

Cross-Border Loss Relief In Permanent Establishments: Lessons From *Bevola*

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In this article, Berlin explains the treatment of a foreign permanent establishment's losses, particularly when the losses can no longer be used in the source jurisdiction.

Introduction

The treatment of losses incurred in foreign permanent establishments remains a contentious issue in EU tax law, particularly when the losses are no longer usable in the source state. The question of whether these “final losses” may be deducted in the head office state has been addressed in several landmark cases, most notably *Marks & Spencer*¹ and *Bevola*.² The latter, a Danish referral to the EU's Court of Justice, clarified the circumstances under which a member state must allow deduction of foreign PE losses under the freedom of establishment.

Despite the clarity offered by *Bevola*, national implementation has varied. Denmark, which operates a territorial tax system with optional international joint taxation, has been cautious in allowing cross-border loss relief. A recent judgment from the Danish National Tax Tribunal revisits the deductibility of losses from a foreign PE in light of *Bevola*, offering insight into how the

Danish legislator and tax authorities interpret the Court's guidance and apply it to domestic law.

This article examines the legal and policy implications of the tribunal's decision, situates it within broader EU jurisprudence, and considers its impact on taxpayers with cross-border operations.

The Right to Deduct Cross-Border Losses

The treatment of cross-border losses within the EU has been shaped by the principle of freedom of establishment, enshrined in articles 49 and 54 of the Treaty on the Functioning of the European Union. While member states retain broad discretion to design their corporate tax systems, this discretion is limited by EU law in which national rules create unjustified restrictions on fundamental freedoms.

The development of EU case law on cross-border loss relief began with *AMID*³ in which the Court examined whether national tax rules that made the exercise of the freedom of establishment less attractive constituted a restriction under article 43 EC (now article 49 TFEU). The Court confirmed that measures that disadvantage companies operating cross-border compared to those operating purely domestically may breach EU law even if they apply without discrimination. While these restrictions can be justified by overriding reasons of public interest, such as preserving a balanced allocation of taxing rights and preventing tax avoidance, they must comply with the principle of proportionality. The judgment established that restrictions on cross-border tax benefits require strong justification and

¹ *Marks & Spencer plc v. David Halsey*, C-446/03 (2005).

² *A/S Bevola, Jens W. Trock ApS v. Denmark*, C-650/16 (2018).

³ *Algemene Maatschappij voor Investeren en Dienstverlening NV (AMID) v. Belgium*, C-141/99 (2000).