United Kingdom; Netherlands

Court of Appeal Refuses Tax Relief for Surrendered Losses

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The United Kingdom's Court of Appeal has published its decision in *Volkerrail v His Majesty's Revenue and Customs* [2023] EWCA Civ 210, which disallowed corporation tax group relief under the Income and Corporation Taxes Act 1988, which is now Part 5 of the Corporation Tax Act 2010. The details are summarized below.

(a) Facts. Four Volkerrail companies (the taxpayers) appealed against the decision of His Majesty's Revenue and Customs (HMRC) to not allow a claim to group relief for losses of a UK branch of a Dutch company. This was because the losses had been already deducted in the Netherlands.

(b) Issue. As well as allowing trading losses and some other amounts to be eligible for relief from corporation tax against the same company's profits, the United Kingdom's corporation tax legislation allows these to be relieved against the profits of another company in the same group or consortium. This group relief could be set off against the profits of UK resident companies and, from April 2000 under section 403D of the Income and Corporation Taxes Act 1988, of UK branches of non-resident companies (permanent establishments).

However, section 403D(1)(c) refused group relief if the loss was "deductible from or otherwise allowable against non-UK profits of the company or any other person". There was thus restriction on the surrender of losses of a UK tax resident company if these were deductible elsewhere.

(c) Decision. The Court of Appeal noted that the Netherlands-United Kingdom Income Tax Treaty (2008) was relevant in that the United Kingdom had the right to tax profits of a Dutch enterprise carried on through a branch or permanent establishment in the United Kingdom.

In the similar case of *The Commissioners for Her Majesty's Revenue & Customs v Philips Electronics UK Ltd (*C-18/11*)*, the Court of Justice of the European Union (ECJ) had previously ruled that these provisions limiting the use of losses were a restriction on freedom of establishment and could not be justified. However, in its more recent decision in *NN A/S v Skatteministeriet (*C-28/17*)*, the ECJ held that restricting the double use of losses was a legitimate objective in restricting freedom of establishment. And in *Marks & Spencer (*C-446/03*)* it was held that "the allocation of taxation powers among the Member States may justify restrictions of the freedom of establishment" and that Member States "must be able to prevent the risk of losses being taken into account twice".

The Court of Appeal therefore dismissed the appeal of the taxpayers and upheld HMRC's decision to refuse tax relief.