Neutral Citation Number: [2016] EWHC 279 (Admin)

Case No: CO/5523/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2016

Before :

Mrs Justice Whipple

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Between :

R (on the application of (1) Imperial Chemical Industries Ltd and (2) FCE Bank PLC)	**Claimants**
- and -	
(1) Her Majesty's Treasury **(2) The Commissioners for Her Majesty's Revenue and Customs**	**Defendants**

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Daniel Margolin QC (instructed by **Joseph Hage Aaronson LLP**) for the **Claimants**
Elizabeth Wilson, **Andrew Macnab and Aparna Nathan** (instructed by **The General Counsel and Solicitor to HM Revenue and Customs**) for the **Defendants**

Hearing date: 3 February 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mrs Justice Whipple

Mrs Justice Whipple:

Introduction:

1. The Claimants apply for permission to bring a judicial review of the Treasury and HM Commissioners for Revenue and Customs (the "Commissioners"). The Claim Form was lodged on 11 November 2015 and was issued the next day. By it the Claimants seek judicial review of the Restitution Interest Tax Provisions ("RITP") which were brought into effect from 26 October 2015 by a resolution laid on 23 October 2015 under the Provisional Collection of Taxes Act 1968. The provisions are contained in Part 8C of the Corporation Tax Act 2010, as amended by the Finance (No 2) Act 2015.

2. This claim arises against a background of the Franked Investment Income Group Litigation Order ("FII GLO"), litigation which has been on foot since October 2003, commenced in the Chancery Division of the High Court, and which is not yet concluded finally. That litigation is helpfully summarised by Henderson J at paragraphs 1-3 of "*FII (HC 2)*" in 2014, [2014] EWHC 4302 (Ch), [2015] STC 1471. I shall not repeat the details of it here.

3. Both of the Claimants in this judicial review are parties to the FII GLO. Each of them has received an interim payment of restitution interest reflecting the taxpayers' success to date in the FII GLO. The First Claimant ("ICI") received £22 million in 2009, the Second Claimant ("FCE") received £41 million in 2015. Both Claimants recognised these payments in their accounts for the years ending 31 December 2009, in the case of ICI, and 31 December 2014, in the case of FCE (with such caveats as were considered necessary from an accounting perspective to reflect the provisional nature of the receipts). Both accounted for tax on the payments on the basis of the tax legislation prevailing at the time of receipt.

The legislation:

4. It is not necessary for present purposes to detail the RITP. It is sufficient that I note the key features, in summary:

    a) The RITP provide for corporation tax at 45% on restitution interest, which is interest defined by reference to a number of conditions. There are no reliefs or set-offs against this tax.

    b) Condition (A) is that the interest is paid or payable in respect of a claim by a taxpayer for restitution on grounds of a mistake of law relating to a taxation matter or the unlawful collection of tax.

    c) Condition (B) is that the court has made a final determination that the Commissioners are liable to pay the interest, or have entered into a final settlement of the claim under which the taxpayer company is entitled to interest.

    d) Condition (C) is that the interest is not simple interest at a statutory rate.

e) On making a payment of interest which meets certain other conditions a deduction must be made on account of the tax. The amounts withheld in this way are to be treated as paid by the taxpayer on account of its liability to corporation tax on the interest payment as restitution interest. A notice must accompany the payment showing the gross amount of the payment and the amount withheld on account of tax.

f) The Commissioners can assess amounts chargeable to tax under the RITP in which event the company must pay the amount assessed within 30 days.

g) There is a right of appeal against any assessment or withholding to the First Tier Tribunal (Tax Chamber) (the "FTT").

5. The effect of these provisions is to impose a tax on compound interest payments paid by the Commissioners, which becomes due at the point that (and only if) the court finally determines compound interest to be payable by the Commissioners or any final settlement to that effect is reached. The collection mechanism will depend on the date of payment of the interest. If payments (on account or final) are made following the introduction of the RITP, they will be subject to a withholding. If payments have been made on account before the introduction of the RITP, they will be subject to an assessment.

