Neutral Citation Number: [2020] EWHC 2022 (Comm)

Case Nos: CL-2018-000297; CL-2018-000404;
CL-2018-000590; CL-2019-000487

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **16 July 2020**

Before :

Mr Justice Andrew Baker

- -

Between :

Skatteforvaltningen (The Danish Customs and Tax Administration) ("SKAT")	**Claimant**
- and -	
Solo Capital Partners LLP (in special administration) and many others	**Defendants**

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- -

Michael Fealy QC, Sam O'Leary, James Ruddell and KV Krishnaprasad (instructed by **Pinsent Masons LLP**) for the **Claimant**
Alba Brown and **Alasdair Brown** appeared in person
Anthony Mark Patterson appeared in person
David Rosen (General Counsel of **Acupay System LLC (UK Branch)**) appeared with permission of the court for **Acupay**
Andrew Hunter QC and Ben Woolgar (instructed by **Reed Smith LLP**) for **Ms Stratford**
Andrew Onslow QC, David Head QC, Tom De Vecchi and Sophia Dzwig (instructed by **DWF Law LLP)** for the **DWF Defendants**
Ali Malek QC and George McPherson (instructed by **Rosenblatt Limited)** for **ED&F Man**
Charlotte Tan (instructed by **Brown Rudnick LLP)** for the **Edo Barac Defendants**
Marie-Claire O'Kane (instructed by **Kingsley Napley LLP)** for **Goal Taxback**
Fred Hobson (instructed by **Howard Kennedy LLP)** for the **HK Defendants**
Edward Rowntree (instructed by **BAC Law LLP)** for the **Jas Bains Defendants**
Adam Zellick QC and Ian Bergson (instructed by **Reed Smith LLP)** for **Messrs Knott and Hoogewerf**

Patricia Robertson QC and Daniel Edmonds (instructed by **Stewarts Law LLP)** for the **PS/GoC Defendants**
Nigel Jones QC, Lisa Freeman and Laurence Page (instructed by **Meaby & Co Solicitors LLP)** for the **Sanjay Shah Defendants and Ushah Shah**
Emmanuel Sheppard (instructed by **Simons Muirhead & Burton LLP)** for the **Godson, Jain and Fletcher Defendants**
No other Defendant appeared or was represented, but some other Defendants had provided observations in writing for the hearing

Hearing dates: 14, 15, 16 July 2020
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PRELIMINARY ISSUES RULING

Approved Judgment

This is the final, approved transcript of an *ex tempore* judgment given on 16 July 2020. Copies of this version as published may be treated as authentic.

Mr Justice Andrew Baker

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Mr Justice Andrew Baker, Thursday 16 July 2020

1. I have been extremely grateful for all of the contributions during the hearing on the preliminary issues debate. If I may say so in particular I have been delighted to hear directly for the first time from Mr Rosen on behalf of Acupay and Ms Brown, one of the litigants in person, if only to highlight a feature in the case of which I have been well aware throughout, and that is the wide variety of different defendants or defendant groups in the case, the wide variety of types of claim that SKAT makes against different defendants and defendant groups, and the vastly different orders of magnitude involved, in some cases, in the sums being claimed by SKAT against certain defendants in comparison to the sums claimed against certain other defendants.

2. I have taken, and will continue to take, as a guiding principle wherever I can seek to give effect to it that, if we can, we should manage this mammoth litigation in such a way that those defendants or defendant groups who have a more peripheral or minor role to play in the litigation as a whole, but yet for whom the particular claims made against them individually may well still be of very great significance, are able to participate effectively where justice really requires that they separately participate, if they are able to do so, but also either sit out entirely or, at all events, participate more minimally where, in fairness to them and to all the other parties, that would be a satisfactory approach.

3. That means, in particular, although as it happens I apprehend all parties were singing from the same hymn sheet in this regard ultimately, that I have only been happy to contemplate the ordering of one or more preliminary issues where to do so, and bearing in mind the type of trials that those would generate, will not significantly interrupt the general progress of the case otherwise towards a main trial, if there needs to be a main trial, commencing, we hope, in late 2022 or early 2023.

