Fourthly, in *Collins v Addies* [1992] STC746 the novation of a close company loan to a participator (i.e. the substitution of a new debtor) was held to constitute a 'release' of the original loan. This emphasises that the situation the law is concerned with is one where a participator is a debtor of a close company, not the converse.

Transactions in securities

HMRC's concern appears to be that the vendors partially fund the acquisition by Acquirer Co by leaving in the company post-acquisition funds which might have been made over to them pre-acquisition by way of a distribution.

That is a situation which would come more naturally within the transactions in securities rules in ITA 2007 ss 684–713, rather than the loans to participators rules. In general, the conditions for the transactions in securities rules will be satisfied where:

- there is a transaction in securities;
- involving two or more close companies;
- the relevant person receives relevant consideration;
- the taxpayer does not pay income tax on the consideration; and
- the consideration represents profits available for distribution or future receipts of the company.

However, the rules will be excluded by virtue of ITA 2007 s 686, provided that there is a fundamental change of ownership of the close company, i.e. the vendors sell at least 75% of their shares.

Conclusion

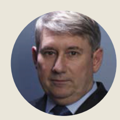
In the example given above, there cannot be a loan or advance to Mr and Mrs T. This is because: (i) Mr and Mrs T end up creditors, not debtors; (ii) no value has passed out of T Co, so as to constitute a distribution – the cash is replaced by a loan to its new parent; and (iii) there is nothing colourable in the price paid to Mr and Mrs T.

In my view therefore, people have been frightening themselves with a phantom

The error lies in reading s 459 in isolation from the scheme of the legislation as a whole. The meaning of words is governed by their context. The context is both statutory and factual. Neither the statutory nor the factual context justifies the extension of s 459 in such an unreal way. In my view therefore, people have been frightening themselves with a phantom. ■

Analysis

BT Pension Trustees: possible extension of remedies for breach of EU law



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Speed read

In *BT Pension Trustees* (Case C-628/15), Advocate General Wathelet challenges the established dichotomy adopted in the characterisation of claims in breach of EU law. He finds a simpler way to address a claim by an exempt taxpayer seeking a credit denied in breach of EU law than the usual distinction between a claim for the repayment of tax and the more restricted claim for damages to compensate for indirect losses. In his view, the primacy of EU law acts to remove the discriminatory provisions pure and simple.

The recent opinion of AG Wathelet in *BT Pension Trustees* (Case C-628/15) provides an interesting and direct answer to the question: what is a taxpayer's remedy for a breach of EU law where it has not paid any tax at all?

The issue arises in the arid context of a tax credit which has not existed for almost 20 years. In very broad summary, until Gordon Brown's famous raid on pension funds in 1997, an exempt taxpayer, such as a pension fund, receiving a dividend from a UK company in which it held a portfolio interest would receive a tax credit (ICTA 88 s 231(3)), which it could redeem in cash by making a claim. However, in the period from 1994, if the UK company paid a dividend which it matched with foreign sourced profits under the foreign dividend income (FID) regime, the availability of a cash credit under s 231(3) was excluded by ICTA s 246C.

The opinion concerns claims by pension funds for such cash credits upon the receipt of FIDs, notwithstanding that restriction. As the advocate general acknowledges, the exclusion of the credit for shareholders on the payment of a FID was established to be a discriminatory aspect of the FID regime over ten years ago.

The advocate general bats away a volley of defences. Chief among them was the argument that as the dividend concerned was paid by a UK resident company to a UK pension fund, there was no cross border movement to engage EU law in the first place. The advocate general was dismissive. The FID regime was specifically targeted at distributions by companies in receipt of foreign sourced income. It has been long established that such a circumstance clearly engages the EU freedoms, even where the recipient is resident in the same state (see *Keller Holding* (Case C-471/04)).

Characterising the claim

The more interesting question the advocate general then addresses is how to characterise the claim. There is an important practical distinction to be made between a claim for the recovery of tax unduly levied (a *San Giorgio* claim (Case C-199/82)) and a *Francovich* damages claim (Case C-6/90).

The *San Giorgio* claim recognises that the right to refund of charges levied in breach of EU law is the necessary consequence and complement of the rights conferred by EU law on EU nationals. The remedy must be as of right, which is not subject to conditions and restrictions; and we now know from *Littlewoods* (Case C-591/10) that requires a restitutionary remedy set by reference to the claimant's loss.

