HAGE AARONSON

LITIGATION SPECIALISTS

APRIL 2013 NEWSLETTER

UPCOMING DATES

2 May 2013	ROSIIP GLO (QROPS & retrospectivity)	High Court permission hearing
14 May 2013	FII GLO (dividend tax and remedies)	Directions for next stages
17 Jun 2013	ROSIIP GLO	High Court hearing
Jun/Jul 2013	Prudential (portfolio dividend claims)	High Court hearing
Circa Jun/Jul 2013	Marks & Spencer (cross border group relief)	Supreme Court judgment
Autumn 2013	Littlewoods (compound interest)	High Court hearing
Circa late 2013	FII GLO (retrospective legislation)	CJEU decision

Interest on a Tax Refund
Case C-565/11 *Mariana Irime*

FEDERICO M. A. CINCOTTA

The CJEU has held that it is unlawful for a national system to limit the interest granted on repayment of tax levied in breach of EU law to the interest accruing from the day following the date of the claim for repayment of the tax as opposed to when the tax was actually paid. The CJEU confirmed its judgment in *Littlewoods*, stating that where a Member State has levied taxes in breach of the rules of EU law, individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it which relate directly to that tax. The CJEU take into consideration the losses constituted by the unavailability of sums of money as a result of a tax being levied prematurely and the duration of the unavailability of the sum unduly levied. This decision affirms the approach in *Littlewoods* although what the CJEU meant in *Littlewoods* remains the subject of ongoing litigation in that case.

Exit Taxes
Case C-64/11 *Commission v Spain*

FEDERICO M. A. CINCOTTA

The CJEU concluded that the taxation of unrealised capital gains on assets assigned to a permanent establishment which ceases to operate in Spain does not amount to a restriction on the freedom of establishment. This is considered a purely domestic situation, since that taxation does not result from a transfer of the place of residence or of the assets of a company to another Member State, but merely from a termination of its activities. However, as decided in *National Grid Indus*, the immediate taxation of unrealised capital gains on the transfer of the place of residence or of the assets of a company established in Spain to another Member State amounts to a restriction on the freedom of establishment. **T**he right to the freedom of establishment does not preclude capital gains generated in a territory from being taxed, even if they have not yet been realised. By contrast, it does preclude a requirement that that tax be paid immediately.

Recovering unlawful “passed on” VAT
ITC v Commissioners for HMRC
2nd High Court Judgment

ROBERT WATERSON

The *ITC* case concerns the recovery by Investment Trust Companies of unlawfully levied VAT paid on services supplied to them by their management companies. The Managers were able only to recover the VAT they had passed on to HMRC on these services net of input tax deductions. The *ITC* case concerned the irrecoverable residual sum of VAT to which the ITCs remained out of pocket. The statutory provisions for

the recovery of VAT provide no mechanism for the ITCs to recover this residual sum (because they are not the taxable person accounting for the VAT to HMRC) so the claimants issued claims in the High Court. This second judgment, which awaited judgments on a related point in the Supreme Court and CJEU in the *FII* and *Littlewoods* cases respectively, represents a win for the taxpayer on some of their claims (those outside for the so-called "dead period"). Like FII, two types claims were potentially available to the claimants: "*Woolwich*" type claims limited to 6 years and a "*mistake*" claim with a potentially unlimited time period. The issue before the Court was whether claimants were restricted to the least favourable of those options which would have left the claims entirely out of time. In *FII* the Supreme Court saw no reason why a claimant should be restricted to choosing the least-best remedy as a matter of principle in order to vindicate its rights at EU law. There was no reason to restrict the freedom of choice which English law normally affords where different remedies are available. Henderson J concluded, applying that judgment, that the claimants did have a "mistake" claim and therefore had no effective time limit on their claims.

Cross Border Group Relief
Marks & Spencer in the Supreme Court

MICHAEL ANDERSON

The Supreme Court hearing took place on 15 April 2013 in the Marks & Spencer group relief case. The hearing dealt only with the question of when the no possibilities test should be assessed (at the end of the accounting period in which the losses arose or at the date of the claim). The Supreme Court will decide whether or not that issue needs to be referred back to the CJEU and, if not, will determine the matter itself. Judgment has been reserved.

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