Advocate General opinion in FII GLO encourages claimants

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The Franked Investment Income Group Litigation (FII GLO) concerning claimants’ rights to recover overcharged tax from HM Revenue & Customs (HMRC) has been batted back and forth between the UK courts and the European Court of Justice (ECJ) since 2006. Philippe Freund explains why an Advocate General’s opinion on the third reference to the ECJ has given taxpayers cause to be optimistic.

Advocate General Wathelet handed down his opinion on the third reference in the Franked Investment Income Group Litigation (FII GLO) on September 5 2013. In his opinion, which was made following a reference for preliminary ruling from the UK Supreme Court, the Advocate General confirms the existing case law of the European Court of Justice (ECJ) in relation to retrospective legislation. If followed by the ECJ this would be a major success for taxpayers in the FII GLO in their challenge to recover unlawfully levied tax from HM Revenue & Customs (HMRC). It will also impact on a number of other pending cases where the availability of a mistake based restitution remedy is in issue.

Background

The claimants in the FII GLO have made claims for the restitution of unlawfully levied tax which was paid under a mistake of law. The mistake of law cause of action was first recognised by the House of Lords in the case of Kleinwort Benson Ltd v Lincoln City Council. In his judgment of July 18 2003 in the case of Deutsche Morgan Grenfell plc v Inland Revenue Commissioners (DMG), Park J ruled that the mistake remedy was also available in claims against the UK revenue authority (now HMRC). This finding was reversed by the Court of Appeal in February 2005 but then reinstated by the House of Lords in October 2006.

In the FII GLO the availability to taxpayers of the mistake cause of action was important in two respects. Firstly, it was at the time considered to be the only cause of action available to recover tax paid under self assessment – such as advanced corporation tax (ACT). The other cause of action, based on the case of Woolwich Equitable Building Society v Inland Revenue Commissioners, was then believed to require an unlawful demand. Secondly, by virtue of section 32(1)(c) of the Limitation Act 1980, the six year limitation period for bringing a claim based on mistake only started to run once the mistake had been or could, with reasonable diligence, have been discovered. This cause of action therefore allowed the claimants in the FII GLO to make claims for the repayment of tax paid as far back as 1973.

On September 8 2003, in the period between Park J’s judgment and the judgment of the Court of Appeal in DMG, the government announced the introduction of what would later become section 320 of Finance Act 2004. This section exempts tax matters from the application of the extended limitation period under section 32(1)(c) of the Limitation Act. The mischief, as far as the claimants are concerned, is that this section applied retrospectively from the date of announcement and
without providing a transitional period within which claimants with existing claims could assert their claims.

Four years later the government introduced further retrospective legislation in the form of section 107 of Finance Act 2007. This section mirrored the effect of section 320 of Finance Act 2004 but applied to claims issued before September 8 2003.

**Hearings in UK courts**

In the High Court Henderson J held that both section 320 of Finance Act 2004 and section 107 of Finance Act 2007 breached the claimants’ EU rights. He held that taxpayers could use every remedy available under national law to assert their EU law claims and that to shorten the limitation period for one of those remedies breached their EU law rights.

The Court of Appeal reversed Henderson J’s judgment on this point. It came to the conclusion that the restitutionary remedy established in the case of Woolwich did not require a demand and was therefore available to the taxpayers. Having observed that the Woolwich remedy was unaffected by either bout of retrospective legislation the Court of Appeal held that the Woolwich remedy provided taxpayers with a fully effective remedy with which to assert their EU law claims. Parliament was therefore entitled to shorten the longer limitation period of the mistake based remedy as this remedy was not required by EU law.

On appeal, the Supreme Court reversed the Court of Appeal’s judgment, holding that taxpayers can use every remedy available under national law to assert their EU law claims. The Supreme Court unanimously held that section 107 of Finance Act 2007 breached the taxpayers’ EU law right to protection of their legitimate expectation (the majority holding that it also breached the principles of effectiveness and legal certainty).

By a majority of five to two, the Supreme Court also held that section 320 of Finance Act 2003 was in breach of the principles of effectiveness, legal certainty and legitimate expectations. However two of their Lordships, Lords Clarke and Sumption, disagreed. In their view the principle of effectiveness was not breached as the taxpayers had a fully effective remedy through the Woolwich cause of action. The fact that, at the time of the announcement of the legislation, the mistake remedy in tax cases had only recently been recognised by the High Court and was not finally recognised by the House of Lords until well after that date meant that the claimants could not have formed legitimate expectations. There was therefore also no breach of the principles of legal certainty and legitimate expectations.

