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Tax newsletter

Welcome to the latest issue of our tax newsletter in which we consider some of the main tax developments over the last month. This includes the *Littlewoods* judgment, billed as a case on entitlement to compound interest but with interesting discussion too on the underlying VAT liability and abuse of process, and the *Deutsche Bank/UBS* decision – a rare win for taxpayers operating a tax avoidance scheme.

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Littlewoods: compound interest

The High Court has determined that a taxpayer receiving simple rather than compound interest on a repayment of VAT paid by mistake had not been adequately indemnified for its loss suffered as a result of the mistake. The UK's remedy did not therefore, in this case at least, comply with EC law. Henderson J also considered the merits of the underlying tax issues and whether it would be an abuse of process for HMRC to resurrect whether the VAT had been due in the first place.

HMRC accepted that commission paid on catalogue orders was a discount and VAT had been overpaid

Littlewoods carried on catalogue-based home shopping businesses, which involved selling goods through networks of agents. Agents earned commission on both purchases by third parties (TPPs) and their own purchases of goods from the catalogue (AOPs). That commission was calculated as a percentage of the payments that Littlewoods received for the purchases. The commission was credited to an account and the agent could then claim 10 per cent as a cash payment, as a credit against their own account balance, or 12.5 per cent as a full (or part) payment against the purchase of further goods.

Commission earned in respect of AOPs was treated as a discount from the price of goods purchased by the agent. However, 10 per cent TPP commission was treated as consideration for services provided by the agent to the mail order company with the additional 2.5 per cent (if the commission was used by the agent to purchase goods) treated as a discount from the price of the secondary goods purchased by the agent. Littlewoods then claimed there was no justification for the differential treatment and it should all be treated as discount. HMRC reluctantly agreed, as the link between the 10 per cent element of the commission and the services provided by the agents was hard to identify on a sale-by-sale basis.

Following the Court of Appeal decision, HMRC accepted that Littlewoods had overpaid all the VAT relating to the commissions, and that the overpayment was due to a mistake. HMRC therefore refunded the principal amounts plus simple interest at the statutory rates in section 78 VATA; a total of around £475m. Littlewoods, however, claimed that £1.2bn of compound interest was required in order for the restitutionary remedy to comply with the EU principle of effectiveness and HMRC subsequently applied to amend its defence so as to withdraw its admissions of liability on the basis of the decision in Grattan, a case with similar facts.

HMRC's contention that the VAT was payable by Littlewoods has merit

Although noting that he was bound by the Court of Appeal decision, Henderson J considered that those judges had not come to a satisfactory conclusion. While it was hard to find a link between the commission and the services provided by the agents in any given particular case, it was clear that the agents did provide services of real economic value to Littlewoods in procuring, administering and making payment in respect of third-party purchases. Nor could it be disputed that, when such payments were made to Littlewoods, they generated a right to commission which the agent could take either in cash or in goods. On an aggregated basis, therefore, the link was real and direct.

Furthermore, Henderson J did not see how the consideration for the TPP supplies at the full catalogue price could be treated as reduced by the payment of commission to the agent. The third parties, who were the final consumers of the relevant supplies, remained liable to pay the full invoice price of the goods that they had purchased. This was not a simple *Elida Gibbs* situation with a linear supply chain as there are two entirely separate supply chains. In other words, commission which, by definition, is earned in respect of supplies of primary goods to third parties should not be allowable as a deduction from the taxable consideration for entirely separate supplies of goods to agents.

Henderson J's view, therefore, was that the VAT was payable and should not have required repaying. However, he was not sufficiently confident about this conclusion to hold that it is correct (should the issue require ruling upon at some later date) without a further reference to the ECJ. This is because there is no existing case in which the ECJ has considered the application of the principle of fiscal neutrality to a discount from the taxable amount of a transaction where the discount derives from a supply of different goods to a third party, but is granted to the final consumer of the taxable transaction. This was touched upon in the AG opinion in Grattan but only in terms of uncertainty, and the ECJ in Grattan did not address this point.