4. I share the slight pessimism, or note of caution, expressed by Mr Jones QC that as a result of the COVID-19 pandemic and other matters, we may be further away from an ability to list a major trial to commence in October 2022 as opposed to, say, January 2023 than we might have hoped six months ago. However, I adhere to the view I expressed to him when we discussed that aspect, namely that the degree to which there may now be some slippage, as compared to what we might have hoped to achieve for the purposes of commencing a major final trial in this case, does not really impact upon the appropriate size or shape of any preliminary issues trial to take. That is to say, specifically, I do not think that the danger of biting off and seeking to chew too much by way of preliminary issues, such as to turn a preliminary issues trial into more of a fully-fledged primary factual trial, trespassing on significant areas of the wider case, causing significant delay to the main trial, is really mitigated by the fact that the start date of the main trial may now be some few months later than we had otherwise hoped.

5. As a broad analysis, as it seems to me, this is a case in which there are seven stages in a full trawl from the start to the end of a determination of all the different types of claims. I am influenced by that in how I structure the direction that I shall now be making about preliminary issues, and it may be that what I am about to say will be of some value

indicatively for the purposes of other questions of trial and case management, for example, how one does ultimately structure a final, main trial.

6. Stage 1, at least potentially, is a question of whether we have a competent claimant at all. That is to say, whether the issues around the nature or status of SKAT that we have started to debate at this hearing in the context of disclosure might be or have been such as to mean that the proceedings were entirely defective and ought to have been thrown out without reference to any other issue. As things stand, it has not proved the case that any party is suggesting that, and nor did anybody suggest that to the extent the questions around the nature or status of SKAT still arise they are apt to be taken separately in a preliminary issues trial; and I agree with that collective assessment. The questions around the nature of SKAT will pop up as and when they pop up, such as already they have popped up in the context of disclosure, and it may be at some much future date aspects of them will pop up again in the context of assessments as to whether the claimant, as named, is able to pursue all of the claims that it is pursuing as a matter of substance, as opposed to some *in limine* complaint about the competence of the process.

7. Stage 2, as it seems to me, is the question whether these are admissible claims in this court. That is, as we have been describing it, the revenue rule issue. It is reflected as issue 65 in the case management list of issues, "*Are any of SKAT's claims barred by the revenue rule and, if so, which claims and why?*"

8. Having reflected carefully on all of the submissions in relation to that issue, it is my view that it is by nature, and suitable for determination as, essentially a strikeout issue. It could have been raised, as it seems to me, by an application to strike out some or all of the causes of action as pleaded, on the basis that they infringe what we may find ourselves calling for shorthand Dicey Rule 3 (by reference to *Dicey, Morris & Collins on the Conflict of Laws*' articulation of the point of law as its Rule 3 (15th Ed., para 5R-019)), or for that matter it might have been competently raised by a strikeout application issued by SKAT seeking to strike out the individual paragraphs in the various defences that have raised the point as an affirmative defence.

9. As it seems to me, it is a significant and it may be an important point, concerning the nature and scope of that rule of law and how it applies to the causes of action alleged by SKAT, but that is the nature of the issue, that is to say an argument of law. Because of the number of parties with an interest, because they have different interests, and because of the range of different causes of action and issues as pleaded that those causes of action generate, it is not but a one or two-day argument; however, I am confident that with, it may have to be, moderately lengthy written outline arguments providing the court with reasonably full citation of authority, and a proper opportunity to pre-read, and discipline as to the timetabling of the oral argument, it will be possible to do that question justice in a four-day argument with two days for pre-reading, and that is what I shall order for the Hilary term 2021, with discussion at an appropriate moment to the extent required of the pre-hearing steps to be taken.

10. As I presently see it, in line with Mr Onslow QC's submissions, I apprehend that all that is going to be required is a process well in advance of whatever is the hearing date that is listed of sequential exchange of the reasonably full written outline arguments that I have just mentioned. I anticipate it may well be appropriate and convenient for that to be structured by way of the DWF Defendants who have taken a lead going first, for any other defendants who wish to provide independently of adopting the DWF Defendants' arguments their own written submissions, an opportunity to do so, and then a responsive written submission from SKAT. We can have a discussion as to whether we leave it there then prior to final, and probably quite brief, skeleton arguments, drawing threads together in advance of the hearing, or whether there should appropriately be some reply round of further written submissions prior to that.

11. Stage 3 in the case as a whole is the question whether, in the various different parts of the case with which the court will ultimately be grappling – be it the so-called Solo model WHT reclaims or the ED&F Man applications or the Donaldson/La Rosa later examples – whether what was being submitted to SKAT were, objectively speaking and technically speaking, valid or, by contrast and as SKAT says invalid, WHT refund claims.

