



**Easter Term
[2013] UKSC 30**

On appeal from: [2011] EWCA Civ 1156

JUDGMENT

**Commissioners for Her Majesty's Revenue and
Customs (Respondent) v Marks and Spencer plc
(Appellant)**

**Commissioners for Her Majesty's Revenue and
Customs (Appellant) v Marks and Spencer plc
(Respondent)**

before

**Lord Neuberger, President
Lord Hope, Deputy President
Lord Mance
Lord Reed
Lord Carnwath**

JUDGMENT GIVEN ON

22 May 2013

Heard on 15 April 2013

Appellant
David Milne QC
Nicola Shaw QC
(Instructed by Hage
Aaronson Ltd)

Respondent
David Ewart QC
Sarah Ford
(Instructed by HMRC
Solicitors Office)

Appellant
David Ewart QC
Sarah Ford
(Instructed by HMRC
Solicitors Office)

Respondent
David Milne QC
Nicola Shaw QC
(Instructed by Hage
Aaronson Ltd)

LORD HOPE (with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Carnwath agree)

1. This litigation concerns claims by Marks and Spencer plc (“M&S”) for group relief in respect of losses sustained by two of their subsidiaries: Marks and Spencer (Deutschland) GmbH (“MSD”), which was resident in Germany; and Marks and Spencer (Belgium) NV (“MSB”), which was resident in Belgium. The claims were originally made and refused by the Revenue (“HMRC”) more than ten years ago. They raise questions about the availability of cross-border group relief and the method of quantifying such relief as is available which, despite having been the subject of nine separate hearings since the case was first considered in December 2002, have still not yet been resolved.

2. The appeals come before the Court at this stage on an application by M&S for a reference to the Court of Justice of the European Communities. On 14 October 2011 the Court of Appeal gave judgment on five issues which had been identified as arising in the case: *Marks and Spencer plc v Revenue and Customs Commissioners* [2011] EWCA Civ 1156, [2012] STC 231. The Court of Appeal found in favour of M&S on four of these issues and in favour of HMRC on the other one. It gave the parties permission to appeal on all issues. M&S had intended to seek a reference on the first issue, but on 21 February 2013 the CJEU gave judgment in Case C-123/11 *Proceedings brought by A Oy*. M&S submit that any doubt that might have existed on the first issue has been dispelled by that ruling, that a reference is no longer necessary and that it can now be answered in their favour. HMRC had objected to M&S’s application for a preliminary ruling on the ground that the answer to the first issue was already clear. As matters now stand, however, they simply invite this Court to determine this issue in their favour. So the hearing on M&S’s application for a reference became a substantive hearing of the appeal on the first issue.

Background

3. M&S began to expand its business into other countries in 1975. By the end of the 1990s it had sales outlets in more than 34 countries, with a network of subsidiaries and franchises. But by that date it had already begun to incur losses, and in March 2001 it decided to withdraw from its continental European activity. It was able to sell its French and Spanish subsidiaries to third parties, but no purchasers could be found for MSD and MSB. MSD ceased trading in August 2001 and was dissolved following liquidation on 14 December 2007. MSB ceased

trading on 22 December 2001 and was dissolved following liquidation on 27 December 2007.

4. The first group relief claims were made between 2000 and 2003 at a time when neither subsidiary was in liquidation. They concerned MSD's losses for the years 1998 to 2001 and MSB's losses for the years 2001 and 2002. Claims for the same losses by the same companies for the same years were made on three subsequent occasions in response to what M&S describe as factual and jurisprudential developments: on 20 March 2007, when both companies were in liquidation; on 12 December 2007, just before the companies were dissolved; and on 11 June 2008, on behalf of MSB following the dissolution of that company. The claims for the years from 2000 onwards were governed by the self-assessment rules in Schedule 18 to the Finance Act 1998 and were within the statutory time limits. HMRC maintain that the claims for years prior to 2000, which were governed by the corporation tax pay and file rules in Schedule 17A to the Taxes Act 1988, were out of time when they were included in the claims that were made on the three occasions subsequent to the making of the first claims between 2000 and 2003.

