Section 35: group relief

As the Base Erosion and Profit Shifting (BEPS) project shows, it is difficult to impose a national corporation tax on international activity. That is particularly so when activity occurs between cross-border groups of companies or consortia.

The difficulties which arise for tax authorities are heightened when states choose to create a borderless space like an internal market. One Advocate General has noted the extensive litigation before the CJEU over UK group relief.[1] The cases began with *Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*[2] and carry on to *Felixstowe Dock and Railway Co Ltd v HMRC* (*Felixtowe Dock and Railway Co Ltd*).[3] Of course, the UK is far from alone in facing such difficulties. The CJEU judgment in *Groupe Steria SCA v Ministère des finances et des comptes publics*[4] a few weeks ago is the latest confirmation of that.

In *Felixstowe Dock and Railway Co Ltd*,[5] UK resident and incorporated group companies sought to obtain consortium relief for losses surrendered by a UK resident joint venture company. Relief would have been available had the company which linked the group and the consortium been resident in the UK or, if not so resident, had traded in the UK through a permanent establishment.[6] The link company was resident in Luxembourg and did not satisfy these conditions. The CJEU held that refusal of the relief on the ground that the link company was, in effect, established in the wrong Member State infringed the freedom of establishment.

The requirement that a link company be UK resident, or if non-resident, carrying on a trade in the UK through a permanent establishment, that is, "UK related", was addressed by section 12 of and Schedule 6 to the Finance (No.3) Act 2010 (F (No.3) A 2010). Paragraph 4 of Schedule 6 inserted a new paragraph (g) into section 133(1) and (2) of the Corporation Tax Act 2010 (CTA 2010). This required that a link company must be UK related or established in the European Economic Area (EEA). Paragraph 4 also inserted into section 133 CTA 2010 new sub-sections (5) to (8) inclusive. These imposed conditions where a link company was established in the EEA but was not UK related.

[1] See [3] of the Opinion of A.G. Jääskinen of October 24, 2013 in *Felixstowe Dock and Railway Co Ltd v HMRC* (C-80/12) ECLI:EU:C:2013:699, October 24, 2013.
[2] *Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)* (C-264/96) [1998] ECR I-4695.
[3] *Felixstowe Dock and Railway Co Ltd v HMRC* (C-80/12) ECLI:EU:C:2014:200, April 1, 2014.
[4] *Groupe Steria SCA v Ministère des finances et des comptes publics* (C-386/14) Judgment of the Court (Second Chamber) of 2 September 2015. ECLI:EU:C:2015:524.
[5] *Felixstowe Dock and Railway Co Ltd* (C-80/12), above fn.3, ECLI:EU:C:2014:200.
[6] See ICTA 1988 s.402(3A) and (3B), and CTA 2010 s.133(1)(f), s.133(2)(f) and s.134 prior to the amendments made by F (No.3) A 2010 Sch.6, para.4.

The effect of sub-sections (5) to (8) of section 133 CTA 2010 was to require that, where a link company was not UK related, all intermediate companies between the claimant and surrendering companies had to be established in the EEA. As the background note to clause 34, now section 35 of the Finance (No.2) Act 2015 (F (No.2) A 2015), says: "This creates a difference of treatment between UK link companies and those in the EEA or in other jurisdictions." F (No.3) A 2010 had responded to one problem but had created another.

Rather than provide the CJEU with more work, section 35(1)(c) F (No.2) A 2015 now deletes from section 133 CTA 2010 most of the provisions introduced by paragraph 4 of Schedule 6 F (No.3) A 2010. Sub-sections (5) to (8) are removed by section 35(1)(c) F (No.2) A 2015. Section 35(1)(a) and (b) delete paragraph (g) from section 133(1) and (2) CTA 2010. That done, section 35(2)(c) F (No.2) A 2015 is able to remove section 134A CTA 2010 which determines when a company is established in the EEA. This had been inserted by paragraph 5 of Schedule 6 F (No.3) A 2010. Consequential amendments are then contained in section 35(2)(a), (b) and (d) F (No.2) A 2015.

Section 35(3) F (No.2) A 2015 provides that all the amendments made in the section have effect in relation to accounting periods beginning on or after December 10, 2014 when the draft clauses were published. Any who are disadvantaged by the requirements in relation to earlier periods have, no doubt, protected their interests.

It will be apparent that the background note to clause 34, now section 35 F (No.2) A 2015, is correct to say that, as well as removing a difference of treatment, clause 34 simplifies claims for relief. What it does not say, understandably enough perhaps, is that it is removing differences of treatment and complications that were introduced only in 2010.

More broadly, section 35 F (No.2) A 2015 shows in a small way the choices a legislature faces in responding to the demands of globalisation and of an internal market. First, it can narrow reliefs generally. Secondly, it can favour those within the internal market but disadvantage those outside it. Thirdly, it can construct tax rules which contain as few geographical distinctions as possible. By removing the requirement that a link company be UK related or established in the EEA, section 35 F (No.2) A 2015 shows the UK legislature choosing the third option. It would, of course, have been much better had it made that choice in 2010, but better to make it late than never.

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