C-705/20-1

App.No.2 of 2020

IN THE INCOME TAX TRIBUNAL OF GIBRALTAR
IN THE MATTER OF AN APPEAL UNDER SECTION 32 OF THE INCOME TAX ACT 2010
IN THE MATTER OF TABLE C, CLASS 6, OF SCHEDULE 1 OF THE INCOME TAX ACT 2010

BETWEEN

FOSSIL (GIBRALTAR) LIMITED

Appellant

-AND-

THE COMMISSIONER OF INCOME TAX

Respondent

ORDER FOR REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

Wednesday the 16th day of December 2020

Before the Mr James Neish QC (Chairman), Mr Emilio Gomez FCCA and Mr Ernest Gomez BA, MEd ("the Income Tax Tribunal")

UPON the Appellant having requested the Income Tax Tribunal to make a reference to the Court of Justice of the European Union ("CJEU") concerning a question of interpretation of the European Commission State Aid Decision of 19 December 2018 (EU) 2019/700

UPON HEARING Mr Daniel Feetham one of Her Majesty's Counsel for Gibraltar and Mr Moshe Levy Esq. instructed by Hassans International Law Firm on behalf of the Appellants and Mr Terence Rocca Esq. Senior Crown Counsel instructed by the Commissioner of Income Tax on behalf of the Respondent;

IT IS ORDERED THAT:

1. The question set out in the attached Schedule shall be referred to the CJEU for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union ("TFEU").

2. This Order and the Schedule hereto shall be sent to the CJEU forthwith.

3. All further proceedings shall be stayed until the CJEU has given its preliminary ruling on the question set out in the Schedule hereto or until further order.

4. Costs reserved.

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CHAIRMAN

INCOME TAX TRIBUNAL OF GIBRALTAR

SCHEDULE

REQUEST FOR A PRELIMINARY RULING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

1. INTRODUCTION

1. This Order for a reference from the Income Tax Tribunal of Gibraltar arises out of a challenge brought by the Appellant in relation to the enforcement by the Respondent of European Commission State Aid decision, Commission Decision (EU) 2019/700 of 19 December 2018 (notified in C(2018)7848) (the "**Decision**").

2. In particular, following a direction from the European Commission DG Competition ("**DG Competition**") contained in a letter dated 26 March 2020, the Respondent refused to provide the Appellant with tax relief under section 37 of the Income Tax Act 2010 ("**ITA 2010**"), in respect of tax paid on the Appellant's royalty income in the United States. But for the direction of DG Competition, the Respondent acknowledges that they would provide the Appellant with such relief.

3. The Appellant contests the refusal by the Respondent (made pursuant to the direction of DG Competition) to provide tax relief under section 37 of the ITA 2010 and contends that the Decision does not prevent the Respondent from applying such relief.

2. THE FACTS IN BRIEF

4. On 16 October 2013, the Commission initiated a formal investigation procedure to verify whether the passive interest and royalty income tax exemption in the ITA 2010 selectively favoured certain companies. The Decision found that it did.

5. The Appellant is a wholly owned subsidiary of Fossil Group Inc, a company domiciled in the United States and forms part of a US fashion designer and manufacturing group founded in 1984 and based in

Richardson, Texas. Their brands include Fossil, Relic, BMW, Michele Watch, Skagen Denmark, Misfit, WSI, and Zodiac Watches. The Appellant is a Gibraltar company that receives royalty payments from the worldwide use of certain trademarks and design intangibles associated with the brands they own.

6. The Respondent is the Commissioner of Income Tax and by virtue of section 2 of the ITA 2010 is the authority in Gibraltar responsible for the assessment and collection of income tax.

7. The Appellant was not one of the 165 companies investigated by the European Commission and listed at the end of the Decision. It was, however, the beneficiary of royalty income tax exemption under the ITA 2010. All royalty income received by the Appellant was declared to the United States Tax Authorities by Fossil Group Inc and tax was paid in the US on that income at the rate of 35%.

8. It is agreed by the parties that:

   (a) section 37 of the ITA 2010 empowers the Respondent to provide the Appellant with tax relief on any tax paid in the US, by Fossil Group Inc, on the Appellant's royalty income;

   (b) but for the EU Decision, the Respondent would have provided the Appellant with such tax relief as against any tax it is required to pay on that income in Gibraltar in accordance with the provisions of the ITA 2010;

   (c) even if royalty income had been taxed in Gibraltar under the ITA 2010 in 2011 to 2013, and there had been no EU Commission investigation into this part of the ITA 2010, the Respondent would have provided the Appellant relief under section 37.

