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particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.'

The task of the ECHR towards the national courts in the Member States is not that of an extra court of appeal with a *full* review against decisions of these national courts to refuse to refer preliminary questions to the CJ.

The task of the ECHR is, on the basis of the 'fair trail' principle as formulated in Article 6 of the European Convention for the Protection of Human Rights, merely to conduct a *limited* review on the *comprehensibility* of the refusal of a national court to refer preliminary questions to the CJ (*cf.* paragraph 67). In its decision, a national court has to substantiate the exception to the main rule that a national court has to refer preliminary questions when 'a question of community law is raised before it' (*cf.* paragraph 21 of the *Cilfit* case cited above, hereafter referred to as the 'rule').

The rule is restricted to the *highest* national courts of the EU Member States. In tax matters, this rule is further restricted because in tax procedures, only tax fines fall within the scope of Article 6 of the European Convention for the Protection of Human Rights. Nevertheless, the *lack of motivation or the incomprehensibility* of the refusal of the highest national court to refer preliminary questions in a tax penalty procedure can be 'appealed' before the European Court of Human Rights in Strasbourg.

Edwin Thomas

DIRECT TAXATION, CASE LAW

2 FCE Bank PLC. Group relief in reliance on a provision in a Double Taxation Convention. Court of Appeal (comments by Last)

FCE Bank plc ('FCE') is a company resident in the UK. It is a subsidiary of Ford Motor Company ('FMC'), a company resident in the USA. FCE made a claim for group relief for the accounting period ending 31 December 1994 for trading losses made by Ford Motor Company Limited ('FMCL'), a company resident in the UK and also owned and controlled by FMC. The claim was refused by Her Majesty's Revenue and Customs ('HMRC') on the basis that FCE and FCML were not members of the same group (as defined in the relevant legislation) because the claimant and surrendering companies had no common parent which was resident in the UK.

The taxpayers argued that the non-discrimination article in the US/UK double taxation treaty 1975 (Double Taxation Relief (Taxes on Income) (the United States of America) Order 1980) (the 'Treaty') meant that group relief should be available in the circumstances because such discrimination was prohibited by the non-discrimination article in the Treaty.

On the other hand, HMRC, who had appealed a prior unfavourable decision in the Upper Tribunal, argued that the ground for the difference in treatment was not based on the residence of FMC but because that company was not subject to corporation tax in the UK.

The Court of Appeal in England and Wales found in favour of the taxpayer (The Commissioners for Her Majesty's Revenue and Customs v FCE Bank plc [2012] EWCA Civ 1290; [2012] BTC 462), ruling that the difference in treatment was by virtue of the fact that FMC is a US resident company rather than because the company was not subject to UK corporation tax and accordingly, dismissed the appeal by HMRC. The Court of Appeal accordingly held that the taxpayers could rely on the non-discrimination article in the Treaty.

Court of Appeal, 17 October 2012, no. A3/2011/3302

In the Court of Appeal (civil division)

ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Mr Justice Henderson and Mr Julian Ghosh QC
Appeal No: FTC/50/10
Royal Courts of Justice

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Strand, London, WC2A 2LL
Date: 17/10/2012
Before :
LORD JUSTICE PILL
LORD JUSTICE RIMER and
LADY JUSTICE BLACK
Between :
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Appellants
– and –
FCE BANK PLC
Respondent
Mr Ian Glick QC and Mr David Ewart QC (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the Appellants
Mr John Gardiner QC and Mr John Brinsmead-Stockham (instructed by Slaughter and May) for the Respondent
Hearing date: 10 July 2012
Approved Judgment
Judgment Approved by the court for handing down. The Commissioners for Her Majesty's Revenue and Customs v.
FCE Bank PLC
Lord Justice Rimer :

Introduction

1. By a decision released on 1 April 2010, the First-tier Tribunal (Tax) (John Avery Jones CBE and Edward Sadler) allowed an appeal by FCE Bank PLC ('FCE') against the refusal by the Commissioners for Her Majesty's Revenue and Customs ('HMRC') of its claim for group relief for its accounting period ended 31 December 1994. HMRC appealed against that decision to the Upper Tribunal (Tax and Chancery Chamber) (Henderson J and Mr Julian Ghosh QC) but by a decision released on 13 October 2011 the Upper Tribunal dismissed the appeal. This second appeal, brought with the permission of the Upper Tribunal, is HMRC's appeal against that decision of the Upper Tribunal. In giving its reasons for permitting a second appeal, the Upper Tribunal noted that the interpretation and application of the relevant legislation raised points of general interest and importance, that an appeal had a real prospect of success and that there were therefore compelling reasons for the Court of Appeal to hear it. The result of the appeal will have an impact on other appeals by FCE and other companies within the Ford corporate group.

2. The issue, one of law, is whether FCE was entitled to claim group relief in reliance on a provision in a Double Taxation Convention between the United Kingdom and the United States of America. The FTT and Upper Tribunal held that it was. If, as HMRC contend, they were wrong, the appeal must succeed. Otherwise it must fail.

The facts

3. FCE was at the material times a company resident in the UK. So was Ford Motor Company Limited ('FMCL'). FCE and FMCL were both owned and controlled by Ford Motor Company ('FMC'), a company resident not in the UK but in the USA. FMCL made trading losses during the relevant accounting period and claimed to surrender a proportion of them to FCE. FCE claimed group relief of £ 538,521. If its claim was good, it was entitled to a tax repayment of some £ 177,712 (excluding interest), although that figure has not been finally agreed.

4. HMRC refused the claim. They did so because, under the then applicable legislation, the status of FMC (the parent company) as a non-UK resident company prevented it and the two subsidiaries (FCE and FMCL) from constituting a relevant 'group' and only a 'group' company was entitled to group relief. Subject to the effect of the applicable Double Tax Convention, FCE accepts that HMRC's reading of the legislation was correct.

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The legislation

5. The applicable statutory provisions are those in force prior to changes effected by the Finance Act 2000. Section 402 (in Part X, Chapter IV, 'Group Relief') of the Income and Corporation Taxes Act 1988 ('the Taxes Act') provided so far as material:

'402. Surrender of relief between members of groups and consortia

(1) Subject to and in accordance with this Chapter and section 492(8), relief for trading losses and other amounts eligible for relief from corporation tax may, in Judgment Approved by the court for handing down. The Commissioners for Her Majesty's Revenue and Customs v. FCE Bank PLC the cases set out in subsections (2) and (3) below, be surrendered by a company ("the surrendering company") and, on the making of a claim by another company ("the claimant company") may be allowed to the claimant company by way of a relief from corporation tax called "group relief".

