UPCOMING EVENTS & LIKELY DATES

February 2018
NEWSLETTER

2018

March	Danish Beneficial Ownership cases	Opinion of the Advocate General
Q2	Prudential (Portfolio Dividends)	Supreme Court Judgment
	Fidelity Funds (WHT on dividends to non resident UCITS)	ECJ judgment
	FII (dividends from controlled interests)	Supreme Court permission to appeal
June	Test Claimants in the CFC and Dividend GLO (Jurisdiction and time limits for Tax Claims)	High Court Hearing
July	BAT Industries (45% WHT on interest for EU claims)	Upper Tribunal Appeal

C-398/16 and C-399/16 X BV and X NV on the Dutch Fiscal Unity Regime – Interest Rules Breach EU Law, but Currency Loss Rules are Compatible

The two cases concerned the compatibility of the Dutch group tax regime with freedom of establishment, specifically on the deductibility of interest and currency losses. The regime allows a Dutch parent company to form a group with its Dutch (but not foreign) subsidiaries so it can deduct certain costs for corporate tax purposes.

C-398/16 concerned the deductibility of interest on an intra-group loan from a Swedish company to a Dutch company which the latter used to invest in its Italian subsidiary. Dutch law precludes such a deduction in so far as the loan relates to a capital contribution, in particular in the purchase of shares in a related entity. Dutch resident groups of companies can get around this by forming a single tax entity, which leads to the group being taxed jointly at the level of the parent company. As a result of that consolidation mutual equity links, such as capital contributions, become non-existent for the purpose of taxation and interest payments can be deducted even where the loan relates to a capital contribution. The CJEU found there was a difference in treatment in Dutch law between financing a Dutch and financing a foreign subsidiary which amounted to a restriction of the freedom of establishment. The two scenarios were objectively comparable, as their purpose was to allow intra-group transactions to remain tax-neutral, and the difference in treatment was not justified.

C-399/16 concerned the deductibility of a currency loss where a Dutch company invested in its UK subsidiary. The CJEU held that freedom of establishment was not infringed by the Dutch legislation. Currency losses sustained on investment in a Dutch subsidiary and currency losses sustained on investment in a foreign subsidiary were not objectively comparable. A Dutch company could deduct a currency loss on investment in a Dutch subsidiary where the entities were part of a fiscal unity. By contrast, a currency loss on an investment in a foreign subsidiary was not deductible because of the symmetry of the relevant Dutch legislation, which neither allowed currency losses to be deducted, nor levied tax on currency gains on investments in foreign subsidiaries (the so-called "participation exemption"). This outcome can be reconciled with C-168/01 Bosal Holding, where the Dutch participation exemption had been declared incompatible with freedom of establishment insofar as it precluded the deductibility of interest on investments in foreign subsidiaries.

C-685/16 EV – German Participation Exemption for Dividends Breaches EU Law

Advocate General ("AG") Wathelet of the CJEU has issued his Opinion in C-685/16 EV v Finanzamt Lippstadt. The AG found that the German participation exemption regime applicable to company dividends originating in non-EU countries was incompatible with the free movement of capital. Non-EU dividends had to comply with stricter requirements than German dividends in order to qualify for the exemption, even though the two types of dividends were objectively comparable. This difference in treatment amounted to a restriction on the free movement of capital which could not be justified on grounds of overriding public interest, such as combating tax avoidance or ensuring the effectiveness of fiscal controls.

De Silva – Supreme Court Upholds HMRC's Assessment as Valid in Carry-Back Claims

R (De Silva & Anor) v Commissioners for HMRC [2017] UKSC 74 involved an HMRC enquiry into two taxpayers' partnership affairs. The taxpayers had sought relief for loss incurred in a later year by carrying it back to an earlier year. The taxpayers claimed that HMRC could only conduct an enquiry under Schedule 1A to the Taxes Management Act 1970 ("TMA"), which covers claims not included in the return, and under that provision the statutory limit for carrying out the enquiry had lapsed.

The Supreme Court dismissed the appeal. It held that under other provisions in the TMA, HMRC was entitled to enquire into anything contained or required to be contained in the tax return, including the carry-back claims contained in the later year's tax returns, and therefore HMRC was not required to launch an enquiry under Schedule 1A to challenge the claims. *De Silva* was soon applied by the High Court in *B Knibbs and others v HMRC* [2018] EWHC 13 (7 February 2018).

JHA BLOG

JHA's blog is updated with major news and developments in the fields of tax litigation, sanctions law, commercial litigation and arbitration. The blog can be accessed here.

- Simon Whitehead
- Paul Farmer
- Michael Anderson
- Ray Mc Cann
- Steve Bousher
- Helen McGhee
- Philippe Freund
- Ibar McCarthy
- Katherine Blatchford
- Shofiqur Miah

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