Hilary Term
[2014] UKSC 11
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 Mance
Lord Clarke
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

19 February 2014

Heard on 25 and 26 November 2013

Appellant	*Respondent*
David Milne QC Nicola Shaw QC (Instructed by Joseph Hage Aaronson LLP)	David Ewart QC Sarah Ford (Instructed by HMRC Solicitors Office)

Appellant	*Respondent*
David Ewart QC Sarah Ford (Instructed by HMRC Solicitors Office)	David Milne QC Nicola Shaw QC (Instructed by Joseph Hage Aaronson LLP)

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

Introduction

1. This is another round in a long drawn out saga between HMRC and Marks and Spencer plc ("M&S"). It was last before the Supreme Court on 22 May 2013 when Lord Hope gave judgment on the first of five issues. Only Lord Hope gave a judgment. The other members of the Court, namely Lord Neuberger, Lord Mance, Lord Reed and Lord Carnwath simply agreed with Lord Hope. I have, as it were, replaced Lord Hope, who has now retired.

2. For the purposes of corporation tax, M&S claims group relief in respect of losses sustained by two of their subsidiaries, namely Marks & Spencer (Deutschland) GmbH ("MSD"), which was resident in Germany and Marks & Spencer (Belgium) NV ("MSB"), which was resident in Belgium. As Lord Hope observed at para 1 of his judgment, the claims were originally made and refused by HMRC over ten years ago and raise questions about the availability of cross-border group relief and the method of quantifying such relief as is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. This is thus the tenth such hearing. As will be seen, one of the striking features of the various hearings is the number of distinguished tax lawyers who have taken part. As to the losses in respect of which relief is sought, the earliest losses relied upon extend back to 1997 in the case of MSD and back to 1998 in the case of MSB.

The issues

3. The five issues were summarised by Moses LJ in the Court of Appeal when (as appears below) the dispute came to the Court of Appeal for the second time. He summarised them thus at [2012] STC 231, para 4:

> "(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.
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> (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?"

4. As Lord Hope observed in para 10, those issues have been restated in a slightly amended form in the statement of facts and issues prepared for the appeals to this Court. I will return to the facts and issues as so formulated so far as necessary below.

5. The reference to the 'no possibilities test' established by the ECJ is a reference to the decision of the ECJ in a ruling in a judgment of 13 December 2005 in Case C-446/03, *Marks & Spencer plc v Halsey* [2006] Ch 184, [2005] ECR I-10837. In order to be able to follow the thinking of the Court of Appeal and of this Court it is necessary to say something about the history and background which I can take largely from paras 2 to 14 of the judgment of Lord Hope.

History and background

6. 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 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 or 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.

7. The first group relief claims were made between 2000 and 2003 at a time when neither subsidiary was in liquidation. They concerned MSG's losses for the years 1998 to 2001 and MSB's losses for the years 2001 and 2002. Claims in respect of the same losses by the same companies for the same years were made on three subsequent occasions in response to what (as Lord Hope put it) M&S described 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, in respect 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 (it is now agreed) were within the statutory time limits, to which I will return below. 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 Income and Corporation Taxes Act ("ICTA") 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.

8. As Lord Hope observed at para 5, M&S's 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 I7 December 2002 the special commissioners, who were Dr John Avery-Jones and Mr Malcolm Gammie QC, held that there had been no breach of that article: *Marks & Spencer plc v Halsey* [2003] STC (SCD) 70. On appeal, Park J decided to refer the matter to the ECJ: [2003] EWHC 1945 (Ch). He sought a preliminary ruling on two questions, namely (1) the compatibility of the UK provisions with article 43 EC and (2) what difference the facts of M&S's case might make to the answer to the first question.

9. As stated above, the ECJ gave its ruling in its judgment of 13 December 2005. 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, namely (1) preserving the balanced allocation of the power to impose taxes between member states; (2) preventing losses being taken into account twice in different member states; and (3) preventing the risk of tax avoidance if the taxpayer were to be free to choose the member state in which to claim relief: paras 41-51. In particular, at para 51 it was said that in principle such restrictive provisions pursue legitimate objectives which are compatible with the Treaty and constitute overriding objectives in the public interest and that they are apt to ensure the attainment of those objectives. However the Court noted in effect at para 53 that, in order to be lawful, the measures must not go beyond what is necessary to attain the objectives pursued. In short the measures must be proportionate.

10. For present purposes the critical paragraphs are paras 55 and 56:

> "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:
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> (i) 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
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> (ii) 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.
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> 56. Where, in one member state, the resident parent company demonstrates to the tax authorities that those conditions are fulfilled, it is contrary to articles 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."

11. The matter then returned before Park J in April 2006. In *Marks & Spencer plc v Halsey (No 2)* [2006] STC 1235 he held that the "no possibilities" test referred to in para 55 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, comprising Chadwick, Tuckey and Jacob LJJ, upheld the judge's findings: [2008] STC 526. The case then returned to the Tax Chamber of the First-tier Tribunal ("FTT"), which comprised Judge Avery-Jones and Judge Gammie (as they had by then become): *Marks and Spencer plc v Revenue and Customs Comrs* [2009] UKFTT 64 and 231 (TC) and proceeded from there to the Upper Tribunal ("UT"), which comprised the President, Warren J, and Judge Edward Sadler: [2010] STC 2470 and thence to a second Court of Appeal, comprising Lloyd, Moses and Etherton LJJ [2012] STC 231. It was in his judgment in that second appeal that Moses LJ, with whom Lloyd and Etherton LJJ agreed, set out the issues as quoted above. The Court of Appeal dismissed HMRC's appeal on issues one, two and five and dismissed M&S's appeal on issue four. It gave both parties permission to appeal to this Court.