(2) Group relief shall be available in a case where the surrendering company and the claimant company are both members of the same group.

A claim made by virtue of this subsection is referred to as a "group claim". ...'

6. The working of that subsection, in particular the meaning of a 'group', requires a reference to section 413, the interpretation section. The material provisions are subsections (3)(a) and the opening words of subsection (5):

'(3) For the purposes of this Chapter –

(a) two companies shall be deemed to be members of a group of companies if one is the 75 per cent. subsidiary of the other or both are 75 per cent. subsidiaries of a third company; ...

(5) References in this Chapter to a company apply only to bodies corporate resident in the United Kingdom; ...'.

7. The interpretation of section 413(3)(a) in turn requires a reference to section 838, 'Subsidiaries', of the Taxes Act, which provided so far as material:

'(1) For the purposes of the Tax Acts a body corporate shall be deemed to be –

(a) ...

(b) a "75 per cent. subsidiary" of another body corporate if and so long as not less than 75 per cent. of its ordinary share capital is owned directly or indirectly by that other body corporate; ...

(2) In subsection (1)(a) and (b) above "owned directly or indirectly" by a body corporate means owned, whether directly or through another body corporate or other bodies corporate or partly directly and partly through another body corporate or other bodies corporate.'

8. It follows from those provisions that as FMC, the parent, was not a 'company' for the purposes of section 413, FMCL and FCE were not members of a 'group' of companies for the purposes of group relief and that, without more, FCE's group relief claim had to fail. There is no dispute that, if FMC had been resident within the UK at the material time, FMCL and FCE would have been members of a 'group' for the purposes of group relief and that HMRC would have had to accept FCE's claim. That is because each was a '75 per cent. subsidiary' of FMC within the meaning of section 413(3)(a).

9. Chapter IV of Part X of the Taxes Act is not, however, the end of the story because Part XVIII, headed 'Double Taxation Relief', includes another relevant chapter, Chapter 1, 'The Principal Reliefs'. That provides so far as material (as did its predecessor section 497 of the Income and Corporation Taxes Act 1970):

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'788. Relief by agreement with other countries

(1) If Her Majesty by Order in Council declares that arrangements specified in the Order have been made with the government of any territory outside the United Kingdom with a view to affording relief from double taxation in relation to –

(a) income tax,

(b) corporation tax in respect of income or chargeable gains, and

(c) any taxes of a similar character to those taxes imposed by the laws of that territory, and that it is expedient that those arrangements should have effect, then those arrangements shall have effect in accordance with subsection (3) below. ...

(3) Subject to the provisions of this Part, the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax in so far as they provide –

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(a) for relief from income tax, or from corporation tax in respect of income or chargeable gains; ...'.

10. The Order in Council relevant to the present case was made on 21 April 1980 and gave domestic effect to the Double Taxation Convention of 31 December 1975 between the UK and the USA. The Order is the Double Taxation Relief (Taxes on Income) (The United States of America) Order 1980 (SI 1980 No 568), and Schedule 1 sets out the terms of the Convention. Article 24 is headed 'Non-discrimination'. Article 24(5), relating to 'enterprises' is the key provision, although I shall also set out article 24(1) relating to individuals which it mirrors:

'(1) Individuals who are nationals of a Contracting State and who are residents of the other Contracting State shall not be subjected in that other State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected. ...

(5) Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.'

Matters of common ground

11. In opening HMRC's appeal, Mr Glick QC helpfully indicated the several areas of relevant common ground between HMRC and FCE, and I shall set them out here. HMRC and FCE agree that:

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(i) FCE and FMCL are relevant 'Enterprises of a Contracting State [the UK]' and so capable of benefiting from the protection of article 24(5): they are objects of article 24(5).

(ii) The relevant hypothetical comparator consists of UK-resident companies carrying on the same business and in the same fiscal position as FCE and FMCL, but owned or controlled by a UK-resident company to the same extent as FCE and FMCL were owned by FMC.

(iii) The group relief provisions – including section 413(5) of the Taxes Act as to the availability of group relief – and the denial of that relief fall within the concept of 'any taxation or any requirement connected therewith' in article 24(5).

(iv) The hypothetical comparator companies would have been able to surrender trading losses between one another through a claim for group relief. FCE and FMCL were unable to do so under the terms of the group relief provisions in the Taxes Act. FCE and FMCL were therefore subject both to 'other' and 'more burdensome' tax treatment than the hypothetical comparator companies would have been, within the terms of article 24(5). This was because of the operation of the group relief provisions, and in particular section 413(5).

(v) The group relief provisions therefore discriminated against FCE and FMCL when their treatment is compared with that of the relevant hypothetical comparator. Mr Glick added that whereas in the case of the hypothetical comparator group relief could have been passed between the subsidiary and the parent as well as between the subsidiaries, in the case of the FMC group it could not have been because FMC was not resident in the UK.

The appeal: the parties' submissions

12. Given that degree of common ground, one might wonder what answer HMRC had to FCE's claim for group relief on the ground that the domestic group relief provisions were contrary to the non-discrimination provision in article 24(5). Mr Glick's responsive explanation was that, subject to one consideration, there would have been nothing to argue about and that FCE would have had an open and shut case for its claimed relief. That consideration – which, however, cut no ice with either tribunal below – was the light said to have been cast on the relevant question by Lord Hoffmann's reasoning in his speech in Boake Allen Ltd v. Revenue and Customs Commissioners [2007] UKHL 25; [2007] 1 WLR 1386, to which I now turn.

13. Boake Allen was not about a disputed claim by a group subsidiary to group relief under Chapter IV of Part X of the Taxes Act. It was about a disputed claim by a group subsidiary to make

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a 'group income election' under section 247 of the Taxes Act. Lord Hoffmann opened his speech with the following succinct explanation of the nature of such an election:

'1. My Lords, between 1973 and 1999 a company resident in the United Kingdom which paid a dividend was liable to pay advanced corporation tax ("ACT"). This payment could be set off against its liability for corporation tax on its profits ("mainstream corporation tax" or "MCT"). The recipient of the dividend was entitled to a tax credit for the ACT. If the recipient was a company, Judgment Approved by the court for handing down. The Commissioners for Her Majesty's Revenue and Customs v. FCE Bank PLC the dividend and the tax credit constituted franked investment income and could be distributed to its own shareholders without further payment of ACT.

2. The economic purpose of this system was to ensure that a company's profits were not taxed twice: first as profits earned by the company and then again as dividends received by the shareholders. The payment of tax by the company was partially imputed by means of a tax credit to the shareholders. But the system also had to ensure that credit was given only for tax which had actually been paid. Hence the requirement that ACT be paid at the time of the distribution and then set off against MCT.

