When can taxpayers claim group relief for losses sustained elsewhere?

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Marks and Spencer plc v Revenue and Customs Commissioners [2014] UKSC 11, [2014] All ER (D) 173 (Feb)

The Supreme Court (SC) ruled on matters arising from proceedings concerning the right of Marks and Spencer plc (M&S) to claim group relief in respect of losses sustained by two of their subsidiaries resident in Germany and Belgium respectively.

What key issues did this case raise, and what was the main issue examined by the Supreme Court?

This case concerned the availability of cross border group relief, in particular the circumstances in which such relief could be obtained by a UK parent company of trading subsidiaries in other member states in the EU.

In 2001, M&S's European subsidiaries ceased trading. The French and Spanish subsidiaries were sold, but the losses of the German and Belgian subsidiaries were claimed against the UK parent's profits by way of group relief. In 2005, the European Court of Justice (ECJ) held that the UK's group relief provisions were contrary to the Treaty on the Functioning of the European Union, arts 43, 48 (TFEU) where a company could show that the possibility of using its losses locally had been exhausted in respect of all prior, current and (crucially) future accounting periods. This became known as the 'no possibilities test'.

The case eventually made its way to the Supreme Court, which heard the appeal in two parts. The first hearing dealt with the issue of when the no possibilities test had to be fulfilled. Last May the SC concluded this should be the date on which the claim was made. HMRC had argued that the test should be met at the end of the accounting period in which it was incurred so that any ability to carry forward a loss into the next year would make a claim impossible.

This however still left HMRC's contention that 'the date of the claim' should be the date of the very first group relief claim and subsequent claims should be ignored. The case therefore returned to the SC on 25 and 26 November 2013 to examine the issue of whether sequential claims can be made for the same losses in respect of the same accounting period, and also the method of quantifying the foreign losses.

To what extent did the judgment clarify the law in this area?

The Supreme Court has concluded that 'the date of the claim' for determining the no possibilities test extends to the date of all subsequent/alternative claims issued within the statutory time period. Also, the correct measure of calculating available losses is Method E. The decision is unambiguous. It is possible for claimants to make sequential claims so long as they are in time to do so.

Are there any related issues still to be litigated, or is this now the end of the line?

This is a successful conclusion for M&S but some issues still remain to be resolved for other taxpayers. HMRC for example do not accept that claimants can rely on the M&S ruling if their group structure differs from that of M&S in certain respects. There also exist reasons why the no possibilities test might be fulfilled other than in circumstances where the loss making entity has entered into liquidation, eg where the jurisdiction of the loss-maker limits the time for carrying forward losses or where some other local rule strands the losses in particular circumstances.

Given that the legislation in question has since been changed, how much hangs on this decision for companies other than M&S itself?

Other than the points mentioned above, there is now a stark inconsistency between:

- how the SC has interpreted the ECJ's judgment in the M&S case, and
- the 2006 amendments to the group relief provisions, which were purportedly introduced to make the UK's legislation compliant with EU law

Thus, for accounting periods beginning on or after 1 April 2006, the no possibilities test has to be met at the end of the accounting period (rather than at the time the claim is made) and the 'lower of' computation method is imposed (rather than Method E). The European Commission has commenced infringement proceedings against the UK in relation to the 2006 changes and it will be very interesting to see how that issue pans out.

What should lawyers advising in this area take note of?

HMRC are very unlikely to accept claims where they can draw any distinction between the particular claimant's circumstances and the M&S case and, as noted above, there are plenty of areas in which to draw those distinctions. A number of arguments therefore remain to be had.

Are there any trends emerging in this area of law? And what are your predictions for future developments?

The trend in the ECJ since its decision in M&S (Marks & Spencer plc Halsey (Inspector of Taxes) C-446/03, [2006] All ER (EC) 255 has been to prevent jurisdiction-shopping. Thus the decisions in C-337/08 X Holding and C-231/05 Oy AA [2007] All ER (EC) 1079 went in favour of the revenue authorities and appeared to suggest that the no possibilities test exception in Marks & Spencer was no longer appropriate. In Case C-123/11 A Oy [2008] STC 991, however, the ECJ envisaged that whether the taxpayer had exhausted all possibilities was a factual test to be determined by the national court. Taxpayers will need to demonstrate that their only choice was between relief in the UK and no relief at all.