



EUROPEAN ASSOCIATION OF TAX LAW PROFESSORS (EATLP)

CONGRESS 2004

3 June 2004 – 5 June 2004, Sorbonne, Paris

‘Cross-border loss relief and international group operations’

Reporters: David Oliver (London) and Joseph Schuch (Vienna)

>> Brief overview of discussion topics for seminar on afternoon of 4th June <<

1. The Marks & Spencer case

- a. The facts of the Marks & Spencer (“M&S”) case
- b. The issue
- c. Brief overview of the analysis by the Special Commissioners

Note that the taxpayer subsequently appealed to the High Court, which has referred the case to the ECJ. The reference is published in O.J. for 13th December, 2003 – Case C-446/03.

2. Different comparisons on loss relief, on the basis of a single entity

For simplicity in approaching a complex matter we can begin by examining the approach to loss relief on the basis of a single entity. When viewed from this narrower perspective, four different comparisons can be made:

(i) Domestic loss/other domestic income

If a loss produced by a **domestic branch** (of activity) of a domestic taxpayer company in State D is deductible against **other domestic income in State D**, i.e. is taken into account in determining the taxable income of the domestic taxpayer company in State D, does EC law require the same loss incurred in State D by the **branch** of a foreign taxpayer company in State F to be set off against **other income arising in State D** to the foreign taxpayer company? Does it make a difference if State D would tax a domestic taxpayer company on third country income (if any) but would not tax a foreign taxpayer company in State F on such income?

(ii) Domestic loss/other foreign income

If a loss produced by a **domestic branch** (of activity) of a domestic taxpayer company in State D is deductible against **(other) foreign income, arising in State F**, i.e. is taken into account in determining the taxable income of the domestic taxpayer company in State D, does EC law require the same loss incurred in State D by the **branch** of a foreign taxpayer company in State F to be set off against **other income arising in State F** to the foreign taxpayer company, in determining the taxable income of the domestic taxpayer company in State D?

(iii) Domestic income/foreign loss

If a loss produced by a **foreign branch** (of activity) in State F of a domestic taxpayer company in State D is deductible against **other domestic income in State D**, i.e. is taken into account in determining the taxable income of the domestic taxpayer company in State D, does EC law require the same loss incurred in State F by a foreign taxpayer company in State F to be set off against **other income arising in State D** to the foreign taxpayer company in determining the taxable income of the foreign taxpayer company in State D?

(iv) Relief for foreign loss as for domestic loss

If the loss produced by a domestic branch of activity of a domestic taxpayer company is deductible, i.e. can be taken into account in determining the taxable income of the taxpayer, does EC law require a loss produced by a foreign branch of a taxpayer to be taken into account in determining the taxable income. This would imply that EU member states which have a territorial system (e.g. France?) would be required to take into account foreign losses.

It would also imply that residence states which **exempt** foreign income would be required to take into account foreign losses.

3. International groups

(i) If a loss produced by a **domestic subsidiary** of the taxpayer can be taken into account by the parent (as a result of group relief, consolidation, etc.), does EC law require a loss produced by a **foreign sub** of the taxpayer to be taken into account as well? Is the particular form of loss relief (Organschaft [G], deemed absorption of subs by parent [NL], transfer of losses [UK]) relevant? [*Bosa*]

(ii) If a loss produced by a **foreign branch** (of activity) of the taxpayer is deductible, does EC law require a loss produced by a **foreign subsidiary** of the taxpayer to be taken into account as well, in determining the taxable income. The M&S analysis.

(iii) If relief is allowed under 3(i) above does EC law also permit a **domestic subsidiary** to claim relief for the **foreign losses** of its **foreign parent company** or **foreign fellow subsidiary**?

4. Consequences of ruling favourable to taxpayer

(i) Limitation on relief for losses in single entities; exemption/territoriality prevails over credit? Limitation on relief for losses in groups? What would be an EC compliant grouping regime? Worldwide/EU wide consolidation

(ii) Claw-back provisions.

(iii) Investment in branches in EU countries routed through subsidiaries in non EU countries giving loss relief in those countries.

(iv) Losses directive?