This will not only be relevant if HMRC appeal the abuse of process point (see below) but is also of interest to other situations where commissions or "discounts" affect more than one supply chain.

Abuse of process

The judge held that it would be an abuse of process if HMRC were permitted to defend the present claims on the ground that the VAT had been due after all. This is because of the importance of finality in litigation and the previous opportunities which HMRC had to raise this defence in earlier proceedings.

In this case, HMRC had accepted the Court of Appeal decision (there was no application to appeal to the House of Lords) and subsequently freely entered into the refund agreements "after first putting the Littlewoods Group to the time, trouble, expense and anxiety of protracted litigation on the underlying liability issues" and then expressly conceded that all of the VAT upon which compound interest was then claimed had been overpaid.

Adequate indemnity for Littlewoods required compound interest

In the earlier reference to the ECJ in this case, it was held that the EU principle of effectiveness requires that the national rules for calculation of interest (i.e. in the present context simple interest calculated in accordance with section 78 VATA) "should not lead to depriving the taxpayer of an adequate indemnity for the loss occasioned through the undue payment of VAT". The question for Henderson J was, therefore, what is an adequate indemnity?

EU principles dictate that the right to reimbursement of unlawfully levied tax extends to amounts paid to, or retained by, the State which "relate directly" to that tax, including losses representing the time value of the tax, i.e. interest. Interest is, therefore, in itself a right derived from and protected by EU law which, under the principle of effectiveness, must not be virtually impossible or excessively difficult to obtain.

The judge concluded that an adequate indemnity here would require the payment to the claimants of an amount of interest broadly commensurate with the loss of use value of the overpaid tax, running from the dates of payment of the tax until the dates when the loss of use value is fully restored to them. The simple interest already received by Littlewoods did not come close to meeting this test and therefore compound interest was required.

Normally, the correct approach would be to ascertain the objective use value of the overpaid tax, but Littlewoods were content to receive the use value of the overpaid tax to the Government, albeit that this was less than the loss of use value to themselves.

Simple interest may be an adequate indemnity in other cases

Henderson J observed that "loss of use value is an inherently imprecise concept, and views may differ in a given case about how it may be quantified". He went on to note that, in other cases (for example, where the period over which interest was due was short), simple interest could potentially be an adequate indemnity. Even if compound interest is required, it may well be computed on a different basis and at different rates in different cases.

Given the sums at stake, it seems inevitable that HMRC will appeal. In the meantime, it will no doubt be rueing the day it conceded liability on the underlying VAT position now that Henderson J has cast such doubt on Littlewoods' discount analysis.

Littlewoods Retail Limited and others -v- HMRC [2014] EWHC 868

Felixstowe Dock: consortium link companies

The CJEU has ruled that the UK consortium relief rules are incompatible with the EU principle of freedom of establishment. HMRC had refused a claim for the transfer of losses between a group and a consortium on the basis that the "link" company belonging to both the group and the consortium was not established in the UK.

Consortium relief claimed via Luxembourg resident link company

A UK loss-making company controlled by a consortium entered into arrangements to surrender its losses to Felixstowe Dock and other UK resident companies. Hutchison 3G UK Investments Sàrl, a Luxembourg resident company, was a member of both the consortium controlling the loss-making company and the group of which Felixstowe Dock and the other claimant companies were members because they were (indirectly) owned by the same Hong Kong resident parent company.

The ensuing consortium relief claims were refused on the grounds that the link company was not resident in the UK and did not carry on a trade in the UK through a permanent establishment. At the time of the claim, this was a requirement for relief under UK law.

Consortium relief

Since 2010, the link company has no longer been required to be resident or carrying on a trade in the UK if it is established in the EEA. However, in this case, consortium relief is only available if the link company is a 75 per cent member of the same group of companies as the surrendering or claimant company without the involvement of a company that is not established in the EEA.