5. The basic contention underlying all these claims was that the provisions in United Kingdom legislation which restricted group relief claims to losses of UK resident companies and, after the Finance Act 2000, losses of UK branches of non-resident companies were contrary to article 43 EC (now article 49 TFEU) on the freedom of establishment, and were thus unlawful. On 17 December 2002 the Special Commissioners held that there had been no breach of that article: *Marks and Spencer plc v Halsey (Inspector of Taxes)* [2003] STC (SCD) 70. Park J on appeal decided to refer the matter to the ECJ: [2003] EWHC 1945 (Ch). He sought a preliminary ruling on two questions. The first was the compatibility of the UK provisions with article 43 EC. The second was what difference the facts of M&S's case might make to the answer to the first question.

6. The ECJ gave its ruling in its judgment of 13 December 2005: Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837. It ruled that the answer to the first question was that article 43 EC did not preclude provisions of a Member State which prevented a resident parent company from claiming group relief for losses incurred by a subsidiary established in another Member State. The restriction was justified by three grounds when taken together: preserving the balanced allocation of the power to impose taxes between Member States; preventing losses being taken into account twice in different Member States; and preventing the risk of tax avoidance if the taxpayer were to be free to choose the Member State in which to claim relief: paras 42-51.

7. As to the proportionality of the restriction, however, the ECJ went on to say this:

“55 In that regard, the Court considers that the restrictive measure at issue in the main proceedings goes beyond what is necessary to attain the essential part of the objectives pursued where:

- the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, and

- there is no possibility for the foreign subsidiary’s losses to be taken into account in its state of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.

56 Where, in one Member State, the resident parent company demonstrates to the tax authorities that those conditions are fulfilled, it is contrary to article 43 EC and 48 EC to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary.”

8. The debate then returned to the United Kingdom. Park J gave effect to the ruling of the ECJ on 10 April 2006: *Marks and Spencer plc v Halsey (Inspector of Taxes)* [2006] EWHC 811 (Ch), [2006] STC 1235. He held that the “no possibilities” test referred to in para 55 of the ECJ’s judgment required an analysis of the recognised possibilities legally available given the objective facts of the company’s situation at the relevant time, and that the test was to be applied at the date when the group relief claim was made. He remitted the case to the Special Commissioners, but both parties appealed against his decision. The Court of Appeal upheld the judge’s findings: [2007] EWCA Civ 117, [2008] STC 526. The case then returned to the Tax Chamber of the First Tier Tribunal: *Marks and Spencer plc v Revenue and Customs Commissioners* [2009] UKFTT 64 (TC); [2009] UKFTT 231 (TC); [2009] SFTD 757, and proceeded from there to the Upper Tribunal [2010] UKUT 213 (TCC), [2010] STC 2470 and then to a second Court of Appeal, whose decisions are now under appeal to this court.

9. The issues that arose in the second Court of Appeal were summarised by Moses LJ in [2012] STC 231, para 4 as follows:

“(i) Is the test that the ECJ established to identify those circumstances in which it would be unlawful to preclude cross-border relief for losses, the ‘no possibilities’ test, to be applied (as the Revenue contend) at the end of the accounting period in which the losses crystallised rather than (as M&S contends) the date of claim? This question involves deciding whether the Court of Appeal in the first appeal reached a binding decision on that issue and whether it remains binding on this court in light of subsequent decisions of the ECJ.

(ii) Can sequential/cumulative claims be made (as M&S contends) by the same company for the same losses of the same surrendering company in respect of the same accounting period? The Revenue assert that that is not a question decided by the Court of Appeal and is precluded both by UK fiscal rules and by the underlying jurisprudence of the ECJ.

(iii) If a surrendering company has some losses which it has or can utilise and others which it cannot, does the no possibilities test (as the Revenue contend) preclude transfer of that proportion of the losses which it has no possibility of using?

(iv) Does the principle of effectiveness require M&S to be allowed to make fresh ‘pay and file’ claims now that the ECJ has identified the circumstances in which losses may be transferred cross-border, when at the time M&S made those claims there was no means of foreseeing the test established by the court?

(v) What is the correct method of calculating the losses available to be transferred?”

