

Newsalert

EU Direct Tax Group

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EU Direct Tax Group

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VODAFONE 2 v HMRC (SPC 479): another UK CFC case referred to the ECJ

HMRC issued an enquiry notice to Vodafone 2 in respect of its period ended 31 March 2001. On the same day, a separate letter was sent to the Vodafone group referring to the enquiry notice and containing a number of questions concerning the CFC status of one of Vodafone's subsidiaries for which it had claimed that the motive test exemption applied.

Vodafone then sent a letter to HMRC stating that it considered the separate letter to be a notice under FA 1998 Sch 18 Para 27 requiring the company to produce documents for the purposes of the enquiry. It appealed against the notice under Para 28 on the grounds that since the UK CFC provisions contravene the freedom of establishment and free movement of capital provisions of the EC Treaty, HMRC could not validly require it to produce documents or provide information in relation to any part of the enquiry that related to compliance with the CFC legislation.

Vodafone 2 subsequently made an application for a closure notice under FA 1998 Sch 18 Para 33. HMRC argued that the letter was not a notice under Para 27, but an informal request for information. The Special Commissioners agreed that the letter was not a notice under Para 27, and that there could therefore be no appeal under Para 28.

The Special Commissioners are obliged to give a direction that HMRC give a closure notice, unless they are satisfied that HMRC have reasonable grounds for not giving a closure notice.

Counsel for the taxpayer contended that HMRC's enquiry was not reasonable, as its only purpose was the testing of the claim that the subsidiary was entitled to the CFC motive test exemption, and that the CFC legislation is incompatible with EC law. However, he accepted that the incompatibility of the CFC legislation with the EC Treaty is not *acte claire*, and therefore requested that the Special Commissioners refer the matter to the ECJ.

Counsel for HMRC argued that continued enquiries by HMRC might produce the result that there was no liability under the CFC legislation, in which case there would be no need to refer the matter to the ECJ. In addition, he submitted that, the question of whether HMRC have reasonable grounds for not giving a closure notice, in the belief that the CFC legislation is compatible with EC law, is entirely separate from the question of whether that legislation is compatible with EC law (i.e. that HMRC does not have to be correct in its grounds for those grounds to be reasonable). He considered that HMRC's view that the CFC legislation is compatible with EC law is a reasonable one (the matter is not clear, otherwise there would have been no need to refer the *Cadbury Schweppes* case to the ECJ) and suggested that HMRC should be able to continue their enquires pending the outcome of the *Cadbury Schweppes* case.

The Special Commissioners considered that the issue of compatibility of the CFC legislation with EC law does need to be determined in order to enable them to give judgment on the application for a closure notice. This was on the basis that if the legal basis of the reason for refusing closure is incorrect, the grounds are not reasonable.

The Special Commissioners then considered whether they should exercise their discretion to refer the case to the ECJ. This hinged around whether the questions to be addressed were already covered in the *Cadbury Schweppes* referral. The Special Commissioners concluded that the circumstances in this case give rise to questions of interpretation of the EC Treaty which go beyond the questions referred in *Cadbury Schweppes* and the *CFC and Dividend Group Litigation*. They therefore directed that the case be referred to the ECJ. HMRC are however seeking an expedited appeal hearing to quash the referral.

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For more detailed information, please do not hesitate to contact your local PwC contact person or a member of the EUDTG.

Peter Cussons +44 20 7804 5260

peter.cussons@uk.pwc.com