October 2017 NEWSLETTER

UPCOMING EVENTS & LIKELY DATES

2017		
Q3	FII (dividends from controlled interests)	Supreme Court Permission to Appeal
DECEMBER	Fidelity Funds (WHT on dividends to non-resident UCITS)	Opinion of the Advocate General
2018		
FEBRUARY	Prudential (Portfolio Dividends)	Supreme Court Hearing
MARCH	Danish Beneficial Ownership cases	Opinion of the Advocate General

Littlewoods – Supreme Court Judgment: Statutory Interest Compatible with EU Law

Ibar Mc Carthy

This case concerned whether the taxpayer was entitled to compound interest in addition to statutory interest on a simple basis with the repayment of overpaid VAT. It was accepted that statutory interest represented only 24% of the taxpayer's actual time value loss from the overpayments. The two issues for the Supreme Court were:

(1) Whether Littlewoods' common law restitution claims for the extra compound interest were excluded by sections 78 and 80 of the Value Added Tax Act 1994 as a matter of English Law, and without reference to EU Law. The lower courts found that Littlewoods' common law claims were barred by the 1994 Act. Littlewoods appealed on this issue.

(2) If Littlewoods' claims for compound interest were excluded by sections 78 and 80 of the 1994 Act, whether that exclusion was contrary to EU Law, in light of the CJEU's judgment in Case C-591/10 Littlewoods. The lower courts found that denying compound interest was contrary to EU law. HMRC appealed on this issue.

The Supreme Court unanimously dismissed Littlewoods' cross-appeal on the first issue. Like the lower courts it held that the correct reading of the VAT Act is that it excludes common law claims and although references are made to interest otherwise available these are clearly references to interest under other statutory provisions and not the common law. To decide otherwise would render the limitations in the VAT Act otherwise meaningless.

The court allowed HMRC's appeal on the second issue, holding that the lower courts were wrong to construe the CJEU's requirement of an "adequate indemnity" as meaning "complete reimbursement". The Supreme Court construed the term as "reasonable redress". They did so for three reasons:

(1) They read the CJEU's judgment as indicating that the simple interest already received by Littlewoods was adequate even though it was acknowledged to be only about 24% of its actual loss;
(2) It is the common practice among Member States to award simple interest with the repayment of tax. If the CJEU intended to outlaw that practice they would have said so;
(3) The reading "reasonable redress" is consistent with the CJEU's prior and subsequent case law.

HMRC announces change in policy on VAT treatment of pension fund management services

Christopher Kientzler

With Revenue and Customs Brief 3 (2017) HMRC has announced a change in policy in the treatment of pension fund management services provided by regulated insurance companies. This means that insurers will no longer be allowed to treat their supplies of management services provided in connection with defined benefit pensions (which do not qualify as special investment funds or "SIFS") as VAT – exempt insurance.

The CJEU found in 2014 that a pension fund which pooled investments from a number of occupational pension schemes qualified as a SIF and could benefit from a VAT exemption for fund management services (see Case C-464/12 ATP PensionService v Skatteministeriet). However, the case dealt with defined contribution pensions and not the VAT treatment of services supplied in connection with defined benefit pensions. According to the CJEU's 2013 judgment in Case C-424/11 Wheels Common Investment Fund Trustees and Others v Commissioners for Her Majesty's Revenue and Customs, defined benefit pensions fell outside the fund management exemption for VAT because the investment fund (which pools the assets of the scheme) was not a SIF. Following ATP PensionService, HMRC accepts that management services for funds which qualify as SIFs, with all their required characteristics, were and always have been VAT exempt. Those pension funds that do not have all those characteristics are not SIFs and are not within the scope of the exemption.

HMRC now consider that case law has finally settled in this area and there will be no further review of the EU rules until after Brexit. The new policy on non-SIF pension fund management will apply as of 1 January 2018.

HMRC v Mercedes Benz Financial Services – CJEU clarifies test on nature of supply of of leasing contracts with option to purchase

Katy Howard

The facts of the case concerned a certain type of motor vehicle finance agreement, called an "Agility Agreement", under which the customer, having paid monthly instalments in exchange for using the vehicle for a specific period, had an option to purchase the vehicle in consideration for a "balloon" payment of approximately 40 per cent of the vehicle sale price, including the cost of financing. The issue is whether these are contracts for a supply of services (with VAT chargeable on each monthly instalment) or a supply of goods (VAT chargeable up front).

From an EU law perspective, this question turns on the interpretation of Article 14(2)(b) of the VAT Directive, which specifies that there is a supply of goods in the case of agreement where there is "the actual handling over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment" (emphasis added).

In its judgment the CJEU has given guidance to national court on the application of the above three-stage test: Article 14(2)(b) applies to leasing contracts with an option to purchase (i.e., an express ownership transfer clause) if it can be inferred from the financial terms of the contract that exercising the option appears to be "the only economically rational choice that the lessee will be able to make at the appropriate time if the contract is performed for its full term". This is obviously a matter for the national court to determine, but in reaching its decision the CJEU referred back to the analysis at paragraphs 50 to 53 of the Advocate General's opinion, and observed that this might in particular be the case where the aggregate of the contractual instalments corresponded to the market value of the goods, including the cost of financing, and the customer would not be required to pay a substantial additional sum as a result of exercising the option.

It is highly likely therefore that the Court of Appeal will find the Agility Agreement to be a supply of services, but other cases will need to be considered on their own facts.

JHA BLOG

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