whether European principles such as certainty and proportionality will carry more weight than the embarrassment of having to find that Parliament had exceeded its powers when a tax case on conforming construction finally comes before the Supreme Court.

GARY RICHARDS

Philips Electronics UK Ltd v HMRC: more unjustifiable restrictions on loss relief

The application of the fundamental freedoms of the EU to systems of national taxation is a dangerous process. For Member States the obvious danger is the potential loss of national tax receipts. That is not the only danger. The supremacy of EU law and the operation of the internal market are also at risk. The Luxembourg Court of Justice (formerly the European Court of Justice and referred to below as the ECJ) has regularly pointed out that Member States' submissions would "deprive the rules relating to the freedom of establishment of all meaning".[1] *Philips Electronics UK Ltd v HMRC (Philips)*[2] is another example of a case in which the scope and benefits of the internal market were put in issue. The protection of the internal market was not, however, left to the ECJ. The First-tier Tribunal (Tax Chamber), consisting of Judges Avery Jones and Berner (the Tribunal), undertook the task itself.

The facts

The case arose out of a joint venture between the Philips Group led by Koninklijke Philips Electronics NV (KPE), registered and resident in the Netherlands, and LG Electronics Inc of Korea. At the head of the joint venture was LG Philips Displays Holding BV (LG.PD Holding), tax resident and incorporated in the Netherlands. With three of its subsidiaries, this company formed a fiscal unity for Dutch tax purposes for most of the period in question.

One of these subsidiaries, LG Philips Displays Netherlands BV (LG.PD), created a UK branch for which, despite the subsidiary's name, life was not good. Not for the first time, the exercise of freedom of establishment by the creation of a presence in another Member State was not the precursor of profit. Between July 2001 and December 2004 the branch lost £197,318,561.[3]

is inconsistent with Community law." Lord Scott also cited the ECJ judgment in *Commission v UK* (C-33/03) [2005] ECR I-1865; [2005] STC 582 at [25]: "... incompatibility of national legislation with Community provisions can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended" and commented that: " 'Mere administrative practices' cannot do this. Nor can judges." See also Lord Hope at [10].

Controlled foreign companies; Corporation tax; EU law; Place of supply; Statutory interpretation; VAT

[1] See, e.g. *Société Papillon v Ministère du Budget, des Comptes publics et de la Fonction publique* (C-418/07) [2008] ECR I-8947; [2009] STC 542 at [26], where the ECJ referred also to *Commission v France* (270/83) [1986] ECR 273 at [18], and *Metallgesellschaft and Hoechst AG v IRC (Metallgesellschaft)* (Joined Cases C-397/98 and C-410/98) [2001] ECR I-1727; [2001] STC 452 at [42].

[2] *Philips Electronics UK Ltd v HMRC* [2009] UKFTT 226 (TC); [2009] SFTD 629.

[3] This is the total of the losses calculated according to UK tax principles and set out at [4(14)] of the decision.

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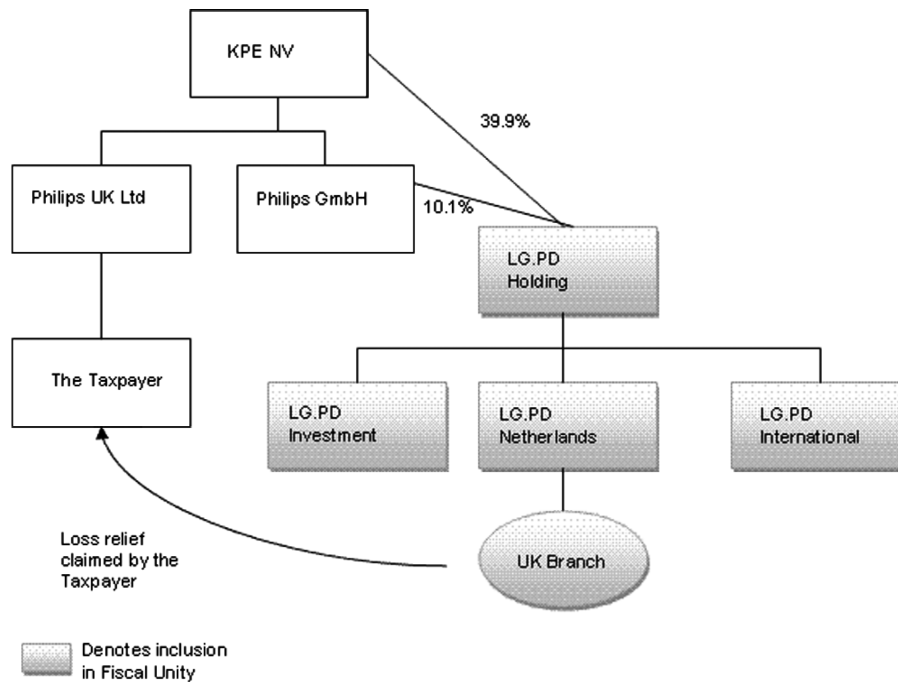