12. When the matter first came before the Court, as Lord Hope observed at para 2, M&S had intended that issue one would be referred to the ECJ but, in the event, on 21 February 2013, the ECJ gave judgment in the case of *A Oy* (Case C-123/11). M&S submitted that any doubt that might have existed on the first issue had been dispelled by that ruling, that a reference was no longer necessary and that it could now be answered in their favour. HMRC had objected to M&S's application for a reference on the ground that the answer to the first issue was already clear, although in the event they simply invited the 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.

13. In retrospect it is perhaps a pity that all five issues were not all considered together on the first occasion because in this appeal, which is concerned with issues

two, four and five (issue three having in effect been resolved by the determination of issue one), there has been much debate as to the inferences that can be drawn from the judgment on issue one. It is of course easy to be wise after the event but the experience of this case shows that, where there are or may be a number of inter-related issues of law, it may be better to consider them all together rather than to consider them one by one. In the event I do not think that this course has affected the result and I recognise that each case must be managed in accordance with its own circumstances but it is something to be borne in mind in the future.

Issues one and three

14. Issue one was restated in the statement of facts and issues as follows:

> "In Case C-446/03 *Marks & Spencer plc 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 period (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)?"

15. The date of the claim was of course the date which both Park J and the first Court of Appeal had held to be the correct date, which was the answer proposed in (b) above: see as to their reasoning paras 11 and 12 of Lord Hope's judgment respectively. Although the second Court of Appeal did not agree (see Lord Hope at para 13), it held that it was bound by the decision of the first Court of Appeal (see Lord Hope at para 14).

16. In para 30 Lord Hope rejected the case for HMRC that the correct answer was that proposed as alternative (a) above, namely that it is contrary to article 43 EC to preclude cross-border loss relief in the member state of the company claiming relief 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. Lord Hope rejected Mr Ewart QC's submission on behalf of HMRC that to take a later date than the end of the accounting period would give the taxpayer a choice, which would upset the balanced allocation of the power to impose taxes. Mr Milne did not dispute the need to avoid upsetting that balance but submitted

that the taxpayer ought to be given an opportunity to deal with it in as realistic a manner as possible.

17. Lord Hope accepted that submission. He said that 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 were 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 did not require to be supported by an approach which restricts the company to that extent. He said that that was clear from the way the issue was dealt with by the ECJ in *A Oy* at para 48.

18. In the course of the oral argument in this Court Mr Milne QC submitted on behalf of M&S that the relevant date was, not the date of the claim, but the later date when the facts were considered, namely the date of the hearing before the FTT. In para 31 Lord Hope rejected that submission. However Mr Milne had not abandoned his original submission, which was now put in the alternative, that the date to be taken was the date of the claim, which was of course the date chosen by Park J and the first Court of Appeal. Such a date would have the advantage of certainty. Lord Hope accordingly opted for option (b). It is important to note that Lord Hope expressly pointed out at the end of para 31 that the questions whether successive claims could be made and, if so, with what effect, must be left over for consideration under issue two. He also stressed in para 32 that the national court must be alert to the possibility that the company may simply be choosing in which member state it should be taxed. The para 55 conditions are designed to exclude that possibility. He held in para 33 that the question for inquiry is whether the 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. Finally, Lord Hope noted that that answer had the consequence that issue three need not be answered.

Issue two

19. Issue two is formulated in the statement of facts and issues in this way:

> "If the answer to issue 1 is (b), does the date of claim include the date of sequential/cumulative/alternative claims by the same company for the same losses of the same surrendering company in respect of the same accounting period provided that the statutory time period for claiming loss relief remains open?"

20. In so far as it was suggested on behalf of the HMRC that the conclusions of Lord Hope on issue one are of some assistance in answering this question in favour of the HMRC, I would not accept the submission. As noted above, Lord Hope made it clear that he was only considering the date as at which the circumstances of a claim were to be determined. He was not considering the question whether further or alternative claims were permissible and in what circumstances. That is the question raised by issue two.

21. Although cumulative claims are included in issue 2 as formulated, HMRC submitted that the claims are not cumulative because each of the claims is in respect of exactly the same losses. That is so but does not affect the issue of principle, which is correctly described by HMRC as whether it is open to a claimant company to make a series of sequential claims for cross-border loss relief in respect of the same losses of the same surrendering company in respect of the same accounting period. For the purposes of discussion it is convenient to refer to the later claims as new claims, even though in one sense they may be said to be old claims. However described, HMRC submitted that the second, third and fourth group relief claims are not valid 'claims' at all, whether as a matter of domestic law or, more relevantly, for the purpose of the no possibilities test, as a matter of EU law. The only valid claims are the original claims, in respect of which the FTT determined that the no possibilities test was not satisfied.

