



Client update – Littlewoods

May 2015

This note reports on the decision handed down yesterday by the Court of Appeal in *Littlewoods Limited and Others v Commissioners for HMRC*.

Executive Summary

The Court of Appeal upheld in full the decision of Mr Justice Henderson in the High Court ([2014] EWHC 868 (Ch)) which gave the claimants a decisive victory. This is a significant boost to your claims and moves closer the time when it will be possible to re-activate your claims and seek recovery from HMRC. Although very positive news, the decision is not that compound interest is available in all circumstances – it does however make it more likely that it will be possible to successfully argue that you ought to be entitled to compound interest.

It is anticipated that HMRC will apply for permission to appeal to the Supreme Court. There is no guarantee that the Court of Appeal will give that permission (it very rarely does) or that the Supreme Court will agree to hear an appeal from HMRC (HMRC has now lost twice on exactly the same legal basis).

A hearing will take place on 4 June 2015, during which the Court of Appeal will hear arguments on appeals and costs. We will provide a further update once we know more.

More detail on the particulars of the decision are provided below.

Background

As you may recall, the central issue before Henderson J concerned what the Court of Justice of the European Union (CJEU) had meant when it said that national rules for the calculation of interest “should not lead to depriving the taxpayer of an **adequate indemnity** for the loss occasioned through the undue payment of VAT” [29]. Henderson J (in another case) described this as “somewhat Delphic guidance” and it is therefore unsurprising that when Littlewoods returned to the High Court, both sides claimed victory.

In the High Court, Henderson J recognised that the key to the problem lay in a proper understanding of the nature and content of the right to interest under EU law. Having reviewed the decision from the CJEU in *Littlewoods* and its subsequent application in the later cases of *British Sugar* (Case C-147/10, and joined cases) and *Irimie* (Case C-565/11), he held that the right under EU law to the payment of interest on recovery of unlawfully levied tax was now firmly entrenched in the jurisprudence of the CJEU. That right is not “ancillary” to a claim for the repayment of tax paid but not due. Rather, the case law cited demonstrated that interest, as a component of a claim, ranked equally in EU law with the right to the repayment of the tax itself.

Any comments or queries?

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The judge concluded that an “adequate indemnity” must require payment of an amount of interest which is “broadly commensurate with the loss of the use value of the overpaid money **in the hands of the taxpayer**”, running from the date of payment until the date of repayment [219], [302]. He went on to find that the only way to provide Littlewoods with adequate compensation for the lost use value of its money would be by an award of compound interest. Henderson J’s reasoning was upheld in its entirety by the Court of Appeal and HMRC’s appeal was dismissed.

Although this judgment has the potential for wide application, in particular, to the many cases stayed pending its outcome, the decision does not go so far as finding that all taxpayers with EU law claims will be entitled to compound interest as a matter of course. The Court of Appeal, like Henderson J before it, emphasised that the question of

what will amount to an adequate indemnity must be answered by reference to the particular facts of a case. As Lady Justice Arden put it “adequate indemnity” is not a rigid straitjacket, and certainly does not go as far as to require compound interest in every case” [108].

What this means in practice is that there may be cases where simple interest alone represents a reasonable analogue for the loss suffered by a claimant and satisfies the adequate indemnity test. This may be the case where, for example, a claim for the recovery of overpaid tax is made within a few years of the date of payment and where the difference between simple and compound interest over that period is relatively minor. Ultimately, it will come down to a question of analysis based on particular facts of the case.

The Court of Appeal will hear submissions on rights to appeal on 4 June 2015.