1. Introduction

In this contribution, the author will discuss three cases. The first case, Case C-399/16 (*X NV*)[1] is a case which has been inspired by the *Groupe Steria* decision[2] and is closely connected with the case which is discussed by Daniel Smit in a separate chapter of this book, Case C-398/16 (*X BV*).[3] The main issue in Case C-399/16 (*X NV*) is whether the *Groupe Steria* decision implies that a Dutch resident parent company cannot be denied the right to take into account currency losses in respect of a UK resident subsidiary. The Netherlands has denied this right on the basis of the Dutch participation exemption. The possible inconsistency with EU law has been founded on the idea that a Dutch resident parent company could have taken into account currency losses if the UK resident subsidiary had been a Dutch resident subsidiary with a permanent establishment (PE) in the UK and that subsidiary had been included in a fiscal unity with its Dutch resident parent company. Can this single element of the Dutch fiscal unity regime be relied on because of the *Groupe Steria* decision? This per-element approach may be relevant not only for the Netherlands, but for all EU Member States and EEA Member States which have a group taxation regime.[4]

The two other cases to be discussed, T-760/15 (*The Netherlands v. Commission*) and T-636/16 (*Starbucks and Starbucks Manufacturing Emea v. Commission*), concern the European Commission decision that Starbucks received forbidden State aid from the Netherlands through an advanced pricing agreement (APA) concluded between Starbucks and the Dutch Tax Authorities (DTA).[5] Both the Netherlands (Case T-760/15) and Starbucks (Case T-636/16) have appealed the decision. The European Commission is very active in the field of taxation of MNEs and potential State aid.[6] In the Starbucks case the arm's length pricing is at stake,[7] but the Commission is also active in respect of other fields. Sometimes the

1 The preliminary questions were asked by the *Hoge Raad* (Supreme Court) HR, 8 July 2016, no. 15/00878, ECLI:HR:2016:1351, published in, inter alia, *Beslissingen in belastingzaken Nederlandse Belastingrechtspraak* (*BNB*) 2016/233, *Vakstudie-Nieuws* (*V-N*), 2016/36.10.

2 CJEU, 2 September 2015, C-386/14, *Groupe Steria*, ECLI:EU:C:2015:524.

3 See Daniel Smit, X BV, Case C-398/16: Impact of *Groupe Steria* Doctrine on Dutch Tax Consolidation Regime and Interest Limitation Rule. It should be noted that in a reasoned opinion, the EFTA Surveillance Authority on 25 Oct. 2016, Case No:76153, raised a similar issue, i.e. that Norway might have breached Art. 31 of the EEA Agreement by maintaining in force interest deductibility restrictions which restrictions may be avoided in domestic situations by applying the Norwegian group taxation rules.

4 See, e.g. the reasoned opinion of the EFTA Surveillance Authority on 25 Oct. 2016, Case No:76153.

5 See Commission Decision of 21 Oct. 2015, C(2015) 7143 final, State aid SA.38374 (2014/C ex 2014/NN): implemented by the Netherlands to Starbucks.

6 See, e.g., European Commission, *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*, OJ C 262/1 of 19 July 2016 (*Notice 2016*), paras. 156–184.

7 See also, e.g., Commission Decision of 21 Oct. 2015, C(2015) 7152 final, State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat.

fields are closely related, such as in the Apple case which concerns the allocation of profits between head office and PE.[8] However, mismatches are also under investigation, such as the mismatch of the PE concept under the US-Luxembourg tax treaty leading to double non-taxation in the McDonald's case.[9] The Starbucks case may also be relevant for all EU and EEA Member States, because APA practices are widely applied by the Member States.

This contribution starts by discussing Case C-399/16 (*X NV*) which is followed with a discussion of the Starbucks cases. For each of the cases, an initial description of the facts is provided. Subsequently, domestic tax law and tax treaty law are addressed. Next, the considerations of the *Hoge Raad* (HR; Dutch Supreme Court) and the Commission are set out respectively. Thereafter, the focus is on the preliminary questions of the HR and the pleas in law and main arguments in the Starbucks cases. Potential answers to the questions raised are then provided along with comments on the positions taken by the EC, the Netherlands and Starbucks from the author's personal perspective. These potential answers and comments are not be given in isolation, rather they are based on benchmarks which will be developed in the next section.[10] The contribution is closed by summarizing the author's main conclusions.

2. Benchmarks

In the author's view, the overall approach is that the potential answers and comments put forth in this contribution should contribute to the development of the internal market and that these answers and comments may be useful building blocks for the awaited court decision and/or for legislative acts of the Netherlands legislature and/or other legislatures.

