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Section 231: overpayment relief: generally prevailing practice exclusion and EU law; Section 232: overpayment relief: time limit for claims

Section 231

This provision owes its existence to the litigation over the compatibility of the UK's franked investment income regime with EU law. The Court of Justice of the EU (CJEU) has given two preliminary rulings.¹ A third is awaited, on the curtailment of limitation periods, following a hearing before the CJEU in June 2013.² In fact, however, section 231 of the Finance Act 2013 (FA 2013) is inspired not by the CJEU, but by the different approaches of the Court of Appeal and the House of Lords³ to the legislation governing error or mistake claims in section 33 of the Taxes Management Act 1970 (TMA). That legislation has been repealed and is replaced by provisions on recovery of overpaid tax in Schedule 1AB TMA.

Section 231(1) FA 2013 amends paragraph 2 of Schedule 1AB to TMA which sets out the cases, A to H, in which the Commissioners are not liable to give effect to a claim for the repayment of overpaid tax. Section 231 narrows the application of Cases G and H. These allow an overpayment claim to be rejected by reference to the fact that generally prevailing practice had been followed. Now, these two Cases “do not apply where the amount paid, or liable to be paid, is tax which has been charged contrary to EU law.”⁴ Case G concerns a situation where an excessive amount is paid, or liable to be paid, by reason of a mistake in calculating the claimant's liability to income tax or capital gains tax (except for mistakes in a PAYE calculation or assessment) in accordance with “the practice generally prevailing at the time.”⁵ Case H covers mistakes in PAYE assessments and calculations where they were made in accordance with “the practice generally prevailing” at the end of 12 months following the tax year for which they were

¹ *Test Claimants in the FII Group Litigation v IRC* (C-446/04) [2006] ECR I-11753; [2007] STC 326; and *Test Claimants in the FII Group Litigation v IRC and HMRC* (C-35/11) [2013] STC 612 (European Court of Justice).

² Reference for a preliminary ruling from Supreme Court of the United Kingdom made on 30 July 2012 *Test Claimants in the Franked Investment Income Group Litigation* (C-362/12). The Advocate General's Opinion in Case C-362/12 was given on September 5, 2013.

³ *Test Claimants in the Franked Investment Income Group Litigation v IRC and another* (*Test Claimants in the Franked Investment Income Group Litigation*) [2012] UKSC 19; [2012] STC 1362 on appeal from the Court of Appeal [2010] EWCA Civ 103; [2010] STC 1251.

⁴ See TMA Sch.1AB para.(9A) inserted by FA 2013 s.231(1).

⁵ TMA Sch.1AB para.(8)(b).

made.⁶ Comparable amendments are made in relation to oil taxation,⁷ the taxation of companies,⁸ and Stamp Duty Land Tax (SDLT).⁹

In short, section 231 FA 2013 makes sure that generally prevailing practice does not trump EU law in relation to an overpayment claim. That surely surprises no-one. Nevertheless, it needed saying. That may be more surprising but the explanation, put forward in the Explanatory Note to clause 228 of the Finance Bill 2013,¹⁰ highlights the different reasoning of the Court of Appeal and the Supreme Court in relation to section 33 TMA, which had a “walk on” part in the *FII Group Litigation*.

Section 33(2A)(a) TMA enabled HMRC to resist an error or mistake claim

“where the return was made on the basis or in accordance with the practice generally prevailing at the time when it was made.”

The Court of Appeal addressed the issue of whether or not this provision could be applied to the claims made in *FII Group Litigation*. It said that, on behalf of HMRC, it was

“... rightly accepted that sub-s (2A)(a) is incompatible with Community law. It would wholly deprive the claimants of any remedy for repayment of taxes paid in breach of Community law as a result of the Revenue’s misunderstanding and misapplication of that law. But he submitted that, properly construed, s33 is compatible with Community law.”¹¹

The Court of Appeal then went on to construe the provision, according to the principle of conforming interpretation, so that it applied “only if and to the extent that the United Kingdom can consistently with its Treaty obligations impose such a restriction.”¹² In the light of this the court was able to conclude that the provisions of section 33(1) TMA provided an exclusive remedy to the claims in question.¹³

In the Supreme Court, Lord Walker also applied the principle of conforming interpretation, but he did not have any enthusiasm for the approach of the Court of Appeal. He thought it probably went against the grain of the legislation. Instead, he concluded that conforming interpretation required section 33 TMA to be construed so that it did not provide an exclusive remedy for the claims in question. Lord Clarke agreed and thought such a construction of section 33 “acte clair”.¹⁴ Lord Sumption also rejected the Court of Appeal’s interpretation of section 33 as an exclusive remedy which could then be made to operate subject to EU law, saying:

⁶ TMA Sch.1AB para.(9).

⁷ FA 2013 s.231(2) amending the Oil Taxation Act 1975 Sch.2.

⁸ FA 2013 s.231(3) amending the FA 1998 Sch.18.

⁹ FA 2013 s.213(4) amending the FA 2003 Sch.10.

¹⁰ HMRC and HM Treasury, *Draft Clauses and Explanatory Notes for Finance Bill 2013* (December 11, 2012), see in particular, para.12, available at: <http://www.hmrc.gov.uk/budget-updates/11dec12/complete-draft-legislation.pdf> [Accessed September 5, 2013].

