UPCOMING EVENTS & LIKELY DATES

July 2017
NEWSLETTER

2017

OCTOBER	Littlewoods (compound interest on repaid VAT)	Supreme Court Judgment
Q3	FII (dividends from controlled interests)	Supreme Court Permission to Appeal

2018

FEBRUARY	Prudential (Portfolio Dividends)	Supreme Court hearing

FTT Appeal - 45% Withholding Tax on Restitution Interest - B.A.T. Industries p.l.c. and Ors v HMRC

Peter Stewart

The First-tier Tribunal (FTT) dismissed the appeal brought by the British American Tobacco Group against the imposition of a withholding tax on restitution interest under Part 8C Corporation Tax Act 2010.

Part 8C Corporation Tax Act 2010 (introduced by Finance No.2 Act 2015) created a ring-fenced charge at a rate of 45% on interest, not limited to simple interest at a statutory rate, paid in respect of common law claims in restitution. The rationale for the charge, it was said, was that had the awards of interest been received and taxed year-by-year over the period of the claim, they would have been subject to tax at higher corporation tax rates than the current rate and the compounding effect would have been reduced by annual charges.

The FTT rejected BAT's submission that the tax infringes a number of EU law principles, including the principle of effectiveness and the right to an adequate indemnity for losses arising from a breach of EU law. The Appellants argued unsuccessfully that it is for the courts to calculate taxpayers' losses due to breaches of EU law based on their individual circumstances and not for the legislator to seek to claw back part of those awards via a one-size fits all tax. However, the FTT considered that a retrospective tax on a court award would only breach EU law if it was confiscatory in nature, which the 45% tax was not.

BAT had also argued that, even if a ring-fenced tax on Court awards did not by its nature breach EU law, 45% was a disproportionate rate, since it was set by reference to the nominal rate of tax and that most if not all of the affected taxpayers would have reduced their tax liability through the availability of reliefs. The FTT rejected this argument, finding that BAT had not proven that they had not received a windfall and that it was rational and proportionate to set a tax by reference to the nominal rate.

The FTT did not consider it appropriate to refer any questions to the CJEU since it found that the law was clear. The next stage is an appeal to the Upper Tribunal.

Supreme Court - BPP Holdings Ltd v HMRC – Compliance with Tribunal Rules

Tom O'Reilly

The Supreme Court dismissed HMRC's Appeal against a debarring order in the First-tier Tribunal. The FTT had, in making the debarring order against HMRC for various procedural breaches, referred to the guidance in *Mitchell v News Group Newspapers Ltd*, which it had held to be applicable by analogy to the Tribunals.

HMRC argued before the Supreme Court that the FTT's reliance on Mitchell was unsound. In particular, CPR applies only to the Courts of England and Wales, whereas the Tribunal has its own rules, the jurisdiction of which extends to the whole of the United Kingdom. The Supreme Court held, however, that it would be unrealistic and undesirable for Tribunals to develop their own procedural jurisprudence on any topic without paying close regard to the approach of the courts to that topic.

Therefore while the imposition of a debarring order was a tough sanction, it was not unreasonable or unjustifiable. The FTT had also not come to its decision on unsound reasoning or any errors of law.

R (on the application of Hely-Hutchinson) v HMRC – Reliance on HMRC guidance – Mansworth v Jelley

Cristiana Bulbuc

The taxpayer received employee share options from his employer and he exercised those options in 1999 and 2000. Following the decision in *Mansworth v Jelley* in which the grant of an option and its exercise were deemed to be a single transaction, HMRC issued its 2003 guidance, which stated that the income tax payable had to be added to the base cost and confirmed it would apply the same treatment to shares acquired under options before April 2003.

The taxpayer therefore sought to amend his returns to claim a capital tax loss to offset against subsequent capital gains. HMRC opened enquiries into the taxpayer's self-assessment, warning him that they did not accept his additional losses and his claims remained open. Six years later, HMRC issued corrected guidance announcing that its 2003 guidance had been wrong in law and that the base cost would be treated as the market value of the shares at the date of acquisition unless the taxpayer could show real detrimental reliance on the previous guidance.

It was accepted by the parties that HMRC's guidance had given rise to a legitimate expectation that HMRC would be bound by the guidance. However, the Court held that it is open to a public body to change a policy if it has acted under a mistake. HMRC's decision could only be successfully challenged if it caused conspicuous unfairness, which in this case the Appellant was unable to show.

JHA BLOG

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