19 February 2014

PRESS SUMMARY

Commissioners for Her Majesty's Revenue and Customs (Respondent) v Marks and Spencer plc (Appellant)
Commissioners for Her Majesty's Revenue and Customs (Appellant) v Marks and Spencer plc (Respondent) [2014] UKSC 11
On appeal from [2011] EWCA Civ 1156

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Reed and Lord Carnwath

BACKGROUND TO THE APPEAL

These appeals raise questions about the availability of cross-border relief and the method of quantifying such relief. For the purposes of corporation tax, Marks and Spencer plc ("M&S") claim group relief in respect of losses sustained by two of their subsidiaries: Marks and Spencer (Deutschland) GmbH ("MSD"), which was resident in Germany, and Marks & Spencer (Belgium) NV ("MSB"), which was resident in Belgium.

M&S began to expand its business into other countries in 1975. By the end of the 1990s it had sales outlets in more than 34 countries, with a network of subsidiaries and franchises. But by that date it had already begun to incur losses, and in March 2001 decided to withdraw from its continental European activity. It was able to sell its French and Spanish subsidiaries to third parties, but no purchasers were found for MSD or MSB. MSD ceased trading in August 2001 and was dissolved following liquidation on 14 December 2007. MSB ceased trading on 22 December 2001 and was dissolved following liquidation on 27 December 2007.

The claims were originally made and refused by HMRC over ten years ago. M&S's basic contention underlying all these claims was that the provisions in UK legislation were contrary to Article 43 EC (now Article 49 TFEU) on the freedom of establishment and were therefore unlawful. The ECJ gave a preliminary ruling holding that Article 43 EC did not preclude provisions of a member state which prevented a resident parent company from claiming group relief for losses incurred by a subsidiary established in another member state.

This case was last before the Supreme Court on 22 May 2013 when Lord Hope gave judgment on the first of five issues. The Court held that that the correct date to identify the circumstances in which it would be unlawful to preclude cross-border relief for losses (the "no possibilities" test) was the date of the claim, not the end of the accounting period. As a consequence, one of the issues (issue 3) did not need to be answered. That left three issues:

> Issue 2: Can sequential/cumulative claims be made by M&S for the same losses in respect of the same accounting period?
> Issue 4: Does the principle of effectiveness require M&S to be allowed to make fresh 'pay and file' claims now that the ECJ has identified the circumstances in which losses may be transferred cross-border, when at the time M&S made those claims, there was no means of foreseeing the test established by the court?
> Issue 5: What is the correct method of calculating the losses available to be transferred?

The courts below did not analyse the issues in quite that order, but they held, in essence, that the answer to issue two was yes: M&S were in principle entitled to make sequential/consequential claims in respect of the same accounting period. As to issue 4, part of which was treated as part of issue 2, they held that both the principle of effectiveness and the principle of certainty did allow M&S to make fresh 'pay and file' claims provided that they were not time barred. However they held that such claims were time barred. As to issue 5, they preferred the method of calculation advanced by M&S to that of the HMRC.

M&S appealed to this court on the time bar point, whereas the HMRC appealed on the issues on which they had lost.

JUDGMENT

The Supreme Court unanimously dismisses all the appeals. Lord Clarke gives the lead judgment, with which Lord Neuberger, Lord Mance, Lord Reed and Lord Carnwath agree.

REASONS FOR THE JUDGMENT

As a matter of domestic law, there is no support in the provisions in Part VIII of Schedule 18 to the Finance Act to support the conclusion that only one claim can be made. On the contrary, the provisions contemplate that successive claims can be made [**24**]. As a matter of construction of the relevant provisions, without any manipulation made necessary by the fact that the draftsman did not have cross-border relief in mind, there is no support for the conclusion that only one claim can be made [**27**].

The legislation must also be construed so as to ensure that European Community law rights are effective in the sense that they are not practically impossible or excessively difficult to exercise and so as to ensure that the statutory code provides an effective remedy [**28**]. The taxpayer is entitled to advance claims for cross border relief provided that it is in time to do so [**36**].

The principle of effectiveness is concerned with giving effect to European Community rights. It is concerned with ensuring that such rights as a person has under Community law are recognised and given effect to in a member state which has not properly reflected such rights in its own domestic law. It was no part of that principle that a person should be given the opportunity to bring about a new state of affairs giving rise to the existence of new rights which he does not already have, in order to enforce them under Community law when they would be unenforceable under domestic law [**45**]. The relevant jurisprudence establishes that a member state may impose a reasonable time limit in the interests of legal certainty [**46**]. The relevant pay and file claims are now time barred [**48**].

The correct method for calculating the losses available to be surrendered is the one contended for by M&S [**49**]. It begins by applying the local rules to determine whether there is a loss in a particular period and, if so, the amount of the loss that remained unutilised. The unutilised loss calculated by reference to the local rules is then converted to UK principles [**50**]. It does not give the parent company greater relief than would have been available had its subsidiary been resident in the same state as the parent, whether in Germany or in the UK [**52**].