Domestic law

22. It is convenient to consider first the position as a matter of domestic law, which was not considered at all for the purposes of the resolution of issue one. The relevant statutory provisions are set out in Annex A to this judgment, which is taken from the annex to the supplementary case for M&S and is not in dispute.

23. As noted in para 7 above, M&S made three new claims in respect of the same losses on 20 March 2007, 12 December 2007 and 11 June 2008. HMRC submit that those claims are invalid as a matter of domestic law. They rely upon para 73(2) of Schedule 18 to the Finance Act ("FA") 1998, which provides that "a claim for group relief may not be amended, but must be withdrawn and replaced by another claim". They say that the original claims were not withdrawn and that it follows that the new claims cannot be valid claims. Further or alternatively, they say that the new claims were not claims at all but merely repetitions of valid claims already made.

24. I would not accept those submissions. There is in my opinion no support for them in the provisions set out in Annex A below. As drafted, those provisions do not expressly contemplate cross-border relief. On the contrary, they refer to the surrendering company's tax return in terms that show that the draftsman had in mind the tax return of an English company: paras 69(3), 70(3)(b), 72(1)-(3) and 75. More importantly, there is no support for the conclusion that only one claim can be made. On the contrary, the provisions contemplate that successive claims can be made. Thus para 69(2) provides that a claim is ineffective if the amount exceeds the amount available for surrender at the time the claim is made; para 70(4) provides that a claim is ineffective

unless it is accompanied by a copy of the notice of consent to surrender given by the surrendering company; and para 70(3) provides that the claim is ineffective if the necessary consents are not given. Importantly, para 73(2) provides that a claim for group relief may not be amended but must be withdrawn and replaced by another claim. Those provisions are, in my opinion, inconsistent with the proposition that only one claim can be made.

25. So too are the time limitation provisions in the self-assessment rules. It is common ground that under para 74(1) the time limit for making or withdrawing a claim for group relief does not expire until the latest of the four periods referred to in (a) to (d) (set out in Annex A below), which might take some years where, as is not uncommon, there is an enquiry into the relevant tax return. Those provisions seem to me to be inconsistent with the notion that there can only be one claim.

26. The UT discussed the structure of the domestic legislation in some detail between paras 67 and 86, in the last of which they expressed their overall conclusion thus:

> "Our overall conclusion with regard to the group relief provisions as they apply in the domestic context under the self-assessment regime is that, whilst they are detailed and prescriptive, they are nevertheless both flexible and dynamic: in broad terms, the 'mechanics' of Schedule 18 FA 1998 are directed so as to achieve the result that, in their final form, the tax returns of the claimant and surrendering companies accurately reflect amounts eventually shown to be available for surrender, as supported by corresponding notices of consent. Further, the processes and adjustments required to reach that final result may continue throughout the period during which it is open for a group company to make a group relief claim (which in practice, under self-assessment, is a generous period). That is all that is required in a self-assessment regime, and the flexibility and dynamism are required where, in large groups of companies with complex tax affairs, adjustments and consequential changes are likely to be inevitable and frequent."

27. I agree. In short, simply as a matter of construction of the relevant provisions, without any manipulation made necessary by the fact that the draftsman did not have cross-border relief in mind, there is no support for the conclusion that only one claim can be made. Para 73(2) makes that clear. It does not provide that successive claims cannot be made. On the contrary, it expressly provides that a claim for group relief may not be amended but must be withdrawn and replaced by another claim and thus necessarily contemplates that successive claims may be made.

The EU context

28. It is common ground that, as the UT put it at para 87, in order to give effect to M&S's Community law rights, some adjustment or remoulding of the domestic

legislation was required: *Autologic plc v Inland Revenue Comrs* [2006] 1 AC 118, per Lord Nicholls at paras 16-17 and 29-30. The legislation must be construed so as to ensure that those rights are effective in the sense that they are not practically impossible or excessively difficult to exercise and also so as to ensure that the statutory code provides an effective remedy.

29. The UT identified the problem posed by para 69(2). It concluded at para 107 that para 69(2) makes no sense if applied literally in the context of a claim for relief in respect of a foreign surrendering company. The "amount available for surrender" is not well defined in the context of the no possibilities test by reference to the definition in para 69(3). Even if the reference to the tax return can be read as the equivalent document in a member state to the UK tax return, that document will only provide information relevant to ascertaining the loss according to the law of that state and not UK tax law and will not reveal what, if any, part of the loss satisfies the no possibilities principle. In these circumstances, at para 108 the UT identified what it described as at least two approaches to the necessary disapplication or moulding of para 69(2) and, for the reasons specified in paras 109 to 111 concluded that the appropriate solution was to disregard para 69(2).

30. The UT expressed its conclusions thus at para 112:

> "To summarise: in our view, a claimant company seeking group relief in respect of the losses of a foreign group company can make successive claims, provided that all those claims are made within the time limit for claims specified by paragraph 74. It does not have to withdraw an earlier claim before making another claim. The validity of the later claim depends on the facts as they are at the time of the later claim. If the first claim results in no relief being given because at the time that first claim is made the no possibilities test is not fulfilled in respect of any part of the losses in respect of which relief is claimed, a later claim can be made for such amount of those losses as satisfies the no possibilities test as at the time of the later claim. If an earlier claim is valid in respect of part of the losses (because the no possibilities test is satisfied in respect of part) then a later claim can be made for the balance. This, in our view puts the company claiming group relief for the losses of a foreign group company in effectively the same position as though it were claiming such relief for domestic losses, after taking account of those factors and difficulties which are not present in the domestic context. It does not put the claimant company in any better a position (save possibly - and if so, legitimately - in relation to cash flow) than if it waits until the last possible moment within the time limit period to make its claim, that is, the point at which it is most likely to be able to satisfy the no possibilities test."