12. The case management list of issues at issue 3 has this as a major issue in the case: "*What was the nature, terms and effect of the alleged transactions that gave rise to the WHT Applications? In particular did such transactions have the effect that the WHT Applicants had the right to reclaim WHT from SKAT?*"

13. As a matter of definition, I occasionally lose track of what definition covers what, but I have in mind that the 'WHT Applications' as defined do not include the 'ED&F Man Applications', but for present purposes that subtlety does not matter. An issue of that sort is fundamental to, and appears to me foundational in respect of, all of SKAT's claims, and to adopt a use of language I used before, at least definitional in relation to all of those claims, across the whole universe of the individual WHT reclaims in respect of which SKAT makes its various allegations in the litigation.

14. At one level, if it were amenable to this, I adhere to the view that as an issue it cries out for preliminary definitive treatment. That would have needed what I might call fully fledged test case treatment, under which, since we have well over 4,000 individual claims ultimately, a sampling process for representative examples, such as will have to happen at some stage in the case if it is proceeding, would need to be done, and one simply posed as a first main trial question whether as a matter of fact and law, they had been good or bad claims.

15. I am persuaded, without going back over the detail of the argument over the first more than a day and a half of this long CMC, that it simply is not realistic or feasible to achieve that. It would involve an artificial attempt, having isolated a few sample examples, to pretend that the full gamut of issues that may bear upon actual validity do not end up bleeding into very significant parts of the main, primary contested facts, such as, in the case of certain defendants, their honesty or dishonesty in relation to the trading or purported trading in which they were involved.

16. There is one exception to that, however, and that is that I am persuaded that the nature of the issues arising in respect of the ED&F Man Applications is sufficiently limited and in certain respects different in kind to, although there are also areas of overlap with, the issues that arise across the litigation more generally, that the validity in fact and law of the claims supported by the ED&F Man tax vouchers, where this is disputed (so that is excluding the Annex E examples, some 80 or so where ED&F Man concedes that they were not valid claims) is susceptible of definitive resolution. If I were not persuaded, as in the event I have been, to direct some preliminary issues concerning the question of validity of WHT reclaims more generally in this case, I would have ordered a standalone preliminary issues trial as between SKAT and ED&F Man on that basis.

17. As it is, and agreeing with Mr Malek QC, as best I can assess it, having the additional element of dealing definitively on the facts with the ED&F Man Applications, though that will require some element of pre-trial engineering and I have no doubt the identification of sample examples, will be capable of sensible inclusion within a single preliminary issues trial. Furthermore, because there is at least a significant degree of overlap in relation to some of the questions of principle that arise, it will be convenient to have that preliminary issues trial, though it is ultimately only between SKAT and ED&F Man, heard together with the issues of principle that I am going to say should be tried by way of preliminary issues across the entire piece.

18. On the litigation more widely, the choice for this Stage 3 has come down to as many as five different options, only the first of which is to rule out entirely the taking of the validity issues, or individual issues concerning validity, separately and first.

    i) The first option is no preliminary issues of any kind, the question of validity across the entire universe of claims, and however that would be managed at trial, being then just a major and foundational element of the causes of action tried at a single monster trial that I have previously described and will continue to describe as the case management option of last resort.

    ii) The second possibility is a set of preliminary issues on individual foundational elements of the ultimate validity question that are apt to be tried early and by reference to either limited or no matters of disputed fact.

    iii) The third option is preliminary issues covering at least that second option, but also addressing in terms, and providing as a result a judgment reaching determinations as to the validity of, individual examples, whether real or assumed, but tried on assumed facts as regards matters that would be contentious at the final trial.

    I have reflected very carefully on the various proposals that have been raised that included examples of that third type of issue. I am not

persuaded that in this complex case any of those will prove other than to have been a treacherous shortcut, in the classic way of preliminary issues tried on only hypothetical facts. That is my view to a sufficient extent, therefore, that although as is reflected in the document I circulated earlier, I have concluded that a set of preliminary issues of the second variety I have just described is viable, sensible and appropriate, the potential value added by trying in addition to examine and determine what I would then actually say as to the validity of some individual examples, but with a whole series of assumptions as to fact built in, is, putting it bluntly, not worth the powder and shot and, put more formally, will gain only a rather marginal additional value that has every prospect of achieving not very much for the parties that they cannot achieve for themselves by working out for themselves what they assess to be the likely answer to any individual cases in the light of the decisions of principle that will be reached by reference to preliminary issues of the second type.

iv) The fourth option would have been preliminary issues on a test case basis, leading to a full and final determination that would be *res judicata* as to the validity or invalidity of the selected individual examples, and as I have already indicated in what I have said so far, I am persuaded by the various submissions that have been made against that idea that it is not possible conveniently to achieve that.

v) Then, fifthly, there would have been the option of preliminary issues, if you like, but which are not so much preliminary issues as, rather, a first phase of the main trial being that what I have here called Stage 3 of the overall analysis of the case is simply taken first, but through to a pause and a time for a final judgment.