The Claimants' circumstances

6. ICI was paid compound interest by way of interim payment (in 2009). FCE was paid compound interest following the FII Quantification Trial (in 2014): [2014] EWHC 4302 (Ch), [2015] STC 1472. But the FII litigation is not yet concluded (and is unlikely to be concluded, finally, for some years yet). In consequence, both Claimants are potentially liable to pay tax under the RITP, if the FII GLO is finally resolved in the taxpayers' favour. Neither Claimant has received an assessment to the tax, and in consequence neither has a right of appeal to the FTT in relation to this potential liability to tax. However, to complete the picture, I am told that ICI has recently received or is shortly to receive a further payment in relation to compound interest under the FII GLO, which payment will be subject to withholding, and in relation to which ICI will have a right of appeal to the FTT.

The chronology of litigation

7. The Claimants lodged a Claim Form on 11 November 2015. The following 5 propositions are advanced at [2.7] of the Grounds:

1) The Restitution Interest Tax Provisions violate the UK's obligations under EU law to provide the Claimants with an adequate and effective remedy in respect of taxes unlawfully levied contrary to the principle of effectiveness and Article 47(1) CFREU.

2) They also contravene the established EU law and ECHR law principles of legal certainty, non-retroactivity and the protection of legitimate expectations.

3) By seeking to reverse the effect of final judicial rulings as to the appropriate and necessary remedy, the Restitution Interest Tax Provisions constitute an unjustified interference by the State in judicial proceedings contrary to general principles of EU law and ECHR law, including the rule of law and the requirement of separation of powers, and contrary to Article 6 ECHR and Article 47(2) CFREU.

4) The Restitution Interest Tax Provisions are contrary to Article 1 of Protocol 1 to the ECHR ("**A1P1**") and Article 17 CFREU.

5) The Restitution Interest Tax Provisions are discriminatory and contravene Article 14 ECHR."

8. Those grounds are expanded at [8.3] – [8.42].

9. Relief of various sorts is sought, but the Claimants' main focus is on declaratory relief, to the effect that the RITP are unlawful, being incompatible with EU law and/or the Convention. So far as the Convention grounds are concerned, the Claimants seek a declaration of incompatibility. It is also suggested that any doubt in EU law should be resolved by a reference to the Court of Justice of the European Union.

10. In addition to substantive relief, the Claimants sought interim relief by means of a stay of the RITP pending the outcome of this judicial review.

11. When they issued their Claim Form, the Claimants also sought expedition in the form of consideration of the Claim within 7 days of lodging, abridgment of time for the Commissioners to lodge their Acknowledgement of Service to 3 days (from the standard 21 days), that the application for interim relief should be considered by the Court within 21 days, that permission should be considered by the Court within 21 days, and if granted, that the judicial review should be disposed of on or before 31 January 2016. It was said that the urgency was consequent on

> ".. the immediate and continuing prejudicial impact of the [RITP] on the Claimants' business and affairs and the conduct of their claims in the FII GLO …. In short, the unique prospect, if the [RITP] are lawful, of a tax charge potentially arising at an uncertain date in the future but then being backdated to an accounting period in the past gives rise to serious accounting issues and may cause severe commercial and reporting difficulties." (cf [7] of the Reasons for Urgency on the Form N463).

12. Simler J made no order on the application for expedition when she reviewed the papers on 18 November 2015, and permitted the Defendants the usual period of 21 days to submit their Acknowledgement of Service, following which she directed that

the papers were to be put before a Judge as soon as possible to consider permission. The Defendants lodged their Acknowledgement of Service on 2 December 2015.

13. In answer, the Claimants lodged a supplemental note (plus a further ring binder of evidence) on 4 December 2015.

14. The matter came before me on the papers on 22 December 2015. By this stage, there were around 5 lever arch files of authorities lodged, together with a similar number of files of documents. Meanwhile the Claimants' solicitors had corresponded extensively with the Court on expedition and other things; those letters had been answered by the Commissioners' representatives, and where required by the Court itself.