31. That reasoning is not entirely consistent with that of the FTT, which held in its para 36 that the no possibilities test was not satisfied "so the claim did not validly claim anything" at all. It added:

> "Accordingly, we find that the first claims were not valid claims at all. If we are wrong and they had some validity, the Appellant has undertaken to withdraw them and we proceed on that basis."

32. As I read it, it was not part of the Upper Tribunal's reasoning that the first claims were not valid claims at all. However, whether they were or not, the taxpayer is entitled to withdraw any unnecessary claims and advance a new claim at any time before such a claim becomes time barred. Moreover, on the facts, I would accept M&S's submission that it made it clear from the outset that, once the courts had determined which claims were valid, it would withdraw the other claims. The correspondence amply supports the conclusion that M&S made it clear that their successive claims were made in the alternative to their original claims and that, if the original claims succeeded, they would withdraw their later claims and vice versa. HMRC did not accept that approach but in my view the FTT was entitled to proceed on the basis that, if the first claims failed, M&S had undertaken to withdraw them. See, to the same effect, the UT at paras 103 and 104.

33. The second Court of Appeal upheld the decision and reasoning of the Upper Tribunal. Moses LJ summarised their conclusions in paras 57 and 58 in this way:

> "57. M&S, which made its first claims at a time when the conditions were not satisfied, and when it could not have known whether the conditions could be satisfied since it could not know what those conditions were, can surely not be worse off than if it had made no claim at all. On the [first] Court of Appeal's understanding of the ECJ's decision, it makes no sense to deprive M&S of the ability to claim cross-border losses merely because its claims were premature. If it should have waited until it could satisfy the paragraph 55 conditions, and it was still in time to make claims to cross-border losses, it is difficult to see why it should lose that opportunity because it made its claims too soon. If the Revenue are correct in their essential argument that the conditions must be applied at the time the losses crystallised then the problem does not arise; no advantage is to be gained by making successive claims. But once it is accepted, as the [first] Court of Appeal accepted, that a claimant may wait between the end of the accounting period in which the losses crystallised and the expiry of the time for making a claim, there is no reason why a claimant should forfeit the right to make a claim merely because it makes the claim too soon. The [first] Court of Appeal has recognised a right to claim based on facts which arise after the end of the accounting period, and before the expiry of the time for making a claim. Since there is no restriction against withdrawing a claim and advancing a new claim within that period, there is no good reason to prevent M&S doing so for the purpose of satisfying the paragraph 55 conditions. To refuse M&S the right to withdraw its earlier claims would put it at an unjustifiable disadvantage as against other potential claimants who have made no claim at all. If the only inhibition on waiting is the time limit for bringing claims, there can be no reason for refusing to allow M&S to withdraw such claims made at a time when the

> facts do not satisfy the paragraph 55 conditions, and rely on a claim made at a time when they do. The only time limit for such withdrawal is that which is consequent on the time limits within paragraph 74.
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> 58. That result may be achieved, in compliance with paragraph 73, by M&S withdrawing the earlier claims and amending its return to make the claim at a time when the facts do satisfy the conditions in paragraph 55 pursuant to paragraph 75(6) of Schedule 18."

34. I agree. In addition, at paras 59 to 62 the Court of Appeal expressly approved the mechanics adopted by the UT. See in particular para 60, where Moses LJ gave his reasons for agreeing that para 69(2) should be ignored as the UT proposed. Moses LJ added at para 61:

> "61. The issue, however, is not one of mechanics but of principle. The Revenue's objection is that a claimant should not be permitted to delay making a claim until it can satisfy the paragraph 55 test and, accordingly should not be permitted to withdraw earlier claims, which do not satisfy that test. But, like the Upper Tribunal, I see no reason why it should not. Either the Schedule permits such a course or it must be moulded for that purpose. Once it is acknowledged, as the Court of Appeal decided, that a claim may be delayed from the accounting period in which the losses claimed crystallised to the end of the time for making a claim, there can be no reason not to permit a series of claims being made. It seems to me that the Revenue's objection can only succeed if they are correct in their essential argument that a claimant cannot rely upon any facts other than those which exist at the time when the losses claimed crystallised. Once it is accepted that facts which arise subsequently, and up to the expiry of the period for making a claim, are relevant, the objection becomes a mere question of machinery.

35. Again, I agree. I also agree with Moses LJ's conclusion at para 62 that the decision of the first Court of Appeal dictates that the claimant M&S is permitted to make successive claims to the same loss and rely on the claim which satisfies the para 55 criteria, and then withdraw any earlier claims in respect of the same surrendered losses.

36. In these circumstances I would answer the question posed in issue two in the affirmative, subject to a consideration of a somewhat different point taken by HMRC that this approach offends the principle of legal certainty and jeopardises the preservation of the balanced allocation of taxing rights. However, there is nothing in the conclusion which I have reached so far that offends against the principle of legal certainty. The taxpayer is entitled to advance claims for cross border relief provided that it is in time to do so. I will return to this under issue four below in connection with time bar.

