

# £1 BILLION AT STAKE

## Taxpayer wins compound interest on overpaid VAT

The High Court (Henderson J) handed down its decision on 28 March 2014 awarding the mail order and retail company, Littlewoods Retail Limited, **compound interest** on sums of overpaid VAT that had originally been reimbursed to it by HMRC with simple interest. *Littlewoods'* claim is estimated at in excess of £1 billion, representing interest on repaid sums going back many decades. *Littlewoods* are by no means alone in this matter and thousands of similar claimants have had their claims stood behind this main action. Several hundred such claimants are represented by DLA Piper UK LLP.

### THE JUDGMENT

The judgment, described by Henderson J himself as "a long and twisted journey", has culminated in a comprehensive defeat for HMRC, who it must be said used every conceivable defence to the claim.

It was many years ago that the House of Lords in *Sempra Metals Ltd v Commissioners of Inland Revenue* determined that compound interest was an adequate indemnity under EU law. That case involved mistaken repayment of Advance Corporation Tax. So, those who have justifiably put in claims for compound interest on overpaid VAT have no doubt been somewhat perplexed by the tortuous court processes (including a referral to the Court of Justice of the

European Union ("CJEU")), that has eventually determined compound interest as payable on VAT.

Henderson J's judgment reads like a textbook, extending to 450 paragraphs, setting out in detail each step of the journey and thankfully providing user-friendly conclusions at each stage. The main points for those who have followed the case are as follows:

- HMRC had tried to re-open the debate about the underlying VAT liability which had led to *Littlewoods'* repayment. They maintained that the underlying VAT liability should be re-visited because of subsequent case law; essentially, this might have extinguished the interest claim altogether. However, Henderson J said that to do so would clearly amount to an abuse of process since resiling from previous determinations on VAT would be unjust to the taxpayer.
- On the substantive issue, he held that the question of interest and the disapplication of the UK statutory provision for interest under section 78 Value Added Tax Act 1994 ("VATA") were matters of EU law. Section 78 provides for interest on overpaid VAT and such interest is calculated on a simple basis by regulations.
- Interest was repayable under EU law when unlawful levies were to be reimbursed to the taxpayer.

- The CJEU itself had previously accepted (although curiously not in *Littlewoods'* preceding reference) that the calculation of interest should not lead to depriving the taxpayer of adequate compensation for the loss sustained through the undue payment of the tax.
- In the present instance, the CJEU had left it to the national court to determine the level of interest. This is despite the CJEU having already established in the case of *Marshall v Southampton and South West Hampshire Health Authority* that financial compensation should be "adequate" to make good "in full" the loss and damage actually sustained by a claimant (although *Marshall* itself was not about compound interest).
- The critical point of the judgment is that the right to interest is now derived from, and protected by, EU law in the same way as the right to repayment of unlawful tax. The loss that must be indemnified is the loss of the use value of the money overpaid; the only way to provide the taxpayer with adequate compensation for the lost use of his money will be by an award of compound interest.

The court went on to disapply s78 VATA since it could not be construed comfortably with EU law. This meant that claimants should be allowed to pursue their claims.

## HOW DOES THIS AFFECT YOU?

Those who have lodged claims in the High Court for compound interest on overpaid VAT will have had their appeals held in abeyance pending the outcome of *Littlewoods*. It should be appreciated that this is a first instance decision and while it makes conclusive findings on the law it is not yet determinative of all other claims before the courts. HMRC however are very much on the back foot. They will inevitably appeal to the Court of Appeal, but the outcome of that appeal will be law, which if it goes against HMRC will be precedent for all claimants.

HMRC are very unlikely to drop right now their defence to all claims presently before the High Court. All interested parties will have to await the outcome of the Court of Appeal's decision. However, if the Court of Appeal uphold the present judgment, each claimant will want to actively pursue their claims.

## THE LOSS TO THE TREASURY

If HMRC lose, is estimated at several billion pounds. DLA will update all tax paers with the outcome of the Court of Appeal's decision and then advise on next steps.

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