3. Section 247 of [the Taxes Act], like many other of its provisions, recognised the unity of a group of companies which are in law separate persons but economically a single enterprise. It provided that a parent and subsidiary, both resident in the United Kingdom, could jointly elect that the subsidiary would pay dividends free of ACT and the parent would receive them without the benefit of a tax credit. The dividends would not be franked investment income and the parent would be liable for ACT when it passed them on as dividends to its own shareholders. The advantage to the group was that money could be moved from subsidiary to parent, either with a view to subsequent distribution or for some other purpose, without attracting an immediate liability to ACT.'

14. The critical point about the availability of a section 247 election, as Lord Hoffmann noted, is that it applied only to the case in which both subsidiary and parent were resident in the UK. If a 51% (or more) subsidiary paid a dividend to its parent resident outside the UK, the subsidiary had no choice but to pay ACT on the distribution since section 247 afforded no option to the two companies to make a group election. As Lord Hoffmann also explained, in Metallgesellschaft Ltd v. Inland Revenue Commissioners and Hoechst AG v. Inland Revenue Commissioners (Joined Cases C-397 and 410/98); [2001] Ch 620 the Court of Justice held that UK revenue law, which had between 1973 and 1999 allowed companies with parents resident in the UK to elect to pay dividends to those parents free of ACT, discriminated unlawfully against companies with parents resident in other member states by not giving them a like right of election: such discrimination was contrary to the 'freedom of establishment' under article 43 in the EC Treaty. The Hoechst decision gave rise in this jurisdiction to a mass of claims against HMRC for compensation. The Pirelli litigation to which Lord Hoffmann refers in the passage from his speech that I am about to quote concerned some of such claims.

15. Boake Allen was not about UK resident subsidiaries with a parent resident in another member state. It was instead about UK resident subsidiaries with parents resident in the USA and Japan. Both countries had entered into Double Taxation Conventions with the UK. I have referred to the convention between the USA and the UK and, as regards the USA element of the litigation, the relevant provision was also the non-discrimination article 24(5). The like provision in the convention with Japan, article 25(3), was in the same terms.

16. One question in Boake Allen was whether section 247 of the Taxes Act infringed those articles on the ground that it subjected the UK 'enterprises' (UK subsidiaries of non-UK parents) to a compulsory payment of ACT on the payment of a dividend to its overseas parents whereas a similar enterprise (a subsidiary of a UK parent) would Judgment Approved by the court for handing down. The Commissioners for Her Majesty's Revenue and Customs v. FCE Bank PLC not have had to pay such ACT if it had made an election under section 247. Park J ([2004] STC 489) and the Court of Appeal ([2006] STC 606) held that section 247 did infringe the articles.

17. The first issue with which Lord Hoffmann dealt on the appeal to the House of Lords was HMRC's contention that the courts below had been wrong to hold that the denial of a right of election to groups with foreign parents infringed the non-discrimination articles of the conventions. For reasons with which all their Lordships agreed, Lord Hoffmann accepted HMRC's submission and held that such denial involved no such infringement. He said:

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'14. The reasoning of the judge and the Court of Appeal was that article 24(5) of the US DTC (for example) requires one to compare the positions of the UK-resident subsidiary of a US parent and the UK-resident subsidiary of a UK parent. If the latter can elect under section 247 and the former cannot, that is discrimination contrary to article 24(5). It is irrelevant that an election would transfer liability for ACT to the UK parent but not to the US parent. The DTC is concerned with the taxation of enterprises in the UK and not with the tax position of their foreign-resident shareholders. The authoritative commentary on the equivalent article of the OECD Model Convention with Respect to Taxes on Income and on Capital 1963 says that its object is:

"to ensure equal treatment for taxpayers residing in the same state, and not to subject foreign capital, in the hands of the partners or shareholders, to identical treatment to that applied to domestic capital."

15. I respectfully think that this particular observation does not take the matter much further forward because it is directed to a different point. It draws attention to the limited application of the non-discrimination article, which provides only for treatment of resident tax payers and does not prevent a state from discriminating in its treatment of the income of foreign shareholders; for example, by imposing a withholding tax. It does not say that parentage cannot be a relevant characteristic of a resident tax payer.

16. The question, as it seems to me, is whether section 247 discriminates against a UK company on the ground that its capital is "wholly or partly owned or controlled, directly or indirectly" by residents of the US, or Japan, or some other foreign state. In relation to article 24(1) of the OECD Model Convention, which prohibits discrimination between residents on grounds of nationality, the commentary says that the "underlying question" is whether two residents are being treated differently "solely by reason of having a different nationality". It does not repeat this observation in relation to article 24(5), but the principle must be the same. Does section 247 discriminate on the grounds that the capital of the subsidiary is controlled by a non-resident company? [Lord Hoffmann's emphasis].

17. In my opinion it plainly does not. For example, if a US parent were to interpose a UK-resident holding company between itself and its UK-resident subsidiary, the control would remain in the US but there would be no objection to an election by the UK subsidiary and its immediate, UK-resident parent. On the other hand, an individual US shareholder and the company he controls in the UK Judgment Approved by the court for handing down. The Commissioners for Her Majesty's Revenue and Customs v. FCE Bank PLC could not elect, but the reason is not because the company is subject to US control. An individual UK shareholder and his company could not elect either, for the same reason that a non-resident company cannot elect. It is because an individual is not liable to corporation tax. An election is a joint decision by two entities paying and receiving dividends that one rather than the other will be liable for ACT. This is not a concept which can meaningfully be applied when one of the entities is not liable for ACT at all.

18. Unfortunately the judge and the Court of Appeal did not have the benefit of the discussion of the nature of the section 247 election in the speeches in this House in Pirelli Cable Holding NV v. Inland Revenue Commissioners [2006] 1 WLR 400. The point was luminously made by Lord Nicholls of Birkenhead, at para 19, in a speech with which the rest of their Lordships agreed:

"A group income election is a group election. A group income election cannot be made by a subsidiary alone. It is an election made jointly by the subsidiary paying the dividend and the parent receiving the dividend. By making such an election both companies seek the fiscal consequences of making the election. One consequence is that by making the election the subsidiary will obtain the advantage of not paying ACT in respect of the relevant dividend. Another consequence is that the subsidiary will obtain this advantage at the cost of depriving the parent of a tax credit in respect of the dividend. These two fiscal consequences are inextricably linked. You cannot have one without the other. That is why the election has to be made jointly. The advantage to the paying subsidiary comes at a price to the recipient parent."

