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By PwC Deutschland | 23 January 2019

Final loss utilisation by parent company in case of merger and liquidation of a second-tier subsidiary?

The European Court of Justice will have to decide once again on the justification of the non-deductibility of ‘final losses’ in the foreseeable future. In two Swedish cases the Advocate General has formulated her opinion and is not convinced of a "finality" or cross-border loss utilisation due to the particularities of the cases.

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Case C-608/17 (Holmen AB)

It must be clarified whether a Swedish parent company is entitled to deduct losses of an indirectly wholly owned Spanish subsidiary (sub-subsidiary) from its profits generated in Sweden if the sub-subsidiary has been wound up (liquidated) and has not been able to use all its losses in Spain (i.e. offset against its own or other profits of the Spanish group).

If the sub-subsidiary is able to transfer the losses to a third party (e.g. a subsidiary), the losses are not final and should not otherwise been usable by the parent company. In other words - as the Advocate General (AG) put it - the losses in an indirectly owned company (a second-tier subsidiary) do not in principle constitute final losses in relation to the grandparent company. Specifically, the referring court wishes to know whether a loss which had to be carried over as a result of a restriction on setting off losses is also to be regarded as definitive. The AG is of the opinion that a loss ‘merely’ carried over is not to be regarded as a ‘final loss’ even if it has not been possible to set off against earlier profits as a result of a restriction on loss relief in the subsidiary’s State. The existence of that loss depends solely on the organisation of Spanish tax law and thus cannot compel Sweden to recognise that loss and thus reduce the tax burden.

Case C-607/17 (Memira Holding AB)

The question here is whether a Swedish parent company is entitled to deduct the losses of a wholly owned German subsidiary if the latter is merged with the parent company and has not been able to fully use its losses in Germany.

According to the AG, the preconditions for the assumption of a final loss are not met. The use of losses presupposes that it is legally possible to take account of losses in the State in which the subsidiary is established and the Company has made full use of this opportunity (which, however, has yet to be demonstrated in the present case). Such possibility of using the loss includes a realisation of losses by way of a merger with a third party or a realisation by way of a sale of the company to a third party (which, however, was not done by Memira). Finally, the AG points out that it is irrelevant whether in the case in question the group has other companies in the subsidiary’s State to which it would have been possible to transfer losses.

Source

The ECJ case reference is C-608/17 Holmen and C-607/17 *Memira Holding* opinion of January 10, 2019.

Keywords

Loss utilisation, final losses