Fédération des Experts
Comptables Européens

Press Release

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European Court Judgement opens the door for substantial tax equivalence, says European Accountants

Ruling in Marks & Spencer Case has major implications for reporting foreign subsidiaries

Friday 04 August 2006 – BRUSSELS - The ruling by the European Court in the Marks and Spencer case opens the way towards substantially equivalent tax treatment between domestic and foreign companies, according to the organisation for European Accountants, FEE.

Commenting at the launch of FEE's observation paper on the case, Stefano Marchese, FEE Vice-President stated "While it is not easy to state the precise implications of the judgment for Member States," noted Mr Marchese, "it is highly possible that the current group relief systems in place in Member States could evolve towards an optional model of tax consolidation due to this judgment. With this model, profits of foreign subsidiaries are taxed at the parent company level and losses deducted at the same point."

The case, which was taken by Marks and Spencer against Her Majesty's Inspector of Taxes, dealt with the issue of reporting the profits of foreign subsidiaries. The law in contention stated that while UK resident companies could offset their profits and losses amongst themselves, the losses of foreign subsidiaries could not be offset against the parent company's profits. This was considered by the European Court to be an incorrect restriction on the EU's freedom of establishment due to lack of proportionality.

As a result of this judgment, FEE has stated that company tax systems should now have symmetrical treatment of company profits and losses, with the losses of foreign subsidiaries being taken into account for the calculation of the parent company's taxable income, unless used in the state of the subsidiary.

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In addition to this, FEE also noted that this judgment avoids the risks of double deduction of a loss in two different jurisdictions and of loss transfer from a low-tax jurisdiction to a high-tax jurisdiction.

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Notes for Editors:

1. The Fédération des Experts Comptables Européens (FEE) is the representative organisation for the accountancy profession in Europe. FEE's membership consists of 44 professional institutes of accountants from 32 countries. FEE member bodies are present in all 25 member states of the European Union and three member countries of EFTA. FEE member bodies represent more than 500,000 accountants in Europe.

2. The case in question is the Judgement of the Court of 13 December 2005 in Case C-446/03, Reference for a preliminary ruling under Article 234EC from the High Court of Justice of England and Wales, Chancery Division (UK), made by decision of 16 July 2003, received at the Court on 22 October 2003 in the proceedings Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)

3. The FEE paper, "Fee Observations on European Court of Justice Decided Case C—446/03 Marks & Spencer v Her Majesty's Inspector of Taxes" can be downloaded for free at http://www.fee.be.