UK Supreme Court ruling in Marks and Spencer case – commentary

(Please note that these articles are from independent third-party tax news providers and the views expressed do not necessarily reflect those of Deloitte).

On 19 February 2014, and following on from the decision of 22 May 2013, the UK Supreme Court gave a further judgment in relation to the *Marks & Spencer case (C-446/03)* regarding the remaining three issues, outstanding from the decisions of lower courts, as to the availability of cross-border loss relief and the method of quantifying such relief.

The three outstanding issues were as follows:

- Issue 2: could sequential and/or cumulative claims be made by Marks & Spencer for the same losses in respect of the same accounting period?

- Issue 4: did the principle of effectiveness require Marks & Spencer to be allowed to make fresh "pay and file" claims given that the Court of Justice of the European Union (ECJ) had identified the circumstances in which losses could be transferred cross-border, when, at the time Marks & Spencer made those claims, there was no means of foreseeing the test established by the ECJ?

- Issue 5: what was the correct method of calculating the losses available to be transferred?

The various lower courts in question did not analyse the issues in this order, but held the following. In essence, the answer to Issue 2 was that Marks & Spencer was, in principle, entitled to make sequential and/or consequential claims in respect of the same accounting period. With regard to Issue 4, part of which was treated as part of Issue 2, the lower courts held that both the principle of effectiveness and the principle of certainty allowed Marks & Spencer to make fresh "pay and file" claims, provided that they were not time barred, but that such claims were time barred. With regard to issue 5, the lower courts preferred Marks & Spencer's method of calculation.

Marks & Spencer appealed to the Supreme Court on the time barred issue and Her Majesty's Revenue & Customs (HMRC) appealed on the issues on which they had lost.

The Supreme Court unanimously dismissed all of the appeals and, therefore, the decisions of the lower courts stand as final.

The UK Supreme Court on 19 February unanimously dismissed the appeals raised by both parties in a long-running dispute between Marks & Spencer and HM Revenue & Customs, upholding part of the former's group loss claims related to its now-defunct Belgian and German subsidiaries.

The judgment in HM Revenue & Customs v. Marks & Spencer plc is the latest chapter of a long-running saga grappling with questions about the availability of cross-border group loss relief to UK companies operating in EU member states and how that relief should be calculated.

The dispute first arose when the UK retailer decided to close its continental European operations, ceasing operations at its Belgian and German subsidiaries in 2001. The company attempted to apply the losses against the parent company's UK profits, but HMRC denied its claims for group loss relief.

On reference to the European Court of Justice, UK restrictions against cross-border group losses were found to violate the freedom of establishment under article 43 of the EC Treaty, which is now article 49 of the Treaty on the Functioning of the European Union. The decision was outlined by the ECJ in its 2005 judgment in *Marks & Spencer plc v. Halsey (C-446/03)*. The case has since been heard by various UK courts and the ECJ, having last been addressed by the Supreme Court on 22 May 2013.

In its latest judgment, written by Justice Anthony Clarke, the Supreme Court held that Marks & Spencer was able to make more than one claim to offset its Belgian and German losses for the same UK accounting period, but that the

earliest claims from 1997 through 1999 were time-barred, reaffirming its May 2013 decision 2013 WTD 100-34: Court Opinions upholding a lower court decision on the same issue.

The Supreme Court also upheld the Court's May 2013 decision that Marks & Spencer was able to claim group losses for the years starting from 2000 onwards under self-assessment rules in Schedule 18 to the Finance Act 1998; the claims were deemed to be within the statutory time limits and met the "no possibilities" test, as set out by the ECJ in *Marks & Spencer plc v. Halsey*.

The test, which identifies the circumstances in which it would be unlawful to preclude cross-border relief for losses, requires a group loss relief claimant to prove that it has exhausted all options for offsetting its losses in the member state where the loss-making subsidiary is located. However, the ECJ did not clarify when the no possibilities test must be satisfied, which resulted in additional litigation. Also, after the 2005 ECJ judgment, the UK adopted new rules for group loss relief.

Clarke wrote that the Supreme Court's latest judgment resolves issues not addressed in its earlier decision in May 2013. In that judgment, Justice David Hope decided on only the first of five issues, and the other members of the Court "simply agreed with Lord Hope."

The five issues were:

- whether the no possibilities test should be applied at the end of the accounting period in which the losses crystallised, as argued by HMRC, instead of the date of claim, as argued by Marks & Spencer;

- whether Marks & Spencer can make sequential/cumulative claims for the same losses regarding the same accounting period;

- if a surrendering company has some losses that it has or can use and others that it cannot, whether the no possibilities test precludes, as HMRC argued, the transfer of the proportion of losses that it has no possibility of using;

- whether the principle of effectiveness requires Marks & Spencer 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, even though there were no means of foreseeing the test established by the Court at the time Marks & Spencer made those claims; and

- what the correct method is for calculating the losses available to be transferred.

The Supreme Court had held definitively on the first issue, saying that the correct date for applying the no possibilities test was the date of the claim, not the end of the accounting period, and that as a result the third issue did not need to be addressed. Regarding issue two, the Court essentially held that Marks & Spencer was in principle allowed to make sequential/consequential claims regarding the same accounting period.

Regarding the fourth issue, the Court had held that although the principle of effectiveness and the principle of certainty did entitle Marks & Spencer to make new pay and file claims if they were not time-barred, the claims were in fact time-barred. The Court also expressed a preference for Marks & Spencer's method of calculating losses over that advanced by HMRC.

After the Supreme Court's May 2013 decision, Marks & Spencer appealed on the time bar issue in issue four and HMRC appealed on the issues on which it had lost, issues two and five.

Clarke wrote that the Supreme Court dismissed all appeals after upholding Hope's previous judgment and held definitively on the remaining issues. The Court agreed with the previous holdings on issues two and four and sided with Marks & Spencer on issue five, concerning the proper means of calculating losses.

Clark also wrote that the correct method for calculating losses available to be surrendered is to apply local rules to determine if there is a loss in a particular period and, if so, determine the amount of the loss that remained unused. After that unused loss is calculated, it must be converted to UK principles. According to the Court, the method does not give the parent company greater relief than would have been available if its subsidiary were resident in the same state as its parent.

"The judgment confirms we are not obliged to accept out of time claims," an HMRC spokesman told Tax Analysts. "But we acknowledge that subsequent alternative cross-border group relief claims can be made within the statutory time limits."

A Marks & Spencer spokeswoman said that the judgment repeats the previous decisions of the Upper Tribunal and the Court of Appeal. "As the judgment has only just been released, it would not be appropriate for us to comment further at this stage," she said.

HMRC and Marks & Spencer have not indicated whether they will pursue further action on the case.

(This article has been edited to remove the Practitioner reaction section with comments from other firms.)