For the same reasons as apply in relation to not taking individual examples as test cases, as I presently see it, and sufficiently so for me to grasp the nettle and make a determination about whether to have preliminary issues, it is not conveniently going to be possible to separate out the validity question for final resolution across the piece from questions that I am going to come on to at Stages 4 and 5 of the case overall, at which point we are into the heart of the factual case, the need, for example, for Mr Fealy QC to put his entire case of dishonesty to the principal allegedly dishonest defendants, and that is not therefore something that is feasible or appropriate to take hugely in advance of the main trial and, come what may, the only purpose of a decision now to take at least some issues first and separately is if they can feasibly be taken very significantly in advance of the main trial, and then serve by way of the answers given to them, to use that phrase again, at least a definitional purpose as to what the main trial will have to consider.

19. Just, then, to complete my thinking for the time being on the viability and appropriateness of an option 2-style set of preliminary issues, with a side order of definitive resolution for ED&F Man because it is feasible to do that with ED&F Man, I would add only this, which again harks back to my concept of definitional or foundational issues. Reflecting on the argument and agreeing with at least Mr Jones QC and it may be others who if I go back and re-read the transcript were saying essentially the same thing in different ways, the main points of principle that we have distilled, subject to final drafting work settled by me if it cannot be agreed, as to how a valid WHT claim should or should not work in principle, will lie at the heart of all of the next major elements of the claim analysis. They will go not only to the question in and of itself whether any individual WHT reclaim was a good claim, and therefore whether, for that particular claim, SKAT potentially gets off the starting blocks in terms of its first allegation, which is that it made a payment on that claim which it was not really liable to pay, and where we may then go from there, but, more than that, it seems to me they will be key to any assessment or analysis of:
    - what, if any, representations were made by whom;
    - which, indeed, of the representations as alleged it will be material to consider or pursue at a trial;
    - how, if at all, any representations that were made by any different parties were capable of being rendered false;
    - and then also what will be involved in allegations that individuals with a role to play and who it is said may have some species of responsibility in principle for the implications of representations made, acted carefully, negligently, honestly, dishonestly, or as the case may be, as alleged against various of them.

20. For those reasons, in my judgment it is not merely a matter of having identified, as I am satisfied – and I am grateful to the parties for this – that the parties have identified, a set of major elements that *can* be tested and determined as to the constituent requirements for a valid WHT reclaim, and taking those issues first because we can and we may as well make at least some progress (although I have to say that the case is so huge that I might have been persuaded that if there was no more to it than that, that would be achievement enough to make it worthwhile). It is more than that, for the reasons I have just indicated, namely that I apprehend, and of course one can never gaze perfectly into the crystal ball and be 100% confident of an assessment of this kind, but as best I can assess it, I am tolerably confident that determinations on those issues, to whatever extent they are favourable to SKAT on the one hand or favourable to the defendants on the other hand, or a curate's egg mix of a bit of both, will narrow what then has to be dealt with at the main trial because of their definitional nature, or their contribution to the underlying backdrop of fact and law against which all of the causes of action will fall to be judged.

21. It therefore seems to me it will be of very significant value to the parties and to the court for the parties in the first instance, and then for the court at a final major trial, if there still is one, not to have to carry through everything, through the review of the disclosure, through the identification of the issues that factual witnesses need to address, through the formulation of the questions to be put to experts, through to formulating primary, alternative, second alternative or third alternative arguments, the various different

alternative permutations that may arise based upon the parties' competing cases as to what amounted to a valid or invalid WHT reclaim in the first place.

22. So possibly then expressed at greater length than I had initially anticipated I might, those are my reasons for saying that a preliminary issues trial of what I have called the option 2 variety, but in the case of ED&F Man of the option 4, final determination, variety, is both viable and suitable.