In 2003 LG.PD entered into an agreement with Philips Electronics UK Ltd (the Taxpayer) an indirectly held subsidiary of KPE. The Taxpayer was to pay to LG.PD an amount equal to half of the UK corporation tax saved by using the losses of LG.PD's UK branch.[4] By March 2005, the operations of the branch had been closed. On January 26, 2006, the business and assets of the branch were transferred to an indirectly held subsidiary of LG.PD Holding. The next day LG.PD went into bankruptcy. Other companies, including LG.PD Holding, also went into bankruptcy. The decision records that the Netherlands' bankruptcy procedure was continuing and none of the companies entering bankruptcy had been dissolved.[5]

The Taxpayer made large consortium relief claims under section 403(2) of the Income and Corporation Taxes Act 1988 (ICTA). A joint experts' report before the Tribunal concluded that a very substantial proportion of the losses of the UK branch, computed for the purposes of the Netherlands' tax law, would be available for use in the Netherlands during periods terminating between December 31, 2011 and December 31, 2013, unless certain companies, including LG.PD, were dissolved earlier.

The consortium relief claims were rejected. If all companies concerned had been resident in the UK then LG.PD would have been able to surrender about half of its losses to the Taxpayer.[6] The claims failed because of two provisions of UK tax law. The first was section 406(2) of ICTA. This has the effect of limiting a claim to circumstances where "link" companies, as defined, could have made consortium relief claims if they had taxable profits. The link companies in this case are KPE and its German subsidiary. They could not have made consortium relief claims. They were not UK resident nor did

[4] *Philips*, above fn.2, [2009] SFTD 629 at [4(16)].
[5] *Philips*, above fn.2, [2009] SFTD 629 at [4(26)].
[6] *Philips*, above fn.2, [2009] SFTD 629 at [5].

they carry on business in the UK. The second provision was section 403D(1)(c) of ICTA (section 403D(1)(c)). This prevents the use of losses of a UK branch of a non-resident company, such as LG.PD, if any part of the losses corresponds to amounts deductible for foreign tax.

The questions

Under paragraph 31A of Schedule 18 to the Finance Act 1998, provision is made for the reference, to the First-tier Tribunal, of questions arising in connection with the subject-matter of an enquiry into a company's tax return. Pursuant to this provision the Tribunal was, by the joint referral by the Taxpayer and HMRC, asked two questions. First, "whether in light particularly of any applicable principles of EU law", section 406(2) of ICTA, or any other provision, applied to prevent consortium relief being available on the basis that the relevant link companies were not at any relevant time within the charge to UK corporation tax. Secondly, "whether in light particularly of any applicable principles of EU law", section 403D of ICTA, or any other provision, applied to prevent consortium relief being available by reference to the prospect of the relevant losses being utilised in any period for the purposes of Dutch corporate income tax or any other non-UK tax.[7]

The Taxpayer's ability to rely upon EU law in the first place was not specifically raised. Yet that issue was the first which the Taxpayer had to face. In the view of the Tribunal:

> "What is odd is that HMRC should agree to join in making the referral, which is entirely on the compatibility of two provisions of consortium relief with EU law, and then argue that the taxpayer could not raise the issue."[8]

The Tribunal would have preferred that the "jurisdictional issue" be specifically raised. It must be right that there should be no doubt about the issues to be addressed on a referral. That is particularly true where, as here, the issue in question is of great importance.