The CJEU was asked whether there is a restriction on the freedom of establishment if the link between the surrendering and receiving companies is resident in another Member State, and whether the situation is any different if the link between companies passes through companies in third countries. Also put to the CJEU was the question of whether a Member State is permitted to require that the lowest common parent within a group of companies (i.e. that to which both the link company and the claimant of the losses belong) be resident in the EU or EEA, or whether the connections between the link company and the companies receiving the losses must consist solely of such companies.

Consortium relief should not be limited where link company is EEA resident

The CJEU found that it was contrary to the EU right to freedom of establishment to require the "link company" to be UK resident in these circumstances and further concluded that the freedom of establishment of neither the EEA link company nor the link company's EEA direct parent was affected by the fact that the ultimate parent company of the group, as well as certain intermediate companies in the chain, were established in third countries.

The Advocate General had opined that the UK is entitled to require that the lowest common parent within the group of companies (i.e. that to which the link company and the companies receiving the losses for tax purposes belong) be EEA resident and that the connections between the link company and the loss claimant companies consist solely of such companies. The CJEU's judgment is less clear on this but indicates that consortium relief should be available to structures with an EEA link company in the same way as where the link company is a UK corporation tax payer. This goes further than the AG's opinion and would mean that intermediate companies in the structure which are not established in the EEA could be ignored.

The condition that an EEA-established link company must be a 75 per cent member of the same group of companies as the surrendering company or the claimant company without the involvement of a company that is not established in the EEA may therefore be open to further EU law challenge.

Felixstowe Dock and Railway Company Ltd and others -v- HMRC (Case C-80/12)

Deutsche Bank/UBS: restricted securities remuneration schemes

Unusually, the Court of Appeal has found for both taxpayers in the twin cases of Deutsche Bank and UBS regarding similar employee remuneration avoidance schemes. These schemes involved each bank using restricted securities to pay bonuses to employees in order to circumvent the PAYE and NICs provisions.

Restrictions on shares lapsed within five years of acquisition

The essence of both schemes was that Deutsche Bank and UBS (the Banks) were issued a special class of redeemable share in offshore special purpose vehicles (SPVs). These shares were then transferred to their employees as per their bonus allocations. The shares were subject to certain restrictions which automatically lapsed soon after acquisition. Shortly after the restrictions fell away, the Banks' employees

became entitled to redeem their shares, although some held them for two years to maximise taper relief, or even longer. The SPVs invested the subscription monies in the Banks' shares so the value of the SPVs' shares mirrored those of the Banks.

Deutsche Bank and UBS each argued that the acquisition of these securities was exempt from any charge to income tax by virtue of section 425 ITEPA 2003, which provided that no income tax charge arises on acquisition of a share where the restrictions automatically cease within five years of acquisition. The subsequent removal or lapse of the restrictions would normally have been subject to an income tax charge under the restricted securities regime. However, an exemption in section 429 ITEPA 2003 applied to prevent an income tax liability provided certain conditions were met, including that the recipients of the shares were not employees of the share issuing company or a company associated with it.

The intention of the schemes was to prevent income tax charges arising under the employment-related securities provisions contained in Chapter 2 of Part 7 of ITEPA 2003. UK domiciled individuals could have redeemed the shares after holding them for two years and qualified for business asset taper relief, reducing their rate of taxation on any chargeable gain to 10 per cent. Non-domiciled individuals could have escaped UK taxation altogether provided that they did not remit the proceeds of any redemption of the shares to the UK.

Ramsay principle is not applicable

Rimer LJ first considered whether a Ramsay argument that could strike down the schemes. HMRC argued this point both on the basis that "in reality" each scheme as a whole was merely a complicated method of paying bonuses without PAYE/NICs, and the forfeiture provisions specifically were commercially irrelevant as being either short-lived (in the case of Deutsche Bank) or hedged such that the risk of receiving a lower than market value for the shares on forfeiture was neutralised (in the case of UBS).

