NF 2013-05

5 November 2013

Newsflash

EU Direct Tax Group

Finnish Supreme Administrative Court decision on cross-border merger and 'final losses' (A Oy, C-123/11)

On 4 October 2013, the Finnish Supreme Administrative Court (SAC) gave its decision (KHO 2013:155) in the case regarding a cross-border merger and the utilization of foreign tax losses in Finland.

Background

The case relates to a request for a preliminary ruling made by the SAC to the Court of Justice of the European Union (CJEU) and for which the CJEU gave its decision on 21 February 2013 (A Oy, C-123/11). The case concerned a situation where a Swedish company with tax losses was merged into its Finnish parent company. The activities of the Swedish company had ceased to exist.

In its decision, the CJEU upheld the *Marks & Spencer* doctrine but left the important question of determining 'final losses' to the national court.

Decision of the SAC

The SAC stated that the questions raised in the preliminary ruling were answered by the CJEU. The SAC then repeated the judgment of the Court saying that Articles 49 and 54 TFEU do not preclude the Finnish rules which deny the transfer of losses in a cross-border merger. However, the Finnish legislation is nonetheless incompatible with European Union law insofar it does not allow the parent company the possibility of showing that the subsidiary has exhausted the possibilities of taking those losses into account and that there is no possibility of them being taken into account in its state of residence in respect of future tax years either by itself or by a third party.

As regards the calculation of the 'final losses', the SAC noted that the CJEU had stated that the calculation must not constitute unequal treatment compared with the rules of calculation which would be applied if the merger were with a resident subsidiary.

In this respect, the SAC held that the above requirement would be best fulfilled when the losses of the foreign subsidiary are calculated in accordance with the provisions of the Finnish Business Income Tax Act.

As regards the issue whether the losses are in fact final in the case of A Oy, the SAC merely stated that the only question in the proceedings has been to determine whether the losses of a Swedish subsidiary could be taken into account in the taxation of the Finnish parent company.

Conclusions

It can be noted that the Finnish procedure of case A Oy started in 2008 as an advance ruling application made to the Finnish Central Tax Board. The negative ruling was appealed by the tax payer to the SAC. The SAC now overruled the negative ruling made by the Central Tax Board and stated that losses should be transferred for A Oy provided that they are final.

However, SAC did not take a stand if the losses were in fact final in the case at hand. Neither did SAC provide any additional guidance on how to evaluate the concept. It seems to be only the future tax practice that establishes the content of the concept 'final losses'.

EU Direct Tax Group

The EUDTG is one of PwC's Thought Leadership Initiatives and embedded in the International Tax Services Network. The EUDTG is a pan-European network of EU tax law experts and provides assistance to organizations, companies and private persons to help them to fully benefit from their rights under EU law.

Should you be interested in receiving the free bi-monthly newsletter, then please send an e-mail to eudtg@nl.pwc.com, with "subscription EU Tax News".

For more detailed information, please do not hesitate to contact your local PwC contact person or a member of the EUDTG.

Jarno Laaksonen
PwC Finland
+358 9 2280 1327
jarno.laaksonen@fi.pwc.com

Heikki Lajunen
PwC Finland
+358 9 2280 1244
heikki.lajunen@fi.pwc.com

Jaana Mikkola
PwC Finland
+358 9 2280 1418
jaana.mikkola@fi.pwc.com