The first issue: can EU law be relied upon?

HMRC contended that the Taxpayer had no standing to claim the benefit of directly enforceable "Community rights" of companies established in the Community because it had not exercised any of them.[9] In their view a "similar issue" had been raised in *Test Claimants in the Thin Cap Group Litigation v HMRC (*the *Thin Cap* case*)* before Henderson J.[10]

The issue Henderson J. had to address in relation to thin capitalisation was, in his words:

> ". . .whether Article 43 is engaged in a situation where the UK subsidiary to which the loan is made has an EU resident parent, but the lending company is neither itself EU resident nor the subsidiary of an EU resident parent."[11]

[7] See *Philips*, above fn.2, [2009] SFTD 629 at [3] for the precise terms of the questions.
[8] *Philips*, above fn.2, [2009] SFTD 629 at [13].
[9] *Philips*, above fn.2, [2009] SFTD 629 at [8]. By virtue of the Lisbon Treaty of course: "The Union shall replace and succeed the European Community." (TEU art.1).
[10] *Philips*, above fn.2, [2009] SFTD 629 at [11]. *Test Claimants in the Thin Cap Group Litigation v HMRC* [2009] EWHC 2908 (Ch).
[11] See the *Thin Cap* case, above fn.10, [2009] EWHC 2908 (Ch) at [188].

There was, therefore, a considerable involvement of companies established outside the EU in the *Thin Cap* case. By contrast, in *Philips*, the Taxpayer was incorporated and tax resident in the UK, the loss-making branch of LG.PD was the UK branch and LG.PD itself was resident and incorporated in the Netherlands.

The suggestion that the two cases are similar is, however, instructive. It goes some way to suggesting that the issue before the Tribunal was, for HMRC, the extent to which a company established in the EU could be treated in the same way as a company established outside the EU. It is hardly surprising that, in the event, the Tribunal found that a UK branch of a Netherlands subsidiary could rely on EU law.

The reason that the Tribunal gave for so deciding is that the Taxpayer is the person most affected by any restriction on the freedom of establishment. It would have to pay more tax if it could not use the losses because of a breach of the rights of LG.PD.[12] *Halliburton Services BV v Staatssecretaris van Financiën (Halliburton)*[13] was said by the Tribunal to be an example of the ECJ allowing a company that had not itself exercised any Community rights to claim such rights in the ECJ. The Tribunal considered, however, that not too much could be read into that case because the point in question before it was not argued before the Court.[14] Nevertheless, it was contended in *Halliburton* that the freedom of establishment did not assist the claimant. The contention was not put in the same terms as in *Philips* but the cases are not materially different. In fact, the reasoning in *Halliburton* can be applied to *Philips* quite directly.

Halliburton concerned two subsidiaries of a US parent. The German subsidiary exercised its freedom of establishment by creating a permanent establishment in the Netherlands which it sold, with its immovable property, to the Netherlands' subsidiary. The Netherlands' subsidiary was denied the exemption from Netherlands' transfer tax given to internal reorganisations. The Netherlands contended that there was no discrimination as the German company was not charged to tax. It was, it said, a situation internal to the Netherlands. Freedom of establishment was inapplicable.[15] The Court held, however, that the freedom of establishment was infringed because:

> ". . .payment of a tax on the sale of immovable property constitutes a burden which renders the conditions of sale of the property more onerous and thus has repercussions on the position of the transferor. . . [T]he vendor is in a distinctly less favourable position than if it had chosen the form of a public or private limited company instead of that of a permanent establishment for its business in the Netherlands."[16]

LG.PD in *Philips* is in a comparable position to the German subsidiary in *Halliburton.* LG.PD had exercised its freedom of establishment. The limitations on consortium relief clearly had repercussions for it. For example, at all material times it was unable to benefit from any agreement that it be paid a sum of money calculated by reference to the surrender of its branch losses to the Taxpayer. The fact that it actually entered into such an agreement only in February 2003 is immaterial.

[12] *Philips*, above fn.2, [2009] SFTD 629 at [14].
[13] *Halliburton v Staatssecretaris van Financiën* (C-1/93) [1994] ECR I-1337; [1994] STC 655.
[14] *Philips*, above fn.2, [2009] SFTD 629 at [12].
[15] See *Halliburton*, above fn.13, [1994] STC 655 at [18].
[16] See *Halliburton*, above fn.13, [1994] STC 655 at [19].