However, he noted that the Ramsay principle involved two steps: a purposive construction of the statute to see, on a "close analysis", what transaction will answer to the statutory provision, and a realistic analysis of the transaction to see whether it answers to that description. The question was not whether this legislation applied to schemes aimed at tax avoidance but whether what the employees received was money or securities. It was not possible to use Ramsay to re-characterise the share awards as payments of money to the employees when the shares were "real shares which functioned as such" with the amount of money obtainable on redemption not preordained but varying with the fortunes of the underlying shares. Similarly, the provisions relating to the restrictions focus on whether these reduce the shares' value and not whether they are there for commercial reasons.

As in the Upper Tribunal judgment, this discussion is helpful in confirming that there are limits to the width of the Ramsay principle.

The scheme shares were "restricted securities"

In the UBS scheme, the arguments centred around whether the restriction had the effect that the holder of the share was not entitled on the transfer to receive an amount of at least their market value. The securities issued to UBS employees were subject to a forced sale provision that provided that the shares had to be sold for 90 per cent of their market value in the event of a specified movement in the FTSE 100. HMRC argued that certain call options held by the SPV (designed to hedge against the risk of a forced sale) and which HMRC described as "the one truly commercial element in the whole structure", had the effect of ensuring that the employees never made an economic "loss".

The Court of Appeal held that, when assessing whether the employee would receive less than market value on a forced sale, the determination of market value of the shares:

- should disregard the forced sale provisions in the articles of the SPV (as this is part of the provision for transfer, reversion or forfeiture which section 423(c) plainly requires to be disregarded); but
- should take into account the effect of the call option arrangements (as these were purely collateral to the transfer reversion or forfeiture provisions and served a different purpose of ensuring that the employees would not end up significantly out of pocket if a forced sale occurred).

Consequently, the requirement to sell at 90 per cent of market value as so determined meant that the securities were restricted securities and no income tax charge arose on their acquisition under section 425 ITEPA 2003.

The Deutsche Bank share restriction consisted merely of a requirement to transfer the shares if the employees ceased employment, and was not faced with serious argument. The Court of Appeal therefore had no difficulty in holding that these shares were "restricted".

Neither SPV was "associated" with the employing Banks

When the shares ceased to be "restricted securities", an income tax liability would have been triggered unless the exemption in section 429 ITEPA 2003 applied. One of the requirements of this section is that the majority of shares held in the relevant class of shares must not be held by certain persons, including employees of an associated company of the SPV.

A company is defined as another's associated company in section 416 ICTA 1988 if at any time in the previous year one of the two has control of the other, or both are under the control of the same person. Control is defined by reference to the ability to exercise or being entitled to acquire direct or indirect control over the company's affairs and in particular where a person is entitled to acquire:

- the greater part of the share capital or issued share capital of the company or the voting power in the company;
- the greater part of income available to be distributed to participators in the company; or
- the greater part of assets available on a winding-up.

The UBS scheme

In the case of UBS, the First Tier Tribunal had held that "it saw no evidence to suggest there was control of the kind envisaged by section 416". Two of the three directors were appointed by the independent company Mourant and "held real meetings and made real decisions". The Court of Appeal upheld this, stating that "What UBS wanted was clear enough. It was, however, in no position to dictate to Mourant to do its bidding… Mourant exercised its shareholder powers in respect of [the SPV] independently".

The Court also rejected HMRC's argument that an Article self-evidently inserted into the UBS SPV's Articles to ensure it could not be controlled by UBS should be disregarded as artificial or a sham. This was because there was genuine commercial risk, albeit remote, under the Article and it represented the true arrangement to which UBS intended to submit.

The Deutsche Bank scheme

In the Deutsche Bank scheme, as a technical matter, Investec (an independent company) had a controlling interest throughout but was held by the First Tier Tribunal to have acted only "to earn the full fee" for implementing the scheme and never to have exercised any independent discretion with regard to the scheme. The First Tier Tribunal had concluded that Deutsche Bank did not control the SPV on the basis that Investec had not acted under the necessary "degree of compulsion" which would amount to control.

