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Bevola: The ‘Marks & Spencer Exception’ Is Still Alive!

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The *Marks & Spencer* case (**C-446/03**), in which the Grand Chamber of the Court of Justice of the European Union rendered its decision that final losses incurred by its non-resident subsidiary can be deducted in the Member State of the resident parent company, caused a commotion. This doctrine is considered to be a violation on the sovereign right of a Member State to levy taxes on their own profits and losses. After all, with the Marks & Spencer exception a Member State is being forced to exercise its tax jurisdiction asymmetrical: (final) foreign losses are deductible, while foreign profits are not being taxed. The Court concluded this in the so called fourth step of its (rule of reason) analysis. After the Court had decided that Marks & Spencer had access to Union law (first step) and that the parent company with a non-resident subsidiary was in the same position as a parent company with a resident subsidiary (second step), the Court rendered its decision that the difference in treatment was justified by overriding reasons in the public interest. However, the measure was not appropriate for ensuring the attainment of the objective that it pursued and went beyond what was necessary in order to attain it respectively, as far as it concerned final losses. Although it is understandable from an internal market point of view, it still caused a lot of commotion.

The case *Timac Agro* (**C-388/14**) also caused a lot of fuss, even though this case concerns losses from a foreign permanent establishment instead of losses from a non-resident subsidiary. From this case, it follows that a resident company with a foreign permanent establishment is not in a comparable situation as a resident company with a domestic business, in a situation in which the Member State does not exercise its tax jurisdiction over the foreign permanent establishment. In this case the Court had not come around to the third (and fourth) step. In other words, unequal cases may be treated unequally.

Has this put the Marks & Spencer exception aside? After all, it could be said that also the Member State of the parent company does not exercise its tax jurisdiction over the foreign subsidiary, just as Germany did not exercise its tax jurisdiction over the foreign permanent establishment in *Timac Agro*. Again, the Grand Chamber of the Court gives the answer to this question in the recent *Bevola* case (**C-650/16**). That case concerns the situation in which a Member State does not exercise its tax jurisdiction over a resident company with a foreign permanent establishment of which the activities are being ceased and a non-deductible loss remains in the source state. The Grand Chamber of the Court held that the aforementioned Marks & Spencer exception is also applicable in this situation. In between, the Court makes it clear, especially in points 33 *et seq*, that the *Timac Agro* case needs to be read differently than described above. If a Member State applies different rules on resident companies with domestic and with foreign establishments, then this cannot be legitimate criterion for assessing the objective comparability of these situations. Otherwise, the freedom of establishment would effectively turn into a dead letter. As far as it concerns final losses, a resident company with a foreign permanent establishment and a resident company with a resident permanent establishment are comparable. So the Court did not recall *Marks & Spencer*, but confirms its (old) doctrine: *Marks & Spencer* is still alive (and kicking)!