23. Very briefly, then, the remaining stages of the case, none of which gives rise in the event to any serious submission to the court that they might be suited for preliminary issue determination, are:

    i) Stage 4 - representations and duties; what statements made by whom, owing what, if any, duty to SKAT, were made by the submission of WHT reclaims to SKAT, and for these present broad-brush purposes I emphasise that I would include in the concept of duty, a duty not to act fraudulently, so this captures the whole universe of the different types of claim made.

    ii) Stage 5 - breaches of duty, if any, including allegations of deceit and conspiracy where those are made.

    iii) Stage 6 - questions of damages, including causation, contributory negligence and the like.

    iv) Stage 7 - what one might call broadly the follow-on claims: restitution claims, knowing receipt claims, tracing remedies. It is at that Stage 7 that I have well in mind the position in particular of the likes of Ms Brown and her brother, on which Ms Brown addressed me yesterday, and there may be others like them, where (going all the way back to my opening observation) they are alleged to have a liability only in respect of that type of claim, for an amount of money that is several orders of magnitude smaller, albeit it is a substantial amount of money to the individuals involved, and in respect of which there will be a real question we will come back to this afternoon, whether even now we say that those who are only engaged in the litigation for that sort of claim should be treated in some way differently from the general run of the case and the progress that is to be made between now and something like two and a half years' time to get to a first major trial.

24. So, against all that background and for those reasons, my direction is that the revenue rule be taken as a first preliminary issue trial, for four-day argument with two days' pre-reading, in Hilary term next year, and that a set of preliminary issues relating to the question of validity be taken as a second preliminary issues trial. I have suggested, subject to

consideration by the parties, Trinity term or Michaelmas term 2021, and informed as best I can be by all the submissions that have been made, adopting again the approach that I discussed, as it happens principally during the dialogue with Mr Jones QC during his submissions, I am going to take the view, and have taken the view, that the parties can be given and will be given a four to six-week listing, that listing to include reading time. They will make the trial fit that time estimate.

25. If ultimately what I have proposed in the document I have circulated, subject to its being finalised, proves to be biting off more than can be chewed on with that estimate, then what we chew will have to be trimmed; I will not be increasing the trial estimate. (At least that will be the starting point. No doubt somebody will then say one cannot strictly speaking ever say never, and fully and formally tie my hands as to the future exercise of a discretion, but that certainly will be the intention and the starting approach, if there were any suggestion that more time was required.)

26. Conversely, if it should turn out that a finalised version of what I have proposed, once tidied up and once the parties further down the line are on the way to preparing for that trial, will not require as much as the four to six weeks, that will not be an invitation to expand the scope of the trial; that will be an invitation to reduce the time estimate.

27. As to the specifics of the second preliminary issues trial, the parties will have noted the three significant things I have done in the revision overnight to the draft document that I had helped the parties with, which itself was only an attempt to aggregate the parties' own previous drafting, which are these.

28. The first change is that on reflection it seemed to me that the appropriate, logical order for what was originally Mr Fealy QC's issue 5, had become my issue 7 and is now my issue 3, is, as that revised numbering indicates, that that issue 3 comes first. That is to say, is the answer to any of the individual questions around such things as what do we mean by dividend and what do we mean by beneficial ownership and the like, affected by certain things such as a market practice. If so, and where we can sensibly do so, we then deal with the existence or not of that feature that may influence the answer to the other questions on the facts.

29. The second significant change is then at the back end of the document where the parties will see that, reflecting the ruling I have now given, it retains a question but in revised form, so as to be clear that it is a definitive determination question, for the ED&F Man applications, but it loses all questions of determination by reference to assumed facts of the actual question of validity of individual examples (real or hypothetical).

30. The third significant change is then this, that - having again reflected carefully on all of the arguments - I have both:

    i) revised somewhat the sub-questions that are now part of issue 3, and the parties will see that the bridging issue that was in my document of yesterday, 7.4, is not now 3.4 because it is not there at all. It is not there at all because, reflecting further overnight,

and looking back at the DWF Defendants' pleading that gives rise to it, I have come to the view that I was right in the provisional view I was starting to form that it added nothing beyond, in effect, a partial repetition of elements of sub issue 3 and sub-issue 4, and was not helpfully included as a separate item; and

ii) concluded, on that and other thinking, that the "*If so …*" (what are the facts in that regard) question can and should be tried, and that will involve therefore a degree of disputed expert factual enquiry at the preliminary issues trial, under items 1, 2 and 3 - market practice, permission or mandating of market practice at European and global levels, and responses of authorities and regulators.