Rimer LJ considered that the Upper Tribunal had misunderstood the First Tier Tribunal's reference to "compulsion". He found that, although Investec and the SPV were guided closely about what they had to do and when, involving close co-ordination and co-operation, this did not amount to section 416 control. Investec could rationally only be regarded as doing what it did by consulting its own interests in doing so. While the companies were working together towards a common goal, the suggestion that one was controlling the decision of the other makes no commercial sense.

Contrary to the view of the Upper Tribunal, therefore, the Deutsche Bank scheme did qualify for the exemption in section 429 ITEPA 2003 and no income tax liability was held to arise when the restrictions fell away. This may also be of comfort in other situations where the parties wish to avoid section 416 control but are following preordained, closely co-ordinated courses of action.

DB Group Services (UK) Limited and UBS AG -v- HMRC [2014] EWCA Civ 452

Mixed member partnerships and AIFM partners

A further technical note and revised legislation has been published on several aspects of partnership taxation, including the tax motivated allocation of business profits and losses in mixed member partnerships and Alternative Investment Fund Managers' deferred remuneration.

Mixed member partnerships

These anti-avoidance measures prevent partnerships with both individual and corporate partners allocating "excessive" profits to the corporate partners. The rules are aimed at situations where the corporate partner is controlled by an individual partner who may wish to divert profits to the corporate where the profits will be taxed at a lower rate than if received by the individual directly. The profits could then be withdrawn later in a more tax-efficient manner.

The new legislation provides for the reallocation of profits in two circumstances:

(X) where the excessive profits allocated to the corporate partner represent "deferred profit" of an individual partner; and

(Y) where the corporate's share exceeds the appropriate notional profit and the individual partner

has the "power to enjoy" all or any part of the corporate's profit share (for example, by reason of the individual holding shares in the corporate partner receiving the profit allocation), and it is reasonable to assume that the corporate's profit share is referable to the individual partner's power to enjoy.

The new Finance Bill provisions extend these circumstances, notably in terms of the definition of "deferred profit" which now includes an individual partner's share of any deferred remuneration (or benefits or returns) that is due to him and one or more others rather than being limited to deferred remuneration due to him alone, and by extending the definition of "power to enjoy" to include being a party to arrangements with a main purpose of ensuring that an amount of a corporate's profit share is subject to corporation tax rather than income tax. The note indicates that the latter point was prompted by schemes in which profits were allocated to corporate partners with corporation tax reliefs available for use.

Aside from confirming that the legislation does not apply to mixed member partnerships in which the partners are genuinely acting at arm's length, provided that they do not intend to secure a tax advantage, the guidance generally confirms the breadth of this legislation, which will no doubt remain of concern for some commercial arrangements.

For example, the appropriate notional return is not set at a specific rate but will vary from case to case, taking into account the level of risk involved and being limited to a reasonable rate of interest; it is not relevant that an equity return on the same investment might have been much greater. Fees will be treated as another form of return on capital and this will be deducted in arriving at the limit on the notional return. The guidance also clarifies that a partner's day-to-day balance on a current account is not capital, nor is an undrawn profit share.

The "power to enjoy" requirement is also widely drawn and does not depend on the individual partner deriving any direct benefit from the profits allocated to the corporate partner, nor does it require any actual connection between the individual and corporate partners.

Where a business is transferred to a partnership by a company, and the company and a shareholder of the company both become partners in the firm, HMRC's view is that, where the shareholder continues to be involved in the business after the transfer, it will nearly always be reasonable to conclude that the excess allocation of profits to a company which he substantially owns is attributable to his continuing involvement with the firm, with the result that any such profit allocated to the company will be reallocated to him under this legislation.

AIFM partners: deferred payments

The remuneration proposals issued by the Financial Conduct Authority pursuant to the Alternative Investment Fund Managers Directive (AIFMD) can, in certain cases, require the remuneration paid to certain key individuals in an AIFM firm to be deferred. The new AIFM provisions allow the AIFM partnership or its delegate to elect to pay the tax on deferred remuneration, and on any remuneration in the form of instruments that must be retained for at least six months, rather than the individual partner. This ensures that individuals taxed on a self-employed basis do not suffer "dry" income tax and NICs charges when the profits arise and before they are received.

