EU Advocate General opines on UK group relief rules

On 23 October 2014, the EU Advocate General (AG) Kokott issued her opinion in case C-172/13 Commission v United Kingdom. The AG has rejected the European Commission's claims that the UK legislation on cross-border claims for group relief was too restrictive. Indeed, the AG concluded that the complete refusal of the loss relief for nonresident subsidiaries in the UK would be acceptable.

The AG noted that, in practice, the Court of Justice of the European Union (CJEU) judgment in the Marks & Spencer case (in particular, the test that cross-border loss relief should be allowed if there is no possibility that the losses may be used in another EU Member State) has caused many implementation difficulties. She noted that subsequent case law has narrowed the scope of the Marks & Spencer test so much that it is virtually impossible to identify the cases in which it might apply. The AG's opinion considers the perceived shortcomings of the Marks & Spencer test in detail and recommends the abandonment of it.

The AG Opinion will now be considered by the CJEU in reaching its judgment and it is possible, but not certain, that the CJEU will adopt the reasoning of the AG.

Groups with cross-border loss relief claims may wish to monitor developments closely.

Background

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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