companies are directly owned by a foreign company that does not participate in the joint taxation, although indirectly owned by an Icelandic dominant company.

3. In light of CJEU cases such *Papillon*,[6] *Felixstowe Docks*[7] and *SCA Group Holding BV et al*,[8] does the Icelandic Government consider the above requirement (i.e. that no less than 90% of the shares in subsidiaries are held by the parent company wishing to be jointly taxed, or other subsidiaries included in the joint taxation) to constitute a restriction for the purposes of Article 31 EEA?

4. If the previous question is answered in the affirmative, does the Icelandic Government consider the restriction to be justified by a legitimate objective and, furthermore, be proportionate and necessary to obtain the objective?

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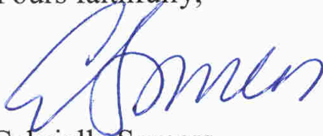
[4] Ibid, paragraph 19.
[5] Ibid, paragraph 26.
[6] Case C-418/07, *Société Papillon*, EU:C:2008:659.
[7] Case C-80/12, *Felixstowe Dock and Railway Company Ltd and others,* EU:C:2014:200
[8] Joined Cases C-39-41/13, *Inspecteur van de Belastingdienst/Noord/kantoor Groningen v. SCA Group Holding BV* (C-39/13), *X AG and others v. Inspecteur van de Belastingdienst Amsterdam* (C-40/13) and *Inspecteur van de Belastingdienst Holland-Noord/kantoor Zaandam v. MSA International Holdings BV and MSA Nederland BV* (C-41/13), EU:C:2014:1758.

EFTA SURVEILLANCE AUTHORITY

The Icelandic Government is invited to submit the above information, as well as any other information it deems relevant to the case, so that it reaches the Authority by *9 May 2016*.

Yours faithfully,



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