

Finnish Supreme Administrative Court: Corresponding Adjustment Based on Arbitration Convention May Lead to Losses Despite Domestic Group Contribution Rules

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The Supreme Administrative Court of Finland (*Korkein hallinto-oikeus, KHO*) has recently decided in the case of [KHO:2023:32](#). Details of the decision are summarized below.

(a) Facts. A Finnish company, FI Co, made in 2010 a group contribution to another Finnish company FI Co2, which belonged to the same group. Consequently, FI Co had no taxable profits in 2010. In 2015, the French tax authorities made a transfer pricing adjustment and denied the deductibility of certain payments FI Co had made to a French subsidiary, FR Sub, also belonging to the same group as FI Co and FI Co2. In a mutual agreement procedure (MAP) held between the French and the Finnish tax authorities based on the [Arbitration Convention \(90/436\)](#), the authorities had agreed that the adjustment made reflected an arm's length result. In 2019, the Finnish tax authorities made a corresponding adjustment to the results of FI Co for 2010. The tax authorities deducted the amount of the corresponding adjustment from the business income of FI Co but refused to confirm the amount as a tax-deductible loss that could be carried forward. The latter was denied based on the domestic group contribution rules.

(b) Legal background and issue. The Finnish law on Group Contributions (*Konserniavustuslaki*) allows group contributions. A qualifying group contribution may be deducted from the taxable profits of the contributing company and added to the taxable income of the recipient company. A group contribution may, however, not exceed the net taxable business income of the paying company and may not be part of losses to be carried forward for tax purposes by that company.

Under article 14(a) of the [Arbitration Convention \(90/436\)](#) the double taxation of profits shall be regarded as eliminated if the profits are included in the computation of taxable profits in one State only.

The issue of the case was whether the denial of the deductibility of losses to be carried forward to subsequent years was incompatible with the Arbitration Convention.

(c) Decision. The court overruled the judgment of the Administrative Court of Helsinki. The court pointed out that the Finnish tax authorities had decided to make the corresponding adjustment by adjusting the taxable profits of FI Co, instead of adjusting the profits of FI Co2, which had received the group contribution. Consequently, the tax authorities should have confirmed a loss at the level of FI Co to be compatible with article 14(a) of the Arbitration Convention. The Court emphasized that the provision requires the elimination of double taxation by the participating Member States. Hence, the specific features of the domestic group contribution system need to be interpreted in connection with the requirements and purpose of the Arbitration Convention.

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