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No doubt much more will be said about this first issue and, for example, the Tribunal's reliance on *Jansen Nielsen Pilkes Ltd v Tomlinson*,[17] but the other issues, considered below, are also of great interest.

The second issue: do the provisions of ICTA constitute a restriction?

So far as concerns section 406(2) of ICTA, the Tribunal concluded that there was a restriction and considered that any doubt about the matter had been removed by *Société Papillon v Ministère du Budget, des Comptes Publics et de la Fonction Publique (Société Papillon)*.[18] It said:

> "In *Papillon* relief for losses between two French companies was restricted by the existence of an intermediate Dutch company; here group relief between a UK branch and a UK company is restricted by the existence of non-UK link companies."[19]

The judgment in *Société Papillon* was itself consistent with long-established case law of the ECJ.[20] It is not surprising, therefore, that HMRC concentrated its attention on ICTA 1988 section 403D(1)(c), on the ground that if the taxpayer failed on that section, there would, be no need to consider ICTA 1988 section 406(2).[21]

In considering whether or not section 403D(1)(c) constituted a restriction on the exercise of the freedom of establishment, the Tribunal quoted extensively from the Opinion of the late Geelhoed AG in *Test Claimants in Class IV of the ACT Group Litigation v IRC (ACT IV GLO)*.[22] It found this valuable because, amongst other things, it "explains clearly what is the correct comparison in particular circumstances."[23] It is worth noting here that the need to make comparisons at all is not beyond dispute. For example, Maduro AG in his Opinion in *Marks & Spencer Plc v David Halsey (Marks & Spencer)*, explained the history of the development of the freedom of establishment. He showed that the Court of Justice no longer proceeded exclusively by way of comparison but had regard to whether the exercise of a freedom was prohibited, impeded or rendered less attractive.[24] He noted, too, the difficulties of identifying the correct comparison.[25]

[17] *Jansen Nielsen Pilkes Ltd v Tomlinson* [2004] STC (SCD) 226; see *Philips*, above fn.2, [2009] SFTD 629 at [13].

[18] *Société Papillon*, above fn.1, [2009] STC 542.

[19] *Philips*, above fn.2, [2009] SFTD 629 at [17].

[20] A difference in tax treatment which depended upon where the seat of a subsidiary was situated was held to be a restriction on the freedom of establishment in *Imperial Chemical Industries Plc v Colmer* (C-264/96) [1998] ECR I-4695 at [23]; [1998] STC 874. In *Société Papillon*, above fn.1, [2009] STC 542, the difference in treatment depended upon where the registered office of the subsidiary was located: see the judgment at [31] and the opinion of Kokott AG at [39].

[21] If HMRC were correct that any amount of a UK loss corresponding to a "foreign loss" disqualified the entire UK loss from relief, Philips would have had no allowable loss. The existence of an infringement in s.406, therefore, would not have made any practical difference. See further at [16] of the Tribunal's decision. HMRC appear to have assumed that they would succeed in defending s.403D(1)(c) in full.

[22] *Test Claimants in Class IV of the ACT Group Litigation v IRC* (C-374/04) [2006] ECR I-11673; [2007] STC 404.

[23] *Philips*, above fn.2, [2009] SFTD 629 at [20].

[24] *Marks & Spencer Plc v David Halsey* (C-446/03) [2005] ECR I-10837; [2006] STC 237—Opinion of Maduro AG at [35].

[25] *Marks & Spencer*, above fn.24, [2006] STC 237—Opinion of Maduro AG at [32].

