

Newsalert

EU Direct Tax Group

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The EUDTG is one of PwC's Thought Leadership Initiatives and embedded in the International Tax Services Network. The EUDTG is a pan-European network of EU tax law experts and provides assistance to organizations, companies and private persons to help them to fully benefit from their rights under EU law.

The European Court of Justice on 1/10/09 in case C-569/07 ruled that the 1.5% Stamp Duty Reserve Tax (SDRT) charge levied by the UK upon the issuance of new securities into a clearance service is contrary to EU law.

Upholding Advocate General Mengozzi's opinion (delivered 18/3/09), the ECJ decided in favour of the taxpayer in the case of HSBC Holdings plc and Vidacos Nominees Ltd v HMRC (Case C-569/07). Dismissing HMRC's arguments that the charge was a tax on future transfers rather than on issues, the Court found specifically that the 1.5% SDRT charge on the issue of shares into a clearance service was prohibited under the Capital Duty Directive (69/335/EEC).

HSBC made an offer for CCF SA, a French company, and included a share-for-share alternative with their cash offer. To make that option attractive to French resident shareholders of CCF SA, HSBC obtained a Paris Stock Exchange listing. HSBC was obliged to issue shares into Sicovam SA, the then monopoly French settlement system, via its UK nominee, Vidacos Nominees Ltd. HSBC agreed to pay the c£27m 1.5% SDRT chargeable on Vidacos as nominee/agent of Sicovam SA.

The ECJ held that the 1.5% charge under s96 FA 1986 was in breach of Article 11 of the 1969 Capital Duty Directive, as amended in 1985. Article 11 prohibits any form of taxation on the issuance of shares.

Although the judgment deals only with the issue of shares into a clearance service, the same analysis is considered very likely to apply to the issue of shares into an authorised depository (e.g. US ADRs), which attracts a similar 1.5% SDRT charge under s93 FA 1986.

HMRC have said 1/10/09 that they will stop collecting the 1.5% SDRT under s96 on issue of UK shares into EU clearance services.

Claims for SDRT unlawfully paid within 6 years should normally be possible via the SDRT legislation reclaims procedures. Potentially several £bn-worth of SDRT paid at the 1.5% rate could now be reclaimed.

Claims for SDRT paid unlawfully more than 6 years ago will very likely have to be made via issuing and serving a High Court claim. Following the UK High Court judgment in the FII GLO case, s320 FA 2004, which sought to block claims for tax paid more than 6 years previously under a mistake of law, s320 was held to be unlawful as no transitional period had been given. This judgment is however under appeal in the UK Court of Appeal, the hearing commencing 5/10/09.

Such High Court claims should carry compound interest.

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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.

Craig R Leslie

+ 44 207 212 4287

craig.r.leslie@uk.pwc.com

Peter Cussons

+ 44 207 804 5260

peter.cussons@uk.pwc.com