CJEU issues judgment on UK group relief rules

On 3 February 2015, the Grand Chamber of the Court of Justice of the European Union (CJEU) issued its judgment in case C-172/13 Commission v United Kingdom. The CJEU rejected the European Commission's claims that the UK legislation on cross border claims for group relief was incompatible with the freedom of establishment on the basis that the legislation was too restrictive in its operation.

The CJEU reasoning was however different to that of Advocate General Kokott, delivered on 23 October 2014. The Advocate General had considered the Marks & Spencer test in detail, reviewed its perceived shortcomings and recommended the abandonment of it. The CJEU did not consider these issues rather it focused on whether the Commission had proved its case that the UK provisions made it virtually impossible for a successful claim to be made.

The CJEU found that there was no requirement in UK law for the EU subsidiary of a UK parent company to be put into liquidation for a valid claim to be made. The UK Government had confirmed that cross border group relief would be available “where immediately after the end of the accounting period in which the losses have been sustained, that subsidiary ceased trading and sold or disposed of all its income producing assets.” On this basis the CJEU found that the Commission had not shown that it was virtually impossible for a successful claim to be made and rejected the complaint that the UK cross border group relief provisions were too restrictive.

The CJEU also accepted that the UK was not required to legislate for cross border group relief prior to 1 April 2006, when legislation became effective, as the UK explained that the earlier legislation was now construed in accordance with EU law. In addition the Commission had not established the existence of a situation in which cross border group relief was not granted.

The judgment appears to mean that, for the purpose of UK group relief, whether the “no possibilities” test is met must be considered at two different times, depending on the period for which group relief is claimed. For periods prior to 1 April 2006,
when there was no explicit relief available in the UK legislation, the test as laid down by the Supreme Court is to be considered at the time the claim to group relief is made. For periods after 1 April 2006, as now set out in Corporation Tax 2010, the test is to be considered at the end of the accounting period in which the loss arose.

In declining to follow the reasoning of the Advocate General, the CJEU has effectively chosen to confirm the Marks & Spencer concept of cross border loss relief.

Background on UK group relief rules
The Commission v United Kingdom case concerns the interpretation of Article 49 in conjunction with Articles 54 and 31 of the Treaty of the Functioning of the European Union in the context of the UK group relief rules.

Following the judgment in C-446/03 Marks & Spencer, the UK amended its group relief provisions and introduced a number of tests that the companies should meet to be able to utilize their foreign losses in the UK. The provisions governing the losses of nonresident companies are now contained in Corporation Tax Act 2010.

The Commission claimed that the tests introduced in the UK legislation following the Marks & Spencer case are too restrictive such that it is virtually impossible for the companies to obtain cross-border group relief. The UK contended that the conditions are indeed restrictive but this is in consequence of the case law.

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