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Sharpston AG said in *Deutsche Shell GmbH v Finanzamt für Grossunternehmen in Hamburg (Deutsche Shell GmbH)*[26]:

> "The choice of comparator typically gives rise to an animated debate, since the decision as to whether there is (or is not) discriminatory treatment often turns upon the precise choice of comparator. The present discussion is, in that respect, rather reminiscent of the early case law dealing with discrimination on grounds of sex, where much ink was spilt over the vexed question of the appropriate comparator for a pregnant woman.
>
> It seems to me that, despite its considerable academic and intellectual interest, in the specific circumstances of this case a lengthy discussion of discrimination is unnecessary. For the Commission, the decisive factor. . . is not whether there has been discriminatory treatment, but whether the. . . national law produces a situation which has a restrictive effect on those who wish to exercise their freedom of establishment."[27]

Geelhoed AG, however, took the view that:

> ". . .in the direct taxation sphere, there is no practical difference between these two manners of formulation i.e., 'restriction' and 'discrimination'."[28]

Some will wonder, if that is so, why freedom of establishment in the direct tax sphere should utilise a methodology superseded in other spheres since 1993.[29] The debate in this area, however, is by no means over.[30]

Wisely cautious, the Tribunal in *Philips* proceeded by way of comparison. It compared the position of a branch generally and a subsidiary which UK law placed on a similar footing.[31] Had LG.PD created a subsidiary the loss would not have fallen within the prohibition of section 403D(1)(c). It had created a branch and so the prohibition of section 403D(1)(c) applied to it. Accordingly, there was discrimination against the branch by the source, or host, state. Having decided that both provisions of the ICTA 1988 constituted restrictions on the availability of consortium relief, the next task was to address the issue of justification.

[26] *Deutsche Shell GmbH v Finanzamt für Grossunternehmen in Hamburg* (C-293/06) [2008] ECR I-1129; [2008] STC 1721.

[27] *Deutsche Shell GmbH*, above fn.26, [2008] STC 1721 at [34] and [35] was not referred to in the Tribunal's decision. The reports available to the writer do not indicate whether or not it was cited in argument. Footnote and paragraph numbers are omitted.

[28] *ACT IV GLO* (C-374/04) [2006] ECR I-11673; [2007] STC 40 at [436].

[29] *Marks & Spencer*, above fn.22, [2006] STC 237 at [26]. The case identified by Maduro AG as marking the change is *Dieter Kraus v Land Baden-Württenberg* (C-19/92) [1993] ECR I-1663.

[30] In *CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Kereskedelmi Kft. v Adó- és Pénzügyi Ellenőrzési Hivatal (APEH) Hatósági Főosztály* (C-96/08) December 17, 2009, Sharpston AG found the Hungarian levy in question a restriction "because it renders the exercise of the right to freedom of establishment less attractive" (at [53]). She also noted the existence of "two schools of thought" so far as concerns whether or not restrictions derived from the existence of two tax systems may be compatible with EC law (at [27]). The Opinion was delivered too late for more than cursory mention in this note.

[31] *Philips*, above fn.2, [2009] SFTD 629 at [18]. Naturally, it was no answer to the discrimination that LG.PD could have created a subsidiary instead of a branch.

The third issue: are the restrictions justified?

Unsurprisingly, fiscal coherence featured amongst the possible justifications relied upon by HMRC and was considered inapplicable. The Tribunal relied upon the analysis of fiscal coherence in *Société Papillon*.[32] It went on to hold that fiscal coherence was ensured by section 411(1) of ICTA which provided that, "[r]elief shall not be given more than once in respect of the same amount. . .". The provision applied to resident and non-resident companies. The provisions of section 406(2) of ICTA were not directed to denying any additional advantages that may arise and its provisions were neither necessary nor justified.[33]

Most of the submissions were directed to section 403D(1)(c). HMRC contended that where a measure is targeted at preventing double use of losses it must be true that it may be justified on those grounds.[34] The Tribunal rejected that submission following extensive reference to cases such as *Marks & Spencer*,[35] *Proceedings brought by Oy AA*,[36] *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn (Lidl)*[37] and *Rewe Zentralfinanz eG v Finanzamt Köln-Mitte (Rewe)*.[38] It concluded that a Member State cannot rely solely upon the prevention of double use of losses as a justification for a provision. It accepted that, following *Lidl*, it was not necessary for a Member State to rely upon the three justifications present in *Marks & Spencer*, namely, the protection of a balanced allocation of the power to impose tax, the prevention of the double use of losses and the prevention of tax avoidance.[39] Nevertheless, in *Lidl* the justification was the prevention of double use of losses together with the protection of the allocation of the power to tax and the latter was, properly, regarded as fundamental.[40] The tribunal did not consider that the protection of a balanced allocation of taxing rights could be seen in *Philips*. It noted that the UK would have given relief for losses in a subsidiary without prejudicing the balanced allocation of taxing rights. Consequently, relief for branch losses would also not prejudice such allocation.[41] It also noted that what the Netherlands did in relation to the losses of the UK branch was a matter for it and could not affect the UK's position.[42]