15. I made no order on the Claimants' application for expedition and ordered the application for permission to be adjourned to an oral hearing for one day, with directions, saying that this would meet the asserted urgency of the claim. I was unable to determine the issue of permission on paper because the Defendants had identified two preliminary issues, namely prematurity and forum, which the Claimants had not answered (or not fully answered). Meanwhile, the Commissioners had not answered the point made in the Claimants' supplemental note, that there was no other forum available to the Claimants. These issues were plainly relevant to permission.

16. In advance of that hearing, and in compliance with my directions, each party filed a skeleton argument (Claimants' dated 19 January 2016, Defendants' dated 26 January 2016). The Claimants filed a reply to the Commissioners' skeleton dated 1 February 2016, and two more bundles of authorities. The Commissioners filed a Supplemental Skeleton dated 2 February 2016 (the day before the hearing, which was fixed for 3 February 2016) which attached a copy of the judgment of Henderson J dated 2 February 2016 in *Six Continents Ltd v CIR and HMRC* [2016] EWHC 169 (Ch).

Appropriate Forum

17. It became apparent to me on reviewing the skeleton arguments prepared by each party in advance of this hearing that there were a number of proceedings running in parallel with this claim, in other jurisdictions, in which similar (if not identical) issues arose as to the validity of the RITP. This raised an obvious question in my mind about the appropriate case management of this claim.

18. At paragraph 1.3 of his skeleton for the Claimants, Mr Margolin QC for the Claimants listed the various proceedings in which lawfulness of the RITP has been raised:

    a) Judicial review proceedings brought by The Prudential Assurance Co Ltd ("Prudential") under reference CO/6183/2015.

    b) Gross payment applications issued by British American Tobacco (or companies in the BAT group, collectively referred to as "BAT") and 8 other members of the FII GLO in the Chancery Division seeking payment of their judgment debts gross of the 45% withholding.

    c) Appeal by BAT (or companies in the BAT group) to the FTT, proceeding under consolidated tribunal reference TC/2015/06960,

lodged on 1 December 2015 (the "BAT FTT appeal"). BAT challenges the withholding under RITP from a payment of interest.

d) An application made by Six Continents Ltd and other companies in its group to amend its pleadings in a case due for trial in the Chancery Division in May 2016. (This is the application on which Henderson J has now given judgment – see above.)

19. The same legal team represents Prudential (in a. above), and BAT in its appeal to the FTT (c. above). The same solicitor but different counsel represents Six Continents (d. above). I do not know about representation of BAT (in b. above).

20. The Defendants' skeleton also noted the existence of parallel proceedings, and specifically referred to the BAT FTT appeal, attaching case management directions in that appeal made by Judge Roger Berner on 7 December 2015. Judge Berner had declined expedition of the BAT FTT appeal (having been asked by BAT to expedite, for similar reasons as have been advanced for expedition in this claim) but had issued directions. The Defendants told me that a case management hearing in front of Judge Berner is scheduled for 4 March 2016, by which time pleadings will be closed and lists of documents will have been exchanged.

21. I should record that the Commissioners had made a passing reference to the existence of parallel proceedings in their Acknowledgement of Service, and had referred to Judge Berner's refusal of expedition in the BAT FTT appeal, in a letter dated 8 December 2015 to the Court resisting the Claimants' request for expedition in this judicial review. But the existence or intended issue of parallel proceedings, in which similar challenges to the lawfulness of the RITP were being or would be raised, was not explained or noted by the Claimants in their pleadings or applications to this Court, or in any correspondence with the Court, until their skeleton argument arrived on 19 January 2016. This was obviously an important matter, and indeed became the central issue at the hearing before me. In keeping with their duty of candour, I believe that the Claimants should have informed the Court that the issues of law raised in this judicial review were being argued in other cases also, or were going to be raised in other cases, as soon as the Claimants (or their representatives) became aware of that fact. The existence of parallel proceedings would doubtless have been important when considering how best to manage this judicial review.