The new Finance Bill provisions restricts the operation of these rules to firms with a regular business of managing alternative investment funds or carrying out some functions of such management as a delegate of a person whose regular business is managing alternative investment funds. Previously, it was sufficient that the firm's trade involved these activities to some extent.

The drafting has been corrected so that, when any of the profit is vested in the partner, it will be treated as receiving profits of an amount equal to the amount vested net of the income tax for which the AIFM firm is liable but grossed up by either:

(i) the income tax paid by the AIFM firm by the time of vesting; or

(ii) if the profit vests in the same period in which it is allocated, the income tax payable by the AIFM firm (under the original drafting, in these circumstances the tax would not have been treated as the partner's profit), although the guidance confirms that a partner will only receive a tax credit for the tax for which the AIFM firm is liable if the AIFM has paid that tax.

Revised technical note and guidance

MG Rover and *Standard Chartered*: VAT group repayments

VAT – Section 80 claims and VAT groups

The First Tier Tax Tribunal decisions in respect of *MG Rover* and *Standard Chartered* have just been released. The issues before the Tribunal in each case were substantially similar. The judges, however, have come to some different conclusions on the proper application

of section 80 of the VAT Act 1994 in the context of VAT groups.

Section 80 allows taxpayers to reclaim overpaid VAT from HMRC. As a result of a spectacular legislative "own goal" by the Government, confirmed by the House of Lords' decision in *Fleming*, claims could be made under that section for VAT overpaid in respect of all periods from the introduction of VAT in 1973 through to 1996, provided that the claims were submitted before 1 April 2009. HMRC received a swathe of section 80 claims accordingly.

The factual background relating to each of *MG Rover* and *Standard Chartered* is complicated and it is not necessary to rehearse it here. The key issue before the Tribunal in each case was not whether VAT had been overpaid but where the right to make a claim under section 80 resides when the company which has actually made the supplies giving rise to the overpayment of VAT has been or become a member of a VAT group and subsequently left it. Does the right reside with the representative member of the VAT group or with the company which has actually made the supplies (the generating company)?

The issue arises because section 43 of the VAT Act 1994 provides that, where companies are treated as members of a VAT group, any business carried on by a member of the group shall be treated as carried on by the representative member and any supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member. In other words, section 43 deems everything to be done through the representative member for VAT purposes and the representative member will account for any VAT due on supplies by the group accordingly. Section 80 provides that where a person has accounted to HMRC for VAT which was not due, HMRC shall be liable to credit the person with that amount.

Against this background, HMRC maintain that, absent a specific assignment, the only person entitled to make a claim for VAT overpaid in respect of supplies made by a company while a member of a VAT group is the representative member of that group, i.e. the person who accounted for the VAT, even if the generating company has since left the group. HMRC do, however, concede that where the relevant VAT group has been disbanded, a claim under section 80 can be made by the generating company. They also maintain that the representative member of a VAT group cannot make a claim under section 80 in respect of supplies made by a company before it became a member of that group.

MG Rover

MG Rover's principal claim was for VAT overpaid in respect of supplies made by it or its predecessor in the business, while a member of a VAT group, for periods between 1973 and 1996. MG Rover left the VAT group in 2000. The VAT group continues to exist, however, and HMRC have rejected MG Rover's claims accordingly on the basis that it is the representative member (and not MG Rover) who is entitled to claim. It is worth noting that competing claims for part of the overpaid VAT have been made by MG Rover's predecessor in the business and by the representative member of the VAT group of which MG Rover was a member at the relevant time, and these two parties were therefore joined to the proceedings although nothing material turns on that.

