

# Dorsey London Tax Update 2 June 2010

## Upcoming and Anticipated Dates

M&S (group relief)	Upper Tribunal (judgment)	June 2010
Prudential (portfolio dividends, FII and life assurance, compound interest)	High Court (judgment)	July 2010
ACT Classes 2 and 4	Court of Appeal (leave to appeal)	Late May 2010
FII GLO	Supreme Court (leave to appeal)	June-July 2010
Wilkins v HMRC (compound interest)	Court of Appeal (hearing)	24- 25 June
Thin Cap GLO	Court of Appeal (hearing)	18 Oct 2010
FID Litigation (cash tax credits)	First Tier Tribunal (judgment)	Pending other judgments (mid 2010)
Accor (avoir fiscal)	ECJ (hearing)	Ca Dec 2010

## Seminars and Presentations

EU Judicial Protection	18 June 2010	Kings College	London
International Tax Conference	7 October 2010	KPMG	Cyprus
Compound Interest & Time Limits	1 July 2010	Dorsey & Whitney	London

## Upcoming Judgments

The Upper Tribunal's judgment in the Marks & Spencer case concerning the application of the no possibility test is likely to be delivered in the next two weeks.

## Success for the taxpayer in Pre-FA 2000 group relief claims

On 1 April 2010, the First-tier Tribunal (FTT) found in favour of the taxpayer in *FCE Bank plc v Commissioners for HMRC* [2010] UKFTT 136 (TC).

This case deals with the long outstanding issue of whether it breached the Non-Discrimination article and the Double Tax Treaties to deny group relief between two UK subsidiaries of a non-UK parent prior to Finance Act 2000 which extended group relief to those circumstances in response to the ECJ decision in *ICI v Colmer*.

The FTT found that FCE had been treated less favourably for group relief purposes for the sole reason that its immediate parent was a US resident company in contravention of the UK/US DTC.

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**Dorsey ranked top for tax litigation, Legal 500 2009 edition**

**Dorsey ranked top of "the best in the UK" for contentious tax, Chambers 2008, 2009 and 2010 editions**

Dorsey awarded **European Tax Litigation Firm of the Year in 2009 and 2007**

Dorsey wins the **ECJ Award for 2008** and **Editor's Award for 2006** by International Tax Review

Dorsey named the **UK's Tax Team Of The Year 2006** by Legal Business Magazine

Paul Farmer named **Tax Lawyer of the Year 2006** by Lexis Nexis



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### **Compound Interest Update**

As a result of the restriction to simple interest in the VAT Act 1994, VAT claims are only entitled to compound interest if Community Law requires it. In direct tax restitution cases the contrary argument exists following *Sempra Metals* that compound interest is generally available under UK Law without the need to involve the further assistance of EU Law.

This issue in the VAT context was meant to be taken first in the *VIC GLO* but that action failed on procedural grounds without addressing conclusively the substantive argument conclusively on the right to compound interest. The *VIC GLO* now appears to be over.

The question of whether compound interest is a required remedy under European Law in VAT cases has however now been referred to the ECJ in *Littlewoods* but with a large number of other procedurally complex questions. We understand there is a further hearing in July to confirm the questions to be referred and the matter may still be subject to a further appeal before any reference is made.

The issue of the general availability of compound interest in Direct Tax cases was taken in *Prudential* last week. Judgment is awaited.

### **HSBC – New Stamp Duty GLO**

On 1 October 2009 the ECJ decision in *HSBC Holdings plc, Vidacos Nominees Ltd v HM Revenue & Customs* that held that the 1.5% charge to SDRT when securities were issued through clearance services where no charge would otherwise be imposed was a breach to EU Law. A GLO has now been established for claims following this litigation.

The change to the legislation which excluded High Court claims took effect from 1 April and will probably not apply to SDRT claims. If anyone has paid SDRT and wishes to make a claim for repayment please contact a member of the team.

### **The Long Death of *Daily Mail*? ESA Takes Action Against Norway's Exit Taxes**

The EFTA Surveillance Authority (ESA) has issued a letter of formal notice against Norway regarding the compatibility of its exit tax legislation with the EEA Agreement. The legislation imposes immediate exit taxes on unrealised capital gains of companies that transfer their seat or assets and liabilities from Norway to other EEA States, and unrealised capital gains on the shares of those companies. The same is not true for mergers between domestic companies and ESA regards this as a violation of articles 31, 34 and 40 of the EEA Agreement (freedom of establishment and the free movement of capital).

ESA's actions represents a departure from the ECJ's approach to this subject which, from *Daily Mail* in 1988, has held that restrictions which prevent the retention of the status of a company from one member state to another are outside the scope of Art 23 or 48 EC. This approach was confirmed most recently last year in the case of *Cartesio*.

The Norwegian government has the option of submitting observations after which ESA may issue a reasoned opinion and bring infringement proceedings before the EFTA Court. We will continue to monitor progress.

**When will a tax motive be abusive?**

In cases such as the Thin Cap GLO, the ECJ has indicated that restrictions tax measures might be permitted where the transactions was not genuinely commercial, but purely for tax objectives. In the UK courts the Thin Cap case has explored the circumstances in which a genuine commercial transaction will exist. The judgment of the ECJ in case C-350/08 Zwijnenburg provides some insight into what will amount to a tax objective showing the rather restricted circumstances in which it will be regarded as abusive.

The benefits available under the Mergers Directive (90/434/EEC) will not apply if the principal objective or one of the principal objectives is tax avoidance or evasion. The interesting feature here is the conclusion of the court that for that exclusion to apply the tax motive must be directed to one of the specific taxes to which the Directive relates. If the transaction has the objective of avoiding or evading some other form of tax, it will not be an abusive tax structure.

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