

Cross border profit/loss utilization – good news for Swedish multinationals?

The government has proposed new rules which will allow Swedish companies to deduct (final) losses in foreign subsidiaries. The proposed legislation thus opens up for a limited form of cross-border profit/loss utilization. Where a foreign investment has failed, it could be possible to reduce the financial loss by a tax deduction.

The Swedish system with so-called group contributions enables profit utilization within a Swedish group of companies. Provided that certain requirements are met, a group contribution is deductible for the paying company and taxable for the receiving company. One of these requirements is that the receiving company is a Swedish company or a foreign company with a permanent establishment in Sweden. However, after the judgments by the EU Court of Justice in the Marks & Spencer (C-446/03) and Oy AA (C-231/05) cases, it has been questioned whether this requirement is in conflict with the freedom of establishment in the Treaty on the Functioning of the European Union (“TFEU”).

On 11 March 2009, the Swedish Supreme Administrative Court issued judgments in several cases where Swedish companies had requested deductions for group contributions paid to foreign companies, with the support of the Marks & Spencer and Oy AA judgments. The Supreme Administrative Court found that in cases where a foreign subsidiary of a Swedish company had exhausted all possibilities of utilizing its own losses, it follows from the principles laid down in the Marks & Spencer and Oy AA judgments that it would be in conflict with the TFEU to deny the Swedish company deduction for group contributions paid to the foreign subsidiary. For this reason, the court found that deduction for such group contributions should be granted (provided certain conditions were met).

Following the judgments from the Supreme Administrative Court, the government has proposed new rules which will provide for a limited form of cross border profit utilization. According to the proposed rules, a Swedish company will be allowed a deduction for a final loss in a foreign directly owned subsidiary within the EEC (“Group Deduction”) under the conditions that:

- the subsidiary has been liquidated (deduction will be allowed when the liquidation is finalized);
- the subsidiary has not transferred an essential part of its business to another group company within the last ten years, and
- there is no other group company carrying on activity in the country of the liquidated subsidiary.

A loss is considered to be final if the loss has not, or could not have been, utilized in any way by the subsidiary. A loss is not final if it has not been used by the subsidiary due to the absence of a legal right or due to the fact that the right to use losses is limited in time.

The proposed new rules, which also contain provisions on how the losses in the subsidiary are to be calculated and the maximum amount of the Group Deduction, are proposed to enter into force on 1 July 2010.

When analyzing the proposed rules, we can conclude that the government has not opened up for cross border utilization in situations other than those specifically mentioned by the EU Court of Justice in the Marks & Spencer case. Hence, the proposed legislation is almost a codification of the principles laid down in Marks & Spencer (and the following judgments from the Swedish Supreme Administrative Court). However, it has been discussed whether the proposed rules are sufficient for Swedish legislation not to be in conflict with the TFEU. For instance, some believe that the requirements that must be met in order to be eligible for the Group Deduction are not supported by the EU Court of Justice. In the event the proposed legislation is adopted, it is probably only a question of time before somebody tries to challenge the rules from an EU perspective

