

Euro Tax Flash

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Euro Tax Flash from KPMG's EU Tax Centre



CJEU decision on “Marks & Spencer exception” for cross-border losses

European Commission – infringement – cross-border losses – ‘Marks & Spencer exception’

On February 3, 2015 the Court of Justice of the EU (CJEU) rejected the Commission’s complaints against the United Kingdom regarding the compatibility of the UK’s cross-border group relief (“CBGR”) rules with EU law ([Commission v UK, case C-172/13](#)).

Background

The proceedings were initiated by the European Commission on the grounds that the tax rules adopted by the UK following the Marks & Spencer decision (case C-446/03) were in breach of the freedom of establishment to the extent they are based on a restrictive interpretation of the “no possibilities test” – also referred to as the ‘Marks & Spencer exception’.

In particular, the breach resided in the fact that you have to determine at the end of each accounting period whether there is no possibility of future loss relief. According to the Commission, this provision has the effect of making it virtually impossible for a resident parent company to obtain cross-border relief limiting said

relief to only two situations: (i) where the foreign subsidiary has no domestic carry forward loss provision and (ii) where the subsidiary is wound up before the end of the accounting period in which the loss was sustained.

CJEU Decision

The CJEU rejected the Commission's arguments. With respect to the first situation the CJEU held that losses incurred by a non-resident subsidiary cannot be characterized as "definitive" in absence of loss carry-over provisions in the foreign Member State. Hence, cannot impose an obligation on the Member State of the parent company to provide for a loss deduction ([K, case C-322/11](#)).

The second situation was rejected based on the fact that contrary to the Commissions understanding the rules do not impose any obligation to wind up the loss-making subsidiary before the end of the accounting period in which the losses are suffered.

EU Tax Centre's Comment

The decision is significant for UK taxpayers with existing cross-border group relief claims under the 2006 rules as well as those considering new claims for periods that follow the introduction of the 2006 UK legislation.

In light of the judgment, the UK may continue to apply its existing restrictive interpretation of the 'Marks & Spencer exception' dealing with final losses. However, the UK did acknowledge that the test could be met in those cases where the loss making company ceased its business at the start of the new period.

The decision should not impact claims directly under EU law for losses prior to the 2006 legislation in those cases where the UK Supreme Court has already ruled that the losses need only be definitive at the date of the claim, not at the end of the relevant accounting period.

The decision is also relevant to taxpayers in other Member States making similar claims for the utilization of overseas losses confirming the validity of CJEU case law since Marks & Spencer in December 2005 and rejecting the AG's position from October 2014 (read our [EuroTaxFlash issue 237](#)).

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor.

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