

## Dorsey London Tax Update

September 2009

### **Marks & Spencer (Group Relief): HMRC's "lesser of" quantification method rejected**

In its previous decision in April the First Tier Tribunal upheld the cross border group relief claims which Marks & Spencer made in respect of its Belgium and German subsidiaries after the subsidiaries had commenced liquidation. The Tribunal held further that, whereas the utilisation of the losses was to be determined by reference to local rules, the unutilised losses had to be re-computed according to UK principles for the purposes of determining the amounts which could be group relieved.

At a later hearing on 10 July 2009, the Tribunal heard argument on the correct methodology for achieving that result. This latest decision follows that hearing.

HMRC contended that the losses had to be computed on both a UK and a local basis and that the amount eligible for group relief was the lesser of the two amounts in each year. This of course mirrors the approach in the 2006 group relief changes.

Marks & Spencer argued that the Revenue's method was unfair because it failed to take account of timing differences which arose on conversion from local to UK principles. A loss which occurred in one year under local principles could, on conversion into UK principles, move wholly or partly to another year. Marks & Spencer put forward two methodologies in order to deal with this problem.

The Tribunal agreed with Marks & Spencer that the losses eligible for group relief should not be reduced simply because of timing differences between the local and UK rules and accepted one of two methodologies put forward by Marks & Spencer ("Method E"), as being the simplest method and also the closest to their previous decision.

Method E took as its starting point the local loss, computed on a local basis. The local tax adjustments were then reversed to produce the local accounting loss per the local statutory accounts. The UK tax adjustments were then introduced in order to convert the loss to a UK tax basis. A deduction was then made for utilisation under local principles on a FIFO basis. The resulting amounts were the amounts available for group relief under UK principles after local utilisation.

This decision completes the First Instance Tribunal's consideration of the case. The decision is subject to appeal and is expected to be listed at some point early next year.

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## **M&S followed in Cross Border Consortium Relief Claim: Philips v HMRC**

A UK subsidiary of non-UK resident link companies sought to claim loss relief from the UK branch of a non-resident subsidiary of the consortium company. The provisions operated by a) limiting a claim by a subsidiary of a link company to situations where the link company itself could have made a consortium relief claim (here the link companies were non-resident and therefore not themselves able to claim loss relief) and b) preventing any losses of that UK branch being surrendered if any part of those losses corresponded to amounts deductible for foreign tax.

Following *Papillon* the Tribunal decided that both the provisions represented restrictions to Article 43 EC Treaty and that those restrictions were neither justified, nor proportionate. Accordingly, the taxpayer succeeded. The decision builds on the M&S decision and is particularly helpful to claimants in Class 2 (i.e. non-UK parents) of the Loss Relief GLO."

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