Appeal number: TC/2010/4962

FIRST-TIER TRIBUNAL

TAX

(1) THE FELIXSTOWE DOCK AND RAILWAY COMPANY
(2) SAVERS HEALTH AND BEAUTY LIMITED
(3) WALTON CONTAINER TERMINAL LIMITED
(4) WPCS (UK) FINANCE LIMITED
(5) AS WATSON CARD SERVICES (UK) LIMITED
(6) HUTCHISON WHAMPOA (EUROPE) LIMITED
(7) KRUIDVAT UK LIMITED
(8) SUPERDRUG STORES PLC

Applicants

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

DIRECTIONS

TRIBUNAL: ROGER BERNER
SIR STEPHEN OLIVER QC
(Tribunal Judges)

UPON this appeal having been heard by the Tribunal on 24 – 26 May 2011

IT IS DIRECTED that:

1. The questions set out in Part A of the Schedule to these Directions (below) concerning the interpretation of European Union law be referred to the Court of Justice of the European

Union for a preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union.

2. That the Registrar of the First-tier Tribunal (Tax Chamber) do forthwith transmit this Direction and the accompanying Schedule to the Registrar of the Court of Justice of the European Union.

3. All further proceedings in this application relating exclusively to issues of European Union law be stayed until the Court of Justice of the European Union has given its ruling on the said questions or until further direction.

R. J. Ray.

J Th Oliver.

TRIBUNAL JUDGE
RELEASE DATE: 19/12/2011

SCHEDULE

REQUEST FOR PRELIMINARY RULING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION BY THE FIRST-TIER TRIBUNAL (TAX CHAMBER) OF THE UNITED KINGDOM

Part A

The Questions Referred

Preamble

In the light of the agreed facts (set out in the Agreed Statement of Facts attached as Part B of this Schedule), and with regard to the legislation of the United Kingdom (summarized in Part C of this Schedule), the First-Tier Tribunal requests the Court to give a ruling on the following questions:

Questions

1. **In circumstances where:**

> **(1) the provisions of a Member State (such as the United Kingdom) provide for a company (a "claimant company") to claim group relief for the losses of a company that is owned by a consortium (a "consortium company") on the condition that a company that is a member of the same group of companies as the claimant company is also a member of the consortium (a "link company"), and**
>
> **(2) the parent company of the group of companies (not itself being the claimant company, the consortium company or the link company) is not a national of the United Kingdom or any other Member State,**

do Arts.49 and 54, TFEU preclude the requirement that the "link company" be either resident in the United Kingdom or carrying on a trade in the United Kingdom through a permanent establishment situated there?

2. **If the answer to question 1 is yes, is the United Kingdom required to provide a remedy to the claimant company (for example, by allowing that company to claim relief for the losses of the consortium company) in circumstances where:**

> **(1) the "link company" has exercised its freedom of establishment but the consortium company and the claimant companies have not exercised any of the freedoms protected by European Law,**

(2) the link(s) between the surrendering company and the claimant company consists of companies not all of which are established in the EU/EEA.

Part B

Agreed Statement of Facts (with Appendices 1 and 2)

1. The Applicants are all companies incorporated and resident in the United Kingdom and were members of the group comprising Hutchison Whampoa Ltd and its subsidiaries (the "Hutchison Whampoa Group") during all, or part of, the period from 26 April 2002 to 23 June 2005 (the "Total Period"). They have made claims for consortium relief under sections 402 and 406 of the Income and Corporation Taxes Act 1988 (ICTA) in respect of the trading losses of Hutchison 3G UK Limited ("the Surrendering Company"), a company incorporated and resident in the United Kingdom.

2. The Surrendering Company, a company incorporated and resident in the United Kingdom, commenced trading on 26 April 2002 and had an accounting period for all relevant years ending 31 December. The accounting periods of the Surrendering Company that fall within the Total Period are referred to here as the "Relevant Accounting Periods". On 23 June 2005 the consortium relationship ceased to exist and the Surrendering Company became a member of the same group as the Applicants.

3. The ultimate parent company of the Hutchison Whampoa Group is, and was throughout the Total Period, Hutchison Whampoa Limited ("HWL"), a company incorporated and resident in Hong Kong. The diagram at Appendix 1 illustrates the Group position of the Applicants and the Surrendering Company as at 7 November 2003 (the relevance of that date is explained below). The diagram at Appendix 2 illustrates the Group position of the Applicants and the Surrendering Company as at 23 June 2005.