10. The Court of Appeal refused HMRC’s appeal on the first, second, third and fifth issues. It refused M&S’s appeal on the fourth issue. As both parties sought and obtained permission to appeal to this court, all five issues remain to be decided. They have been re-stated in a slightly amended form in the statement of facts and issues. For present purposes only the first issue need be set out here. It is in these terms:

“In Case C-446/03 *Marks & Spencer v Halsey*, did the ECJ decide that it was contrary to article 43 EC to preclude cross-border loss relief in the Member State of the claimant company (a) only where the taxpayer can show, on the basis of the circumstances existing at the end of the accounting period in which the losses in question arose, that there was no possibility of the losses in question being utilised in the Member State of the surrendering company in that accounting period, in any previous accounting period or in future accounting periods (as HMRC contend), or (b) where the taxpayer can show, on the basis of the circumstances existing at the date of the claim, that there has been no possibility of utilising the losses in the Member State of the surrendering company in any accounting period prior to the date of the claim and no possibility of such utilisation in the accounting period in which the claim is made or in future accounting periods (as M&S contend)?”

Issue 1 in the courts below

11. The question which Park J had to resolve, when the case returned to him after the ECJ had given its ruling, was whether the facts by reference to which the conditions set out in para 55 had to be satisfied were those which existed or could be foreseen at the end of the accounting period in which the losses arose, or those which existed at the date of the claim. He held that the relevant time was the date of the claim: [2006] STC 1235, paras 44-46. He said that the end of the accounting period was too soon. It would be likely to rule out virtually every case. He found it hard to imagine any case in which German or Belgian law would not provide for some possibility of relief for the losses at the end of an accounting period in which MSD or MSB made a loss and was still carrying on its trade. The date of the claim provided a rational basis for applying para 55, and if a company claimed group relief at a time when those criteria are satisfied it should get the relief.

12. The first Court of Appeal also held that the relevant time was the date when the claim was made: [2008] STC 526, para 32-42. Chadwick LJ said in para 36 that he could find no support in the reasoning which underlay the approach of the ECJ for the proposition that the para 55 conditions must be satisfied at the end of the surrender period:

“It is important to keep in mind, as it seems to me, that the question whether the United Kingdom tax authorities are precluded by Community law from applying the restriction on group relief imposed by domestic law does not arise until a claim for group relief is made by the claimant company. The claim must be accompanied by a notice from the surrendering company. At the least the

surrendering company must consent to the use of its losses by the claimant company; and (as I have said) it may well be that the claimant company can be required to provide some formal confirmation from the surrendering company that the losses are not available in its state of residence. The question whether the United Kingdom tax authorities are precluded by Community law from applying the restriction on group relief imposed by domestic law turns on whether the para 55 conditions are satisfied. I can see no reason in principle why the latter question – whether the para 55 conditions are satisfied – should not be answered by reference to the facts as they are when the former question arises.”

13. The second Court of Appeal did not agree: [2012] STC 231. Moses LJ said in para 29 that the principled objection to allowing the question whether the para 55 conditions are satisfied to be answered by reference to the facts as they are at the time of the claim is that it gives an option or choice as to where the losses may be relieved, and that that option was recognised by the ECJ as substantially jeopardising fiscal sovereignty. In other words, the claimant company should not be given an opportunity to take steps that might bring about a situation in which it could make a cross-border claim. Placing the relevant moment at the end of the accounting period in which the losses were made denied it that opportunity. In paras 30 and 31 he gave further reasons for disagreeing with the reasoning of Park J and the first Court of Appeal. But in para 33 he recognised that there was a question as to whether it was open to his court to do so. HMRC contended that it was open to his court to depart from the decision in the first Court of Appeal because subsequent decisions of the ECJ demonstrated that it fell into error, and that his court should follow those subsequent decisions.

14. Moses LJ said that he was more than happy to follow the approach of Chadwick LJ in *Condé Nast Publications Ltd v Customs and Excise* [2006] EWCA Civ 976; [2006] STC 1721, para 44, that the Court of Appeal could refuse to follow its own earlier decision where the judgment of the ECJ under consideration in the earlier case had been the subject of further consideration, and consequent interpretation, explanation or qualification, by the Court in a later judgment. But he was unable to find anything in Case C-231/05 *Proceedings brought by Oy AA* [2007] ECR I-6373; [2008] STC 991 or *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn* Case C-414/06 [2008] ECR I-3601; [2008] STC 3229 which followed the ruling in *Marks & Spencer v Halsey* that suggested that the Court thought that it was departing from or going beyond what it had previously decided, although it had every opportunity to do so. He concluded therefore that his court was bound by the decision of the first Court of Appeal, and that its decision as to the date for assessment of the para 55 conditions was binding on his court: paras 46-48.

