Tax integration and losses of European subsidiaries : the "Mark and Spencer" jurisprudence revisited

The Court of Justice of the European Union (CJEU) considers that the losses of a non-resident subsidiary that have become definitive may be transferred within the tax integration of the integral parent company. For this reason, it is up to the latter to demonstrate that it is impossible for it to value these losses by ensuring, in particular by means of an assignment, that they are fiscally taken into account for future periods.

In France, the Montreux Administrative Court recently recognized that losses resulting from the liquidation of a non-resident subsidiary are imputed on the integrated tax result of a French parent company (TA Montreuil 17-1-2019).

By two decisions of June 18, 2019, the CJEU has recently clarified the possibility of transferring the definitive losses incurred by a non-resident subsidiary or sub-subsidiary to the parent company of the integrated group, thus reviewing the "Marks & Spencer" case law (CJUE 19-6-2019 aff. 607/17, Skatteverket c/ Memira Holding AB ; CJUE 19-6-2019 aff. 608/17, Skatteverket c/ Holmen AB).

The legal basis for the transfer of losses from one Member State to another

By a decision of the Grand Chamber in the case Marks & Spencer (CJUE 13-12-2005 aff. 466/03), the Court of Justice of the European Union held that the restriction on the freedom of establishment by limitation of the right of a company to deduct the losses of a foreign subsidiary, while this deductibility is granted to a resident subsidiary, is justified by the need to maintain a balanced allocation of taxing powers between Member States and to prevent the risk of duplication of losses as well as tax evasion..

However, the Court clarified that this restriction would be disproportionate if the non-resident subsidiary has exhausted all possibilities of taking into account its own losses and if there is no possibility that such losses may be taken into account either by itself or by a third party through an assignment of the subsidiary to it.

After hesitations regarding the particular nature of the tax regime discussed in the case law of Marks & Spencer and the case law “X Holding BV” (CJUE 25-2-2010), the CJUE has raised the doubts of the doctrine and the scope of the case law created by the tax judge by means of two decisions concerning permanent establishments whose principles seem, *mutatis mutandis*, applicable to the subsidiaries (CJUE 12-6-2018 ; CJUE 4-7-2018).

In the "Bevola" case, the Court in fact extends the Marks & Spenser solution to permanent non-resident loss-making establishment. But in the "NN A / S" decision, which pursues the logic of the Marks & Spencer judgment, the Court applies this notion to a group of companies, including a non-resident subsidiary, considering this situation comparable to that of a purely national group.

In fact, restrictions on the fundamental principle of freedom of establishment, the cornerstone of a single European market, do not in any way prevent the comparison of situations between different systems leading to the taking into account of losses between companies belonging to the same group (be it tax integration or loss exchange).

Regarding the judgment X Holding BV, it concerned the conditions of access to the tax integration system, but did not address the issue of the definitive exclusion of non-resident companies with

regard to the tax advantages enjoyed by the companies members of the integrated tax group. In this case, it was pointed out that the decision of the Dutch parent company not to include a non-resident subsidiary in its own tax integration, since the profit earned by this subsidiary was not subject to Dutch tax law was consistent compatible with European principles.