19. In my respectful opinion, it is not possible to decouple the positions of parent and subsidiary as the judge and the Court of Appeal sought to do. To allow an election by a group with a US-resident parent would not be to give a relief available to a group with a UK-resident parent. It would be something different in kind. It would not be an election as to who would be liable for ACT but as to whether the group should pay it at all.

20. These arguments were in substance those put forward by the UK Government to the Court of

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Justice in the Hoechst decision [2001] Ch 620. But they were rejected. Why? Because the prohibition on discrimination implied in article 43 of the EC Treaty has an altogether different purpose from the prohibition on discrimination in the DTCs. Freedom of establishment under article 43 is the freedom of the resident of a member state to establish itself in another state. In the case of parent and subsidiary, it is the freedom of the parent to establish a subsidiary. As Lord Scott of Foscote explained in the Pirelli case [2006] 1 WLR 400, para 77:

"the right to freedom of establishment conferred by article [43] is the right of a company (or an individual) with its seat in one member state to establish itself in another member state. Unwarranted restrictions imposed by the latter member state on the branch or agency or subsidiary company by means of which the parent company is seeking to establish itself in that member state is plainly a breach of the ... right to freedom of establishment of that parent company."

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21. Discrimination against the group as a whole is thus a restriction on the parent's freedom of establishment. If a group with a UK parent has a cash flow advantage which a group with a parent in another member state does not enjoy, that is a restriction on the latter's freedom of establishment. Fortunately, by the time of the decision in Hoechst, ACT had been abolished. So no one had to decide how the decision should be given effect for the future. But it obviously would not have been possible simply to give a group with a parent in another member state the right to elect under section 247. That would have enabled it to elect not to pay ACT and put it in a better position than a group with a UK parent. It would have been necessary either to repeal section 247 or abolish ACT.

22. A DTC, on the other hand, does not give a company or individual resident in one country a right of establishment in the other. As the commentary on the OECD model says, the equality it ensures is only that any enterprise it owns in the other country will not be subject to taxation which discriminates on the ground of its foreign control. In my opinion, the denial of the right of election was not on the ground of the company's foreign control but on the ground that section 247 cannot be applied to a case in which the parent company is not liable to ACT.'

18. Mr Glick subjected those paragraphs to a close analysis. He submitted first that paragraph 15 shows that article 24(5) is concerned solely to protect the UK resident subsidiary from improper discrimination in its tax treatment, not its foreign parent. Second, he said that the last sentence of paragraph 15 shows that parentage can be a relevant characteristic of a resident UK taxpayer without there necessarily being any breach of article 24(5): and such a characteristic may show why the UK resident taxpayer is being treated differently from other UK resident taxpayers. Third, and fundamentally, he said that the first sentence of paragraph 16 shows that whether a tax provision breaches article 24(5) depends on whether it discriminates against a UK resident company 'on the ground that' its capital is wholly or partly owned or controlled by a non-resident parent; and that the second and third sentences of paragraph 16 show that 'on the ground that' means 'solely by reason of'. The relevant question in the present case is, therefore, whether the group relief provisions discriminated against FCE solely on the ground that its capital was owned or controlled by FMC. If yes, the discrimination is proved. If no, there was no relevant discrimination. In either case, no question of justification arises.

19. Mr Glick said that Lord Hoffmann then made it clear in the first stage of his reasoning (namely, in the last sentence of paragraph 16 and in the second sentence of paragraph 17) that there was in Boake Allen no discrimination on the ground (i.e. the sole ground) of the foreign ownership or control of the UK taxpayer. This was because it had been open to the group to interpose an intermediate UK holding company between the foreign owner/controller and the UK resident subsidiary, so that such holding company and the subsidiary could then make a group income election. In that event, the ultimate ownership or control would still remain in the foreign company, but the opportunity to take such steps so as to enable the making of a valid election shows that it was not the fact of such foreign ownership or control that was the ground of the discriminatory tax treatment. I shall refer to this part of Lord Hoffmann's reasoning in paragraph 17 as 'the intermediate holding company example'.

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20. Mr Glick said that the second stage in Lord Hoffmann's reasoning, in the third to fifth

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sentences of paragraph 17, was based on the invocation of the example of the case in which the parent shareholder of the subsidiary is an individual, whether resident in either the UK or the US. In relation to that example, Lord Hoffmann made the point that in neither case can a section 247 election be made, the reason being that given in the fifth sentence, namely that it is because 'an individual is not liable to corporation tax'. I shall refer to this second example posited by Lord Hoffmann as 'the individual shareholder example'. That example, and also the intermediate holding company example, were said by Mr Glick, to provide the key to Lord Hoffmann's reasoning in the remainder of paragraph 17 and his subsequent conclusions. Lord Hoffmann there made it plain that the disadvantage suffered in Boake Allen by the UK resident subsidiaries was nothing to do with the fact of their foreign ownership or control. It was instead all to do with the fact that it was of the essence of a section 247 group income election that (a) it was a joint exercise between subsidiary and parent, and (b) it could meaningfully only be made by two companies which were both liable to corporation tax. That required both electing companies to be resident in the UK. In paragraph 19, and in the last sentence of paragraph 22, Lord Hoffmann explained how these dual considerations meant that the inability of the subsidiaries in Boake Allen to make a group income election was not on the ground of their foreign ownership or control. To entitle them to make such an election would not be to give them relief of a kind that was available to a group with a UK-resident parent. It would be to give them relief that was 'something different in kind'.

21. Mr Glick submitted that the essence of the decision in Boake Allen was, therefore, to the effect that to allow a section 247 election to be made by a UK-resident subsidiary in respect of a dividend paid to a US-resident parent would be to produce an outcome totally different from that in which the parent is a UK-resident company. The right to pay dividends free of ACT that was being claimed in Boake Allen was, as Mr Glick put it, a 'different animal' from the right created by section 247.

22. Mr Glick of course recognised the difference between the issues considered in Boake Allen and those raised by the present case. He nevertheless submitted that a material part of the Boake Allen reasoning applies equally to the present case, in particular the intermediate holding company example. If FMC had interposed a UK-resident intermediate holding company between itself and its subsidiaries, a 'group' within the meaning of the domestic legislation would thereby have been established and there would have been no difficulty in passing trading losses between the subsidiaries of such an intermediate company. It cannot therefore be said that FCE's failure to be entitled to group relief was on the ground that it was owned by a US-resident company. Lord Hoffmann's individual shareholder example showed likewise. The group relief provisions applied only to UK-resident companies, because it is only such companies that are liable to corporation tax: a UK-resident individual shareholder is no more liable to corporation tax than is a US-resident individual shareholder. These two steps in Lord Hoffmann's reasoning showed that, in the present case, it is not FMC's foreign residence that was the ground of the discrimination.

