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By PwC Deutschland | 19. Juni 2019

European Court of Justice: Final Losses

The European Court of Justice held in its decision Memira Holding AB issued on 19 June 2019 that when assessing whether the losses of a non-resident subsidiary are final within the meaning of its judgment in Marks & Spencer on 13 December 2005 (C?446/03), the fact that, in the event of a merger, the subsidiary's Member State of establishment does not does not allow the losses of one company to be transferred to another company liable for corporation tax, is not decisive, unless the parent company can demonstrate that it is impossible for it to deduct those losses through ensuring that - in particular by means of a sale- the losses are fiscally taken into account by a third party for future tax periods.

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Background

Memira is a Swedish company operating, via its subsidiaries, in the sector of ophthalmic surgery. It had a single subsidiary in Germany, which owned and operated clinics. The operations of the German subsidiary gave rise to losses and Memira provided it with a loan to finance its operations. The injections of funds were unsuccessful so that the subsidiary had to cease activities. Only debts and certain liquid assets remained on its balance sheet.

Memira wished to absorb the German subsidiary in a cross-border merger, which would lead to that subsidiary being dissolved without liquidation and Memira subsequently no longer exercising any activity, either directly or indirectly, in Germany.

Of the losses sustained by the German subsidiary, it was not possible to set off an amount of EUR 7.6 million against earlier profits. The ECJ noted that the losses would be eligible for deduction from German corporation tax through deduction from current profits or from earlier profits without limit of time. However, they would not be eligible for deduction in the case of an up-stream merger since, under German law, it is not possible to transfer losses to another company, which is liable for tax in Germany in the event of a merger.

In contrast, in the case of a so-called “qualifying merger”, Swedish tax law allows a Swedish tax resident receiving company to deduct the losses of a Swedish tax resident transferring company from earlier tax years.

In this context, Memira applied to the Swedish tax authorities for a preliminary decision on the question whether it could rely on the freedom of establishment to deduct the losses of its German subsidiary from its Swedish corporation tax if it implemented its planned merger. The Swedish tax authorities answered in the negative.

Judgment

Two questions were put before the Court:

Question 1

Must account be taken, in the assessment of whether a loss in a subsidiary in another Member State is definitive within the meaning given in, inter alia, the judgment A. Oy of 21 February 2013, (C?123/11), - i.e. thus allowing the parent company to deduct the loss on the basis of Article 49 TFEU - of the fact that, under the rules of the subsidiary’s State, there are rules restricting parties other than the loss-making party itself from deducting the loss?

Question 2

If a restriction such as that referred to in Question 1 must be taken into consideration, must account then be taken of whether, in the case in question, there actually is another party in the subsidiary’s State which

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could have deducted the losses if that were permitted there?'

The ECJ answered as follows:

Question 1

For the purposes of the assessment of the finality of the losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment of 13 December 2005, Marks & Spencer (C?446/03), the fact that the subsidiary's Member State of establishment does not does not allow the losses of one company to be transferred, in the event of a merger, to another company liable for corporation tax, whereas such a transfer is provided for by the Member State in which the parent company is established in the event of a merger between resident companies, is not decisive, unless the parent company demonstrates that it is impossible for it to deduct those losses by ensuring, in particular by means of a sale, that they are fiscally taken into account by a third party for future tax periods.

Question 2

If the fact referred to in the first question becomes relevant, the fact that there is, in the State of establishment of the subsidiary, no other entity, which could have deducted those losses in the event of a merger if such a deduction had been authorised is irrelevant.

Source:

Decision of European Court of Justice in Memira Holding AB dated 19 June 2019 (C-607/17)

Schlagwörter

cross-border mergers, final losses, freedom of establishment