37. As to the importance of the preservation of the balanced allocation of taxing rights, as indicated above, it was and is correctly accepted on behalf of M&S this is an important principle, as indeed Lord Hope accepted at paras 29 and 30. The question is essentially a factual question which involves practical considerations. In reaching these conclusions Lord Hope took account both of *Oy AA* (Case C-231/05) [2008] STC 991 and of *A Oy* (Case C-123/11). He concluded at para 30 that, in carrying out the factual exercise, the taxpayer should be given the opportunity of proceeding in as realistic a manner as possible and that the balanced allocation principle does not require to be supported by an approach as narrow as that proposed by HMRC under issue one. It was in the light of those considerations that this court held that the facts should be considered as at the date of the claim. For my part I see no reason why the same approach should not be adopted as at the date of the relevant claim, which for the reasons given above may be made at any time before it becomes time barred. I would accept Mr Milne's submission that there is no inconsistency between that approach and the principle of the balanced allocation of the power to impose taxes.

38. As stated above, Lord Hope made it clear at para 32 that the taxpayer may simply be choosing in which member state it should be taxed. Again Mr Milne correctly accepts the validity of that principle but submits that there was no question here of M&S making such a choice and that the FTT resolved this issue in favour of M&S. He also relies upon para 32 more widely:

> "The national court will, of course, be alert to the possibility that the 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 company a reasonable opportunity of showing that the para 55 conditions are satisfied."

39. I appreciate that those views were expressed in the context of issue one but they are to my mind consistent with the findings of fact made by the FTT. The FTT held at para 29 that at the time of the first group relief claims there was nothing to prevent the losses being used by continuing to trade or starting another trade or business and that it

followed that the no possibilities test was not satisfied at the time of any of the first group relief claims. However, the FTT reached different conclusions in the case of the second, third and fourth group relief claims.

40. As to the second relief claims it said this at para 30:

> "The second group relief claims were all made during the liquidation. In both Germany and Belgium no new activities can be started once the company is in liquidation; the liquidator's functions are to pay the liabilities and distribute the assets. In both countries losses can be carried forward to the liquidation and set against income arising during the liquidation. As we have concluded in paragraph 25 above, so far as it can be estimated that there will be such income this can be used to offset the losses, but we find that any losses in excess of such estimated income will satisfy the no-possibilities test."

In para 31 it notes that the third group relief claims were also made during the liquidation but closer to the end of it, two days before final dissolution for MSG and about two weeks before for MSB. As to the fourth claim, which related only to MSB, they noted in para 32 that it was made after the dissolution of the company. In these circumstances the FTT held that the position was the same in the case of each of the second, third and fourth group relief claims because, unlike the first claim, they in principle satisfy the no possibilities test.

41. I can see no realistic basis upon which those conclusions of fact can be challenged. It follows that, in the light of the answer to the question posed by issue two, the subsequent alternative claims are in principle valid against the event of the prior claims failing under the no possibilities test, subject to the answer to the question posed by issue four.

Issue four

42. As formulated in the statement of facts and issues, issue four asks these questions:

> "Does the principle of effectiveness require M&S in the particular circumstances of the present case to be allowed:
>
> (i) to make fresh 'pay and file' or self-assessment claims once the ECJ identified the circumstances in which losses had to be permitted to be transferred cross-border; and/or
>
> (ii) to make sequential/cumulative/alternative self-assessment claims while the statutory time period for making claims remained open as the legal position became clearer?"

43. Although issue four is formulated in that way, the conclusions set out above in connection with issue two to the effect that it is permissible to have sequential claims and that they are in principle valid so long as they are brought within the relevant time limits resolves the position with regard to self-assessment claims. As already stated, it is common ground that all the self-assessment claims are in time, so that it follows that, at any rate in my opinion, those claims can in principle be pursued.

44. The position of the pay and file claims is different. As the UT observed at para 156, it was said that it was not until the judgment of the ECJ in December 2005 that M&S could have anticipated that a test such as the no possibilities test would be introduced. Accordingly, M&S should not only be given time after the decision to make its claim, it should be given time to put itself into a position where it could make an effective claim. It was said that M&S should have been given time, say, to put the surrendering companies into liquidation and to have them dissolved. However, the UT rejected that argument.

45. They held that the principle of effectiveness is concerned with giving effect to Community rights. It is concerned with ensuring that such rights as a person has under Community law are recognised and given effect to in a member state which has not properly reflected such rights in its own domestic law. It was no part of that principle that a person should be given the opportunity to bring about a new state of affairs giving rise to the existence of new rights which he does not already have, in order to enforce them under Community law when they would be unenforceable under domestic law. In those circumstances, the principle of effectiveness could not be invoked since there was no right under Community law in respect of which a claim could be made within the time limit and, for reasons the UT had given in para 158, it is not part of the principle of effectiveness that a company must be given an opportunity to create a new situation so as to allow it to assert a right which it would not otherwise have.