9. Domestic legislation implementing the Decision was introduced by the Chief Minister of Gibraltar, as Minister responsible for finance, on 7

February 2019 when he published the Income Tax (Amendment) Regulations 2019 (the "**Regulations**"). The Regulations amend the ITA 2010 so as to allow retrospective taxation under Class 3A of Schedule 1, ITA 2010 of royalty income earned from 1 January 2011 to 31 December 2013.

10. Before providing the Appellant with tax relief under section 37 of the ITA 2010, the Respondent entered into communication with and sought guidance from DG Competition. On 26 March 2020 DG Competition wrote to the Respondent informing it that it could not consider tax paid in the United States on the Appellant's royalty income in the tax assessments.

3. FIRST AND LAST REFERENCE BY THE INCOME TAX TRIBUNAL

11. This is the first time (and due to the United Kingdom's exit from the EU, the last time) that the Income Tax Tribunal makes a preliminary reference to the CJEU pursuant to Article 267 TFEU. The Income Tax Tribunal must be regarded as a tribunal empowered to do so in order to ensure the uniform application of EU law: see Case C-274/14 *Bank de Santander* (from the Tribunal Económico-Administrativo Central (Central Tax Tribunal, Spain) para [51], Case C-355/89 *Barr and Montrose Holdings* [1991] ECR I-3479, paras [6-10]; Case C-171/96 *Pereira Roque v Governor of Jersey* [1998] ECR I-4607 and Opinion of Advocate General La Pergola at para [24]. The Income Tax Tribunal is a permanent tribunal, its jurisdiction is compulsory, and its procedure is *inter partes* as between an appellant under section 35 of the ITA 2010 and the Commissioner of Income Tax (i.e. the Respondent). The Income Tax Tribunal applies rules of law and, indeed, there is an appeal on any point of law from it to the Supreme Court of Gibraltar. The Income Tax Tribunal is also independent and is subject to the rights safeguarded by the Gibraltar Constitution (mirroring the European Convention of Human Rights) on, for example, the right to a fair hearing.

4. THE STATUS OF GIBRALTAR UNDER EU LAW

12. EU law applied to Gibraltar pursuant to Article 355(3) TFEU which provides:

> *"The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible".*

13. The full application of EU law to Gibraltar, which is the effect of Article 355(3) TFEU, was tempered by Articles 28, 29 and 30 of the treaty concerning the conditions of accession for the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (the "**1972 Treaty of Accession**"). One of the effects of those provisions is to exclude Gibraltar from the EU's common customs territory.

14. The effect of that exclusion was considered by the CJEU in Case C-30/01, *Commission v United Kingdom* [2001] ECR I -2919 (the "**Gibraltar Case**"). In that case, the CJEU had to consider the applicability to Gibraltar of a number of EU directives which had Article 100 EEC (subsequently Article 94 EC and now Article 115 TFEU) or Article 100a EEC (subsequently Article 95 EC and now Article 114 TFEU) as their legal basis and which had the free movement of goods as their principal objective. The CJEU held at para [59]:

> *"...the exclusion of Gibraltar from the customs territory of the Community implies that neither the Treaty rules on free movement of goods nor the rules of secondary Community legislation intended, as regards the free circulation of goods, to ensure approximation of the laws, regulations and administrative provisions of the Member States pursuant to Articles 94 EC and 95 EC are applicable to it.".*

15. All the other freedoms (persons, services and capital) applied to Gibraltar prior to exit of the United Kingdom from the EU.

Transposition/Enforcement of EU measures in Gibraltar.

16. Under EU law, the United Kingdom was the Member State ultimately responsible for compliance with EU law in Gibraltar. However, under Gibraltar constitutional law, and consistently with the constitutional fact

that Gibraltar does not form part of the United Kingdom, EU matters, including the obligation to transpose and implement EU directives within Gibraltar's national legal order, is a matter for which the Gibraltar Government and the Gibraltar Parliament are responsible.

17. This is confirmed by section 47(3) of the Gibraltar Constitution which provides:

"Without prejudice to the United Kingdom's responsibility for Gibraltar's compliance with European Union law, matters which under this Constitution are the responsibility of [Gibraltar Government] Ministers shall not cease to be so even though they arise in the context of the European Union."

18. Under article 16(3) of Regulation no. 2015/1589 (the "**Procedural Regulations**") recovery of state aid is to be effected in accordance with the procedures under national law of the Member State concerned. It is for the Gibraltar authorities to recover that aid in accordance with national laws in operation at the time.