31. I emphasise, however, that my added wording at what is now issue 3.3 I will wish to be tightened so it is clear that the exclusive focus is on responses that would have been visible to private parties operating in the field and is not to include an exploration of matters subjective to or internal to SKAT or the Kingdom of Denmark.

32. By contrast, I have concluded that matters solely internal to or subjective to SKAT and/or the Kingdom of Denmark would be the realm of asking the "*If so …*" question for what are now issues 3.4 and 3.5, and I was persuaded by Mr Fealy QC's response that it is not appropriate or fair to SKAT to dip our toes into those factual waters when they are factual waters that overlap so heavily with questions relating to reliance, causation, the contributory negligence allegations and other matters, and it will be unfairly awkward for SKAT to try to walk what would then be the tightrope of how much of its case it should bring forward, and whether it was even in a position satisfactorily to bring forward its entire factual case on those areas, merely to deal with the facts on these points if, against its own submissions (as they will be) I conclude that those matters of fact are relevant at all to this question of objective validity, all where, at least as I provisionally apprehend it, there is a real prospect I may be saying SKAT is right about their irrelevance.

Appendix – Draft List of Preliminary Issues Discussed in the Ruling Above

REVISED DRAFT LIST OF ISSUES FOR POSSIBLE TRIAL(S) OF PRELIMINARY ISSUES (July 2020 CMC Ruling)

The 'Revenue Rule'

1. Are any of SKAT's claims, as alleged, inadmissible in this court under the rule of law stated, e.g., as *Dicey Rule 3* (*Dicey, Morris & Collins on the Conflict of Laws*, 15th Ed., para 15R-019). If so, which claims are inadmissible and why?

WHT Reclaim Principles

2. Did the Double Tax Treaties become part of Danish domestic law upon ratification and, if so, (a) did they give rights to private persons to receive refunds of WHT, (b) did they entitle private persons to apply for a refund of WHT independently of section 69B(1) of the WHT Act?[1]

3. Is the answer to any of questions 4 to 8 below affected by:

   3.1 The existence of a market practice during the Relevant Period as alleged by the DWF Defendants?[2] If so, was there a well-established market practice during the Relevant Period as alleged by the DWF Defendants, the Godson, Fletcher and Jain Defendants and the Sanjay Shah Defendants?[3]

   3.2 Whether such market practice was expressly permitted and/or mandated at European and global levels?[4] If so, …?

   3.3 The response of European and Danish tax authorities and regulators to such market practice [*to be 'tightened' to create exclusive focus on responses visible to private parties operating in this field*]?[5] If so, …?

   3.4 Whether and if so to what extent SKAT was aware of such market practice?[6]

   3.5 How SKAT understood the requirements for a valid WHT reclaim application and why it implemented them as it did by the Forms Scheme?[7]

4. What were the requirements of a valid application for the refund of WHT from SKAT between August 2012 and July 2015 (the "**Relevant Period**")?[8] In particular, was it necessary that:

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1 Godson, Fletcher and Jain/7, 38, 86.1
2 DWF Defendants/8, 10, 13, 19.
3 DWF Defendants/8, 10, 13. Godson, Fletcher, Jain/9-24; Sanjay Shah Defendants/15.
4 DWF Defendants/9, 19.
5 DWF Defendants/10-11, 16-17, 19.
6 DWF Defendants/12, 18, 19.
7 DWF Defendants/12, 18, 19.
8 SKAT/7; PS/GOC Defendants/15.1, 15.2.

4.1 the applicant had been liable to taxation pursuant to section 2 of the WHT Act or section 2 of the WHT Act or section 2 of the Danish Corporation Tax Act;

4.2 the applicant had received the dividends;

4.3 tax had been withheld from the dividends received by the applicant pursuant to sections 65-65D of the WHT Act;[9] and

4.4 the tax withheld exceeded the tax due under an applicable double tax treaty?

5. What constituted a "*dividend*" for the purposes of section 69B(1) of the WHT Act during the Relevant Period? In particular:

5.1 In order for a payment to be a "*dividend*", was it necessary for its recipient to have owned shares in the company which made the payment?[10] If so, what is the relevant time at which the recipient must have owned the shares?

