HMRC - CTM80335 - Groups: UK Permanent Establishment Of Non-Resident Company - Clawing Back Group Relief For Losses Relieved In Foreign Jurisdiction For An EEA Resident Company

## {#IDAFSFQI}

CTA10/S107(6B)

For general guidance about the surrender as group relief of losses and other amounts (CTM80110) of a UK permanent establishment of a non-resident company see CTM80310.

CTA10/S107(6B) is applicable on or after 1 April 2013 to companies resident in the European Economic Area (EEA).

Where CTA10/S107(6B) applies, the permanent establishment losses cannot be surrendered to the extent that tax relief has been given for them in a foreign jurisdiction. This means that if tax relief has not in fact been given in a foreign jurisdiction then the loss will be available for surrender as group relief, even if relief could be given in the foreign jurisdiction in future.

Where a loss that has been surrendered as group relief is later relieved against non-UK profits, then the benefit of the UK group relief should be withdrawn to the extent that the loss has been used elsewhere. This ensures that the losses are not relieved twice, once as group relief in the UK and then again in another country.

The total amount available for surrender as group relief for an EEA resident company is determined principally by reference to CTA10/S99 and CTA10/S107.

From 1 April 2103 the restriction for a company established in the EEA at CTA10/S107(6A) and (6B) operates on the basis of whether losses and other amounts are deducted from, or otherwise allowed against, non-UK profits in any period.

Where losses and other amounts are used against non-UK profits after a notice of consent to surrender has been made, this will reduce the total amount available for surrender. As a result the surrendering company may need to take action in order to reduce the losses and other amounts it has surrendered.

Existing provisions at FA98/SCH18/PARA75 will require the surrendering company to withdraw (and allow it to replace) existing consents to surrender if the amount surrendered exceeds the total amount available for surrender – see CTM97070 for further details. The following example illustrates how these provisions operate together. This example is purely illustrative in that it assumes that the Netherlands rules allow UK permanent establishment losses to be used to reduce Dutch profits, even though, from 1 January 2012, the Netherlands rules do not allow this.

Example

Year 1

A Netherlands resident company (Company A) is trading through a permanent establishment in the UK. For UK tax purposes Company A’s permanent establishment makes a trading loss of £1m (all of which would have been taxable in the UK had the result been positive). For Netherlands tax purposes Company A makes a loss of €5m (€2m of this loss is attributable to the permanent establishment). Company A is not part of a Dutch fiscal unity, so its losses may not be set against the profits of another Netherlands company.

The total amount available for surrender is determined under Part 5 of CTA 2010. Under CTA10/s99 and CTA10/s107 the total amount available for surrender for Company A is £1m. Company A surrenders this in full to a fellow group company resident in the UK (Company B).

Year 2

For Netherlands tax purposes Company A makes a profit of €20m (this includes €3m of losses attributable to the permanent establishment).

For UK tax purposes Company A’s permanent establishment makes a trading loss of £2m (all of which would have been taxable in the UK had the result been positive). Company A has deducted all the losses attributable to its UK permanent establishment from non-UK profits, as they are taken into account in arriving at Company A’s profits of €20m. Under CTA10/s99 and CTA10/s107 the total amount available for surrender in Year 2 is therefore £nil so Company A cannot make a group relief surrender for Year 2.

Company A sets its total loss from Year 1 against its €20m profits in Year 2, reducing its chargeable profits for Netherlands tax purposes to €15m. Company A has deducted all the Year 1 losses attributable to its UK permanent establishment from non-UK profits. Under CTA10/s99 and CTA10/s107 the total amount available for surrender in Year 1 is now £nil.

The use of this Year 1 loss is a ‘triggering event’ for FA98/Sch 18/para 75 to apply as the total amount available for surrender in Year 1 has now been reduced to below the £1m surrendered. Company A is required to withdraw its notice of consent to surrender to Company B (notifying both Company B and HMRC). Company B is required to amend its company tax return to reflect this.

If Company B cannot (or fails to) amend its return for Year 1 then HMRC can issue the claimant with an assessment under FA98/Sch 18/para 76 to recover tax arising from the excessive group relief. If necessary, subject to certain conditions, HMRC can recover any unpaid tax from another company that has had the benefit of group relief from that surrendering company for the same period under FA98/Sch 18/para 75A.

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