The subsequent cases in the Court of Justice

15. In *Oy AA* [2007] ECR I-6373 a Finnish parent company wished, for non-fiscal and genuine commercial reasons, to support an ailing subsidiary which was established in the United Kingdom by transferring profits to secure its financial position. The question was whether it could deduct those transfers from its taxable income in Finland. Finnish law limited a company's right to make intra-group transfers from its taxable business income to cases where a national parent company holds at least nine-tenths of the shares of another national company. The ECJ said that restricting the deductibility of intra-group transfers in this way was apt to safeguard the allocation of powers to impose taxes between Member States, and to combat tax avoidance by deliberately transferring income by means of intra-group transfers to companies resident in low taxation jurisdictions. It ensured that profits earned by group companies in Finland were subject to taxation there according to the principle of territoriality: para 65.

16. Two of the three justifications referred to in para 51 of *Marks & Spencer* were therefore satisfied. Safeguarding the allocation of the power to impose taxes could not be achieved by a corresponding, less restrictive national provision, and the law in question was proportionate. So article 43 EC did not preclude a system such as that in issue in that case: para 67. There is nothing in this ruling that departs from, or modifies, the justifications referred to in *Marks & Spencer* or its view in para 46, which it repeated in para 55 of *Oy AA*, that to give companies the option to have their losses taken into account in the Member State in which they are established or in another Member State would significantly jeopardise a balanced allocation of power to impose taxes between Member States.

17. In *Lidl Belgium GmbH & Co KG* [2008] ECR I-3601 the parent company, Lidl Belgium, was resident in Germany and had a permanent establishment in Luxembourg. Its permanent establishment incurred a loss which the parent company sought to deduct from its tax base in Germany. This was contrary to German law, as the permanent establishment was not subject to taxation in Germany. The question was whether the national tax regime was precluded by article 43 EC. The Court followed the same approach as it had adopted in *Marks & Spencer* and *Oy AA*. As in *Oy AA*, it held that the national legislation could be justified by the need to safeguard the allocation of power to tax between the Member States and the need to prevent tax avoidance: para 41. It recognised, as it did in *Marks & Spencer*, para 55, that a measure which restricted the freedom of establishment goes beyond what is necessary to obtain the objectives pursued where a non-resident subsidiary has exhausted the possibilities for having the losses incurred in the Member State where it is situated taken into account for the accounting period concerned and previous accounting periods, and where there is no possibility for that subsidiary's loss to be taken into account in that State for future periods. But Luxembourg tax legislation provided for the possibility of

deducting a taxpayer's losses in future tax years, and the claimant had not shown that the conditions laid down in para 55 of *Marks & Spencer* were satisfied.

18. Here again there is a straightforward application of the principles established by *Marks & Spencer*. Once again the Court recognised the legitimate interest which the Member States have in preventing conduct which is liable to undermine the right to exercise the powers of taxation which are vested in them, and that to give a company the right to elect to have its losses taken into account in the Member State in which it has its seat or in another Member State would seriously undermine a balanced allocation of the power to impose taxes between the Member States concerned. In Case C-337/08 *X Holding BV v Staatssecretaris van Financiën* [2010] ECR I-01215 a tax scheme which permitted a parent company to form a single tax entity with its resident subsidiary, but prevented it from doing this with a non-resident subsidiary, was held to be justified on the application of the principles established in *Marks & Spencer* and applied in *Oy AA* and *Lidl*. As Moses LJ found when he examined these cases in the Court of Appeal, there is nothing in them which assists, either one way or the other, in the determination of the question raised by the first issue.

