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LITIGATION SPECIALISTS

22 MAY 2013 NEWSLETTER SUPREME COURT DECISION IN M&S GROUP RELIEF CASE

UPCOMING EVENTS AND LIKELY DATES

2013

17 June	ROSIIP GLO (pension transfers and retrospectivity)	High Court hearing
Late June	Prudential (portfolio dividend claims)	High Court hearing
26 June	FII GLO (retrospective legislation)	ECJ hearing
Late July	FII GLO (retrospective legislation)	AG's opinion
July-Oct	Littlewoods (compound interest)	High Court hearing
Q4	FII GLO (retrospective legislation)	ECJ decision
	M&S (group relief)	2nd Supreme Court hearing

2014

Q1	M&S (group relief)	2nd Supreme Court judgment
29 April	FII GLO (dividend tax and ACT)	High Court hearing

Cross Border Group Relief:
Supreme Court Judgment in *Marks & Spencer*

Today the Supreme Court delivered its judgment on the principal remaining issue in the *M&S* case. It has found unanimously in favour of the taxpayer.

The ECJ had found in 2005 that the UK group relief provisions were incompatible with EU rights to the extent that they did not permit the surrender of non resident losses which were beyond possible local use for past, current or future accounting periods. The response of HMRC had been to argue that the "no possibilities" condition could not be met by positive action by the taxpayer. To enable the taxpayer to take steps which would render losses beyond future use would enable a choice of jurisdiction in which the losses could be taken into account offending the balanced allocation of taxing rights. From that principle HMRC argued that the appropriate date at which the "no possibilities" condition should be tested was at the end of the accounting period in which the losses arose, a period short enough to exclude the prospect of such taxpayer action.

Given that all EU jurisdictions permit loss carry forward, to require losses to be beyond possible future use at the end of the accounting period would exclude almost all claims. In cases where a loss making subsidiary was liquidated after years of trading losses leading to a cessation of trade, it would exclude the losses incurred in all but the final year. Although that analysis of the judgment found its way into the amendments to the group relief provisions in 2006 to take account of the M&S judgment, the European Commission have issued infraction proceedings on the grounds, it appears, that in so doing the UK have adopted too restrictive a reading of *M&S.*

M&S had argued that it must be extended the opportunity of demonstrating that its losses were beyond possible future use. It had liquidated its loss making subsidiaries after some 5 years of inactivity. In doing so it was not exercising any choice of jurisdiction: either the losses were to be taken into account in the UK or not at all. It argued that the time at which the "no possibilities" test should be assessed should be the date of the claim for group relief, giving a reasonable period in which to prove the test was met.

The Supreme Court, relying on C-123/11 *A Oy*, has now found in favour of M&S concluding that the correct date to assess the condition is the date of the claim. In so doing it has rejected the interpretation of HMRC that permitting the taxpayer to take steps amounted to the exercise of an impermissible choice of jurisdiction. It has concluded that, as in *A Oy*, the determination of whether the possibilities of local use have been exhausted is a factual one.

The M&S case will however still need to return to the Supreme Court later in the year to answer the other appeal issues. These concern whether further claims can be made while the domestic time limits permit so that the no possibilities test can be assessed at those dates. The remaining issues also concern whether for claims for accounting periods before 2000 under the old pay and file system, with its more restricted time

periods, the time period should be extended given that, although M&S made its claims within time, the ECJ did not reveal the existence of the "no possibilities" test until after that time period had expired. There also remains the question of how to compute losses for cross border surrender (on a local or UK basis or both?), a question referred but not directly answered in *A Oy.*

Other Developments: Recent Listings

The ROSIIP GLO concerns assessments to an unauthorized payment charge and surcharge of 55% upon the transfer of pension savings from UK funds to the Singapore based ROSIIP fund in 2008. A transfer will be an authorized payment not attracting those charges if, among other things, it is to a qualifying fund (a QROPS). ROSIIP appeared on HMRC's published list of QROPS at the time of the transfers. HMRC defend these assessments on the grounds that, although on the list of qualifying funds, ROSIIP in fact did not meet the criteria for qualification and removed it from the list with retrospective effect. Some 37 affected pension holders challenge those decisions on the grounds of legitimate expectation and EU law (movement of capital). Permission was given on 2nd May to move for judicial review. The hearing will commence on 17 June.

The ECJ has now set the 3rd reference in the FII GLO down for hearing in June. This concerns whether the retrospective reduction in the limitation period for mistake claims issued after 8 September 2003 (s320 FA 04) offended EU rights. The Supreme Court concluded in May 2012 that the like provisions which hit claims issued before that date (s107 FA 07) offended EU principles but could only reach the same decision for s320 FA 04 by a majority (5:2) and therefore referred the matter to the ECJ.

Also in the FII case, the High Court has now listed for 29 April 2014 the full hearing of FII case to apply the ECJ's 2nd reference and determine the test claims.

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