22. At the outset of this hearing, I raised with Mr Margolin the potential difficulties in having multiple proceedings running concurrently in different jurisdictions, all covering substantially the same ground. I did so on the basis that, for the purposes of argument, we could put the permission issues aside and concentrate on this issue of case management. The difficulties I had in mind are so obvious that they hardly need to be described: the risk of inconsistent conclusions on the law being reached; the potential duplication of time, effort and cost; and the inefficient use of public resources (namely the Courts and tribunals required to adjudicate this matter in each set of proceedings, and the Defendants' legal resources, noting that the Commissioners would have to respond to every claim). Mr Margolin accepted that one jurisdiction only should "*ideally*" address the central issue of law. When pressed on which was the appropriate jurisdiction, he advanced the following five reasons in support of his expressed preference that, if one jurisdiction had to be appointed for the lead case, it should be the Administrative Court:

1) All of the issues including retrospectivity and legal certainty will arise in these proceedings, whereas that cannot be said the other way around. The BAT FTT appeal would only be a subset of these claims. As an adjunct to this point, he argued that Prudential's claim (a. above) should be consolidated with these claims and heard in the Administrative Court, because Prudential's tax position, absent the RITP, was very different from the Claimants', and the Court would have a better view of the issues by inclusion of another case on different facts.

2) No Declaration of Incompatibility is available in the FTT, and the remedies available in this Court are more apt to the issues raised.

3) There is an additional procedural difficulty in the BAT FTT appeal because there is a preliminary issue in that appeal relating to the validity of the notice served by the Commissioners on BAT, which BAT argues is defective. If BAT was to succeed on that point, then the FTT might decline to address the legal submissions; or if they did, then any reasoning given would be *obiter*. By proceeding in the Administrative Court, the parties could focus efforts on the core issues of lawfulness.

4) The Administrative Court is preferable, being a court of record. Any FTT decision would have to be appealed to the Upper Tribunal ("UT") if it was to have any binding effect on other cases.

5) This case has the "feel" of a judicial review rather than an appeal, because the attack is a root and branch attack on the structure of the tax.

23. Miss Wilson for the Defendants resisted the proposition that the appropriate forum was this Court. She pressed her case that the FTT should address these issues, as the specialist tribunal, currently seised of a tax appeal brought by BAT, which concerns a "real" withholding. This would avoid a hypothetical claim being brought in this Court.

24. I agree with the Defendants that the appropriate forum is the FTT, for the following reasons.

25. First, this issue is already before the FTT in the BAT appeals, and the FTT has already taken steps to progress those appeals. The BAT appeals are further advanced than this claim, where permission has yet to be granted, and where the Commissioners have yet to file their Detailed Grounds and supporting evidence (assuming permission was granted).

26. Secondly, having spent a little time myself comparing the pleadings in the FTT BAT appeal with the Grounds in this judicial review, it appears that the Claimants' grounds ([8.3] – [8.42] specifically) are a precise, verbatim match of the grounds attached to BAT's notices of appeal in the FTT. Thus, the issue of law advanced in this claim mirrors precisely the case advanced by BAT in the FTT. The remedies sought in the FTT differ - necessarily so, because the FTT does not have available to it the same

remedies as this Court; but on the other hand, if the FTT finds in BAT's favour on the validity of the RITP, it will allow BAT's appeal on that basis, which is in effect the same outcome as the Claimants seek in this forum by declaratory relief.

27. Thirdly, there are real advantages in the FTT examining the challenge to the RITP in the BAT appeal, rather than the Administrative Court performing a similar exercise in this claim. That is because (a) BAT's appeal against a withholding is an appeal against a withholding actually made, so that the FTT can consider whether BAT's fundamental rights (in EU or Convention law) have been infringed or would be infringed but for a compliant meaning being accorded to the legislation by a *Marleasing* process of construction. Any evidence required, or arguments advanced, will be tailored to the specific facts. By contrast, the Claimants' case is hypothetical because there is no withholding or assessment yet in existence. As a general proposition, I would think it more effective to test arguments, so far as possible, against actual rather than hypothetical facts. (b) The FTT is a specialist tax tribunal, with knowledge of the background issues giving rise to the appeal (within the FII GLO), and the wider arguments about compound interest. That familiarity will assist in the efficient disposal of this appeal.