One of the most important elements in the tribunal's reasoning was its belief that:

> "The proper analysis. . .is whether, in its context, and having regard to the balanced allocation of taxing rights in favour of the source state, there is an overriding reason of public interest in the restriction sought."[43]

It decided there was not. This approach keeps in view the fundamental rationale of justifications on mandatory grounds. The Tribunal did well to highlight it. There is

[32] *Société Papillon*, above fn.1, [2009] STC 542 at [25] onwards.
[33] *Philips*, above fn.2, [2009] SFTD 629 at [29].
[34] *Philips*, above fn.2, [2009] SFTD 629 at [30].
[35] *Marks & Spencer*, above fn.24, [2006] STC 237.
[36] *Proceedings brought by Oy AA* (C-231/05) [2007] ECR I-6373; [2008] STC 991.
[37] *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn* (C-414/06) [2008] ECR I-3601; [2008] STC 3229.
[38] *Rewe Zentralfinanz eG v Finanzamt Köln-Mitte* (C-347/04) [2007] ECR I-2647; [2008] STC 2785.
[39] *Marks & Spencer*, above fn.24, [2006] STC 237 at [51].
[40] *Lidl*, above fn.37, [2008] STC 3229 at [42] and *Philips*, above fn.2, [2009] SFTD 629 at [42].
[41] *Philips*, above fn.2, [2009] SFTD 629 at [46].
[42] *Philips*, above fn.2, [2009] SFTD 629 at [47].
[43] *Philips*, above fn.2, [2009] SFTD 629 at [45].

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a danger that such fundamental principles are forgotten as the case law increases in complexity.[44]

The Tribunal found that the restrictions were totally unjustified and, therefore, was able to answer the questions put to it by stating that, in the circumstances before it, neither section 406(2) nor section 403D of ICTA applied so as to prevent consortium relief being available. The Tribunal did not discuss the process of disapplication which is, after all, obligatory in the circumstances.[45] Its answers to the questions referred make clear that it is disapplying the provisions in the circumstances before it rather than more generally. The process of limited disapplication was also adopted by Henderson J. in the *Thin Cap* case.[46]

The fourth issue: proportionality

Both provisions of ICTA constituted unjustifiable restrictions on the freedom of establishment so the issue of proportionality did not arise. Nevertheless, the Tribunal went on to consider the proportionality of section 403D(1)(c) in case it was wrong in relation to that provision. In so doing it adopted Kokott AG's formulation of proportionality, namely that, "'. . .there should be no more moderate means available to prevent the use of the loss more than once.'"[47] Predictably, the tribunal concluded that there was a more moderate means available, namely, the "no possibilities" test adopted in *Marks & Spencer*.[48] The First-tier Tribunal had held that the test did not prevent all loss relief where a company in liquidation would make no trading profits but may earn interest on deposits.[49] Similarly here, section 403D(1)(c) should not prevent all loss relief where just one pound of losses corresponds to foreign allowable losses.

The Taxpayer suggested other more moderate means. Section 403D(1)(c) could apply, it said, to the extent that losses had been set off against profits in the non-UK territory and the future use of losses could be countered by an adjustment of the claim for relief or a further assessment. The Tribunal considered these alternatives as inconsistent with the case law of the ECJ in *Marks & Spencer* and *Lidl*.[50] It noted, but did not follow, the view of Sharpston AG in *Lidl* that a further assessment, or re-capture provision, was appropriate in that case. The Advocate-General had suggested such alternatives so as to avoid a restriction on freedom of establishment due to a cash-flow disadvantage flowing from limitations on the use of certain losses.[51]

[44] HMRC are recorded as formulating their contention to the effect that, "if a provision is aimed at preventing double use of losses then, ex hypothesi, it must be justified." That formulation, as well as relying on the prevention of losses alone, appears to confuse the pursuit of a legitimate aim with its proportionality.

