Case C-650/16, *Bevola*

CJEU rules that freedom of establishment requires Denmark to grant deduction of final losses incurred by foreign PEs

Today the Court of Justice of the European Union ("CJEU" or "Court") issued its judgment in Case C-650/16, *Bevola* (please see our EU Tax Alert 1/2018 for a comment on the Conclusions of the AG in the same case).

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 C446/03 *Marks & Spencer* and, with regard to foreign PEs, C-414/06, *Lidl Belgium*).

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). Otherwise, due to the application of the exemption method under Danish ordinary regime, income and losses attributable to foreign PEs are not taken into account for Danish tax purposes.

First, the Court holds that the Danish regime is aimed at preventing double taxation as well as, symmetrically, at preventing the double use of losses incurred by Foreign PEs. Based on the cases *Nordea Bank Danmark* (C-48/13) and *Timac Agro Deutschland* (C-388/14) foreign PEs and domestic PEs should not in principle be regarded as being in comparable situation with regard to measures aimed at preventing double taxation (para. 37). However, in relation to the prevention of the double use of losses, foreign PEs which incurred final losses must be considered as being comparable to domestic PEs (para. 38). According to the Court, such conclusion is further confirmed by the fact that national provisions aimed at the elimination of double taxation or the double use of losses tend, more generally, to ensure that taxpayers suffer an appropriate tax burden in the light of the ability to pay principle (para. 39).

Second, the Court holds that the denial to use losses of a foreign PE can be justified by the need to ensure a balanced allocation of taxing rights between Member States (§ 43); by the need to preserve the coherence of the Danish tax system (§ 51) and by the need to avoid the double use of losses (§ 52). However, the denial is not proportionate to the extent that the foreign PE incurred final losses. In such a case, indeed, the principle of the ability to pay, which underlies the exemption method applied by Denmark, is better served by

requiring the State of residence of the company to take into consideration the final losses incurred by the foreign PE (para. 59).

Finally, the Court relies on its precedent in the case *Marks & Spencer* (C-446/03) to state that the burden of proof is on the taxpayer to provide evidence that the losses should be considered as final which is the case when (i) the foreign PE has exhausted the possibilities of taking into account the losses in its State of establishment also in relation to the taxable income of previous tax years; and (ii) where there are no possibilities to use such losses in the PE State in future years. As clarified in the case *Commission v United Kingdom* (C-172/13) such last requirement is met only if it is established that the foreign PE does no longer receive revenue (even for small amounts) in the State of establishment (paras. 60-64).

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