46. That analysis seems to me to be correct. It was accepted by Moses LJ in para 63 of his judgment in the Court of Appeal, where he added that a period of six years and three months was reasonable. He then discussed the problem in some detail between paras 63 and 68. He set out the differing conclusions of the FTT and UT in paras 64 and 65 respectively and in para 66 he noted (a) that the relevant jurisprudence establishes that a Member State may impose a reasonable time limit in the interests of legal certainty: *Aprile Srl v Amministrazione delle Finanze dello Stato (No 2)* (Case C-228/96) [2001] 1 WLR 126, [1998] ECR 1-7141 at para 19 and *Fleming (trading as Bodycraft) v Revenue and Customs Comrs* [2008] 1 WLR 195 at para 79(a) and (b) that such a time-limit must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law: *Aprile* at para 19. He concluded, in my opinion correctly, that the line of cases concerned with the reduction of a time limit which has the effect of taking a right away without adequate transitional arrangements, as for example Case C-62/00, *Marks & Spencer plc v Customs and Excise Comrs "(M&S 1)"* [2003] QB 866) has no relevance to these claims. As he explained, the time limit of 6 years and 3 months was in place, M&S's claims were made within that period and were found not to have satisfied the paragraph 55 conditions.

47. Moses LJ recognised at para 67 that M&S could not have foreseen the contents of para 55 of the ECJ judgment but held that the critical question was whether at the expiry of the time limit for making a claim M&S had a right to claim the MSG losses. He then expressed his conclusion in para 68 thus:

> "At the time M&S made its claim to the losses sustained by MSG, it had no community law right to make such a claim. The prohibition against such a claim was lawful because M&S did not satisfy the conditions identified by the ECJ in paragraph 55. The ECJ has espoused the principle that, provided that the time limits are not discriminatory and do not render the exercise of Community law rights virtually impossible or excessively difficult in practice, a Member State may lay down reasonable time limits even if their effect is to deprive a claimant of such a right *(Haahr Petroleum v Abenra Havn and Others* [(Case C-90/94)] [1997] ECR 1-4085, para 48). That case concerned, like *Aprile* and *M&S 1,* the propriety of a time limit for claims to repayment. There is no principle that a reasonable time must be afforded to a claimant in which to bring about the circumstances which would generate the Community law right. The error of the FTT lay in the assumption that M&S had a right at the time it made its claim; on the findings of fact, at that time it had no such right and the principle of effectiveness cannot be invoked to create one. In my view the Upper Tribunal was correct and the 'pay and file' claim in respect of MSG is time-barred. I would uphold the decision of the Upper Tribunal."

48. I agree with that reasoning and would uphold the decision of the UT and the Court of Appeal that, unlike the self-assessment claims, the relevant pay and file claims are time barred. That appears to me to be a sufficient answer to the question relating to those claims raised by issue four.

Issue five

49. This issue asks what is the correct method of calculating the losses available to be surrendered. Before the FTT (at both the liability and quantum hearings) the essential issue was whether the losses should be calculated (a) under the rules of a single country and, if so, whether it should be a local country ("Method A") or the UK ("Method C"); (b) by converting to UK rules the unutilised losses as determined under local rules ("Method E"); or (c) by taking the lower each year of the amounts calculated and utilised either under local rules or after conversion to UK rules ("Method F"). The FTT held that Method E was the correct method and its decision was upheld by the UT and by the Court of Appeal. HMRC however contend that Method F is correct. The question in this appeal is thus whether the correct method is E or F.

50. The essential difference between the methods is this. Method E begins by applying the local rules to determine whether there is a loss in a particular period and, if so, the amount of the loss that remained unutilised. The unutilised loss calculated by

reference to the local rules is then converted to UK principles. M&S says that this conversion to UK principles ensures that M&S only obtains the same relief as a UK-resident group would obtain. So, for example, if a loss calculated under local rules included a capital (rather than a trading) loss, that loss would be eliminated from the claim on conversion to UK principles because in the UK group relief is only available for trading losses. It says that the conversion process also ensures that the relief is given in the same year as that in which it would be given to a UK resident group. In some cases the process of converting the loss to UK principles has the effect of moving the loss from one period to the next. For example, the whole or part of a loss incurred in Year 1 under local rules may after conversion to UK principles be incurred in Year 0 or Year 2 under UK rules. This does not involve a permanent difference between the two sets of rules. The total amount of the loss over the period remains the same but the loss now occurs in Year 0 or 2. M&S say that this is an essential part of ensuring equal treatment. Were the group a UK-resident group the loss would occur in those years.

51. M&S says that Method E is to be preferred to Method F because it is the more equitable approach. HMRC, on the other hand, contend that no system of quantification can be permitted which allows a loss to be claimed in a period in which, in Germany no loss was sustained, as for example in 2002. They say that no principle of EU law requires the German losses to be relieved to a greater extent than would be the case if they were claimed in Germany.