8 See, e.g. EC 30 Aug. 2016, IP/16/2923: State aid: Ireland gave illegal tax benefits to Apple worth up to € 13 billion.

9 See Commission Decision of 3 Dec. 2015, C(2015) 8343 final, State aid SA. 38945 (2015/C) (ex 2015/NN) – Luxembourg: Alleged aid to McDonald's.

10 The benchmarks have partly been developed on the basis of, e.g. E.C.C.M. Kemmeren, *Principle of Origin in Tax Conventions, A Rethinking of Models*, PhD thesis Tilburg University (Dongen: E.C.C.M. Kemmeren/Pijnenburg vormgevers-uitgevers, 2001) pp. 21–45, 69–83, 162–181, 323–327, 390–395, 469–475 (also available on http://webwijs.uvt.nl/publications/304239_ext.pdf); E.C.C.M. Kemmeren & D. Smit, *Taxation of EU-non-resident companies under the CCCTB system: Analysis and suggestions for improvement*, in: M. Lang et al. (eds.), *Corporate Income Taxation in Europe, The Common Consolidated Corporate Tax Base (CCCTB)* (2013) pp. 51–59; E.C.C.M. Kemmeren, *The Netherlands I: Personal Circumstances of a Non-Resident Taxpayer with income from the Netherlands and Switzerland (Case C-283/15 [X.])*, in: M. Lang et al. (eds.), *CJEU – Recent Developments in Direct Taxation 2015 (2016)* (Vienna: Linde 2016) pp. 121–150.

2.4.2. Origin of income

Origin-based taxation justifies taxation of income by a state, if the income is created within the territory of that state, i.e. the cause of the income is within the territory of that state. That state makes the yield or the acquisition of wealth possible. Only *individuals* can create income, things in themselves cannot. The intellectual element is the key component for the production of income. Through the action of an individual, with or without using a device, i.e. a capital component, value may be added to things. Whereas the causal relationship between production of income and the territory of a state is predominant under the principle of origin, it is of minor or no importance under the principle of source. Therefore, the principle of origin and the principle of source are not necessarily identical. If the income is not generated in a state but, nevertheless, physically appears to be from that state, tax jurisdiction may be allocated to that state on the basis of the principle of source, but not on the principle of origin.[15] In this context and because of the facts of the cases under discussion, in the analysis below the author only looks more closely at business profits.

2.4.3. Origin-based taxation of business income

Based on the principle of origin, tax jurisdiction with respect to business profits should be allocated to the state in which an enterprise of a person carries on substantial entrepreneurial activities. As a consequence, all income whether arising in the state where the entrepreneurial activity is carried on, in another Member State, or in third states, will be taxable only in the state of the substantial entrepreneurial activity, unless another income allocation rule of the relevant tax convention derogates from this rule. Such a substantial business activity is present if the relevant business activity in a state forms an essential and significant part of the business activity of the enterprise as a whole. A distinction between business activities and independent personal services is not necessary. This is also in line with the EU fundamental freedom of establishment. As a rule, services or activities cannot be performed at any place other than where the individual performing them is physically present. The decisive factor is where that person works and not where the results of his work are exploited. If an enterprise of a person carries out substantial entrepreneurial activities not only in one contracting state, but also in

15 Therefore, in the author's view, it is not self-evident that the principle of source, as generally used, may serve as a justification for a tax on income, since the income may be produced or the property may be established and preserved in a state other than the one in which the person from which the income has been received or the property concerned is physically situated. For the allocation of tax jurisdiction on income from activities, a substantial relationship between the activity and the state concerned is required. Such a relationship should be considered present if a substantial income-producing activity is exercised in the state concerned. An income-producing activity is considered to be substantial if the activity forms an essential and significant part of the activity as a whole.

the other contracting state, the income must be allocated to both states as far as it is produced in the respective states. Attribution of income to each part of the enterprise must be neutral.

2.5. Interim conclusion

In conclusion, international tax neutrality and CLIN imply that income should be taxed only in the state to which it can be economically linked. Therefore, creating a level playing field, international tax neutrality, CLIN, satisfying the ability-to-pay principle, and establishing an origin-based allocation of tax jurisdiction on income go hand in hand and all five of these factors contribute to the development of the internal market of the European Union.