23. As to whether to allow the relief claimed in this case would, as in Boake Allen, be to create a 'different animal' from that created by the group relief provisions, Mr Glick submitted that it would. He referred us to the observations of Lord Nolan in Imperial Chemicals Industries plc v. Colmer (Inspector of Taxes) [1996] STC 352, a case Judgment Approved by the court for handing down. The Commissioners for Her Majesty's Revenue and Customs v. FCE Bank PLC raising an issue under section 258 (as amended) of the Income and Corporation Taxes Act 1970, the predecessor of the group relief provisions in the Taxes Act. Lord Nolan said of this legislation, at [1996] STC 352, 358:

'... The evident purpose of s. 258(1) was to enable a parent company and its 75% subsidiaries to be treated as a single entity for tax purposes, merging the profits and the losses of individual members of the group in order to arrive at the taxable profit (if any). It is to be noted that in the case of what might be called ordinary group relief under s. 258(1) the relief which may be claimed is not limited to the extent of the equity participation: a claim for 100% of the loss may be made under s. 259(1) even if the equity participation is no more than 75%. ...'.

24. Mr Glick noted the like comment made by Lord Hoffmann in paragraph 3 of his speech in Boake Allen with regard to the scheme underlying section 247 of the Taxes Act. In Mr Glick's submission, the purpose of group relief as explained by Lord Nolan cannot be achieved in a case in which the corporate parent of a group of UK-resident subsidiaries is not resident in the UK or, therefore, liable to corporation tax: in such a case the group cannot be treated as a single entity for

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corporation tax purposes. In the present case, FCE wants to be treated as a part of a group that is entitled to claim group relief. There is of course no problem in the case of a group comprising companies that are all resident in the UK: each can surrender its losses to other members of the group. But to treat a group of companies as forming such a group when the parent company is a foreign company not liable to corporation tax at all would be to blow a hole in the scheme. No-one is suggesting that such a company can surrender its losses to its UK-resident subsidiary or can receive a like surrender by such a subsidiary. If, therefore, a comparison is made between (a) the group relief provisions as applied to an exclusively domestic corporate group and (b) those provisions as purportedly applied to a group that includes a parent company not resident in the UK, the comparison is of two different animals. The latter animal is quite different from the type of group intended by the legislation. The legislation required all the companies in a 'group' to be resident in the UK because its scheme is that the loss by any company within the group is capable of being surrendered to any other company in the group; and the basis for that is that all the group companies are liable for corporation tax.

25. Mr Glick criticised the Upper Tribunal's reasons for its different conclusion for (a) failing to pay adequate consideration to Lord Hoffmann's intermediate holding company and individual shareholder examples, and (b) for failing to ask itself what the ground for the discrimination in the present case was whilst contenting itself in paragraph 19 of its judgment with saying that the claim for group relief only affected the UK tax position of the two UK subsidiaries, so making the case relevantly distinguishable from Boake Allen. His overall submission was that, despite the obvious features of distinction, the case was closely akin to Boake Allen and ought to be decided in the like way, namely on the basis that the ground of the admitted discrimination had nothing to do with FMC's foreign residence but everything to do with the fact that FMC was not itself liable to corporation tax. That was the ground of the discrimination that FCE had suffered, not the fact that it was directly owned and controlled by a company resident in the USA.

26. For FCE, Mr Gardiner QC and Mr Brinsmead-Stockham provided an 83-paragraph skeleton argument whose length perhaps suggested that there might be more to Judgment Approved by the court for handing down. The Commissioners for Her Majesty's Revenue and Customs v. FCE Bank PLC HMRC's argument than Mr Gardiner's commendably succinct oral submissions in fact asserted. He said that the essence of HMRC's case came down to the submission that the key to the case was the liability or otherwise of the parent company of the putative group (FMC) to corporation tax. His response was that that consideration was an irrelevance. The key domestic provision is section 402 (2) of the Taxes Act, which shows that in a case in which group relief is claimed it is simply necessary for there to be two companies, the surrendering company and the claimant company. Both such companies of course have to be liable to corporation tax and in the present case the surrendering company, FMCL, and the claimant company, FCE, were so liable. The liability or otherwise of the parent company, FMC, to corporation tax was of no relevance: FMC's only relevance was the fact that it was the owner of the two subsidiaries, which showed that it and they together formed a corporate group.

27. By contrast, Boake Allen concerned a claim by a UK-resident subsidiary to be entitled to exercise an election under section 247. The purpose of the claimed election was to pass the liability for ACT from the subsidiary to the parent. The making of such an election was a joint exercise by subsidiary and parent and so it was necessary, as Lord Hoffmann explained, for the parent also to be liable to corporation tax. The reason for the discrimination suffered by the subsidiaries in Boake Allen was not therefore because their parents were foreign companies but because they were not companies liable to corporation tax or, therefore, to which the ACT liability could be passed on by the subsidiaries.

28. Mr Gardiner submitted, however, that no like consideration applies in the present case. A comparison of it with Boake Allen shows that the true, and only, reason for the discriminatory treatment of FMCL and FCE is because their corporate parent was resident in the US rather than the UK. Had the two companies been owned by an individual resident in the USA there would have been no discrimination, because had they been owned by an individual resident in the UK they would equally not have been entitled to group relief on surrenders of losses between themselves. There is, however, no issue that FCE was the subject of discriminatory treatment. When a comparison is made between (i) FCE owned by a US-parent and (ii) FCE owned by a UK-parent, it can be seen that in case (i) FCE is faced with a tax liability at the applicable rate (because it is not entitled

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to group relief) and in case (ii) it is faced with no tax liability at all because it is entitled to bring the surrendered losses into account. Article 24(5), however, disapplies such discrimination if the sole reason for the different fiscal treatment is the non-UK residence of the parent. Lord Hoffmann's intermediate holding company and individual shareholder examples had no wider purpose than to demonstrate that a section 247 election was one that was only capable of being made by two companies (subsidiary and parent) that are both liable to corporation tax and must therefore be UK-resident companies. It is irrelevant that, in the present case, the Ford group could have reorganised its structure by interposing an intermediate UK-resident holding company. The starting point is to consider the actual fiscal position of FCE as compared with that of a comparator company. That shows, as is admitted, that a discriminatory burden of tax is cast upon FCE. The only remaining question is whether there is a reason for such discriminatory treatment other than the fact of FCE's foreign ownership. The answer, said Mr Gardiner, is that HMRC have failed to identify any and there is none. All that Boake Allen added to our jurisprudence was to show that it is necessary to ask in any particular case Judgment Approved by the court for handing down. The Commissioners for Her Majesty's Revenue and Customs v. FCE Bank PLC whether there was a reason for the discrimination other than the foreign ownership of the UK subsidiary. In that case there was. In this case there is not.