52. Like the UT, the Court of Appeal preferred Method E. It did so for the reasons concisely put by Moses LJ in paras 86 to 88 of his judgment. I agree with his reasoning and could not put it better. It is in these terms:

> "86. … M&S seeks to set against its UK profits losses sustained by its subsidiary in Germany, as if those losses were sustained by a subsidiary resident in the UK. It claims no more and no less. If the losses had been sustained in the UK, it seems to me that there would be no question of timing differences leading to the loss of relief in respect of a proportion of unutilised losses. The effect of the application of UK tax rules may be to shift losses sustained in Year 2 under German tax rules into Year 1, if the subsidiary had been resident in the UK. Those losses should be afforded relief in Year 1 under UK rules. It is nothing to the point that that would not be the appropriate year under German tax rules. The effect of the application of UK tax rules is to convert the German losses into losses sustained in year 1 to be set against UK profits in the same accounting period, ie year 1. That is not to cut across UK tax principles but to apply them.
>
> 87. The consequence of the Revenue's method is to deprive M&S of relief for losses sustained in Germany in circumstances where it would not be refused relief had those losses been sustained in the UK. Method E does not give the parent greater relief than would have been available had its subsidiary been resident in the same state as the parent, whether in

Germany or in the UK. It does not seem to me to matter that the losses are allowed in different accounting periods from those in which they would be allowed in Germany. No relief is to be afforded to losses which would not be relieved in the UK. As the FTT put it:

'Once you move from identifying the local losses (computed under local rules) to identifying their equivalent under UK rules, you also have to move from local time of recognition to UK timing of recognition' (para 7)

88. Method E does not result in a group relief claim for an amount more than could be claimed were the subsidiary to have been resident in the UK. The re-allocation of losses to a different period in the UK is merely the result of the application of UK tax law. I would dismiss the Revenue's appeal on this point."

53. For the same reasons, I would dismiss the HMRC's appeal under this head. I would answer the question posed by issue five by holding that the correct method of calculating the losses available to be surrendered is Method E.

CONCLUSION

54. For these reasons I would dismiss the appeals of the HMRC on issues 2 and 5 and I would dismiss the appeal of M&S on issue 4. I would answer issue two in the affirmative and would hold that M&S is entitled to advance all its self-assessment claims. Under issue 4, I would hold that the relevant pay and file claims are time barred, as contended for by the HMRC. Finally, under issue five, I would hold that the correct method of calculation of the claims is Method E.

55. I would like to conclude by saying how much I appreciate the clarity with which all the tribunals and courts have expressed their reasoning and conclusions on the many different points that have confronted them in the light of the jurisprudence of the ECJ.

ANNEX A

STATUTORY FRAMEWORK

1. Group relief is dealt with in chapter 4 of part X of ICTA 1988[1]. The basic provisions are section 402(1) and section 403(1), which provide so far as material that:

> "402 (1) … relief for trading losses and other amounts eligible for relief from corporation tax may … be surrendered by a company ('the surrendering company') and, on the making of a claim by another company ('the claimant company'), may be allowed to the claimant company by way of a relief from corporation tax called 'group relief'.
>
> 403 (1) If in an accounting period (the 'surrender period') the surrendering company has –
>
> (a) trading losses, excess capital allowances or a non trading deficit on its loan relationships, or
>
> (b) [certain other charges and expenses] which are available for group relief, the amount may, subject to the provisions of this Chapter, be set off for the purposes of corporation tax against the total profits of the claimant company for its corresponding accounting period."

(A) The self-assessment regime (applicable to accounting periods ending on or after 1 July 1999)

2. Part VIII of Schedule 18 FA 1998 lays down more detailed provisions on claims under the self-assessment regime. So far as is material the relevant provisions are as follows:

> "*Claim to be included in company tax return*
>
> "67(1) A claim for group relief must be made by being included in the claimant company's company tax return for the accounting period for which the claim is made.
>
> (2) It may be included in the return originally made or by amendment.
>
> *Content of claims*
>
> 68(1) A claim for group relief must specify -
>
> (a) the amount of relief claimed, and
> (b) the name of the surrendering company.

---

[1] Post Finance Act 1998 version

(2) The amount specified must be an amount which is quantified at the time the claim is made. …

Claims for more or less than the amount available for surrender

69(1) A claim for group relief may be made for less than the amount available for surrender at the time the claim is made.

(2) A claim is ineffective if the amount claimed exceeds the amount available for surrender at the time the claim is made.

(3) For these purposes the amount available for surrender at any time is calculated as follows.

First step
Determine the total amount available for surrender under section 403 of the Taxes Act 1988 –
(a) on the basis of the information in the company's company tax return, and
(b) disregarding any amendments whose effect is deferred under paragraph 31(3).

Second step
Then deduct the total of all amounts for which notices of consent have been given by the company and not withdrawn.
…
Consent to surrender
70(1) A claim for group relief requires the consent of the surrendering company.

(2) …

(3) The necessary consent or consents must be given--
(a) by notice in writing,
(b) to the officer of the Board to whom the surrendering company makes its company tax returns,
(c) at or before the time the claim is made.

Otherwise the claim is ineffective.

(4) A claim for group relief is ineffective unless it is accompanied by a copy of the notice of consent to surrender given by the surrendering company.

(5) …

Notice of consent

71(1) Notice of consent by the surrendering company must contain all the following details -
(a) the name of the surrendering company;
(b) the name of the company to which relief is being surrendered; (c) the amount of relief being surrendered;
(d) the accounting period of the surrendering company to which the surrender relates;
(e) the tax district references of the surrendering company and the company to which relief is being surrendered.

Otherwise the notice is ineffective.

(2) Notice of consent may not be amended, but it may be withdrawn and replaced by another notice of consent.

(3) Notice of consent may be withdrawn by notice to the officer of the Board to whom the notice of consent was given.