[45] For a recent re-assertion of the primacy of Community law and the obligation to disapply national law where necessary see: *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu* (C-314/08) November 19, 2009, at [82].

[46] In the *Thin Cap* case, above fn.10, [2009] EWHC 2908 (Ch) at [97], Henderson J. noted the possible small practical difference between disapplication and interpretation.

[47] *Philips*, above fn.2, [2009] SFTD 629 at [50]. The quotation is from Kokott A.G.'s Opinion in *Société Papillon*, above fn.1, [2009] STC 542 at [62].

[48] *Marks & Spencer*, above fn.24, [2006] STC 237; *Philips*, above fn.2, [2009] SFTD 629 at 55.

[49] See the decision of the First-tier Tribunal in *Marks & Spencer Plc v HMRC* [2009] UKFTT 64 (TC); [2009] SFTD 1.

[50] *Philips*, above fn.2, [2009] SFTD 629 at [58].

[51] *Lidl*, above fn.37, [2008] STC 3229—Opinion of Sharpston AG at [28].

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Interestingly, Kokott AG in *Belgian State v Truck Center SA (Truck Center)*[52] commented on Sharpston AG's view in *Lidl* that a cash-flow disadvantage could constitute a restriction. Referring to the possibility of a cash-flow disadvantage caused by the immediate payment of withholding tax in that case Kokott AG said:

> ". . .in Lidl Belgium the Court did not even mention this issue, although Advocate General Sharpston had reached a different conclusion from the Court's precisely because of the cash-flow disadvantage. If cash-flow effects were now no longer relevant, that would however be a rejection of the earlier case law, to which Advocate General Sharpston had expressly referred."[53]

It would seem very doubtful that the Court has taken the unusual course of rejecting its earlier case law in relation to cash-flow disadvantages.[54] The silence of the ECJ in response to Sharpston AG's comments can hardly be interpreted as such a rejection. It certainly should not be regarded as indicating that future assessments or claim adjustments are inappropriate as "more moderate means" in this case.

In an indication of how far EU law has been accommodated in the legal system, the parties agreed that, on the basis of the Tribunal's findings, it was open to the Tribunal to interpret the provision so as to apply a less restrictive measure.[55] Accordingly, as indicated above, the Tribunal decided that section 403D(1)(c) should be interpreted so as to be in conformity with the "no possibilities" test as set out in *Marks & Spencer* if, contrary to its view, the section was justified but went further than was necessary.

Conclusion

Philips raised a number of important issues of EU law affecting not just fiscal matters but also the law of the internal market generally. There may be some debate about certain aspects of the tribunal's reasoning, but the result it reached is one which higher courts should uphold. The lesson for taxpayers, once again, is to make claims for relief having regard to EU law and not just the words of the statute.

TIMOTHY LYONS

[52] *Belgian State v Truck Center SA* (C-282/07) [2009] 2 CMLR 362.

[53] *Truck Center*, above fn.52, [2009] 2 CMLR 362 at [48] of the Opinion; footnotes omitted. So far as concerns the "earlier case law", Kokott AG noted that Sharpston A.G. had referred to *Metallgesellschaft*, above fn.1, [2001] STC 452 in fn.22 of her Opinion in *Lidl*, fn.37 above, at [44], [54] and [76]; *Proceedings between X, Y and Riksskatteverket* (C-436/00) [2002] ECR I-10829 at [36]–[38]; [2004] STC 1271; *Jean-Claude De Baeck v Belgische Staat* (C-268/03) [2004] ECR I-5961; *Test Claimants in the FII Group Litigation v IRC* (C-446/04) [2006] ECR I-11753; [2007] STC 326 at [96] et seq. and [153] et seq.; *Rewe*, above fn.38, [2008] STC 2785 at [29].

[54] See the comments of the ECJ in *Grundstücksgemeinschaft Busley and Cibrian Fernandez* (C-35/08) October 15, 2009, at [25].

[55] *Philips*, above fn.2, [2009] SFTD 629 at [59]. Reliance was placed, in particular, on *Vodafone 2 v HMRC* [2009] EWCA Civ 446; [2009] STC 1480.

LT Corporation tax; EU law; Freedom of establishment; Group relief

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