Discussion and conclusion

29. The issue raised by this appeal is ultimately quite short, although I have not found it easy. Boake Allen is obviously distinguishable on its facts. A section 247 election of the type there denied to the subsidiaries was one that could not be made by the dividend-paying subsidiary alone. Section 247(1) shows that a valid election required the joint participation of the paying subsidiary and the receiving parent. It is also obvious that such a joint election could only be made by two companies that were resident in the UK and so liable to corporation tax. That is because the purpose and effect of an election was to save the subsidiary the commercial disadvantage of having to pay ACT promptly after the payment of a dividend to its parent and to shift the burden for such ACT on to the parent on the occasion of its own onward payment of a dividend. Such an election would not, I understand, have compelled the parent to pay such a dividend and in practice it might choose not to do so, or might perhaps not even have sufficient distributable profits to enable it to do so. But those considerations did not dilute the need, as explained by Lord Hoffmann, for both payer and payee to be companies liable to corporation tax. A purported section 247 election by a UK-resident payer on the payment of a dividend to its US-resident parent is, therefore, not a section 247 election at all. The refusal of HMRC to give the payer the benefit of such a purported election may be discriminatory but the ground for such discrimination is not because the payee is a US-resident company but because such an election can only be made by two UK-resident companies both liable to corporation tax.

30. Mr Glick's submissions were heavily dependent on the intermediate holding company and the individual shareholder examples that Lord Hoffmann provided in his paragraph 17. I recognise that Lord Hoffmann's former example can be read as saying that, if it is open to a group to meet potentially discriminatory tax treatment by so re-structuring itself as to interpose an intermediate UK-resident holding company between the foreign parent and the taxpayer UK-subsidiary, it cannot be said that the ground of such discrimination is the foreign residence of the parent. If that is the true sense of Lord Hoffmann's example, it can be said to provide support for HMRC's case. The example enabled Mr Glick to argue, as he did, that in this case too the group could have interposed a UK-resident holding company between FMC and FCE and have thereby constituted a 'group' for the purposes of the domestic legislation. Had that been done, HMRC would have had to recognise FCE's group relief claim, to which the fact that it was indirectly owned by a company resident in the USA would have provided no answer. Mr Glick was therefore able to argue that the ground for the discrimination in this case was not because FMC was resident in the USA but because it was not a company liable to UK corporation tax.

31. The point can also be said to find support in Lord Hoffmann's individual shareholder example. If FCE and FMCL had both been owned by an individual shareholder resident in the USA, the refusal of group relief to FCE would have involved it in no discriminatory tax treatment as compared with the position that would have applied if both companies had instead been owned

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by an individual resident in the UK. No group relief would have been available in that case either. That is because in neither case was the individual shareholder liable to UK corporation tax. The common feature Judgment Approved by the court for handing down. The Commissioners for Her Majesty's Revenue and Customs v. FCE Bank PLC of both Lord Hoffmann's examples was therefore advanced in support of the proposition that FCE's group relief claim failed not because FCE was owned by a parent resident in the USA but because it was not owned by a parent liable to UK corporation tax.

32. I do not, however, regard that as a correct analysis of the position. First, I do not interpret Lord Hoffmann's intermediate holding company example as amounting to a general proposition, intended to be of potentially wide application, that there can be no discrimination on the ground of the foreign residence of the corporate owner of the taxpayer company if it is open to the group companies so to restructure themselves as to achieve the removal of the tax disadvantage which, but for such restructuring, would otherwise be suffered. Lord Hoffmann did not purport to make any such general point and ought not to be read as having intended to so. Moreover, his paragraph 17 was by way of answer to his own very precise question posed in the last sentence of paragraph 16, namely, 'Does section 247 discriminate on the grounds that the capital of the subsidiary is controlled by a non-resident company?' Both question and answer were, therefore, apparently intended to be exclusively section 247-specific. In addition, Lord Hoffmann obviously did not approach the composition of his paragraph 17 without already knowing that the heart of the answer to his question was that the critical feature of a section 247 election was that which he explained in the last two sentences of paragraph 17 and in paragraphs 19 and 22: namely, (i) that such an election can only be made by a subsidiary and parent both liable to ACT; and (ii) that it requires a joint decision by both of them. The point in Boake Allen was that, although the dividend-paying subsidiaries suffered discrimination as compared with the position of a dividend-paying subsidiary in the relevant comparator group, the denial of the right of election to the former subsidiaries was not because their capital was owned by a company resident elsewhere than in the UK but because section 247 can have no application to a case in which the parent company receiving the dividend is not a company resident in the UK and so liable to ACT and able to join in the making of a valid election.

33. If these considerations are borne in mind, it appears to me to be clear that, in giving his intermediate holding company example, Lord Hoffmann was doing no more than anticipating his later explanation of the problem with the Boake Allen claims, by showing that, with a slightly different group structure, the subsidiaries and their parents would have been in a position to exercise a section 247 election, being an exercise that would not be prejudiced by the fact that the group was indirectly owned by companies not resident in the UK. His individual shareholder example was directed merely at showing that in such a case, the subsidiaries would be no worse off than subsidiaries with an individual shareholder resident in the UK since a section 247 election is not available in the latter case either. Both examples were in my view directed at showing that the explanation for the denial of the right to a section 247 election was nothing to do with non-UK residence of the subsidiaries' corporate parents but everything to do with the fact that they were not paying the dividends to parent companies resident in the UK (and so liable to UK corporation tax) who had joined in the election so as to make it a valid one.

34. How does that assist the resolution of the present appeal? Boake Allen is a valuable decision in that it shows the need to focus on the ground for the discrimination, and such a focus is required in this case too. Beyond that I regard Boake Allen as of little Judgment Approved by the court for handing down. The Commissioners for Her Majesty's Revenue and Customs v. FCE Bank PLC direct assistance to the determination of this appeal unless only Mr Glick is right that the scheme of the domestic group relief provisions – and, therefore, the right of a UK-resident subsidiary to claim relief in respect of losses surrendered to it by a UK-resident sibling – is as crucially dependent upon the parent company also being a UK-resident company liable to corporation tax as the existence of a duo of UK-resident companies was essential to the making of a valid section 247 election.

