

UK TAX AND FOREIGN CONTROLLED COMPANIES

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Immediately before the printing of this issue a case was reported in which the compatibility with EC law of the UK foreign controlled companies' legislation was questioned. It is impossible in the circumstances to give more than a brief outline of the case but it may prove to be of general interest.

In *Bricom Holdings Ltd v IRC*¹ a company incorporated and resident in the Netherlands and 100% owned by Brikom Holdings Ltd ("Bricom"), a UK resident company, received interest from another UK resident company which was an intermediate parent of Bricom. The relevant provision of the UK/Netherlands Double Taxation Treaty ensured that the Netherlands had taxing rights in respect of the interest. However, the UK Inland Revenue applied the foreign controlled companies' legislation and charged tax on the immediate UK parent of the Dutch recipient.

Before the Special Commissioners the imposition of UK tax pursuant to the foreign controlled companies' legislation was unsuccessfully challenged on a number of grounds. At the end of their decision, the Special Commissioners noted that Bricom wished to reserve the right to contend that the manner in which the foreign controlled companies' legislation had been applied in the case was contrary to the freedom of establishment contained in Article 52 of the EC Treaty. It had apparently been decided not to seek a reference from the Special Commissioners themselves.²

Clearly, in principle, there are a number of contentions which could be put forward in support of the proposition that the foreign controlled companies' legislation is contrary to Article 52. We cannot, of course, discuss their relative strengths and weaknesses in relation to the UK legislation here. It may, for example, be said that the existence of a tax charge in a state of origin improperly

¹ [1996] STC (SCD) 228.

² The Special Commissioners do have the power to refer a case to the ECJ: see *Hurd v Jones* Case 44/84 [1986] ECR 446.

hinders a company in exercising its right of establishment.³ Given appropriate facts it may be said that the controlled foreign companies' legislation improperly limits a UK company's choice of foreign entity in establishing itself outside the UK.⁴ It may also be possible to contend that the "Community MFN" principle applies.⁵

The case raises a number of issues which are relevant to another area of UK tax law, namely the provisions governing the attribution of gains to UK resident participators in non-UK resident companies pursuant to the Taxation of Chargeable Gains Act 1992 section 13, as amended by the Finance Act 1996 section 174. It would seem likely that the fundamental freedoms of the EC will be considered in this context too in due course.

³ *The Queen v HM Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust plc* [1988] ECR 5483 para 16 and *Union Royale Belge des Societe de Football Association ASBI* Case C-41/95, para 97 of the Judgment.

⁴ See *Commission v France* Case C-270/83 [1986] ECR 273, para 21 of the Judgment.

⁵ See the discussion of this principle in Issue 2 of this *Journal* by Paul Farmer: 'EC Law and Direct Taxation - Some Thoughts on Recent Issues' *ECTJ* Vol 1 1995/96 p 91 at p 101 onwards.