References in square brackets are to paragraphs in the judgment

22 May 2013

PRESS SUMMARY

Commissioners for Her Majesty's Revenue and Customs (Respondent) v Marks and Spencer plc (Appellant)
Commissioners for Her Majesty's Revenue and Customs (Appellant) v Marks and Spencer plc (Respondent) [2013] UKSC 30
On appeal from [2011] EWCA Civ 1156

JUSTICES: Lord Neuberger (President), Lord Hope (Deputy President), Lord Mance, Lord Reed, Lord Carnwath

BACKGROUND TO THE APPEALS

These appeals raise questions about the availability of cross-border group relief and the method of quantifying such relief. These questions arise in respect of claims made by Marks and Spencer plc ("M&S") for group relief in respect of losses sustained by two of its subsidiaries: Marks and Spencer (Deutschland) GmbH ("MSD"), which was resident in Germany; and Marks and Spencer (Belgium) NV ("MSB"), which was resident in Belgium. In March 2001, M&S decided to withdraw from its continental European activity. MSD ceased trading in August 2001 and was dissolved following liquidation on 14 December 2007. MSB ceased trading on 22 December 2001 and was dissolved following liquidation on 27 December 2007. Between 2000 and 2008, M&S made several group relief claims in relation to losses sustained by MSD and MSB. The basic contention underlying all these claims was that the provisions in United Kingdom legislation which restricted group relief claims to losses of UK resident companies and, after the Finance Act 2000, losses of UK branches of non-resident companies, were contrary to article 43 EC (now article 49 TFEU) on the freedom of establishment, and were thus unlawful.

The first claims were originally made and refused by the Revenue ("HMRC") more than ten years ago. The matter came before Park J, who made a reference to the CJEU. The CJEU ruled that article 43 EC did not preclude provisions of a Member State which prevented a resident parent company from claiming group relief for losses incurred by a subsidiary established in another Member State. The CJEU also ruled that it is contrary to articles 43 and 48 EC to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary where, in one Member State, the resident parent company satisfies two conditions: (i) the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods; and (ii) there is no possibility for the foreign subsidiary's losses to be taken into account in its state of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.

In giving effect to the CJEU's ruling, Park J, with whom the Court of Appeal agreed, held that the "no possibilities" test required an analysis of the recognised possibilities legally available given the objective facts of the company's situation at the relevant time, and that the test was to be applied at the date when the group relief claim was made. On the basis of that approach, the matter then made its way through the Tax Chamber of the First Tier Tribunal, and the Upper Tribunal, before reaching the Court of Appeal. Moses LJ, with whom Etherton and Lloyd LJJ agreed, disagreed with Park J's approach. They considered that the claimant should not be given an opportunity to take steps that

might bring about a situation in which it could make a cross-border claim. However, they concluded that they were bound by previous authority and could not depart from it.

In the Supreme Court, four issues arise for consideration. The parties will be heard as to the answers to be given to three of those issues at a later date. The first of those issues addressed in this appeal concerns whether the CJEU decided it was contrary to article 43 EC to preclude cross-border group relief in the Member State of the claimant company:

> (a) only where the taxpayer can show, on the basis of the circumstances existing at the end of the accounting period in which the losses in question arose, that there was no possibility of the losses in question being utilised in the Member State of the surrendering company in that accounting period, in any previous accounting period or in future accounting periods (as HMRC contend); or
>
> (b) where the taxpayer can show, on the basis of the circumstances existing at the date of the claim, that there has been no possibility of utilising the losses in the Member State of the surrendering company in any accounting period prior to the date of the claim and no possibility of such utilisation in the accounting period in which the claim is made or in future accounting periods (as M&S contend).

JUDGMENT

The Supreme Court unanimously dismisses HMRC's appeal and adopts approach (b). Lord Hope gives the judgment of the Court.

REASONS FOR THE JUDGMENT

The exercise to be carried out is essentially a factual one. The claimant company ought to be given an opportunity to deal with it in as realistic a manner as possible. It would hardly ever be possible, if regard is had only to how matters stood at the end of the relevant accounting period, to exclude entirely the possibility that the losses in question might be utilised in the Member State of the surrendering company unless, of course, this was prevented by its local law. The CJEU's judgment in February 2013 in Case-123/11 *Proceedings brought by A Oy* makes clear that the claimant company is not required to be restricted to such an extent **[30]**. There is no indication that selecting the date of the claim is likely in practice to give rise to any difficulty. On the contrary, that date has the advantage of certainty, as the facts to be inquired into will not be susceptible to change between the making of the claim and the commencement of the inquiry. The entitlement to cross-border relief is to be examined, as stated in approach (b), on the basis of the circumstances existing at the date of the claim **[31]**.

The national court will, of course, be alert to the possibility that the claimant company may simply be choosing in which Member State it should be taxed. However, what M&S was doing can be attributed to the fact that the companies had ceased trading six years earlier, and not to the exercise of an option to choose where to seek relief for the losses that had been incurred. There is no reason to think that what it did must be seen as a threat to the balanced allocation of taxing powers **[32]**.

Therefore, the question for inquiry is whether the claimant company has been able to show, on the basis of the circumstances known at the date when it makes its claim, that there has been no possibility of the losses in question being utilised in the Member State of the surrendering company in any accounting period prior to the date of the claim and no possibility of such utilisation in the accounting period in which the claim is made or in any future accounting periods **[33]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
www.supremecourt.gov.uk/decided-cases/index.html