

Euro Tax Flash

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European Court of Justice advised to abandon 'Marks & Spencer exception' for cross-border losses (Commission v UK, C-172/13)

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

In an opinion dated October 23, 2014, Advocate General Kokott advised the Court of Justice of the European Union (CJEU) to reverse a key part of its 2005 decision in the Marks & Spencer case ([C-446/03](#)) regarding cross-border losses. In the Marks & Spencer case the Court held that the UK breached the principle of freedom of establishment in denying a UK company the right to claim relief for losses incurred by a foreign subsidiary. However, in order to protect the UK tax base the Court said cross-border relief should be available only if the loss could not be used in the foreign country. This latter exception should be abandoned according to the Advocate General's opinion.

Background

The current proceedings were initiated by the European Commission on the grounds that the UK's legislation, that was

introduced in 2006 with a view to bringing UK law in line with EU law following the Marks & Spencer decision, had been structured in such a way that it was still contrary to EU law. The main argument was that the new rules only allowed for cross-border group relief claims in extremely limited circumstances that were virtually impossible for taxpayers to satisfy. Essentially the 'no possibilities test' also referred to as the 'Marks & Spencer exception' needed to be satisfied at the end of the period in which the losses arose.

The Advocate General's Opinion

The Advocate General's view is that the Commission's complaint should be rejected as the UK should not have been under an obligation to allow the cross-border relief in the first place. Given that the UK does allow relief, it should not then be criticised for imposing strict conditions as to the availability of such relief. The basis for the Advocate General's view lies partly in her conclusion that this would bring the position of cross-border losses into line with other case law, and partly in the difficulty of applying the 'Marks & Spencer' decision so that it would be in the interests of legal certainty to abandon the principle. Most significantly she doubted that a company investing in a foreign subsidiary was objectively comparable to one investing in a domestic subsidiary because the home jurisdiction could not tax the foreign subsidiary.

EU Tax Centre's Comment

This opinion will almost certainly prove controversial. However, it should be noted that the final position will depend on the CJEU's decision and that the CJEU is not bound to follow the Advocate General's opinion. The decision will be significant for UK taxpayers with existing cross-border group relief claims as well as those considering new claims in all periods that follow the introduction of the 2006 UK legislation. It is also likely to be relevant to taxpayers in other countries making similar claims. If however the Court agrees with AG Kokott's views on comparability it would reverse a line of cases, such as Bosal ([C-168/01](#)), or the FII GLO ([C-446/04](#)), which held an overseas investment is comparable to a domestic one. This may open the way to countries, for example, imposing interest restrictions solely on borrowing to invest in foreign shares or denying comparable methods of double tax relief.

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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