Nov. 2016
NEWSLETTER

UPCOMING EVENTS & LIKELY DATES

2017

Q1	Prudential	Supreme Court decision on permission to appeal
February	FII (FID claims)	High Court hearing
May	BAT (super tax on EU claims)	Tribunal hearing
July	Littlewoods (compound interest on repaid VAT)	Supreme Court hearing

Court of Appeal Judgment in The Test Claimants in the Franked Investment Income Group Litigation v HMRC [2016] EWCA Civ 1180

Cristiana Bulbuc

Yesterday, the Court of Appeal delivered its judgment in the FII Group Litigation case confirming Henderson J's judgment of 18 December 2014. This means that the method of computing double tax relief on EU sourced dividend income in the period 1973-1999 remains as established by the judge:

- EU dividend income is not exempt but carried a credit at the higher of the actual tax paid or foreign nominal rate (FNR);
- credit remains for withholding tax;
- mixed dividend income is not streamed. The double tax relief on dividends incorporating multiple sources is established by increasing credits for the FNR where applicable and establishing a weighted average in the same manner as the provisions at the time;
- the complex computational issues concerning ACT determined in the tax payers' favour by the judge remain in place.

The only alteration to the judge's judgment of note is that the Court of Appeal has overturned his finding on the date from which the extended 6 year period for issuing High Court claims runs. The judge had held that High Court claims had to be issued within 6 years of 8 March 2001. The Court of Appeal has amended that date to 12 December 2006.

HMRC's application to appeal to the Supreme Court is pending.

Chancellor's Autumn Statement

Steve Bousher and Helen McGhee

The Chancellor has given his first (and last) Autumn Statement to the House of Commons. There were no announcements to accompany the Autumn Statement which affect EU claims. For a summary of the statement otherwise please read on.

It will be his last Autumn Statement because he has announced that with effect from autumn 2017, the Budget/Finance Bill cycle will move to the autumn from the spring. There will continue to be a spring statement each year as the Government is obliged to respond to the Office of Budget Responsibility's spring forecast. However the Chancellor has said that he intends that, normally, all proposed tax changes will be announced in the Autumn Budget. Draft clauses will normally be published during the summer. This timetable should allow for full discussion of any proposals before the commencement of the tax year in April. On balance this new timetable should be an improvement on what happens at present. However much will probably depend on the publication of draft clauses in the summer rather than after announcement as part of a Budget speech.

The Chancellor announced the usual number of technical fiscal changes but nothing that seems overly dramatic. On the business tax front, the Chancellor has recommitted to the existing business tax roadmap which should lead to a reduction in the CT rate to 17% by 2020. However the 'roadmap' also contains plans regarding the implementation of BEPS and the tax transparency agenda. Apart from this the Chancellor announced that the Government is proceeding with plans to legislate to deal with the deductibility of corporate interest charges, the reform of loss relief and the reform of the substantial shareholding exemption. Each of these changes have been the subject of consultation already.

Interestingly the Chancellor announced that the Government is considering bringing the UK income of non-resident companies into the CT regime. As well as putting all companies onto the same footing in terms of the tax rules that apply, the suggestion would also probably serve to mitigate any rate discrimination as the rate of CT decreases. On the personal tax side the Chancellor has said that the Government will examine the taxation of different forms of remuneration. After consultation, it is intended that (with specific exceptions) the tax and NICs advantages of salary sacrifice arrangements will removed. At the same time the Government intends to consider the question of how benefits in kind are valued for tax purposes.

A low key but potentially significant announcement was that NICs are going to be removed from the ambit of the Limitation Act from April 2018 and be aligned with the time limits and recovery processes currently applicable to other taxes. Whilst this change has the obvious attractions of consistency and simplicity it will mean that HMRC will be able to go back up to 20 years in the enforcement of unpaid NICs. It will be interesting to see the commencement rules for the legislation implementing this proposal.

The blitz on avoidance (and evasion) continues. The changes in respect of disguised remuneration schemes used by employers and employees announced at Budget 2016 will now be extended to counter the use of such arrangements by the self-employed. The Government will legislate the much debated proposals for a new penalty for those who enable another to use a tax avoidance arrangement that is subsequently defeated by HMRC. Much of the debate has involved professional advisers who will be the asserted 'enablers' but as part of the proposal, those who use the tax arrangements will cease to be able to rely on the fact of having taken much professional advice as a defence of 'reasonable care' in relation to a penalty exposure. The 'requirement to correct' which has been the subject of consultation will be enacted. Finally the Government has announced a new requirement for intermediaries arranging complex structures for clients holding money offshore to notify HMRC of the structure and the related client lists. It proposes to consult on this proposal.

C-68/15 X – Attorney General's Opinion on Belgian "fairness tax" *Christopher Kientzler*

The Belgian tax regime enables undertakings to carry forward losses without limitation to future assessment periods and to claim a deduction for so-called risk capital. This resulted in a situation where certain undertakings paid virtually no tax but still distributed profits.

Case C-68/15 X concerns a preliminary reference ruling on the Belgian "fairness tax" which was introduced to deal with this perceived unfairness. The "fairness tax" is calculated on the basis of the amount by which the company's distributed profits exceeded its taxable profits and is levied on domestic companies and foreign companies with a permanent establishment in Belgium but not on subsidiaries.

Examining whether the tax was compatible with the freedom of establishment, Attorney General Kokott concluded that the tax regime did not pose an obstacle to non-resident companies by preventing free choice of legal form.

Further, article 49 did not preclude the levying of a tax in such a way that a non-resident company with a permanent establishment in a Member State is subject to it when it distributes profits, even though the permanent establishment's profits were retained, whereas a resident company that retains profits in full is not.

However, article 4(3) of the Parent-Subsidiary Directive which sets a maximum tax burden, did render the tax offensive because it operates so as to exceed the tax limit when a company distributes a received dividend in a year subsequent to the year in which it received the dividend. Article 4(3) of the directive could not be interpreted so as to apply only to received dividends and not subsequent redistribution.

The Council of the European Union agrees Criteria for the Screening of Third-Country Jurisdictions as Non-Cooperative Jurisdictions *Cristiana Bulbuc*

On 8 November 2016, the Council agreed on the criteria and guidelines for selecting and screening third countries with a view to establish an EU list of non-cooperative jurisdictions in tax matters. The broader aim of the initiative is to combat tax base erosion and profit shifting ('BEPS').

According to the *Council Conclusions on the criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes* (available here), the countries selected for screening will be assessed cumulatively under three criteria, namely:

(1) **tax transparency,** which involves the effective implementation and compliance with the OECD Automatic Exchange of Information ('AEOI') standard, the OECD Exchange of Information on Request ('EOIR') standard, ratification of or participation in the OECD Multilateral Convention on Mutual Administrative Assistance in tax matters, and implementation of a network of exchange arrangements covering all Member States, allowing for both AEOI and EOIR;

(2) **fair taxation,** which entails the absence of preferential tax measures that could be regarded as harmful and absence of offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity; and

(3) **implementation of minimum anti-BEPS measures.**

Screening is due to be completed by September 2017, so that the Council can endorse the list of non-cooperative jurisdictions by the end of 2017. Screening is intended to be a continuous and regular process. Discussions with jurisdictions aimed at resolving concerns and agreeing on commitments are expected to take place by the summer of 2017.

JHA BLOG

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