5. THE LEGAL ISSUES AND ARGUMENTS

The Arguments for the Respondent relying on DG Competition

19. In its letter of 26 March 2020 ("**the March Letter**"), DG Competition took the view that the Respondent could not take into account, tax paid in the United States on *the Appellant's* royalty income because:

(a) *"it is clearly not the purpose of the methodology outlined in para. 226 [of the Decision] to allow deductions of taxes paid in the US as a result of their anti-abuse (CFC) rules. The CFC charge responds to a different taxable logic (anti-abuse) and has no impact on both the reasoning of the Decision and the aid calculation methodology".* DG Competition referred to para 318 of *Fiat Chrysler Finance Europe v EC Commission* (Joined Cases T-755/15 and T-759/15) [2019] BTC 36;

(b) *"allowing the offset of Gibraltar taxes (based on income derived from Gibraltar) by the US taxes would have the paradoxical effect that Gibraltar would not be entitled to exercise its taxing powers (in relation to income generated by a Gibraltar company) while the taxes on the same amount would be effectively paid in the US (in accordance with their anti-abuse rules";*

(c) That paragraph 102 of the Communication from the Commission (2019/C 247/01) OJ C 247, 23.7.2019 had no application to the Appellant because the beneficiary (i.e. the Appellant) had paid no taxes on the aid.

20. The Respondent takes the view that it has to comply with and follow the direction provided by DG Competition.

21. Furthermore, though the availability of section 37 relief under the ITA 2010 was never expressly canvassed with DG Competition, the Respondent takes the view that the March Letter prevents the granting of this relief as it has the consequence of rendering the application of section 37 of the ITA 2010 impossible. The March Letter was written in response to a letter by Fossil Group Inc in December 2019. Neither letter deals with section 37 of the ITA 2010, rather they deal with tax liability calculation under para. 226 of the Decision.

The Arguments for the Appellants

22. The Appellants contest the above views. They make the following arguments:

(a) A Member State is obliged, by virtue of Article 4(3) TEU, to facilitate the achievement of the Commission's task, which includes ensuring that its decisions are implemented. Article 16(3) of the Procedural Regulations requires recovery to be effected in accordance with the procedures under national law of the Member State concerned;

(b) The United Kingdom, through the Gibraltar authorities, has sought to implement the Decision through the introduction in Gibraltar of the Regulations allowing for retrospective taxation of royalty income for the years 2011-2013;

(c) The Respondent as the authority responsible for raising an assessment for that income for those years was entitled, as a matter of domestic law, to apply whatever relief was available to the Appellant under the ITA 2010;

(d) Section 37 of the ITA 2010 did not form part of the Decision and there was no finding in the Decision that the section contravened EU law. Likewise, there was no finding in the Decision that the Respondent was not entitled to apply any tax relief available under Gibraltar law when assessing what sums were due to be paid pursuant to the Decision;

(e) The issue of what relief to apply on any taxable income is one for the Respondent applying domestic law and in this case the Respondent would have provided the Appellant with tax relief as against tax paid in the US on *the Appellant's royalty income.* These where not factors in place in the *Fiat* case referred to in the March Letter which is distinguishable;

(f) The Respondent is conflating the calculation of tax due by virtue of para. 226 of the Decision, which is a simple mathematical calculation, with the issue of what relief can be applied as against the gross sum due. The issue of what relief to apply to any tax to be recovered pursuant to the Decision is a matter for the Gibraltar authorities applying the ITA 2010. This is entirely consistent with the article 16(3) of the Procedural Regulations;

(g) If there is suggestion that the March Letter would apply equally to relief under section 37, and therefore *"would have the paradoxical*

effect that Gibraltar would not be entitled to exercise its taxing powers" it is misconceived. The Gibraltar tax authorities would be exercising their powers under domestic laws to grant relief for tax paid in the US. Indeed, if the ITA 2010 had originally taxed royalty income and the EU Commission had, therefore, not investigated that aspect of the ITA 2010, the Respondent would have applied relief under section 37. In those circumstances, it is difficult to understand why the Appellant is not entitled to the same relief it would have been entitled to had the law complied with the rules of state aid in 2010 and/or why applying relief under domestic rules or law has the paradoxical effect contended for by the DG Commission.

6. REASONS FOR THE REFERENCE

23. The referring tribunal has taken the view that this case raises a complex question on the interpretation of EU law which the CJEU is better placed to answer, not least a question of the effect of the Decision and whether it extends to the ability of the Respondent to apply relief under local laws and rules which did not form part of the investigation on state aid.

7. QUESTION REFERRED

24. The Income Tax Tribunal of Gibraltar accordingly refers the following question:

Would the provision of tax relief by the Commissioner of Income Tax under the ITA 2010 for tax paid in the US in respect of the Appellant's royalty income, infringe the Decision or is otherwise prevented by it?

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CHAIRMAN
INCOME TAX TRIBUNAL OF GIBRALTAR