In contrast, a *Francovich* damages claim is subject to conditions which must be met for a remedy to be available; that is, even where discrimination has been established. Prominent among those conditions is the requirement that the breach of EU law be 'sufficiently serious', or 'grave and manifest'. That condition, the UK argued, had been held by the national courts not to have been established.

So what then was the appropriate characterisation of this claim? Was the claim for a cash credit a claim for the recovery of tax unduly levied? If it was, then in principle the claimant might have a restitutionary remedy for its loss. However, the claimant was exempt from tax. Was the claim then a damages claim? In this case, it would be far less likely that a claim could be made, given the need for a finding of a sufficiently serious breach.

The principle of primacy of EU law

The advocate general concludes that it is something else. It was not a claim for reimbursement of tax unduly levied: the pension funds paid no tax on the FIDs they received. They were exempt from tax. However, the pension funds did have other rights derived from the principle of the primacy of EU law. Those rights required the national court, faced with a national provision incompatible with EU law, to disapply that rule and instead to apply such national procedures as were appropriate to safeguard EU rights.

In the current context, the remedy to which the pension funds are entitled is to the disapplication of the restriction in ICTA 1988 s 246C, which prevented cash credits attaching to FIDs in the same way as ordinary dividends. They get there as persons who have suffered discrimination relying on the principle of primacy of EU law.

In other words, the principle of primacy of EU law obliges the UK to adopt such measures as are necessary to enable the shareholders who have suffered discrimination prohibited by TFEU article 63 to obtain the payment of any sums to which they would have been entitled in the absence of such discrimination.

Consequently, the advocate general held that the exempt shareholders who received foreign sourced dividends treated as FIDs must be ensured effective judicial protection by having ICTA 1988 s 246C disapplied. This entitled them, subject to national time limits, to the payment of that tax credit together with interest.

Procedural autonomy

How EU law is enforced depends largely on the national judicial systems of each EU member state. There is no EU legislation per se on the legal remedies for EU nationals to guarantee their rights based on EU law; and there are no rules on the legal remedies available for the taxpayers to correct a tax treatment that goes against EU law. In other words, EU member states have, in principle, full procedural autonomy when it comes to legal remedies; and each member state has to establish the procedural rules that safeguard the rights of taxpayers that derive from EU law. Thus, procedural rules under domestic law govern the remedies that are available against tax treatment that is in conflict with EU law.

However, despite this procedural autonomy, certain EU legal principles guarantee effective remedies for the enforcement of rights based on EU law. Such principles include, inter alia, the principle of effectiveness, equivalence, direct application and primacy of EU law.

If an individual is the subject of discrimination, it is not necessary to focus exclusively on the existence of an overpayment of tax to find a remedy beyond the limited redress available through a *Francovich* compensation claim

The principle of effectiveness requires that the member state ensures that taxpayers have effective legal remedies enabling them to obtain, for example, reimbursement of taxes levied in breach of EU law. The principle of equivalence requires, for example, that domestic rules on time limits, rules on burden of proof and other procedural rules concerning actions based on EU law are not to be less favourable than the procedural rules concerning actions based on domestic laws. The CJEU has held that, for example, obtaining reimbursement of taxes levied in breach of EU law must not take longer than the reimbursement of taxes levied in violation of domestic law; and that obtaining the reimbursement must not be more burdensome for the taxpayer.

A third option?

While in this case Advocate General Wathelet reiterates both these EU principles and member states' procedural autonomy, his conclusion shows the broad ambit of the primacy of EU over domestic remedies. He shows that if an individual is the subject of discrimination, it is not necessary to focus exclusively on the existence of an overpayment of tax to find a remedy beyond the limited redress available through a *Francovich* compensation claim.

The obvious question is how this should be applied in circumstances of reliefs and allowances used to shelter a tax liability then found to breach EU law and which could otherwise have been surrendered or carried forward to offset other tax liabilities. In the *FII* litigation (Case C-446/04), the High Court and Court of Appeal had focused solely on the directness of the loss to distinguish between these two poles: *San Giorgio* or *Francovich*. A third option may now be on offer: the disapplication of the unlawful charging provision to release those reliefs for alternative use. ■