On 12 June 2018, the Court of Justice of the European Union (CJEU) issued its judgment in A/S Bevola and Jens W. Trock APS vs. the Danish Ministry of Taxation (C-650/16). The underlying question of the case was whether the Danish parent company could deduct final losses incurred by its Finnish permanent establishment after the permanent establishment was shut down. The CJEU therefore had to decide whether:

- the Marks & Spencer doctrine still applies; and
- if yes, whether it also extends to final losses incurred by foreign permanent establishments.

Facts

A/S Bevola is a company tax resident in Denmark. Jens W. Trock APS is the ultimate parent company of the Bevola group. In the tax year 2009, A/S Bevola shut down its Finnish permanent establishment. The Finnish permanent establishment was loss making, and thus in connection with its closure, the Bevola group suffered a loss of DKK 2.8 m. (EUR 375,000). The group wanted to deduct this loss from its taxable income in Denmark, which was denied by the Danish Tax Tribunal in its decision of 20 January 2014. The decision was appealed to the Danish High Court, which referred questions to the CJEU.

Judgment

The CJEU first stated that under Danish law, a Danish company with a permanent establishment in another EU Member State is treated less favourably than a Danish company with a permanent establishment in Denmark as the latter is allowed to deduct losses incurred by the permanent establishment whereas the Danish company with a non-resident permanent establishment is not allowed such a deduction.

According to the CJEU, this difference in treatment cannot be called into question by the fact that the Bevola Group had the possibility to opt for international joint taxation under Danish tax law, as the conditions to apply for the international joint taxation scheme were too strict. If the Bevola Group had opted for international joint taxation, it would have been allowed to deduct the losses incurred in the Finnish permanent establishment.

The CJEU then stated that the situation where A/S Bevola had a Finnish permanent establishment was objectively comparable to a purely domestic situation of a Danish company with a Danish permanent establishment in light of the objective of the Danish provision at issue, which was to avoid double taxation and double deduction.

According to the CJEU, that difference in treatment may however be justified by the balanced allocation of taxing powers, the need to ensure the coherence of the taxing system and the prevention of the risk of the double use of losses.

Finally, when addressing the proportionality of the measure, the CJEU stated that where there is no longer any possibility of deducting the losses of the non-resident permanent establishment in the EU Member State where the PE is situated, the risk of double deduction of losses no longer exists. Accordingly, the Danish provision at issue goes beyond what is necessary for pursuing the objectives of avoiding double taxation and double deduction. With reference to the Marks & Spencer case, the CJEU stated that when the losses in the permanent establishment are final, it is disproportionate to deny the possibility to deduct the losses.

Takeaway

In various EU Member States, there have been doubts as to the applicability of the Marks & Spencer doctrine and consequently whether companies resident in an EU Member State may deduct final losses incurred in non-resident subsidiaries.

With this judgment, the CJEU has confirmed that the Marks & Spencer doctrine still applies and that it also extends to final losses incurred by non-resident permanent establishments.

Companies that have suffered a final loss from their non-resident subsidiaries or permanent establishments are advised to seek a deduction of those losses in the taxable income of the parent company.