Court of Justice of the European Union
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Press and Information

Judgment in Case C-172/13
Commission v United Kingdom

UK legislation allowing cross-border group relief subject to certain conditions, introduced following the Marks & Spencer judgment, is compatible with EU law

In the United Kingdom, the rules on group relief allow the companies in a group to offset their profits and losses among themselves. However, the rules in force until 2006 did not permit losses sustained by non-resident companies to be taken into account. In 2006, following the judgment of the Court of Justice in the *Marks & Spencer* case,[1] the UK amended its legislation so as to allow cross-border group relief, subject to certain conditions. Under those provisions, now set out in the Corporation Tax Act 2010 (CTA 2010), a non-resident company must have exhausted all possibility of having the losses taken into account in the accounting period in which the losses were incurred or in previous accounting periods, and there must be no possibility of the losses being taken into account in future accounting periods. The CTA 2010 requires that the determination as to whether losses may be taken into account in future accounting periods must be made 'as at the time immediately after the end' of the accounting period in which the losses were sustained.

The Commission argues that the CTA 2010 rules make it virtually impossible for a resident parent company to obtain cross-border group relief, since in practice it allows the resident parent company to take such losses into account in only two situations: (i) where the legislation of the Member State of residence of the subsidiary concerned makes no provision for losses to be carried forward and (ii) where the subsidiary is put into liquidation before the end of the accounting period in which the loss was sustained. The Commission also argues that losses sustained before 1 April 2006 are excluded from cross-border group relief, inasmuch as the CTA 2010 provisions concerning that relief apply only to losses sustained after 1 April 2006, the date on which the new legislation entered into force. Considering, therefore, that those rules infringed the principle of freedom of establishment, the Commission brought an action before the Court of Justice.

In today's judgment, **the Court dismisses the action in its entirety.**

With regard to the conditions laid down in the CTA 2010, the Court finds that the first situation referred to by the Commission is irrelevant. In a situation where the legislation of the Member State where the subsidiary is based precludes all possibility of losses being carried forward, the Member State in which the parent company is resident may refuse cross-border group relief without thereby infringing freedom of establishment. As regards the second situation, the Court finds that the Commission has not established the truth of its assertion that the CTA 2010 requires the non-resident subsidiary to be put into liquidation before the end of the accounting period in which the losses were sustained in order for its resident parent company to be able to obtain cross-border group relief. The CTA 2010 does not, on any view, impose a requirement for the subsidiary concerned to be wound up before the end of the accounting period in which the losses were sustained.

The Court observes that losses sustained by a non-resident subsidiary may be characterised as 'definitive', as described in the *Marks & Spencer* judgment, only if that subsidiary no longer has any income in its Member State of residence. So long as that subsidiary continues to be in receipt of

[1] Case C-446/03, see also Press Release No 107/05.

even minimal income, there is a possibility that the losses sustained may yet be offset by future profits made in the Member State in which it is resident. Referring to a specific example of a resident parent company which obtained cross-border group relief, the United Kingdom confirmed that it is possible to show that losses sustained by a non-resident subsidiary may be characterised as definitive where, immediately after the end of the accounting period in which the losses were sustained, that subsidiary ceased trading and sold or disposed of all its income-producing assets.

As regards the possibility for a company to obtain cross-border group relief in respect of the period before 1 April 2006, the Court finds that the Commission has not established the existence of situations in which cross-border group relief for losses sustained before that date was not granted.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.
Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The full text of the judgment is published on the CURIA website on the day of delivery.

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Pictures of the delivery of the judgment are available from "Europe by Satellite" ☎ (+32) 2 2964106