28. Fourthly, I consider there are disadvantages in the Administrative Court considering this challenge to the RITP in advance of (or in preference to) the FTT. The main reasons for reaching this conclusion are: (a) the legal challenge to the RITP is just one aspect of this claim. This court would also have to address the Defendants' arguments based on the prematurity of this claim, the availability of an alternative remedy in due course in the FTT, and the consequent lack of jurisdiction for this Court to hear the claim. These are difficult issues, which will take time and careful analysis to resolve. Those issues do not arise in the FTT. (b) If the Commissioners were correct in their arguments on those threshold issues, then this Court would itself, possibly, never get to the more fundamental issue of law raised by the Claimants.

29. Fifthly, a point related to the fourth point, is that expert accountancy evidence is likely to be required to deal with the prejudice / standing issues raised on the judicial review (and which remain at the heart of the Claimants' cases, notwithstanding the Commissioners' agreement on the reasonableness of the accounting approach adopted by the Claimants). Such evidence is not necessary in the FTT, because that issue does not arise.

30. Sixthly, if this judicial review was to go ahead, it is unclear what would then happen to the BAT FTT appeal. I am told that there is no application to adjourn that appeal currently before the FTT. BAT is not party to this judicial review. If adjournment of the BAT FTT appeal is now suggested, BAT may legitimately answer that its FTT appeal should go ahead regardless of this judicial review, given that it concerns a withholding which has already been made and certainty is required in its case. If so, where does that leave us?

31. I note that Henderson J refused the Claimants' application to amend pleadings to include a challenge to the lawfulness of the RITP in *Six Continents*. He concluded that the FTT was the appropriate forum for that challenge. I believe my conclusion is consistent with his.

32. In response to Mr Margolin's five points, I adopt the Commissioners' answers, and to the extent not already stated, I add further conclusions of my own (adopting the same order):

1) As currently pleaded, BAT's appeal grounds are identical to the grounds advanced in this judicial review. It is right to say that BAT is challenging a withholding, which is not true of the Claimants. It may be that BAT's arguments on retrospectivity will take a slightly different shape in light of the different facts in BAT's case, but retrospectivity is certainly part of BAT's case on appeal, and Ms Wilson is right to say that retrospectivity remains an argument even in the context of a withholding (because the interest does not become restitution interest, as defined in the statute, unless and until the FII GLO is finalised). I therefore reject the proposition that the BAT FTT appeal is a "sub-set" of the Claimants' case. Rather, I conclude that the two cases are materially similar, at least so far as they relate to the headline issue of lawfulness of the RITP. Some aspects of the underlying facts of each case may differ, and that may become relevant in due course, but it is premature to descend to the minutiae of each case on its own facts while the central issue of law remains unexamined. Mr Margolin's proposition that Prudential's judicial review should be joined with this one, because Prudential's facts are different, serves to underline my point.

2) It is right to say that BAT's remedy in the FTT is different to the remedies sought on the judicial review. But I do not consider that to be a difference of any materiality, for reasons outlined above.

3) The fact that BAT raises an issue about the validity of the notice issued pursuant to the RITP does not justify proceeding in the Administrative Court, for a number of reasons. (i) the FTT will undoubtedly consider the substantive issue of legality, alongside any technical argument about the validity of the notice, both points being raised on the pleadings in the BAT FTT appeal. (ii) The fact that the FTT's conclusions on legality could be *obiter* is speculative and probably unimportant given the likelihood of an appeal by the unsuccessful party to the UT and beyond. (iii) If the notice issue really is a problem (which I doubt), then ICI will shortly be able to issue an appeal against the withholding in its case, and I trust that the Commissioners will produce a notice for ICI which is, on any view, compliant with the legislation. So there is another appeal in the offing which does not have the problem which the Claimants identify with the BAT appeal, and the problem can, if necessary, be cured in that way.