3. Fiscal unity, Groupe Steria's per-element approach and currency losses relating to a non-resident subsidiary (C-399/16 [X NV])

As mentioned above, the main issue in this case is whether the *Groupe Steria* decision implies that a Dutch resident parent company can take into account currency losses in respect of a UK resident subsidiary, whereas normally the Dutch participation exemption would prevent it from doing so. The potential inconsistency with the freedom of establishment is based on the idea that the Dutch resident parent company would have been able to take into account the currency losses if the UK resident subsidiary had been a Dutch resident subsidiary with a PE in the UK and that the subsidiary had been included in a fiscal unity with its Dutch resident parent company. Can this per-element approach to the Dutch fiscal unity regime be applied because of the *Groupe Steria* decision?

In this context, the starting-point is whether forbidden discrimination or a restriction can be identified. If so, the subsequent issue is whether justification for such discrimination or restriction can be given based on the rule of reason test, i.e. whether one or more of the aims of the tax rules concerned can be classified as an imperative reason in the public interest, whether these rules are appropriate to attain such aims, and, finally, whether they are proportional to the attainment of such aims.

In this respect, the following issues will be discussed:

1. In respect of whether a discrimination or restriction exists
   a. the essence of the *Groupe Steria* decision;
   b. what fictitious fiscal unit(y)(ies) should be taken into account;
   c. in what respect the *Groupe Steria* case differs from Case C-399/16 (*X NV*); and
   d. a comparison between a UK and a Dutch resident participation that reports profits in GBP.

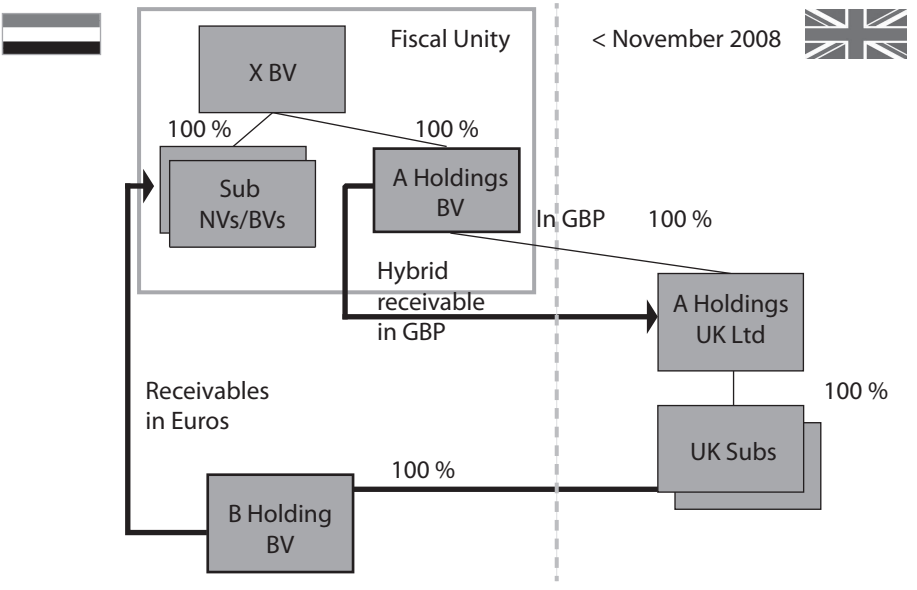
2. In respect of justification in the case of discrimination or a restriction
   a. the need to safeguard the coherence of the fiscal unity system; and
   b. the need to safeguard the coherence of the participation exemption.
3. If no justification for the different treatment as regards participation in another Member State can be given, what currency loss can be taken into account?

As noted above, the discussion of each case starts with a description of the facts. X NV concerns a rather complex group restructuring in which billions of GBP and Euros were involved.

3.1. Facts

A Holdings BV is an indirect subsidiary of the taxpayer X BV. Both are part of a fiscal unity for Dutch corporate income tax purposes.[16] Until November 2008, A Holdings BV held all shares in A Holdings UK Ltd, a UK resident company. The participation was booked in GBP. Furthermore, it held a hybrid debt receivable payable by due from A Holdings UK Ltd in GBP (Hybrid). For Dutch tax purposes, this receivable was classified as equity.

The initial situation can be depicted as follows:



16 See Arts. 15–15aj *Wet op de vennootschapsbelasting* 1969 (Corporate Income Tax Act 1969 [CITA]).

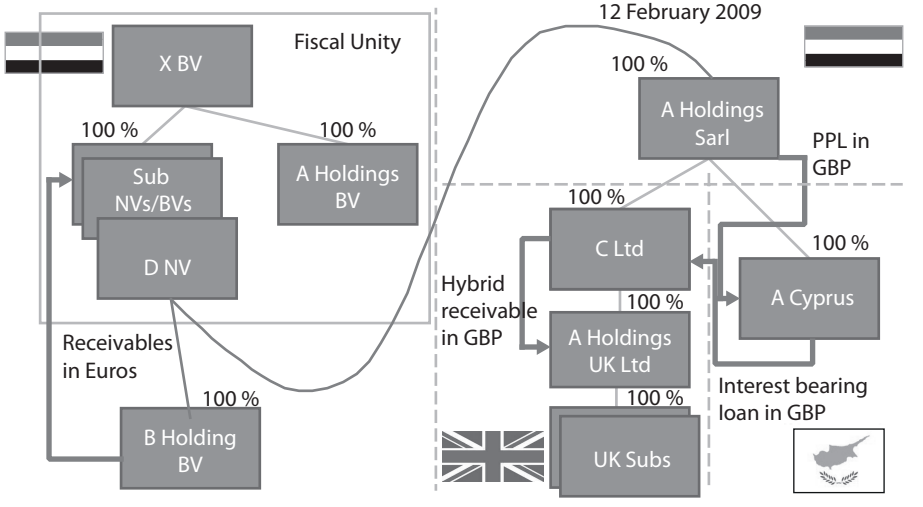
A Holdings UK Ltd held participations in other UK resident companies (British branch) and indirectly via the British branch a participation in a Dutch resident company: B Holding BV. This company held receivables in Euros payable by group companies which were part of the fiscal unity.

On 11 November 2008, A Holdings BV contributed the shares in A Holdings UK Ltd to the UK resident subsidiary C Ltd in exchange for shares. The fair market value of the participation in A Holdings UK Ltd was still denominated in GBP. On the same day, A Holdings BV also transferred its Hybrid receivable to C Ltd in exchange for an interest-free subordinated debt receivable payable by C Ltd denominated in GBP and including the same conditions as the Hybrid receivable (New Hybrid).

On 16 December 2008, C Ltd distributed to A Holdings BV a dividend denominated in GBP. On the same day, the shares in B Holding BV were transferred to D NV which was a subsidiary of X BV and included in the fiscal unity.

On 12 February 2009, A Holdings BV transferred its shares in C Ltd to D NV for an amount in GBP. On the same day, it also transferred its New Hybrid to D NV for an amount in Euros equivalent to the outstanding amount in GBP. Also on that day, DNV transferred to its Luxembourg resident subsidiary A Holdings Sarl, its participation in C Ltd and the New Hybid receivable for the same amounts. Again on this date, the Luxembourg resident A Holdings Sarl granted a profit-sharing loan to its Cyprus resident subsidiary A Cyprus. Subsequently, this company granted an interest-bearing loan to C Ltd with which it repaid the New Hybrid. Furthermore, A Holdings Luxembourg Sarl repaid to D NV an amount in Euros equivalent to the New Hybrid which paid to A Holdings BV the same amount on the loan taken up with A Holdings BV.

After the restructuring, the scheme is now (likely) as follows:



1. Spanish Regional Taxes on Large Retail Establishments

1.1. Introduction

On 25 April 2016 the Spanish Supreme Court decided to refer to the CJEU five preliminary rulings affecting the taxes on large retail establishments approved by the Autonomous Communities of Catalonia (C-233/16), Asturias (C-234/16 and C-235/16) and Aragón (C-236/16 and C-237/16).

Previously, these taxes have come under scrutiny in the European Community from two channels:

a) The Communication by the Directorate-General for Taxation of the European Union, informing of the opening of an EU PILOT scheme, as an initial step prior to the start of official infringement proceedings against Spain, as a result of the complaint by the Spanish association of large distribution companies (ANGED) alleging that this set of taxes would contravene the freedom of establishment established by Article 49 of the TFEU.
b) The letter sent by the European Commission to Spain, on 2 October 2013, as a result of a complaint filed by ANGED, in which the Spanish taxes on large retail establishments are described as a measure that could be State aid such as is incompatible with European law.

The European Commission also issued a decision, in July 2016, concerning a progressive turn-over tax on the retail sector in Hungary, which it found to be in breach of the EU State aid rules because it granted a selective advantage to companies with low turnover over their competitors.

More recently, on 19 September 2016, the Commission opened an investigation into the Polish tax on the retail sector, which applies to companies that operate in Poland and are active in the retail sale of goods, requiring Poland to suspend the application of the tax until the Commission has concluded its assessment.

1.2. Main Features of the Spanish Regional Taxes on Large Retail Establishments

The taxes that are applied on large retail establishments have been approved by different Spanish Autonomous Communities. Catalonia was the first Spanish autonomous community that approved a tax on large retail establishments,[1] also implemented in Navarre, Asturias, Aragón, La Rioja and Canarias. This set of taxes, levied on large commercial establishments or areas, affects superstores and large department stores.