19. Moses LJ did not, of course, have the benefit of considering the Court's judgment of 21 February 2013 in *A Oy*. It is this judgment which is said by M&S to confirm the soundness of their submission that the question whether cross-border relief in the Member State of the claimant company is precluded should be determined on the basis of the circumstances existing at the date of the claim and not at the end of the accounting period in which the losses arose. They say that it shows that the contrary view by Moses LJ is no longer tenable.

A Oy

20. A was a Finnish undertaking with a subsidiary in Sweden, referred to as B. Following trading losses, B closed its sales outlets but remained bound by two long term leases. A planned to merge with B for reasons that could be justified commercially and to make it possible for B's leases to be transferred to A. The effect of that operation would be that the assets, liabilities and residual obligations of B would be transferred to A and that the Finnish parent would no longer have a subsidiary in Sweden. A sought an advance decision as to whether, once the operation had been carried out, it would be able to deduct B's losses in accordance with the Finnish law on income tax. When it received a negative answer it sought a preliminary ruling from the CJEU on the question whether article 49 TFEU, as it now is, precluded legislation under which that deduction could not be made while allowing for that possibility if the merger was with a resident subsidiary.

21. Advocate General Kokott was of the opinion that further development of the court's case-law since *Marks & Spencer* had altered the scope of the justifications referred to in that judgment, that they could be referred to for examining the need for a national measure only if the prevention of double use of losses was recognised as an independent justification, that a justification based on the allocation of taxation powers among the Member States alone was no longer appropriate and that the possibility that the Swedish subsidiary might have its accumulated losses taken into account in its State of residence was irrelevant: paras 47-54. But she went on nevertheless in paras 55-59 to consider whether the conditions in *Marks & Spencer* for the losses of a non-resident subsidiary to be taken into account in the parent company's Member State were fulfilled.

22. In her opinion the *Marks & Spencer* exception was formulated very restrictively, so that there must be no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for past or future periods either by itself or a third party. In *A Oy's* case the merger arose from a free decision of the parent company. The taxable company still had the option of using the Swedish losses in the future by resuming trading and through the resulting profits. Cessation of trading raised the possibility of choosing the tax scheme applicable to those losses which, according to the court's case law, the taxable company did not have. The Finnish provision was necessary for attaining the objective of preserving the allocation of taxing powers among Member States, and the disadvantages it caused were reasonably proportionate: para 68.

23. The Court did not follow either of the two approaches indicated by the Advocate General. The task which it set itself was to consider whether the difference in treatment between resident and non-resident companies was appropriate for ensuring the objective pursued and did not go beyond what was necessary to achieve that objective: para 39. It considered all three of the justifications referred to in para 43 of *Marks & Spencer* taken together, and concluded that the legislation pursued legitimate objectives compatible with the Treaty which were justified by overriding interests in the public interest: paras 40-46. It then turned in para 48 to the question whether the legislation was necessary to attain those objectives:

“48. With respect to the proportionality of the obstacle to freedom of establishment, it must be observed, first, that granting the parent company the possibility of taking into account the losses of its non-resident subsidiary in connection with a cross-border merger is not a priori such as to allow the parent company to choose freely from one year to the next the tax scheme applicable to the subsidiary's losses (see, a contrario, *X Holding*, para 31).

49. It follows, secondly, from the court's case-law that a restrictive measure such as that at issue in the main proceedings goes beyond what is necessary to attain the essential part of the objectives pursued in a situation in which the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account (see, to that effect, *Marks & Spencer*, para 55). It is for the parent company to show that that is the case (see, to that effect, *Marks & Spencer*, para 56).

24. As for the facts of that case, A's argument was that, once the merger had been carried out, B would be liquidated and A would no longer have a subsidiary or permanent establishment in Sweden. So neither of those two companies would appear to have the possibility of relying in Sweden, after the merger, on the losses incurred in Sweden before the merger. The Court's response to this argument in para 52 was that those specific circumstances were not in themselves capable of showing that there was no possibility of taking into account the losses that exist in the subsidiary's State of residence:

“53. Thus several Member States which have intervened in the case consider, on the contrary, that the possibility of taking B's losses into account in Sweden continues to exist. The German Government submits that those losses can be deducted from the income, admittedly very small, which B continues to receive in Sweden. It adds that B is still involved in leases which could be assigned. The French Government also submits that Swedish law allows companies to take losses into account in previous tax years or on the occasion of the taxation of capital gains made on the assets and liabilities of the merged company. The Italian Government submits that Sweden is entitled to evaluate the assets transferred and to tax the merged company on the profit thus realised.