35. The domestic provisions of course required all the companies in the putative 'group' to be UK-resident, including the parent company (without which there could be no group), and so Mr Glick is entitled to say that the corporate structure of which FCE is part is materially different. I agree. If the present case had involved the purported surrender of losses from FMC to FCE, it

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appears to me unlikely that the (let it be assumed) discriminatory refusal of group relief could be met with reliance on article 24(5). In such a case, I consider that Boake Allen would be directly in point and it would be said against FCE that it was not suffering any discrimination on the ground that FMC was resident in the USA but on the ground that such a surrender could only be made as between two group companies both resident in the UK and so both liable to corporation tax.

36. That, however, is not this case. Whilst I have noted the point made by Lord Nolan in the Imperial Chemical Industries case, and relied upon by Mr Glick, that does not appear to me to show that the parent company was in any sense a relevant player as regards the surrender of losses that in fact took place, which was exclusively between FMCL and FCE. In that respect, I agree with Mr Gardiner's submissions and I would respectfully reject Mr Glick's submission to different effect. I agree with the way that the Upper Tribunal dealt with this point at paragraph 19 of its judgment:

'We observe at this point that this crucial part of Lord Hoffmann's reasoning has no relevance to the present case, because the claim for group relief was a claim that only affected the UK tax position of the two UK subsidiaries. The claim had no effect at all on the tax position of the US parent, and the only relevance of the parent company was to establish (or not, as the case may be) the necessary group relationship between the two UK companies which surrendered and accepted the trading losses. It is conceptually quite irrelevant whether the US common parent is within the charge to UK corporation tax or not, in relation to the question of whether two UK tax resident companies are sufficiently connected to each other so as to form a group which permits the surrender of losses from one to another.'

37. Where does that take the present case? I set out earlier in this judgment the common ground between the parties, by which it is agreed that the denial to FCE of its claimed relief was discriminatory as compared with the treatment that FCE would have enjoyed if FMC had been a UK-resident company. That being so, all that remains is to identify the ground of such discrimination. The rival submissions are, by Mr Gardiner, that it is because FMC is US-resident rather than UK-resident; and, by Mr Glick, that it is because FMC is not a company liable to UK corporation tax.

38. In my view, Mr Gardiner's submission is to be preferred. The purpose and effect of article 24 (5) are to outlaw the admittedly discriminatory tax treatment to which (but for the convention) FCE would be subject as the directly held subsidiary of a US-resident company as compared with the more favourable tax treatment to which it would be entitled if it were the directly held subsidiary of a UK-resident company.

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That shows, in my judgment, that the only reason for the difference in treatment in the present case is the fact of FMC's US residence.

39. For these reasons, which are essentially the same as those rather more shortly expressed by the Upper Tribunal, I would dismiss HMRC's appeal.

Lady Justice Black :

40. I agree.

Lord Justice Pill :

41. I also agree.

Comment

Factual Background

FCE claimed group relief of £ 538,521 for the accounting period ending 31 December 1994 in respect of the trading losses of FMCL. Various further claims for group relief were made by FCE and other Ford group companies. Upon the refusal of the group relief by HMRC, FCE appealed to the First-tier Tribunal. It was determined that the appeal against the refusal of the claim for the period ending 31 December 1994 would serve as a lead case to be determinative of the various other claims.

FCE and FCML were both, at all materials times, companies resident in the UK and subsidiaries of FMC, a US resident company (see simple group structure chart below). The group relief was denied by HMRC on the basis that they were not members of the same group because their common parent company was not a company resident in the UK.

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UK Group Relief Provisions

The applicable UK domestic law in force at the time of the claim, section 402 of the Income and Corporation Taxes Act 1988 ('ICTA'), provided for the surrender of trading losses to a claimant company between members of the same group of companies, known as group relief as follows:

'402. Surrender of relief between members of groups and consortia

(1) Subject to and in accordance with this Chapter and section 492(8), relief for trading losses and other amounts eligible for relief from corporation tax may, in the cases set out in subsections (2) and (3) below, be surrendered by a company ("the surrendering company") and, on the making of a claim by another company ("the claimant company) may be allowed to the claimant company by way of a relief from corporation tax called "group relief".

(2) Group relief shall be available in a case where the surrendering company and the claimant company are both members of the same group.'

However, the definition of a group of companies, found in section 413 ICTA, precluded the claim for group relief in FCE's circumstance because it provided that groups of companies had to be held by a company resident in the UK as follows:

'413. Interpretation of Chapter IV

(...)

(3) For the purposes of this Chapter-

(a) two companies shall be deemed to be members of a group of companies if one is the 75 per cent subsidiary of the other or both are 75 per cent subsidiaries of a third company;

(...)

5) References in this Chapter to a company apply only to bodies corporate resident in the United Kingdom;

(...)'

The circumstances of the instant case clearly did not meet the requirements of section 413 (5) because FMC was a company resident in the US and the claims for group relief accordingly were denied by HMRC. It is worth noting at this point that the Finance Act 2000 removed the requirement that group companies be held through a UK resident parent. This case is therefore largely only of relevance to such claims for group relief made in respect of accounting periods ending prior to 1 April 2000.

Contentions of the Parties

FCE accordingly appealed to the First-tier Tribunal arguing that that the group relief was denied only because of the country of residence of FMC, namely the US. As this resulted in less favourable treatment for the UK taxpayer, FCE argued that the legislation in question was therefore contrary to the non-discrimination article of the Treaty: FCE was subject to corporation tax which it would not otherwise have had to pay were it able to claim group relief in respect of the trading losses of FMCL. FCE was accordingly subject to 'other or more burdensome tax', contrary to article 24(5) of the Treaty, which reads as follows:

'Article 24 Non-discrimination

(...)

(5) Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting state to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

(...)'

In response, HMRC relied heavily on the prior House of Lords decision in *Boake Allen Ltd v Revenue and Customs Commissioners* [2007] UKHL 25; [2007] WLR 1386 to argue that the US residency of the common parent was not the *sole* ground for the admitted discriminatory treatment leading to the refusal of group relief. In that case, the claimant was a subsidiary of a US resident company and claimed that the inability to make a group income election on a distribution to its parent and, thus, to avoid the payment of advance corporation tax ('ACT'), infringed the non-discrimination article in the relevant double taxation treaty. The House of Lords held that the treaty was not infringed in those circumstances. It was not the country of

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residence of the foreign parent which prohibited the group income election but rather the fact that the parent could not be liable to ACT. Lord Hoffman suggested, by way of an example, that the interposition of a UK resident company would solve the problem: control would remain in the US but an election would now be possible.