1 Act 16/2000, 29 December, that regulates the tax on Large Commercial Establishments.

However, due to the various proceedings initiated in 2014 by the Commission, the Autonomous Communities of Canarias (2014), Navarre (2016) and La Rioja (2016) abolished their taxes on large retail establishments for fear that non-compliance would entail return of the amounts already collected or, alternatively, a retroactive requirement for all retail traders, including small businesses, to pay these taxes.[2]

As the Spanish doctrine has pointed out, in general terms the taxes created in Catalonia and Asturias, which are now challenged before the CJEU are direct taxes, introduced to address the negative externalities that the opening of large stores produce for the environment, town and country planning and the existing retail trade. Revenues are usually earmarked for the funding of actions that improve infrastructure and the environment.[3]

The taxable event is the use of a large retail outlet and its possible impact. In two of the Communities, large individual stores with an area of 2500 (in Catalonia) or 4000 (in Asturias) square metres or more are taxed. On the other hand, in Asturias, "collective" stores – consisting of a set of individual businesses, regardless of their floor areas, which are located in one or more buildings, where there are certain connecting elements such as communicating internal roads, a common parking area, joint marketing or a marketing or a common legal organization – are also taxed.

Large stores selling gardening items, cars, building materials, machines or industrial supplies (in Asturias only if their surface area is less than 10.000 square metres) are exempt.

The taxpayer is the owner of the large retail establishment, whether or not it is located in a large "collective" store.

In Catalonia, the tax base is the total floor area of the large individual store (excluding parking and storage). In Asturias, it is the surface area of the parking space available for the center (individual or collective). There is a minimum exemption of up to 2499 square metres in Catalonia and 3999 square metres in Asturias.

There is a tax debt allowance (which varies from 40 % in Catalonia to 10 % in Asturias) if the stores fulfil certain requirements as regards access by public transportation. In addition, in Asturias, there is another allowance, applicable up to

2 F. López Pérez, *El impuesto sobre los grandes establecimientos comerciales quince años después: la sombras de este tributo medioambiental a la luz del Derecho Comunitario*, Actualidad jurídica ambiental, núm. 58, 2016, p. 5.

3 A. Grau Ruiz, *Taxing malls: ways to achieve sustainable urban mobility and transport*, in: L. Kreiser et al. (eds.), *Green Taxation and Enviromental Sustainability* (Cheltenham: Elgar Publishing, 2012) p. 84.

10 % of the tax debt, if these establishments implement projects for environmental protection.

The system is managed through an enrolment system. Taxpayers must register when starting their activity and at that time, the debt is determined and notified to them. From then on, notification is only made through collective announcements.[4]

In Aragon (and the Canary Islands) the tax was designed with some important differences. There, the taxable event is the environmental harm caused by commercial activity in an establishment occupying a large retail area (with more than 500 square metres devoted to sales to the public) and with customer parking.

Establishments that carry out wholesale activities in municipal markets and in "users and consumers'" cooperatives are not subject to this tax because they do not sell to the general public.

Establishments whose main activity is exclusively the sale of materials for construction or gardens, machinery and industrial supplies or the sale of cars are exempt. Public administrations are exempt when they perform public functions or pursue public goals.[5]

The taxpayers are the owners of business and commercial activities that cause environmental harm. The tax is levied on units of pollution, which are defined on the basis of the area devoted to each kind of use. The tax base is composed of the following units: retail sales area, parking or areas with other uses (common or ancillary services, such as stores, fridges, toilets or offices, with a maximum limit of 25 % of the sales area open to the public).

There is a graduated scale of rates depending on the area occupied, with a minimum exemption of 2000 square metres. There is a 20 % deduction on the cost of investment in assets whose purpose is to prevent, correct or reverse negative impacts and pollutant effects on the environment and the land, up to 30 % of the tax due.[6]

4 A. Grau Ruiz, *Taxing malls: ways to achieve sustainable urban mobility and transport*, in: L. Kreiser et al. (eds.), *Green Taxation and Enviromental Sustainability* (Cheltenham: Elgar Publishing, 2012) p. 85.

5 A. Grau Ruiz, *Taxing malls: ways to achieve sustainable urban mobility and transport*, in: L. Kreiser et al. (eds.), *Green Taxation and Enviromental Sustainability* (Cheltenham: Elgar Publishing, 2012) p. 85.

6 See M. Marcos Cardona & A. Grau Ruiz, *Impuestos propios de las Comunidades Autónomas,* in: G. De la Peña et al. (eds.), *Sistema Fiscal Español* (Madrid: Iustel, 2016) pp. 401–404.