

## International groups and cross-border loss relief

**If you operate a group company structure and a non-UK subsidiary makes a loss, can you offset it against the profits of a UK-resident company? If you do not know the answer, you are not alone, as this question has bounced around the UK and European courts for over 10 years. But we may now finally have a resolution.**

Historically, UK tax legislation did not allow this type of cross-border group tax relief. Then in 2005 the Court of Justice of the European Union (CJEU) ruled that Marks & Spencer could offset losses from its, now closed, German and Belgian subsidiaries against its UK business. So, from 1 April 2006 the UK law was changed to make it compatible with EU law.

The 2006 changes allowed losses from a company resident in the European Economic Area (EEA) to be relieved against the profits of a UK company in the same group – but only under very specific circumstances. The main requirement was that there should be no possibility in future of using the losses in the country of the unprofitable subsidiary. If the subsidiary continued to trade, there would be the possibility of generating future income against which the past losses could be offset.

The European Commission has challenged the restrictive nature of the 2006 UK legislation, arguing that the rules make it virtually impossible for UK companies to claim group relief for losses arising in a non-UK subsidiary.

Clarity was provided on 3 February 2015, when the CJEU rejected the European Commission's claims.

The upshot is that, where losses arise after 1 April 2006 in EEA subsidiaries, UK businesses can only claim group relief if there is no possibility of carrying the losses forward in the subsidiary. The losses have to be characterised as “definitive”. And the CJEU observed that this will be the case only if the loss-making subsidiary no longer has any income in its member state of residence.

In other words, if the subsidiary continues to receive even minimal income, there is a possibility that the losses could be offset by future profits made in the member state in which it is resident. In these circumstances, the losses won't be capable of being group relieved against the profits of a UK-resident company.

This “no possibilities” test must be considered at the end of the accounting period in which the losses arise. So UK groups will have to evaluate the position of any loss-making EEA subsidiaries at that time. If not, they could miss out on the opportunity for utilising these losses in the UK.