**Referral to ECJ**

As a result of this disagreement, the Supreme Court decided to refer two questions to the ECJ. First, whether in circumstances where a taxpayer can choose between two alternative causes of action and one cause of action benefits from a longer limitation period, the principles of effectiveness, legal certainty and legitimate expectations prevent a member state from curtailing that limitation period without notice and retrospectively.
And secondly, whether it made any difference to the answer to the first question that the availability of the remedy with the longer limitation period had only recently been confirmed by a lower court and was not definitely confirmed by the highest judicial authority until later.

**ECJ proceedings and AG's opinion**

The UK government, the test claimants, the EU Commission and the Kingdom of Spain submitted written observations to the court.

The Commission agreed with the test claimants that section 320 breached the principles of effectiveness, legal certainty and the protection of legitimate expectation and that it was irrelevant that the mistake remedy was only recognised by the House of Lords after section 320 had been enacted.

The UK government effectively adopted the position advocated by Lords Clarke and Sumption. They submitted that the *Woolwich* remedy provided the test claimants with a fully effective remedy. This remedy was not affected by section 320. As there was already a fully effective remedy available to the test claimants, the UK could alter the limitation period of the mistake remedy without breaching EU law. In relation to the second question, the UK government took the view that the taxpayers could not have had any legitimate expectations as the legislation was announced shortly after Park J’s judgment in *DMG*. At that time, it was not certain that the House of Lords would confirm the availability of the mistake remedy to tax claims.

The Spanish Government took the view that it was the principle of equivalence and not the principle of effectiveness that was engaged. This was dismissed by the Advocate General in a footnote.

**Advocate General Wathelet’s opinion**

The Advocate General confirmed that the principles of effectiveness, legal certainty and the protection of legitimate expectations are three separate principles, even though there is significant overlap between the principles of legal certainty and the principle of the protection of legitimate expectations. It was sufficient for section 320 to be incompatible with one of those principles to render it incompatible with EU law.

The Advocate General then considered whether section 320 was compatible with each of these articles. In relation to the principle of effectiveness, which he thought to be the most pertinent to the case, he disagreed with the UK’s position that it was sufficient that one effective remedy was not affected by section 320.

Advocate General Wathelet agreed with the UK that the principle of effectiveness did not require member states to establish more than one remedy to allow claimants to assert their EU law rights. He reasserted that it was for the member states to establish remedies sufficient to ensure the effective legal protection in the fields covered by EU law. However, where a member state has made a number of remedies available to taxpayers, each of those remedies needed to offer effective legal protection. This required, *inter alia*, that the conditions in accordance with which each remedy may be used are known in advance.
The Advocate General made it clear that it was irrelevant that another cause of action which complied with all principles of EU law was available. Otherwise a member state could always give claimants a choice of remedies only to change, without notice or transitional period, the conditions under which this remedy would succeed. This, so the Advocate General concluded, would deprive the principle of effectiveness of its content and could not therefore be accepted.

Turning to the principles of legal certainty and the protection of legitimate expectations, which he considered together, the Advocate General observed that the ECJ had long held that it was open to member states, in the interest of legal certainty, to lay down reasonable time limits for bringing proceedings. However, a legislative amendment which retroactively deprives a claimant of a right derived from EU law contravenes the principle of the protection of legitimate expectations.

Applying the ECJ’s case law to the facts, he found that the taxpayers were entitled to expect, in accordance with the principles of legal certainty and the protection of legitimate expectations, that they would not be deprived of the right to rely on the extended limitation period in section 32(1)(c) by a statute which, after their claim had already been lodged, curtailed those time limits without notice and with retroactive effect.

In that context it was irrelevant that, at the time the legislation was announced, the mistake remedy had only recently been recognised by Park J. It was also irrelevant that it was only finally recognised by the House of Lords much later. The important point was that as the law stood at the time immediately preceding the announcement of section 320, taxpayers could use the mistake remedy to assert their EU law claims. This right was taken away retrospectively and without a transitional period.

**What now?**

The Advocate General re-affirmed the ECJ’s long standing case law that time limits must be fixed in advance and that claimants must be provided with a reasonable opportunity to assert existing claims before time limits are reduced.

Taxpayers will hope that the ECJ, whose judgment is expected towards the end of the year, will follow its Advocate General. In the meantime, the opinion sends out encouraging signals to claimants in the FII GLO and further afield, who were taken by surprise back in September 2003.