5.2 If the answer to the first question in issue 5.1 is in the affirmative, what constituted "*ownership*" for these purposes? In particular:

(a) did a right against a Sub-Custodian[11], in and of itself, constitute ownership of the share?[12];

(b) could there be more shares in circulation at any given point than the number of shares issued by a company?[13]

(c) did the principle "*nemo dat quod non habet*" apply to transactions involving shares?[14] If so, is there a "*Good Faith Purchaser*" exception to the rule as alleged by the Godson, Fletcher and Jain Defendants?[15]

5.3 In order for a payment to be a "*dividend*", was it necessary for its recipient to have received the payment from the company or in a manner that is traceable to the company?[16]

5.4 During the Relevant Period, did Danish law recognise a principle that if the parties to an agreement did not intend to perform it, the agreement would not be effective to convey ownership of property?[17]

6. What were the requirements for relief under the Double Tax Treaties during the Relevant Period? In particular, was it a necessary requirement that:

6.1 the applicant was resident in a Contracting State;

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9 SKAT/7.3, 34; DWF Defendants/22, 67. Godson, Fletcher, Jain/44, 91.2; Sanjay Shah Defendants/8.

10 SKAT/13.1, 14-19, 20-27; DWF Defendants/26, 72.1. Godson, Fletcher, Jain/26, 48; Sanjay Shah Defendants/55.

11 As defined in Sanjay Shah Defendants/18.

12 Sanjay Shah Defendants/18-19; SKAT/15.1, 15.2.

13 Godson, Fletcher, Jain/101.2; SKAT/14.1; Sanjay Shah Defendants/24-25.

14 SKAT/15; Sanjay Shah Defendants/26-27.

15 Godson, Fletcher, Jain/102.2.

16 SKAT/13.2, 30; DWF Defendants/8.4, 8.5, 11, 13.3, 13.6, 17.1, 31.2, 72.2. Sanjay Shah Defendants/55.

17 SKAT/15.5, Sanjay Shah Defendants/31.

6.2 the applicant was the "*beneficial owner*" of dividends paid by a resident of another Contracting State; in particular, was this a requirement under the Denmark-Malaysia Treaty?[18]

6.3 the dividends had been taxed by the Contracting State at a rate that exceeded the rate permitted under the relevant Double Tax Treaty;[19]

6.4 the transactions giving rise to an application for a WHT refund were not created for the sole or main purpose of securing favourable tax treatment under the double tax treaty;[20]

6.5 if the WHT refund applicant was a US pension fund, the pension fund satisfied the requirements of the Denmark-US Treaty?

7. What constituted a "*dividend*" for the purposes of the Double Tax Treaties during the Relevant Period?[21] In particular:

7.1 In order for a payment to be a "*dividend*", was it necessary for its recipient to have owned shares in the company which made the payment?[22] If so, what is the relevant time at which the recipient must have owned the shares?

7.2 In order for a payment to be a "*dividend*", was it necessary for its recipient to have received the payment from the company or in a manner that is traceable to the company?[23]

8. During the Relevant Period, was there a general principle against abusive reliance on double tax treaties and/or a principle that the benefit of Double Tax Treaties was not available to a WHT refund applicant if the sole or main purpose of their participation in the relevant transactions (or the sole or main purpose of the transactions) was to secure a favourable tax position?[24] If so, how was the purpose of their participation or of the transactions to be identified?

ED&F Man Applications

9. In respect of the ED&F Man Applications other than the ED&F Man Applications that were supported by Annex E Tax Vouchers, were ED&F Man rather than the ED&F Man Applicants beneficial owners of the dividends they received?[25]

Mr Justice Andrew Baker

16 July 2020

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18 SKAT/footnote 28; PS/GOC Defendants/11.2, 15.4.2. Godson, Fletcher, Jain/82, 83.

19 4RAPOC 9; Godson, Fletcher, Jain/60, 83.

20 SKAT/39.3; DWF Defendants/101.3; PS/GOC Defendants/15.4.3; ED&F Man/23.3. Sanjay Shah Defendants/66.

21 SKAT/41; DWF Defendants/29-34.

22 SKAT/42.1; DWF Defendants/31, 32.

23 SKAT/42.3, 42.4; DWF Defendants/31, 32.

24 SKAT/39.3, 46.8, 47.6, 48-50; DWF Defendants/20, 110-112; PS/GOC Defendants/15.4.3, 15.6; ED&F Man/28.2, 31-32. Godson, Fletcher, Jain/145; Sanjay Shah Defendants/75.

25 SKAT/47; ED&F Man/30.3.