¹¹ *Test Claimants in the Franked Investment Income Group Litigation*, above fn.3, [2012] STC 1362 at [256].

¹² *Test Claimants in the Franked Investment Income Group Litigation*, above fn.3, [2012] STC 1362 at [261].

¹³ *Test Claimants in the Franked Investment Income Group Litigation*, above fn.3, [2012] STC 1362 at [118] and [119].

¹⁴ See *Test Claimants in the Franked Investment Income Group Litigation*, above fn.3, [2012] STC 1362 at [127].

“... it seems, with respect, eccentric to imply an ambit for section 33 which is inconsistent with EU law and then to torture the express provisions so as to deal with anomalies that but for the implication would never have arisen.”¹⁵

The Court of Appeal’s approach clearly did not survive its examination in the Supreme Court. Both courts, however, had found that legislation, which enabled an error or mistake claim arising out of EU law to be rejected on the ground of generally prevailing practice, was inconsistent with EU law. Furthermore, as we have seen, HMRC had accepted that fact. Unsurprisingly, therefore, the legislature has now stepped in to amend the position relating to reliance on generally prevailing practice in the current regime on recovery of overpaid tax. In doing so, it gives a statutory basis to the practice which HMRC adopted after the Court of Appeal’s judgment. This was set out in *Revenue and Customs Brief 22/10* of June 3, 2010. HMRC had said:

“... if a claim for error or mistake relief or overpayment relief relates to taxes paid in breach of EU law, HMRC will not seek to disallow it on the basis that the tax liability was calculated in accordance with the prevailing practice.”¹⁶

Instead of taxes paid in breach of EU law, the statute refers to tax “charged contrary to EU law”. Tax is so charged where the charge is contrary to:

- “(a) the provisions relating to the free movement of goods, persons, services and capital in Titles II and IV of Part 3 of the Treaty on the Functioning of the European Union, or
- (b) the provisions of any subsequent treaty replacing the provisions mentioned in paragraph (a).”¹⁷

HMRC’s view that what the courts said in relation to error or mistake claims is relevant also to the replacement regime for claims for overpaid tax is, with respect, surely correct. It is also, no doubt, appropriate to ensure that, in a matter of considerable general importance, compliance with EU law is stated clearly in the relevant legislative provisions. There may be at least one issue, however, which remains at large. The fact that section 33 TMA was inconsistent with EU law when read as conferring an exclusive remedy was an important consideration indicating to the Supreme Court that it was not, in fact, an exclusive remedy. It remains to be seen whether rendering Schedule 1AB TMA compliant with EU law will encourage a contention that, unlike section 33 TMA, the Schedule does provide an exclusive remedy.

Section 232

A claim under Schedule 1AB to TMA, for relief for overpaid tax, may arise in two ways. The first of these is that a person has paid an amount by way of income tax or capital gains tax but believes that the tax was not due.¹⁸ The second, is that there has been an assessment, determination

¹⁵ See *Test Claimants in the Franked Investment Income Group Litigation*, above fn.3, [2012] STC 1362 at [205].

¹⁶ HMRC, *Revenue & Customs Brief 22/10* (June 3, 2010), available at: <http://www.hmrc.gov.uk/briefs/company-tax/brief2210.htm> [Accessed September 5, 2013].

¹⁷ See, for example FA 2013 s.231(1) inserting para.(9B)(a) and (b) into TMA Sch.1AB.

¹⁸ TMA Sch.1AB para.1(1)(a).

or direction, that a person is liable to pay tax and that person believes the tax is not due.¹⁹ In both cases, a claim for recovery of overpaid tax may not be made more than four years after the end of the relevant tax year.²⁰ Section 232 FA 2013 ensures that the definition of the “relevant tax year” is now similar for both categories of claim.

Where the amount claimed arises in the first way identified above, and the amount paid, or liable to be paid, is excessive by reason of a mistake in a personal return, a trustee’s return or a partnership return, the relevant tax year is the tax year to which the return, or the first return in question, relates.²¹ Otherwise the relevant tax year is the tax year in which the payment was made.²²

Prior to section 232 FA 2013, where the claim arose in the second way identified above and the person in question believed that the tax is not due, the relevant year was differently defined. It was, simply, the tax year to which the assessment, determination or direction related.²³ There was no reference to the year in which a return was made. By virtue of section 232 FA 2013 that is changed. Now, where the amount liable to be paid is excessive by reason of a mistake in a personal return, a trustee’s return or a partnership return, “the relevant year” is the year to which the return relates. Otherwise, the relevant tax year is the tax year to which the assessment, determination or direction relates.

Comparable provisions are made in respect of oil taxation²⁴ and company taxation,²⁵ though not SDLT. The amendments have effect in relation to any claim made after the end of the six month period beginning with the day on which the Act is passed²⁶. [Ⓞ]

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¹⁹ TMA Sch.1AB para.1(1)(b).

²⁰ TMA Sch.1AB para.3(1).

²¹ TMA Sch.1AB para.3(2)(a).

²² TMA Sch.1AB para.3(2)(b).

²³ TMA Sch.1AB para.3(3).

²⁴ FA 2013 s.232(2).

²⁵ FA 2013 s.232(3).

²⁶ FA 2013 s.232(4).

[Ⓞ] EU law; Limitation periods; Recovery of overpayments; Tax administration