In a lengthy decision, the Tribunal judge found in favour of MG Rover. She did agree, in line with the decision in *Thorn plc,* that as a matter of VAT section 43 did not create a fiduciary, agency or trust arrangement as between the members of a group and the representative member but concluded that there had to be some limit to the deeming provisions in that section and to extend them so as to deny MG Rover the ability to claim overpaid VAT in respect of supplies which it had actually made, particularly in circumstances where it had ceased to have any economic link to the VAT group of which it had once been a member, would lead to an absurd, anomalous and unjust result.

Standard Chartered

This case again involved several interested parties. Standard Chartered was seeking to make a claim as representative member of the Standard Chartered VAT group for overpaid VAT in respect of supplies made by various companies before they became members of the Standard Chartered VAT group. Those companies were subsequently acquired by Lloyds, and Lloyds was seeking to make a claim for overpaid VAT in respect of supplies made by those companies while they were members of the Standard Chartered VAT group. The Standard Chartered VAT group continues to exist.

The Tribunal judge dismissed both appeals. The decision includes a rigorous analysis of the grouping provisions. Again, the judge followed the reasoning in *Thorn plc* and concluded that there was no basis on which to argue that section 43 created some form of fiduciary, agency or trust arrangement as between the members of a group and the representative member the group was simply embodied as a single person in the representative member. It necessarily followed (and this is where the two decisions fundamentally differ) that, prima facie, any rights to repayment relating to the activities of the members of a particular

group, and then only the activities carried out while they were members of that group, must reside with the representative member of that group from time to time. Significantly, therefore, the Tribunal judge did not agree as a matter of principle with HMRC's practice in respect of claims where the historic VAT group had been disbanded.

The only circumstances in which the Tribunal judge thought that a section 80 claim could be made by someone other than the relevant representative member were where:

- a member of a VAT group had accounted for VAT by virtue of being jointly and severally liable for VAT due from the representative member on the basis that it would then be a person who had accounted for VAT to HMRC; or
- it was necessary to give the generating company an effective remedy in respect of the overpaid VAT, in line with EU law and the *San Giorgio* principle, but this would be relevant only where it was virtually impossible or excessively difficult to claim through the relevant representative member.

Neither of these applied in the present case. What is more, the Tribunal judge saw no need for the latter point to be referred to the ECJ (contrary to the observations of the Tribunal judge in *MG Rover*, albeit that she only addressed the EU law position for the sake of completeness because she had found in MG Rover's favour as a matter of domestic law).

There are three important points to take away from these decisions:

- there is clearly going to be more litigation on the issue. It is also worth noting that there are a number of similar cases running through the Tribunals and courts at present and it will be interesting to see how the relevant judges try to reconcile the various decisions we have had to date;
- while the decision in *Standard Chartered* does (if upheld) resolve the anomaly that currently exists between the treatment that applies in respect of generating companies which have left a VAT group where the VAT group continues to exist and the treatment which applies where the VAT group has been disbanded, the implications are significant and do raise potential concerns for taxpayers who are currently negotiating repayment claims with HMRC in the latter category; and
- in the context of any acquisition of a company which has been a member of a VAT group, it will be important to ensure that the contractual position in respect of any potential repayments of overpaid or underclaimed VAT has been specifically addressed in the sale documentation.

MG Rover Group Ltd (in liquidation) -v- HMRC and others [2014] UKFTT 327 (TC)

Standard Chartered plc and others -v- HMRC [2014] UKFTT 316 (TC)

Contacts

If you would like further information on any of the matters raised in this newsletter, please speak to one of the partners below.

Richard Palmer
T: +44 (0)20 7859 1289
E: richard.palmer@ashurst.com

Alexander Cox
T: +44 (0)20 7859 1541
E: alexander.cox@ashurst.com

Paul Miller
T: +44 (0)20 7859 1786
E: paul.miller@ashurst.com

Simon Swann
T: +44 (0)20 7859 1882
E: simon.swann@ashurst.com

Nicholas Gardner
T: +44 (0)20 7859 2321
E: nicholas.gardner@ashurst.com

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