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By PwC Deutschland | 03 February 2015

No requirement to group relief foreign losses brought forward

The ECJ has held that UK group relief provisions that restrict losses incurred by foreign subsidiaries to those that cannot be offset in the same or a previous year in the foreign country or – as apparent immediately after year-end – in a future year are not in breach of community law.

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On December 13, 2005, the ECJ held against the UK that its group relief rules were contrary to the freedom of establishment in that they excluded the losses of subsidiaries in other member states from group relief offset in the UK in all circumstances (case C-446/03 *Marks & Spencer*). The UK accepted this judgment and changed its law to allow offset of losses of EEA subsidiaries where, as seen immediately after year end, the local subsidiary had exhausted all possibilities of claiming an offset in the same or a previous year and – definitively – would be unable to do so in a future year. According to the European Commission, this transposition of the case into national law renders it virtually impossible for a UK group to actually claim relief in the UK for a foreign loss, as it presupposes either that there is no local legal possibility for the subsidiary to carry a loss forward or back or to transfer it to another company, or that the subsidiary has resolved liquidation before year-end. The UK government disputed that view and the Commission sued before the ECJ.

The Commission lost its case. If the local law of the subsidiary precludes all forms of transfer of unutilised losses to another year or entity, there is no obligation on the country of the parent to make good the deficiency. Indeed, its doing so would of itself be discriminatory. The UK government argued that a decision to liquidate immediately after year-end would allow a UK parent to group relief the loss of the foreign subsidiary for that year and nothing more was required by *Marks & Spencer*, since even minimal remaining income would not totally exclude offset of a loss brought forward. The ECJ accepted this argument, especially as the UK government was able to quote a specific example of a successful group relief claim for a loss of a foreign subsidiary. The Commission also attempted to claim that the UK provisions excluded pre-2006 losses from their scope, but the UK replied that those losses would be covered by a direct application of the Marks & Spencer judgment. Since the Commission was unable to produce any evidence to the contrary, it lost that point, too.

In upholding the UK rules, the ECJ did not go quite as far as the advocate general who suggested the court abandon *Marks & Spencer* altogether. However, it is now clear that there is no requirement to allow a parent to offset the previous years' losses of a subsidiary that are now rendered unusable by a current year liquidation decision, so the import of that judgment has certainly been contained.

The ECJ case reference is C-172/13 *Commission v. UK* judgment of February 3, 2015.

Keywords

Marks & Spencer, group relief