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Practice Group:
Tax

Stamp Duty Reserve Tax on Issue of Shares for Depository Receipts Held to Have Been Wrongly Levied

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Following the recent First-tier Tribunal decision in *HSBC Holdings PLC and The Bank of New York Mellon Corporation v HMRC [2012] UKFTT 163 (TC)* HMRC have accepted that the levy of a 1.5% Stamp Duty Reserve Tax (“SDRT”) charge on a company raising capital to the extent that it issues shares represented by depository receipts including American Depository Receipts (“ADRs”) is contrary to EU law. The Tribunal held that SDRT cannot be charged on the issue of depository receipts where this is connected with the raising of capital by an EU company, regardless of the location of the depository. HMRC have now announced that they will not be appealing against the First-tier Tribunal decision and therefore repayment claims can be made for SDRT paid on issues of shares to depository receipt issuers and clearance services.

The EU Capital Duty Directive restricts the duties and taxes which can be imposed on a company when it issues share capital. HMRC argued in *HSBC* that the SDRT charge was not a levy on capital raising but a charge on the transfer to the Bank of New York Mellon. The Tribunal held that the transfer of shares to the Bank of New York Mellon was integral to the raising of new capital. Consequently, the 1.5% tax levied on the transfer did therefore amount to a tax on the issue of *HSBC* shares which is incompatible with the EU Capital Duty Directive. It also confirmed that the Capital Duty Directive applies to issuers in the EU irrespective of the location of investors.

The practical effect of this is twofold:

HMRC will no longer seek to impose 1.5% SDRT on issues of UK shares to depositories receipt issuers and clearance services outside the EU. Although they still maintain that stamp duty and SDRT **applies to transfers** of shares and securities to depository receipt systems or clearance services that are not an integral part of an issue of share capital.

- HMRC will look to repay SDRT paid in respect of issues of shares in a UK-incorporated company to a depository receipt issuer or clearance service on receipt of a claim. They will also pay interest, calculated from when the SDRT was paid, on overpaid SDRT if the amount to be refunded is at least £25.
- HMRC have stated that claims must be made within four years of the later of date on which the SDRT was paid and the date on which the accountable person must account for SDRT. However if you have paid SDRT outside of this period under similar circumstances please contact us as claims outside of this period may still be valid.

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