UPCOMING EVENTS & LIKELY DATES

January 2018
NEWSLETTER

2018

FEBRUARY	Prudential (Portfolio Dividends)	Supreme Court Hearing
MARCH	Danish Beneficial Ownership cases	Opinion of the Advocate General
Q2	Fidelity Funds (WHT on dividends to non resident UCITS)	ECJ judgment
	FII (dividends from controlled interests)	Supreme Court permission to appeal
JUNE	Test Claimants in the CFC and Dividend GLO (Jurisdiction and time limits for Tax Claims)	High Court Hearing
JULY	BAT Industries (45% WHT on interest for EU claims)	Upper Tribunal Appeal

BREXIT Negotiation Directives on the EU-UK Transition Period

Cristiana Bulbuc

The EU Council has published a further set of negotiation directives for the second phase of the negotiations. The document covers issues related to the withdrawal of the UK from the EU and transition arrangements.

Regarding the transition period, the document stipulates that the EU acquis, that is the accumulated legislation, legal acts, and court decisions which constitute the body of EU law, should apply to and in the UK as if it were a Member State as well as any changes to the EU acquis, which should automatically apply to and in the UK, during the transition period. During the transition period, EU law covered by these transitional arrangements should deploy in the UK the same legal effects as those which it deploys within the Member States of the EU. This means, in particular, that the direct effect and primacy of EU law should be preserved. The UK must continue to participate, during this period, in the Customs Union and the Single market (with all four freedoms), and continue to comply with the EU trade policy. Furthermore, during the transition period, the UK may not become bound by international agreements entered into in its own capacity in the fields of competence of Union law, unless authorised to do so by the EU.

The Withdrawal Agreement should, during the transition period, preserve the full competences of the EU institutions (in particular the full jurisdiction of the Court of Justice of the European Union). Also, during the transition period the UK will not attend meetings of committees. Exceptionally, and on a case-by-case basis, the UK could be invited to attend without voting rights.

The transition period should apply as from the date of entry into force of the Withdrawal Agreement and should not last beyond 31 December 2020.

C-504/16 and C-613/16 Deister Holding and Juhler Holding – Anti-Treaty Shopping rules breach EU law

Cristiana Bulbuc

The cases concerned the German Anti-Treaty shopping provision. Both cases concern non-resident holding companies receiving dividends from a German subsidiary and in both cases the holding company received a profit distribution from the German subsidiary, on which dividend WHT was levied. The companies sought a refund of the tax withheld. The German tax authorities denied the request on the basis of the German Anti-Treaty Shopping rules. The holding companies challenged the assessments.

The CJEU firstly concluded that both cases fall within the scope of the Parent-Subsidiary Directive (PSD), which in principle prohibits the levying of WHTs on profit distributions paid to foreign parent companies. According to Article 1(2) of the PSD, Member States are only allowed to deviate from that rule to prevent tax evasion and abuse. The Court stated that only provisions whose specific objective is to prevent artificial structures deviating from economic reality and targeting unjustified tax advantages fall within the scope of the exception in the Directive. The Court concluded that the German rules in question, which generally exclude a special group of taxpayers from the application of the PSD, create a general and irrefutable presumption of abuse and therefore go beyond what is necessary to prevent tax evasion and abuse. In this respect, the Court emphasized that a group's special shareholding structure does not in itself indicate the existence of a wholly artificial arrangement. Consequently, the Court ruled that the disputed German provisions are not in line with the PSD.

The CJEU further observed that it is only where a resident subsidiary distributes profits to a non-resident parent company that the WHT exemption is subject to certain conditions and concluded that this difference in treatment is liable to deter a non-resident parent company from exercising an economic activity in Germany and therefore constitutes a restriction to the freedom of establishment, which cannot be justified.

AG Opinion in Bevola case C-650/16 – Marks & Spencer applied to cross border definitive losses

Cristiana Bulbuc

Twelve years after the judgment in Marks & Spencer, the CJEU is once more called upon to give a decision on a dispute which has arisen in relation to company taxation. In this case, the national court asked the CJEU whether, in conditions equivalent to those in Marks & Spencer, the freedom of establishment precludes a national provision pursuant to which a Danish company may not deduct the losses of a PE situated in another Member State, unless it opts into the 'international joint taxation' scheme.

The case involves Bevola, a company registered in Denmark and is a subsidiary and sub-subsidiary of other Danish companies and which held subsidiaries and PEs in a number of Member States, such as Finland. The Finish PE ceased trading and relief could not be claimed in Finland for its losses and Bevola applied to deduct those losses from its taxable income for the purposes of Danish corporation tax. The Danish tax authorities refused on the ground that revenue or expenditure attributable to a PE situated in a foreign country cannot be included in the tax base, unless the company had opted for the international joint taxation scheme. Bevola appealed.

The AG left it to the national courts to assess whether the Finish losses in this case were definitive and concentrated on two other aspects of the case that were not analysed in the judgment in Marks & Spencer. First, the losses which Bevola sought to deduct in Denmark did not come from a subsidiary but from a non-resident PE in Denmark. Second, the Danish tax system did not absolutely preclude the deduction of those losses, and allowed it if a resident company opts for the international joint taxation scheme.

The AG concluded that that legislation was not compatible with the freedom of establishment. The fact that the parent company may opt into an 'international joint taxation scheme', which requires it to group together, for the purposes of the same tax, all its subsidiaries and all its PEs situated outside Denmark for a period of 10 years, is not proportionate and is incompatible with EU law.

JHA BLOG

JHA's blog is updated with major news and developments in the fields of tax litigation, sanctions law, commercial litigation and arbitration. The blog can be accessed here.

- Simon Whitehead
- Paul Farmer
- Michael Anderson
- Ray Mc Cann
- Steve Bousher
- Helen McGhee
- Philippe Freund
- Ibar McCarthy
- Cristiana Bulbuc

NEWSLETTER SIGN-UP

If you know someone who may be interested in this and future newsletters, please feel free to forward this message to them and/or request that we add them to our mailing list by return email.