

# Newsalert

## EU Direct Tax Group

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### EU Direct Tax Group

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**The First-Tier Tribunal found that the consortium (i.e. joint venture) loss relief rules in the UK are an unjustifiable breach of the freedom of establishment, in that they apply to prevent loss relief in cases where the link company is not a UK resident, but resident elsewhere in the EU.**

The facts of the case are as follows: Philips Electronics UK Limited is a member of the Philips Group, the ultimate parent of which is Koninklijke Philips Electronics NV (KPE NV). Philips Electronics UK had filed claims for consortium relief for KPE NV's share of UK losses arising in a consortium. These losses were attributed to the UK permanent establishment of a Dutch incorporated and resident company for periods between 2001 and 2004.

The UK legislation did not provide for this, as it required the 'link' company to be resident or taxable in the UK: s406(2) of ICTA 1988. The 'link' company is defined as being a company that is both a member of the Philips Group and of the consortium. In the facts at hand, the 'link' company was not a UK resident but a German resident company that was not taxable in the UK via a PE, and the conditions for consortium relief were therefore not met. The taxpayer, Philips Electronics UK Ltd., claimed that this provision breached Article 43 of the EC Treaty and asked the Tribunal to disapply the requirement for a UK 'link' company.

Contrary to what Her Majesty's Revenue and Customs contended, the Tribunal held that even though the case did not concern Philips Electronics UK's but rather KPE NV's freedom of establishment, the taxpayer could ask for the disapplication because it was *'the most affected by the restriction'* and the taxpayer *'which will have to pay more tax if it cannot use the losses because of a breach of the directly enforceable Community rights of another Company established in the Community'*.

The taxpayer contended that it was placed in a less favourable position because the link company was resident and carrying on business in another member State. This difference was previously considered in *the Oy AA Case (C-231/05)* and also in the *Papillon Case (C-418/07)*.

The Tribunal Judges agreed with the taxpayer that s406(2) is a clear case of an unjustifiable restriction on the freedom of establishment, and disapplied the requirement for a UK resident link company. One key point that can be taken from this judgment is the increased willingness of the UK Courts to decide an EC Treaty related issue without referral to the ECJ.

We would therefore recommend that groups holding shares in joint ventures with loss-making UK subsidiaries that were previously not in a position to claim this relief reconsider their position in the light of this judgment, even where the 'link' company is resident elsewhere in the EEA.

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

Peter Cussons

+ 44 20 7804 5260

peter.cussons@uk.pwc.com

Edward Attard

+ 44 20 7804 0537

edward.l.attard@uk.pwc.com