54. It is therefore for the national court to determine whether A has in fact proved that B has exhausted all the possibilities of taking account of the losses which exist in Sweden.”

25. The Court observed in para 55 that, were the referring court to reach the conclusion that such proof had been produced, denial to A of the possibility of deducting from its taxable profits the losses incurred by its non-resident subsidiary, in the context of the proposed merger, would be contrary to articles 49 TFEU and 56 TFEU. It held in para 56 that those articles did not preclude national legislation to that effect. But it added this qualification:

“Such national legislation is none the less incompatible with European Union law if it does not allow the parent company the possibility of showing that its non-resident subsidiary has exhausted the possibilities of taking those losses into account and that there is no possibility of their being taken into account in its State of residence in respect of future tax years either by itself or by a third party.”

26. M&S submit that there are several points in this judgment that are relevant to the first issue. First, it held that the fact that A exercised a free choice in undertaking the merger did not preclude relief: para 48. In other words, the principle that a taxpayer should not be able to choose the country in which to relieve losses does not extend to steps which pose no threat to an entitlement to cross-border relief. Steps which are taken simply in order to show that the para 55 conditions are met do not threaten the balanced allocation of taxing powers. Secondly, the judgment suggests that the mere fact that losses could be carried forward under local law at the end of the accounting period does not of itself mean that the para 55 conditions are not met. Reference was made to this possibility in para 50 of the judgment, but this did not lead to a conclusion that the para 55 conditions were not met. It was still necessary for the national court to examine whether, on the facts, all possibilities of using the losses had been exhausted: para 54. That being so, there was no principled reason for insisting that the relevant date should be the end of the accounting period in which the losses were incurred.

Discussion

27. The point which the first issue raises comes down, in the end, to a choice between what Moses LJ described as the principled approach contended for by HMRC and the one contended for by M&S. The approach for which M&S contend looks instead to the practical consequences if the relevant date is to be taken to be the end of the accounting period in which the losses in question arose. Park J identified the objection to HMRC’s approach in the judgment which he delivered when the case returned to him after the ECJ had given its ruling: [2006] STC 1235, para 46. He said that the end of the accounting period was too soon. As he saw it, the choice of that date would be likely to rule out virtually every case. So he held that it should be the date when the claim was made. On the other hand, there is Moses LJ’s point that to prefer the date of the claim would afford the claimant company the opportunity to bring about a situation in which the para 55 conditions would be satisfied. That would mean that in the period up to the appeal the claimant would be free to choose whether to bring about a situation in which the losses could be transferred cross-border: [2012] STC 231, para 30. The CJEU’s judgment in *A Oy* has made it easier to decide between the two alternatives.

28. Mr Ewart QC for HMRC said that giving the claimant a choice, for whatever reason, as to where its profits were to be taxed would upset the balanced allocation of the power to impose taxes. That was the critical justification for the rule in *Marks & Spencer* that provisions of the kind in issue were not precluded by Community law. M&S had not shown that there was any principled reason for selecting the date of the claim. To choose that date would open up the possibility of choice as to where to seek relief for losses that crystallised in the accounting period. A line had to be drawn somewhere, and the date to which to look was the date when the loss crystallised. A *Oy* had to be approached with caution, as it was a pre-transaction case. In any event the balanced allocation rule was not just about tax avoidance. To allow losses to be brought in from another Member State was bound to upset that balance. It would require a quite extreme case to justify upsetting that balance, and voluntary acts such as liquidation after the loss had crystallised should be excluded.

