

SDRT - HSBC Holdings PLC and the Bank of New York Mellon Corporation V HMRC: First-Tier Tax Tribunal decision - further announcement

Background

Following an appeal hearing in June 2011, the First-tier Tribunal (Tax Chamber) released its decision in the above case on 28 February 2012. The Tribunal held that the charge to Stamp Duty Reserve Tax (SDRT) at the rate of 1.5 per cent levied on a transaction whereby shares in HSBC were transferred to the Bank of New York Mellon as an integral part of the raising of capital by HSBC is incompatible with the European Union (EU) law, in particular the Capital Duty Directive.

HMRC has considered the decision in detail and has decided not to seek permission to appeal against it. The decision is therefore now regarded as final.

Implications for Stamp Duty Reserve Tax

The Tribunal held that the charge to SDRT at 1.5 per cent arose on the transfer of HSBC shares to the Bank of New York Mellon. It rejected HM Revenue & Customs (HMRC) arguments that Article 12 of the Capital Duty Directive permitted the transfers to be taxed and held instead that, because the transfer was integral to the raising of new capital by HSBC, charging it to tax under section 93 FA 1986 amounted to a tax on the issue of the HSBC shares. Accordingly the tax charge contravened Articles 10 and 11 of the Directive and was unlawful. The Tribunal therefore upheld the company's appeal.

In reaching its decision the Tribunal held that the Capital Duty Directive applies to issuers situated in the EU irrespective of where their investors are located. Acceptance of the decision means that HMRC will no longer seek to impose SDRT at the rate of 1.5 per cent on issues of UK shares to depositary receipt issuers and clearance services outside the EU. Following the decision of the European Court of Justice in 'HSBC Holdings plc and Vidacos Nominees Limited v Commissioners for HMRC (C-569-07)', which held that SDRT charges on issues of UK shares to clearance services (and, by extension, depositary receipt issuers) within the EU is unlawful, the overall effect is now that 1.5 per cent SDRT is no longer applicable to issues of UK shares and securities to such entities anywhere in the world.

HMRC does not consider that the Tribunal's decision has any impact upon transfers (on sale or otherwise than on sale) of shares and securities to depositary receipt systems or clearance services that are not an integral part of an issue of share capital. The Stamp Duty and Stamp Duty Reserve Tax charges under sections 67, 70, 93 and 96 therefore continue to apply to such transactions.

Repayment of Stamp Duty Reserve Tax

HMRC will make repayments of SDRT to those companies that have made repayment claims in respect of issues of UK shares to non-EU depositary receipt systems and clearance services and whose appeals are currently stayed behind the decision in this case.

HMRC also now invites statutory claims for repayment under Regulation 14 of the Stamp Duty Reserve Tax Regulations 1986 ('the SDRT Regulations') from any other persons who, pursuant to sections 93 or 96 Finance Act 1986 have paid SDRT in respect of an issue of shares in a UK-incorporated company to a depositary receipt issuer or a clearance service located within or outside the European Union.

Time limit for repayment claims

Regulation 14 of the SDRT Regulations requires any claim for a refund of SDRT to be made within a period of four years beginning with the later of the date on which the tax was paid and the relevant accountable date for payment of SDRT under the SDRT Regulations. Any claims made after the expiry of that period will be time-barred.

Interest on SDRT refunds

Where the amount of SDRT to be refunded is £25 or more, interest calculated at the rate applicable under section 178 Finance Act 1989 will be paid on the amount of any repayment, calculated from the time at which the SDRT was paid.

Making a Claim

In the first instance the information and documents listed in the Appendix to this statement should accompany any claim for repayment. It may be that in certain circumstances further information is required by HMRC before a claim can be processed.

Claims should state the subject matter as 'Claim made as a result of the First-tier Tribunal decision in 'HSBC Holdings plc and Bank of New York Mellon v Commissioners for HM Revenue & Customs (TC/2009/16584)' and should be addressed to Adam Shooter at HMRC Stamp Taxes, 9th Floor, City Centre House, Union Street, Birmingham B2 4AR.

Appendix

Information and documents required in support of a claim to repayment of SDRT paid at 1.5 per cent on the issue of shares to a clearance service or depositary receipt issuer outside the EU

A claim must include the information and documents set out below:

1. **Transactions reported to and settled in the CREST system:**
 - a) The reason(s) to support the request for a refund of SDRT, which includes copy evidence/information to demonstrate that shares were issued (rather than transferred),
 - b) the CREST transaction reference ID,
 - c) the trade date,
 - d) the intended settlement date,
 - e) the full name of the issuer,
 - f) the full name of the acquirer, i.e. name of depositary receipt issuer (or clearance service) outside the European Union,
 - g) the full name and description of security,
 - h) the share quantity,
 - i) the price per share when issued,
 - j) the total consideration paid (if any)
 - k) the amount of SDRT debited in CREST,
 - l) a signed declaration (see below)

Where the person making the claim did not themselves pay the SDRT directly to HMRC, they must include a letter signed by the payer authorising repayment to be made to the person making the claim.

2. **Transactions reported outside of the CREST system to HMRC Stamp Taxes:**
 - a) The reason(s) to support the request for a refund of SDRT, which includes copy evidence/information to demonstrate that shares were issued (rather than transferred),
 - b) the date the shares were delivered to the depositary receipt issuer or clearance service outside the European Union,
 - c) the full name of the issuer,
 - d) the full name of the acquirer, i.e. the name of depositary receipt issuer (or clearance service) outside the European Union,
 - e) the full name and description of security,
 - f) the share quantity,
 - g) the price per share when issued,
 - h) the total consideration paid (if any),
 - i) the amount of SDRT originally paid,
 - j) the date when notification and payment of SDRT was sent to HMRC Stamp Taxes,
 - k) the original (**not** a paper copy, fax, facsimile or email of the original) SDRT receipt issued by HMRC Stamp Taxes,
 - l) A signed declaration (in the attached form)

Where the person making the claim did not themselves pay the SDRT directly to HMRC, they must include a letter signed by the payer authorising repayment to be made to the person making the claim.

A declaration must be included in the claim which has been signed by an appointed officer of the claimant organisation to confirm that 1.5 per cent SDRT has been paid on the issues of UK securities in respect of the transactions outlined in the claim and that no earlier claim and subsequent refund (either partially or in full) in respect of those transactions has been received by the organisation from HMRC Stamp Taxes or Euroclear UK and Ireland Limited.

Company Declaration

Declaration

I declare that, in relation to the claim for repayment from HMRC of Stamp Duty Reserve Tax (SDRT), all of the following is true in relation to each and every aspect of the claim:

- That the SDRT to be reclaimed was paid on the issue of UK securities into a clearance service or to a depository receipt issuer established outside a European Union (EU) member state
- That the SDRT to be reclaimed was paid at the rate of 1.5 per cent,
- That the SDRT claim is made within 4 years beginning with the later of the date on which the payment was made and the relevant accountable date
- That no previous refund of SDRT has been made either by HMRC or Euroclear UK and Ireland Limited, whether in part or fully, in respect of the transactions in relation to which this refund of SDRT is claimed.

Signature:

Name (printed):

Position held in claiming organisation:

Date: