JOSEPH HAGE AARONSON LLP
LITIGATION SPECIALISTS

DECEMBER 2013 NEWSLETTER

UPCOMING EVENTS & LIKELY DATES

2013		
12 Dec	FII GLO (Retrospective Legislation)	ECJ Judgment
Dec/Jan	M&S (Group Relief)	2nd Supreme Court judgment
2014		
Jan	Felixstowe Dock	CJEU judgment
29 Apr	FII GLO (dividend tax and ACT)	High Court Hearing

Autumn Statement

Deep within the press notices accompanying both the budget and pre-budget review has in the past been a likely place to announce retrospective changes limiting claims for the recovery of tax or changes responding to ECJ decisions. Examples include the changes following *Cadbury Schweppes, Marks and Spencer* and *DMG*.

The notices accompanying today's statement however contained no such announcements of legislative changes affecting EU tax claims.

The Chancellor did announce a number of measures relevant to cross border groups to be included in Finance Bill 2014 which have immediate effect. They include:

Debt Cap Provisions

The grouping rules will be amended to ensure that a UK tax-resident company which does not have ordinary share capital can be a relevant group company subject to the world wide debt cap. Further changes relate to the rules' application to the parent company in a group with intermediaries without ordinary share capital, and to the definition of a 75% subsidiary for the purpose of tracing indirect ownership.

Controlled Foreign Companies: Profit Shifting

A new rule will be introduced relating to profit shifting by controlled foreign companies ('CFCs') into Chapter 9 of the Taxation (International and Other Provisions Act) 2010 ('TIOPA'). This will prevent a CFC creditor relationship from being a qualifying loan relationship (QLR) if it arises from an arrangement which has been set up to transfer profits from intra-group lending out of the UK. This will prevent application of the provisions for full or partial exemption in ss371IB and 371ID TIOPA. A provision will also be introduced ensuring that the rules relating to QLRs operate effectively.

Double Tax Relief

The Bill will be amended to clarify that s42 TIOPA applies separately to each non-trading credit, so that any credit for foreign tax which arises will be limited to the amount of corporation tax on the non-trading credit. Legislation will also amend ss34 and 112 TIOPA, reducing the credit or deduction to be given where a foreign tax authority has made a repayment and where there are arrangements enabling another person to receive that repayment.

Transfers of Pensions – HMRC Guidance responding to the ROSIIP GLO

Federico M. A. Cincotta

In 2012 HMRC issued a series of assessments against pension fund holders who had transferred their pensions in 2007-8 from UK pension funds to a Singapore based fund, ROSIIP. The assessments were for 55% of the pension savings transferred on the basis that the transfers were not to an authorised fund. ROSIIP had at the time been accepted by HMRC as an authorised fund (a QROPS) and listed as such on HMRC's website. HMRC maintained that it had nevertheless never been a QROPS and statements by HMRC to the contrary effect could not be relied upon. At around the same time HMRC had exonerated from assessment investors in another similarly placed scheme, the Beazley scheme, even though on that

occasion HMRC suspected the investors of tax avoidance motives, while no such suspicion was raised against the ROSIIP investors. We ran the challenge to those assessments under a GLO.

On the last day of the hearing of the ROSIIP GLO HMRC withdrew all the assessments to tax and undertook to issue guidance on how it would treat transfers to overseas pension funds.

That guidance has now been issued although confusingly referring to the ROSIIP GLO as "R (Gibson) v Commissioner for HM Revenue and Customs", one of the test cases, rather than its official title.

HMRC will not raise assessments from transfers from a registered pension scheme to an overseas scheme provided that 1) the transfer took place before 24 September 2008; and 2) the scheme was included on the list as a QROPS when the transfer took place (or at a time reasonably proximate to the transfer). This is subject to an obvious proviso in cases of dishonesty, abuse, artificially etc.

The date of the 24 September 2008 represents when HMRC assert a caveat was placed on its website alerting readers that they could not rely on the inclusion of a fund on HMRC's QROPS list as evidence that it was in fact a QROPS. For transfers made after that date to funds appearing on the QROPS list HMRC indicate that HMRC will consider whether to issue assessments "in the light of the principle of conspicuous unfairness". No further explanation is given as to whether that should mean that a transfer made in good faith in reliance on the entry of the recipient fund on the QROPS list would not be assessed to tax. In the ROSIIP litigation it was contended that the proper statutory construction of the provisions meant that the entry of a fund on the list amounted to an assessment that it was a QROPS irrespective of any such caveat and that were that not the case the provisions would offend legal certainty. With the withdrawal of the assessments no judgment will be delivered on that point.

The M&S Case followed again: C-322/11 K

Amita Chohan

K, a Finnish taxpayer, sought to deduct losses that were incurred in respect of the transfer of immovable property in France from taxable shares that were transferred in Finland. Finnish national legislation permitted the deduction of such losses in respect of the transfer of only resident immovable property. In France the losses could not be taken into account on the sale. The ECJ followed the approach in the M&S case but concluded that the "no possibilities" condition had not been met. The losses never having been available for use locally, it could hardly be said that those possibilities had been exhausted.

CONTACTS

- Simon Whitehead
- Paul Farmer
- Michael Anderson
- Philippe Freund
- Robert Waterson
- Federico Cincotta
- Nicola Hine

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