



TC03579

Appeal number: TC/2010/04962

*CORPORATION TAX – group relief – determination of EU law question
following CJEU judgment*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

(1) FELIXSTOWE DOCK & RAILWAY COMPANY LTD

(2) SAVERS HEALTH & BEAUTY LTD

(3) WALTONS CONTAINER TERMINAL LTD

(4) WPCS (UK) FINANCE LTD

(5) AS WATSON CARD SERVICES (UK) LTD

(6) HUTCHISON WHAMPOA (EUROPE) LTD

(7) KRUIDVAT UK

Applicants

(8) SUPERDRUG STORES PLC

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

TRIBUNAL: JUDGE ROGER BERNER

Sitting in chambers at 45 Bedford Square, London WC1 on 12 May 2014

DECISION

1. On 19 December 2011 the Tribunal (Sir Stephen Oliver and me) released its
5 decision on the determination of certain questions on a joint referral by the parties
pursuant to paragraph 31A of Schedule 18 to the Finance Act 1998. We determined
two of the three questions before us. One, which was referred to as “the DTC
question”, concerned the extent to which the non-discrimination provisions of Article
26(4) of the UK/Luxembourg double taxation convention impacted upon the
10 Applicants’ claims for group/consortium relief. The other (“the s 410 question”)
concerned the impact of the anti-avoidance provisions of s 410 ICTA on the claims
for group/consortium relief in certain periods.

2. Each of our determinations in those respects is, with the permission of this
Tribunal, under appeal to the Upper Tribunal.

15 3. The remaining issue (“the EU law question”) was whether the requirement of s
402(2) ICTA that the link company be resident in the UK or be a non-resident
company carrying on a trade in the UK through a permanent establishment infringed
the EU law rights of any company in the Hutchison Whampoa Group and, if it did,
whether the Applicants could rely on that infringement in support of their claims for
20 group relief.

4. The Tribunal decided to refer the EU law question to the Court of Justice of the
European Union (“CJEU”), and stayed its own proceedings in that respect.

5. The CJEU issued its judgment on 1 April 2014: *Felixstowe Dock and Railway
Company Ltd and Others v Revenue and Customs Commissioners* (Case C-80/12).
25 The parties have made a joint application consequent upon that judgment, dated 8
May 2014, in which they have invited the Tribunal to answer the EU law question as
follows:

30 “... that the link company residence requirement infringes the EU law
rights of companies in the Hutchison Whampoa Group, and that the
claimant companies can rely upon that in support of its (sic) claims for
relief.”

6. Since the release of the Tribunal’s earlier determinations, Sir Stephen Oliver has
retired as a judge of the Tribunal. It falls to me therefore, sitting alone, to make the
final determination of this Tribunal.

35 7. I have considered the judgment of the CJEU, about which I need make no
observations of my own, and the joint application made by the parties. I am satisfied
that the answer to the EU law question is as submitted.

Determination

40 8. Accordingly, I determine the EU law question as follows: In relation to the
claims for group relief, the requirement in s 406(2) ICTA for the link company to be

resident in the United Kingdom or carrying on a trade in the United Kingdom through a permanent establishment infringes the rights of companies in the Hutchison Whampoa Group, and the claimant companies can rely upon that infringement in support of their claims for group relief.

5 **Application for permission to appeal**

9. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**ROGER BERNER
TRIBUNAL JUDGE**

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RELEASE DATE: 14 May 2014