

JANUARY 2014 NEWSLETTER

UPCOMING EVENTS & LIKELY DATES

2014

Feb	M&S (Group Relief)	2 nd Supreme Court judgment
Q 1	Felixstowe Dock	CJEU judgment
May	FII GLO (dividend tax and ACT)	High Court Hearing
Q4	Prudential (Portfolio Dividends)	Court of Appeal hearing

FII and Dividend Tax Update

In the *Prudential* case (Portfolio Dividend Tax and Life Assurance) the High Court has now given permission to both parties to appeal to the Court of Appeal. HMRC's permission however was restricted, so that it cannot appeal on the issues connected with its "change of position defence" or the nominal rates of tax to apply. The Claimants were granted permission to appeal on the issue of whether dividend income should be exempt as opposed to carrying an additional credit. The court has also ordered that the quantification of

Prudential's claim for sample years be undertaken so that remaining disputes relating to computation are identified.

In the *FII Group Litigation* yesterday the High Court refused permission for HMRC to run two new defences on the grounds that they had been raised too close to trial and would impose extreme evidential burdens on the Claimants. One of these defences was the contention that the recovery of unlawfully paid tax should be reduced by the hypothetical tax saving that would derive from the increased interest deductions available as a result of the payment of the unlawful tax. The second defence was that the Claimants would have to prove that their subsidiaries were "genuinely established" in the terms of the *Cadbury Schweppes* case. Although HMRC was refused the ability to introduce these defences into the *FII* case, they implied that they might well be raised beyond the context of the GLOs. The trial of the *FII* test cases is set for May.

Tax Credit Claims Made Out Of Time

The Trustees of the BT Pension Scheme v HMRC [2014] EWCA Civ 23

Alice McDonald

The BT Pensions Scheme case concerns claims by a large number of pension funds to recover credits under section 231 ICTA 1988 upon the receipt of non-resident dividends in circumstances where such credits were received on dividends from UK resident companies. The current litigation concerns whether or not the claims were not made in time.

Claims could be made for the payment for tax credit within 6 years under section 43 TMA 1970. Claims were also made as High Court claims in restitution.

The previous courts and tribunals who have heard this case have all concluded that all of those claims which were not made as claims for tax credits under s43 TMA within the six year period were out of time.

Two issues have reached the Court of Appeal. The first is whether the six year time period under s43 TMA properly applied to these claims as a matter of statutory construction. The Court of Appeal has now held that it clearly does. The second is whether the imposition of the six year period is contrary to EU law on grounds of legal certainty. A further hearing will now be listed in the Court of Appeal to determine that second issue.

Exit Taxes

Case C-164/12 DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte

Amita Chohan

German rules provide that when partnership interests are transferred by the means of a contribution to a capital company and the transferor receives shares in return, the transferred business assets are to be valued as part of a going concern if at the time of the granting of shares, the holder of the assets is no longer liable to tax in Germany on the gains that accrued from the transfer of those assets. However, investors who are still liable to tax in Germany are only taxed on capital gains once these are realised. These rules further provide that a transferor can opt to pay the tax due on unrealised capital gains either immediately or by way of deferment.

In this case, the transferors' limited partnership (established in Austria) was dissolved upon the transfer of all of its interests to a German capital company. Under the relevant German rules, the value of the contributions of the limited partners was assessed to tax as part of a going concern, which meant that the unrealised capital gains on the interests in the capital company were immediately taxed.

The ECJ ruled that Article 63 TFEU should be interpreted as meaning that the legitimate objective of maintaining the balanced allocation of the power to impose taxes between Member States may justify a difference in the treatment of investors but only if it was *impossible* for Germany to tax capital gains, once realised. It was further ruled that where the taxation of unrealised capital gains is concerned, it is proportionate for the taxable person to be provided with the following payment options: (1) staggered; or (2) immediate.

Unjust Enrichment Defence Compatible with Equal Treatment

Reed Employment Ltd v HMRC [2014] EWCA Civ 32

Alice McDonald

Section 3 of the Finance Act (No.2) 2005 introduced an unjust enrichment defence against claims for repayment of VAT. This defence came into force on 26 May 2005. In 2009, and therefore following the introduction of section 3, the claimant filed repayment claims which had arisen in years before the defence came into force. HMRC relied upon the defence and refused to make repayments. The claimant challenged the application of the defence to the pre 2005 claims on the basis that the defence was incompatible with the EU law principle of equal treatment.

The Court of Appeal dismissed the appeal. It found that the defence introduced in section 3 did not breach EU law and that HMRC could rely upon it.

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