29. Mr Milne QC for M&S did not dispute the need to avoid upsetting the balanced allocation of the power to impose taxes. He agreed that the para 55 conditions were designed to ensure that there was no double use of the claim for relief. The questions that had to be addressed were essentially practical questions. It was a factual exercise. During the course of the hearing he altered his position as to the date as at which the entitlement to relief was to be determined. In its written case M&S said that the most obvious date was, as Chadwick LJ held, the date of the claim. But Mr Milne suggested that the facts should be examined at the time when the question was asked, which was the date when the claim was being scrutinised. A *Oy* had clarified the landscape. The Advocate General's approach was very similar to that of Moses LJ, but that was not what the CJEU decided. The facts of the case showed that B was involved in leases that could still be assigned, so there were assets that could be realised. Yet the Court still left it to the national court to determine whether A had in fact proved that B had exhausted all the possibilities of taking account of the losses and that there was no possibility of their being taken into account in respect of future tax years: paras 54, 56. That was best done, said Mr Milne, by looking to the facts as they were at the date of the first instance hearing.

30. I agree with Mr Milne that the exercise that is to be carried out is essentially a factual one, and the claimant company ought to be given an opportunity to deal with it in as realistic a manner as possible. The approach contended for by HMRC would mean that there would be no realistic chance of satisfying the para 55 conditions at all. It would hardly ever be possible, if regard is had only to how matters stood at the end of the relevant accounting period, to exclude entirely the possibility that the losses in question might be utilised in the Member State of the surrendering company unless, of course, this was prevented by its local law. The balanced allocation principle does not require to be supported by an approach

which restricts the claimant company to that extent. This is made clear by the way the issue was dealt with in *A Oy*: see para 48.

31. The use of the present tense in the Court's description of the matters to be determined by the national court in paras 54 and 56 might be taken as suggesting that the facts that are to be examined are the facts as they are at the date of the inquiry. But they are equally consistent with the proposition that, while the date of the inquiry is the date when the facts are being considered, the date as at which they are to be taken to be established is the date when the proceedings are commenced. Mr Milne did not present any detailed argument for preferring the date of the inquiry to the date that both Park J and the first Court of Appeal held to be the correct date, which was the date of the claim. The First Tier Tribunal at [2009] UKFTT 64 (TC), para 42 and the Upper Tribunal at [2010] STC 2470, paras 56-57 took the same view, holding that the date of the claim was appropriate in relation to the pay and file years: see also para 69(2) of Schedule 18 to the Finance Act 1998 which, for self-assessment years, uses the phrase "at the time the claim is made". There is no indication in any of these judgments that selecting the date of the claim is likely in practice to give rise to any difficulty. On the contrary, that date has the advantage of certainty, as the facts to be inquired into will not be susceptible to change between the making of the claim and the commencement of the inquiry. For these reasons I would reject the choice that Mr Milne made in the course of the hearing and hold that the entitlement to cross-border relief is to be examined, as stated in alternative (b) in the first issue, on the basis of the circumstances existing at the date of the claim. The question whether successive claims can be made, and with what effect, must be left over for consideration under the second issue.

32. The national court will, of course, be alert to the possibility that the claimant company may simply be choosing in which Member State it should be taxed. The para 55 conditions are designed to exclude that possibility. But the judgment in *A Oy* shows that the mere fact that losses can be carried forward at the end of the accounting period in which they arose does not mean that the para 55 conditions cannot be met. Moreover the fact that the merger that was contemplated in that case was not seen as a ground for denying the possibility of taking the losses into account, on the ground that it allowed the parent company to choose freely from one year to the next the tax scheme applicable to its subsidiary's losses, shows that the decisions to wind up MSD and MSB are not open to objection on that ground either. What M&S was doing can be attributed to the fact that the companies had ceased trading six years earlier, and not to the exercise of an option to choose where to seek relief for the losses that had been incurred. There is no reason to think that what it did must be seen as a threat to the balanced allocation of taxing powers. The principle that lies behind HMRC's approach must, of course, be respected. But it does not justify the choice of date for which

they contend which, as Park J said, is too soon to give the claimant company a reasonable opportunity of showing that the para 55 conditions are satisfied.

Conclusion

33. I would answer the first issue by rejecting the alternative contended for by HMRC. I would hold that the question for inquiry is whether the claimant company has been able to show, on the basis of the circumstances known at the date when it makes its claim, that there has been no possibility of the losses in question being utilised in the Member State of the surrendering company in any accounting period prior to the date of the claim and no possibility of such utilisation in the accounting period in which the claim is made or in any future accounting periods. The consequence of this finding is that the third issue does not need to be answered. The parties will be heard as to the answers to be given to the three remaining issues at a later date.