HMRC relied on the judgment of Lord Hoffmann in the First-tier Tribunal in the current case. They argued that because the group relief claim would have been allowed if an intermediate UK resident holding company had been interposed in the structure, *Boake Allen* applied and there was no breach of the Treaty.

FCE distinguished *Boake Allen* on the basis that Lord Hoffmann's analysis concentrated on whether a group income election was available in other circumstances and that the tax treatment of the non-resident parent company was crucial in that particular instance because the legislation required a joint election by the parent and the subsidiary company.

HMRC's argument did not find favour with the First-tier Tribunal which concluded that no ground for the difference in treatment other than the country of residence of the FMC could be found ([2010] UKFTT 136 (TC); [2010] SFTD 718).

When the case reached the Upper Tribunal ([2011] UKUT 420 (TCC); [2011] STC 2366), they noted that although HMRC's example of interposing an intermediate UK resident holding company was correct as a matter of fact, they considered it nothing more than a restatement of the reason for denial of group relief because the actual (rather than the hypothetical) parent of two companies was in fact a US resident company.

Accordingly, the Upper Tribunal distinguished *Boake Allen* on the basis that there was a crucial difference between a group income election (which required both parties to be liable to ACT) and a claim for group relief where both the surrendering and claimant companies were UK resident and could have made the claims but for the fact that the parent company was resident in the US.

Although that was a firm restatement of the law which fully endorsed the decision of the First-tier Tribunal, the case went on appeal to the Court of Appeal.

Decision of the Court of Appeal

As in the tribunals below, there was no dispute between the parties that the denial of group relief was in this case discriminatory. The parties had even agreed a substantial number of areas of common ground prior to the appeal hearing, including the fact that FCE and FCML qualified for protection under the Treaty. Therefore, the court had to focus again on whether the reason for the discrimination was the country of residence of FMC or the fact that FMC was not subject to UK corporation tax. Accordingly, the only substantive issue for consideration by the Court of Appeal was whether the operation of section 413(5) ICTA would infringe the non-discrimination article in the Treaty because of the burden of taxation imposed as a result of the refusal of group relief.

HMRC interpreted the judgment of Lord Hoffmann in *Boake Allen* as authority that the residence of FMC was not the ground of discrimination and criticised the decision of the Upper Tribunal for failing to give sufficient regard to Lord Hoffman's analysis. HMRC's conclusion accordingly was that the discrimination had nothing to do with FMC's residence and everything to do with the fact that company did not pay UK corporation tax.

Rimer LJ, however, distinguished the *Boake Allen* case on the basis that it was irrelevant that the Ford group could have interposed an intermediate UK resident parent company:

'32. ... The point in Boake Allen was that, although the dividend-paying subsidiaries suffered discrimination as compared with the position of a dividend paying subsidiary in the relevant comparator group, the denial of the right of election to the former subsidiaries was not because their capital was owned by a company resident elsewhere than in the UK but because section 247 can have no application to a case in which the parent company receiving the dividend is not a company resident in the UK and so liable to ACT and able to join in the making of a valid election.'

Further Rimer LJ found limited assistance from *Boake Allen* stating that it was only authority to show the need to focus on a 'ground' for discrimination and the ultimate decision of the Court of Appeal was that the ground for discrimination was because FMC was a US resident company rather than for the reason, as submitted by HMRC, that it was because FMC did not

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pay UK corporation tax. The appeal by HMRC was accordingly dismissed by the Court of Appeal. The outcome of an application by HMRC for permission to appeal to the Supreme Court is awaited.

Wider implications of Decision

The First-tier Tribunal also considered a similar point in relation to consortium relief in the *Felixstowe Dock (Felixstowe Dock and Railway Co Ltd and others v Revenue and Customs Commissioners* [2011] UKFTT 838 (TC)) case. In that case, relief under section 406 ICTA had been claimed by the taxpayers but for such relief to be available there had to exist a 'link company' which was a member of both the group and the consortium. Section 406(2) further provided that the link company itself be able to make a claim for consortium relief. However, by virtue of section 402(3B), the link company had to be a UK resident company or carry on a trade through a permanent establishment in the UK.

In this case, the claimant and surrendering companies were UK resident companies, however, the surrendering company was owned by a consortium through an intermediate Luxembourg resident company. Consortium relief was accordingly refused by HMRC. The taxpayer argued on appeal that the non-discrimination article (article 26(4)) of the UK/Luxembourg double taxation treaty was engaged in order to prevent the denial of consortium relief.

On appeal, the FTT found that the essential question to be answered was whether section 402 ICTA discriminated against the surrendering company on the ground that its capital was in part indirectly owned or controlled by a company resident in Luxembourg. The answer given by the tribunal was that 'it plainly does'. Accordingly, the First-tier Tribunal held that the non-discrimination article was engaged and that the surrendering company had been subject to discrimination because of its inability under the UK legislation to surrender its losses to the claimant company. On the wider issue of whether relief could be denied under section 406(2) ICTA by virtue of the requirement that the link company be resident in the UK or carrying on a trade through a permanent establishment in the UK in breach of the freedom of establishment, the First-tier Tribunal referred questions to the CJ for a preliminary ruling.

Following these two cases, it is reassuring to see the UK courts taking a consistent approach to the requirements of double taxation treaties. There could have been a temptation to disapply the authority in *Boake Allen*, however, this has been avoided, thus ensuring that the protections afforded by the non-discrimination article are maintained.

3 Commission v. Germany. CJ dismisses case regarding German taxation of foreign pension funds. Court of Justice (comments by Breuer)

On 22 November 2012, the CJ rendered its judgment in the case Commission v Germany (C-600/10). The case dealt with the taxation of dividend distributions and interest payments to foreign pension funds under German law.

Dividend distributions and interest payments made by German companies to a German pension fund are taxed at the level of the German pension fund on a net basis whereas said distributions and payments are subject to withholding tax on a gross basis when paid to a non-resident pension fund without the possibility to deduct any business expenses directly related to the dividend or interest income received by it.

Considering such difference in taxation, the Commission brought an action against Germany before the CJ based on an alleged breach of the free movement of capital (Article 63 TFEU and Article 40 EEA). The CJ considered that a prohibited restriction included measures of a Member State that were likely to discourage non-residents from making investments in such Member State, such as a different taxation of dividends for resident and non-resident pension funds. The CJ observed that the situations of a non-resident and a resident pension fund must be objectively comparable. In that respect, the CJ pointed out that, in line with settled case law with respect to business expenses directly linked to an activity which has generated taxable income in a Member State, residents and non-residents were in a comparable situation.

The Commission gave three examples of business expenses which, in its opinion, are directly linked to