

Dorsey London Tax Update

18 March 2010

Upcoming and Anticipated Dates

VIC GLO (Compound Interest)	Court of Appeal (judgment/reference)	April 2010
M&S (group relief)	Upper Tribunal (judgment)	April-May 2010
Prudential (portfolio dividends, FII and life assurance)	High Court (reopened trial)	May 2010
ACT Classes 2 and 4	Court of Appeal (leave to appeal)	Late May 2010
FII GLO	Supreme Court (leave to appeal)	June 2010
Thin Cap GLO	Court of Appeal (hearing)	Ca Oct 2010
FID Litigation (cash tax credits)	First Tier Tribunal (judgment)	Pending other judgments (late 2010)
CIP Litigation (Compound Interest)	Court of Appeal (hearing)	Pending other judgments (late 2010)
Accor (avoir fiscal)	ECJ (hearing)	Ca Dec 2010

Seminars and Presentations

Tax Litigation-How to win in the new Landscape	24 March 2010	Lexis Nexis	London
The Impact of ECJ Case Law on National Direct Tax Systems	29-30 April 2010	Academy of European Law (ERA)	Madrid
EU Judicial Protection	18 June 2010	House of Lords	London

Discounts for Dorsey clients are available to listed Lexis Nexis conferences. Please contact Teresa Allan (allan.teresa@dorsey.com; 020 7826 4591) for details.

Changes in the Timetable for Upcoming Cases

Further steps in several actions (including the FID and CIP cases) have been delayed until judgments are delivered in other pending cases. The Prudential case returns to Court for further submissions to be made on the effect of the Court of Appeal's judgment in the FII case before that judgment is finally delivered.

Gielen – ECJ Judgment 18 March 2010: Opt-in elections still discriminatory

The ECJ has held that legislation which provides a tax advantage to Dutch residents over non-residents is discriminatory, notwithstanding the non-residents' ability to opt into the Dutch system and so gain the advantage.

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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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Mr. Gielen operated a company in Germany with a permanent establishment in the Netherlands, but was denied Dutch tax relief on the basis that he had not satisfied an “hours worked” test. He would have qualified for the relief if he was able to include the number of hours he worked in Germany. The ECJ held the Dutch legislation was discriminatory.

The Court further held that the availability of an election to opt into the Dutch tax system and be treated as a resident did not cure the discrimination. This is helpful in the context of ongoing UK litigation in which the Revenue seeks to argue that the taxpayer’s choice to utilise a discriminatory aspect of the tax system precludes recovery of tax based on an infringement argument, for example in relation to s.438(6) elections and FIDs. The mere availability of a choice is not sufficient to absolve the discriminatory effects of the legislation.

X-Holdings – ECJ Judgment 25 February 2010: Fiscal Unity restrictions permissible

The ECJ ruled that domestic legislation which enabled the formation of a fiscal unity between a parent and resident subsidiary or permanent establishment, but prevented it in relation to a non-resident subsidiary, was a permissible restriction.

The ECJ held that the restriction was justified and proportionate to ensure a balanced allocation of taxing powers. Since a parent is free to opt in and out of a fiscal consolidation from year to year, extending the regime to non-resident subsidiaries would enable parents to “jurisdiction shop” to offset their losses.

The ECJ squared this decision with the *Marks & Spencer* case by distinguishing fiscal consolidations from group relief. By matching corresponding profits and losses, group relief performs a more restricted function. It would be quite possible for such a system to allow for the surrender of losses which cannot be used in the surrendering company’s jurisdiction. In contrast, group consolidations give rise to greater risks of forum shopping, justifying a complete restriction to resident losses only.

The end result is the Court’s case law in relation to group relief (*Marks & Spencer*) and the surrender of terminal branch losses (*Deutsche Shell*) remains unaltered, but restricted to those circumstances. Broader systems of consolidation such as group contributions or fiscal unities appear to have fared much better.

ACT – Classes 4 and 2 – High Court Judgment: Abated Partial Tax Credits lawful

On 26 February 2010 the High Court ruled that UK corporation tax legislation which required ACT to be paid by UK subsidiaries in a greater amount than the tax credit available to their parent companies in the Netherlands and Italy under the relevant DTCs was not contrary to Community law. It held that the imposition of the 5% charge to UK income tax on non-resident parent companies in receipt of dividend income from the UK was fully compensated for by the provision of the credit itself and therefore the UK system was not unlawful.

If this judgment is the final word, it will reverse the previous position where German and French parent companies - who received no credit with UK dividends - were worse off than parents in other Member States under the

ACT system who received at least a partial credit. The outcome will be that while French and German parents should have received no credit, their subsidiaries should have paid no ACT. In contrast the subsidiaries of Dutch and Italian parents paid full ACT but only received a quarter of the credit of a UK resident.

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