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MAISTO E ASSOCIATI

EU TAX ALERT 1/2018

Case C-650/16, *Bevola*

AG Campos Sánchez-Bordona issued his opinion on the compatibility with the freedom of establishment of the Danish legislation precluding the deductibility in Denmark of final losses incurred by foreign PEs

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On 17 January 2018, AG Campos Sánchez-Bordona of the Court of Justice of the European Union ("CJEU" or "Court") issued his opinion in Case C-650/16, *Bevola*.

The case concerns a Danish resident company that decided to close its Finnish permanent establishment ("Finnish PE"). Upon cessation of its activities, the Finnish PE incurred losses for which no relief was available in Finland. The taxpayer sought for the deduction of such losses in Denmark relying on the *Marks & Spencer* case law, under which the final losses of foreign subsidiaries may be taken into account in the State of the parent company (see C-446/03 *Marks & Spencer* and, with regard to foreign PEs, C-414/06, *Lidl Belgium*).

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Danish tax authorities denied the deduction of the losses incurred by the Finnish PE claiming that, under Danish law, such a deduction would be permitted only where the Danish taxpayer had applied for the "international joint taxation regime" (an optional regime providing for the combined taxation in Denmark, for a period of at least ten years, of all profits and losses realised by foreign subsidiaries and PEs).

The AG's opinion is based on three arguments. First, the AG confirms that the *Marks & Spencer* case law is still relevant and should be regarded as the appropriate starting point for the Court's analysis.

Second, the AG states that the conclusion reached by the CJEU in *Marks & Spencer* should apply by analogy in the case at stake, as domestic PEs and foreign PEs must be regarded as being in comparable situation from a Danish perspective. In order to support this conclusion, the AG also refers to the fact that, under the optional "international joint taxation regime" (which, however, was not applied in the case at stake), the profits of foreign PEs are subject to tax in Denmark in the same way as the profits of domestic PEs. As a consequence, the denial to take into account in Denmark the final losses incurred by foreign PEs determines a restriction on the freedom of establishment.

Finally, the AG concludes that the possibility for Danish resident companies to opt for the "international joint taxation regime", which permits the deduction of foreign PE losses, does

not remove the existence of a restriction on the freedom of establishment, as that regime is disproportionately onerous.

If the conclusions of the AG were to be upheld by the Court, the judgment could open the way for the taking into account in Italy of the final losses incurred (i) by foreign subsidiaries of Italian resident parent companies that did not opt for the "worldwide tax consolidation regime" and (ii) by foreign PEs of Italian resident companies that opted for the "branch exemption regime". The deduction of such foreign losses is currently forbidden under Italian domestic law.