

Press and Information Division

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Judgment of the Court of Justice in Case C-168/01

Bosal Holding BV v Staatssecretaris van Financien

**DUTCH TAX PROVISIONS WHICH PLACE PARENT COMPANIES WITH
SUBSIDIARIES IN OTHER MEMBER STATES AT A DISADVANTAGE ARE
INCOMPATIBLE WITH COMMUNITY LAW**

To limit the ability of a parent company established in the Netherlands to deduct costs in connection with its holding in a subsidiary established in another Member State to cases where that subsidiary generates profits taxable in the Netherlands constitutes an unjustified restriction on freedom of establishment.

Community law prohibits restrictions on the freedom of establishment of companies established under the legislation of a Member State in the territory of another Member State. That prohibition now also applies to restrictions on the creation of subsidiaries. A Netherlands statute allows companies to deduct costs in connection with a holding in the capital of a subsidiary from the calculation of their profits if those costs serve indirectly towards generating profits taxable in the Netherlands.

Bosal Holding BV is a Dutch company active in holding, financing and licensing/royalty related activities and which, as a taxpayer, is subject to corporation tax in the Netherlands. For the 1993 financial year, it declared costs amounting to NLG 3,969,339 (EUR 1,801,287) in relation to the financing of its holdings in companies established in nine other Member States. Bosal has claimed that those costs should be deducted from its own profits.

The inspector of the Belastingdienst (Tax Office) refused to allow the deduction sought. The Gerechtshof te Arnhem, before which Bosal brought an action against that refusal, confirmed the inspector's position. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), to which Bosal appealed on a point of law, has asked the Court of Justice of the EC whether Community law precludes the Netherlands legislation.

The Court finds that the limitation laid down by the Netherlands law constitutes an **obstacle** to setting up subsidiaries in other Member States and is therefore **contrary to Community law**. A parent company might be dissuaded from carrying on its activities through a subsidiary established in another Member State since, normally, such subsidiaries do not generate profits that are taxable in the Netherlands.

The Netherlands Government has relied on three arguments to justify the provisions in question:

1. the need to ensure the coherence of the national tax system;
2. an argument based on the territoriality principle. According to the Netherlands Government, subsidiaries which make profits taxable in the Netherlands and those which do not are not in a comparable situation; and
3. the need to preserve the tax base of the Member State.

The Court finds **those arguments unconvincing**.

As regards the **need to preserve the coherence of the national tax system**, the Court points out that, in order to benefit from such justification, a direct link must exist between the grant of a tax advantage and the offsetting of that advantage by a fiscal levy, both of which related to the same tax. In this case, however, there is no direct link between the grant of a tax advantage to parent companies established in the Netherlands and the tax system relating to the subsidiaries of parent companies where the latter are established in that Member State. Parent companies and their subsidiaries are distinct legal persons, each being subject to a tax liability of its own. Moreover, the limitation on the deductibility of costs incurred by a parent company in connection with its holdings in subsidiaries is not compensated for by a corresponding advantage. The coherence of the tax system cannot therefore be pleaded in argument.

Concerning the argument based on the **principle of territoriality**, the Court states that the difference in tax treatment in question concerns parent companies according to whether or not they have subsidiaries making profits taxable in the Netherlands, even though those parent companies are all established in that Member State.

As for the **need to preserve the tax base** of the Member State, the Court points out that the need to prevent the diminution of tax receipts is not a reason which can justify a restriction on the freedom of establishment.

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Available languages: DE, EN, ES, FR, IT, NL.

*The full text of the judgment can be found on the internet (www.curia.eu.int).
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