(4) Except where the consent is withdrawn under paragraph 75 (withdrawal in consequence of reduction of amount available for surrender), the notice of withdrawal must be accompanied by a notice signifying the consent of the claimant company to the withdrawal.

Otherwise the notice is ineffective.

(5) The claimant company must, so far as it may do so, amend its company tax return for the accounting period for which the claim was made so as to reflect the withdrawal of consent.

Notice of consent requiring amendment of return

72(1) Where notice of consent by the surrendering company is given after the company has made a company tax return for the period to which the surrender relates, the surrendering company must at the same time amend its return so as to reflect the notice of consent.

(2) Where notice of consent by the surrendering company relates to a loss in respect of which relief has been given under section 393(1) of the Taxes Act 1988 (carry forward of trading losses), the surrendering company must at the same time amend its company tax return for the period or, if more than one, each of the periods in which relief for that loss has been given under section 393(1) so as to reflect the new notice of consent.

For this purpose relief under section 393(1) is treated as given for losses incurred in earlier accounting periods before losses incurred in later accounting periods.

(3) The time limits otherwise applicable to amendment of a company tax return do not prevent an amendment being made under sub-paragraph (1) or (2).

(4) If the surrendering company fails to comply with sub-paragraph (1) or (2), the notice of consent is ineffective.

Withdrawal or amendment of claim

73(1) A claim for group relief may be withdrawn by the claimant company only by amending its company tax return.

(2) A claim for group relief may not be amended, but must be withdrawn and replaced by another claim.

Time limit for claims

[See under *(B)* below]

Reduction in amount available for surrender

75(1) This paragraph applies if, after the surrendering company has given one or more notices of consent to surrender, the total amount available for surrender is reduced to less than the amount stated in the notice, or the total of the amounts stated in the notices, as being surrendered.

(2) The company must within 30 days withdraw the notice of consent, or as many of the notices as is necessary to bring the total amount surrendered within the new total amount available for surrender, and may give one or more new notices of consent.

(3) The company must give notice in writing of the withdrawal of consent, and send a copy of any new notice of consent -

(a) to each of the companies affected, and
(b) to the Inland Revenue.

(4) If the surrendering company fails to act in accordance with sub-paragraph (2), the Inland Revenue may by notice to the surrendering company give such directions as they think fit as to which notice or notices are to be ineffective or are to have effect in a lesser amount.

This power shall not be exercised to any greater extent than is necessary to secure that the total amount stated in the notice or notices is consistent with the total amount available for surrender.

(5) The Inland Revenue must at the same time send a copy of the notice to the claimant company, or each claimant company, affected by their action.

(6) A claimant company which receives --

(a) notice of the withdrawal of consent, or a copy of a new notice of consent, under sub-paragraph (3), or

(b) a copy of a notice containing directions by the Inland Revenue under sub-paragraph (4), must, so far as it may do so, amend its company tax return for the accounting period for which the claim is made so that it is consistent with the new position with regard to consent to surrender.

…"

(B) Time limits

3. The time limits for making group relief claims under the self-assessment regime are set out at paragraph 74(1) of Schedule 18 to FA 1998 as follows:

"(1) A claim for group relief may be made or withdrawn at any time up to whichever is the last of the following dates -

(a) the first anniversary of the filing date for the company tax return of the claimant company for the accounting period for which the claim is made;
(b) if notice of enquiry is given into that return, 30 days after the enquiry is completed;
(c) if after such an enquiry [an officer of Revenue and Customs] [amends] the return under paragraph 34(2), 30 days after notice of the amendment is issued;
(d) if an appeal is brought against such an amendment, 30 days after the date on which the appeal is finally determined.

(2) A claim for group relief may be made or withdrawn at a later time if the Inland Revenue allow it.

(C) Pay and file regime

4. The procedural requirements for making group relief claims for accounting periods ending before 1st July 1999 ("the pay and File years) are set out in Schedule 17A ICTA 1988, paragraphs 2 to 5 of which provide:

"2(1) No claim for an accounting period of a company may be made if-

(a) the company has been assessed to corporation tax for the period, and
(b) the assessment has become final and conclusive.

(2) Sub-paragraph (1) above shall not apply in the case of a claim made before the end of 2 years from the end of the period.

(3) This paragraph applies to the withdrawal of a claim as it applies to the making of a claim.

3(1) No claim for an accounting period of a company may be made after the end of 6 years from the end of the period, except under paragraph 5 below.

(2) This paragraph applies to the withdrawal of a claim as it applies to the making of a claim.

4 Where under paragraph 2 or 3 above a claim may not be made after a certain time, it may be made within such further time as the Board may allow.

5(1) A claim for an accounting period of a company may be made after the end of 6 years from the end of the period if -

(a) the company has been assessed to corporation tax for the period before the end of 6 years from the end of the period,
(b) the company has appealed against the assessment, and
(c) the assessment has not become final and conclusive.

(2) No claim for an accounting period of a company may be made … after the end of 6 years and 3 months from the end of the period."

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	*Respondent*
David Milne QC	David Ewart QC
Nicola Shaw QC	Sarah Ford
(Instructed by Hage Aaronson Ltd)	(Instructed by HMRC Solicitors Office)

Appellant	*Respondent*
David Ewart QC	David Milne QC
Sarah Ford	Nicola Shaw QC
(Instructed by HMRC Solicitors Office)	(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.