4) I fail to see that the FTT's status as an appeal tribunal, not a court of record, makes any real difference to the choice of forum. It is very likely there will be an appeal from the FTT to the UT, and possibly beyond, in any event.

5) I disagree that this case has the "feel" of a judicial review. I conclude that these challenges are well suited to the specialist jurisdiction of the FTT.

33. In summary, the FTT is the appropriate forum for the issues on legality of the RITP to be determined, at least in the first instance.

Case Management

34. Having decided that the FTT is the appropriate forum, I must decide what to do with this judicial review, specifically, whether this claim should be stayed or dismissed outright. On balance, I consider that it is appropriate to stay this claim, pending the outcome of BAT's appeal in the FTT, or until further order. The parties to this claim are not parties to the BAT FTT appeal and have no control over it. It may be that the Claimants need to come back to Court for further directions, depending on what happens in the FTT. Further, prematurity would inevitably be the basis for any dismissal of the claim at this point, and I decline to express any view on the merits of that argument and related points at present: see below.

35. As to permission, I conclude that this claim should be stayed in advance of any decision on permission. If permission was refused, that would bring an end to the claim forthwith, which I do not consider to be the right outcome now (see preceding paragraph). But if I grant permission and then stay the claim (assuming for argument's sake that I am satisfied that the Claimants' case is arguable), that would put this claim on track for a substantive hearing at the point that the stay is lifted, which may be inappropriate, because the FTT will by then have clarified the law and may have shown the lawfulness argument to be without merit. Therefore, this Court should review the arguability of the Claimants' case when the stay is lifted, if the Claimants wish to persist in the judicial review at that point.

36. I have not so far touched on the Defendants' alternative remedy point, which is closely allied with their prematurity and jurisdiction points. This involves an analysis of a number of cases on the jurisdiction of this Court and the FTT. The Defendants' arguments are answered by the Claimants' evidence on prejudice (which the Claimants rely on to demonstrate standing, which they say defeats the Defendants' points about alternative remedy, prematurity and jurisdiction). At the heart of this debate there is, I believe, a difficult and probably new argument about whether a taxpayer can be said to have an "alternative remedy" in circumstances where that taxpayer will undoubtedly have a right of appeal to the FTT in due course if the tax is imposed, but because that point has not been reached, the taxpayer has no right of appeal now. Given my decision to stay this case forthwith and without deciding permission, I do not need to consider these issues which remain open to the parties to argue afresh should this case come to life again, after the FTT appeal. I recognise the irony: these were the very points on which I directed written submissions, in order to enable the issue of permission to be resolved at this hearing. But events have supervened, and it is now apparent that there is a different issue which mandates a stay.

37. I come back to the Claimants' application for expedition. It is now clear that the Claimants' claim is one part of a concerted challenge, likely to involve many taxpayers, seeking to displace the RITP. It is inevitable that there will be appeals to

higher courts and tribunals before the challenge is settled. Expedition is not appropriate, given the likely timeframe of this challenge, and given the imposition of a stay of this claim. I dismiss the application for expedition.

38. I turn to the Claimants' application for interim relief. The Claimants are not currently subject to any withholding or assessment, and I doubt that there is anything to enjoin. But given the imposition of a stay, and the likely timeframe to resolution of the legal issues which are raised in this claim, interim relief as sought - to hold the ring until a substantive hearing - is not appropriate. I dismiss the application for interim relief.

Conclusion

39. I stay this claim pending the outcome of the BAT appeal in the FTT or until further order. I make no order on the application for permission. I dismiss the applications for expedition and interim relief.

40. I would invite the parties to liaise in the event that any of them wishes in the future to make an application to continue or lift the stay, or for any other purpose. A united approach, or if not united, an approach which takes account of the other party or parties' objections, is likely to be the most helpful to the Court.

41. Prudential is not a party to this claim, but it may wish to consider agreeing a similar stay in its claim.