Cases C-608/17, *Holmen* and C-607/17, *Memira Holding*

The CJEU rules on the notion of "final losses"

Today the Court of Justice of the European Union ("CJEU") issued its judgments in cases C-608/17, *Holmen*, and C-607/17, *Memira Holding*. The decisions clarify the concept of final losses as elaborated by the CJEU since its *Marks & Spencer* decision. In particular, both cases concern Swedish parent companies that sought to deduct in Sweden losses accrued by their non-resident subsidiaries. The parent company in the Holmen case wanted to liquidate its Spanish subsidiary, which incurred tax losses that could no longer be used in Spain. Under Spanish tax legislation tax losses could be neither carried back nor transferred to other taxpayers. The parent company in the *Memira* case intended to absorb by merger its German subsidiary, which incurred tax losses exceeding its profits of previous tax years and could not use such exceeding losses in either Germany or in Sweden. In both cases the CJEU held that, regardless of limitation on the use of losses under the tax laws of the Member State where the subsidiary is resident, tax losses cannot be regarded as "final" if the parent company does not provide evidence that it is impossible to use such losses "economically" by transferring them to a third party. According to the CJEU, this would be the case, for example, if the sale of the loss-making subsidiary could be priced so as to take into account the potential tax asset arising from the possibility for the acquiror to use the losses in future years.

Additionally, in the *Holmen* case, the CJEU held that a Member State could not make the use of final losses conditional on the fact that the parent company holds directly the participation in the loss-making subsidiary if all the intermediate companies are resident in the same Member State of the loss-making subsidiary. On the other hand, if any of the intermediate company is resident in a different Member State, there is the risk that tax losses are used twice (in the State of the parent company and in the State of the intermediate company) and, therefore, the Member State of the parent company is not required to allow such company to use the final losses.

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