4. The Surrendering Company is, and was throughout the Total Period, a 100% subsidiary of Hutchison 3G UK Holdings Limited ("Holdings"), a company incorporated and resident in the United Kingdom. On 7 November 2003 Holdings was owned:

   (i) as to 50.1% by Hutchison 3G UK Investments SARL ("Investments"), a company incorporated and resident in Luxembourg;

   (ii) as to 14.9% by three indirect subsidiaries of HWL, Brave First Limited (as to 1.5%), Clear Choice Limited (as to 5%) and Bright Thought Limited (as to 8.4%), all three being companies, incorporated and resident in the British Virgin Islands;

   (iii) as to 20%, by Brilliant Design Limited ("Brilliant Design") a company

incorporated in the British Virgin Islands, whose indirect 100% shareholder was NTT DoCoMo, Inc. ("DoCoMo"), a company incorporated in Japan; and

(iv) as to 15%, by Waerdah Limited ("Waerdah") a company incorporated in the British Virgin Islands, whose 100% shareholder was KPN Mobile N.V. ("KPNM"), a company incorporated in the Netherlands.

5. Throughout the Total Period, Investments was 100% owned by Hutchison Europe Telecommunications SARL, a company incorporated and resident in Luxembourg, which was throughout the Total Period 100% owned by Hutchison Whampoa Europe Investments SARL, also incorporated and resident in Luxembourg, which was throughout the Total Period 98.98% owned by Auditorium Investments 1 SARL, a company incorporated and resident in Luxembourg. The balance of the shares in Hutchison Whampoa Europe Investments SARL were, throughout the Total Period, owned by Auditorium Investments 2 SARL (0.51%) and Auditorium Investments 3 SARL (0.51%), which two companies were incorporated and resident in Luxembourg.

6. Throughout the Total Period, Auditorium Investments 1 SARL, Auditorium Investments 2 SARL and Auditorium Investments 3 SARL were each 100% owned by New Millennium Corp, a company incorporated and resident in the Cayman Islands, which was 100% owned by Ommaney Limited, a company incorporated and resident in the British Virgin Islands, which was owned 100% by Hutchison Whampoa International (00/03) Limited, a company incorporated and resident in the British Virgin Islands, which was owned 100% by Hutchison Telecommunications Limited, a company incorporated and resident in Hong Kong, which was owned 100% by Hutchison International Limited, a company incorporated and resident in Hong Kong, which was owned 100% by HWL.

7. During each Relevant Accounting Period (or part thereof) in respect of which consortium claims have been made, the Applicants were not less than indirect 75% owned subsidiaries of HWL. During each Relevant Accounting Period, the Applicants were neither directly nor indirectly owned by Investments.

8. The principal activity of the Surrendering Company is owning network infrastructure and providing mobile telecoms services in the United Kingdom. In May 2000, the Surrendering Company acquired a UK 3G telecoms licence ("the Licence") and began incurring substantial expenditure in establishing a network, acquiring content and other services to be provided to customers, promotional work and agreeing contracts with suppliers and customers.

9. On 12 July 2000, HWL, KPNM, New Millennium Corp and Koninklijke KPN NV entered into an agreement under which KPNM agreed to subscribe for shares representing 15% of Holdings' issued share capital, and this transaction completed on 21 September 2000. Also on 12 July 2000, HWL, DoCoMo, and New Millennium Corp entered into an agreement under which DoCoMo purchased all of the shares in the issued share capital of Brilliant Design, and this transaction also completed on 21 September 2000.

10. On 7 November 2003 and on 27 May 2004, HWL entered into share purchase agreements (the "SPAs") with KPNM and DoCoMo respectively under which (a) HWL agreed to purchase from KPNM all of the issued shares in Waerdah, and (b) HWL agreed to purchase from DoCoMo all of the issued shares in Brilliant Design.

11. On 23 June 2005, HWL exercised its rights under the SPAs by procuring that New Millennium Corp, an indirect 100% owned subsidiary of HWL, acquired from KPNM all of the issued shares of Waerdah and acquired from DoCoMo all of the issued shares of Brilliant Design. Since 23 June 2005, Holdings has been 100% owned by HWL indirectly and directly owned by Waerdah Ltd (as to 15%), Brilliant Design Ltd (as to 20%), Brave First Ltd (as to 1.5%), Clear Choice Ltd (as to 5%), Bright Thought Ltd (as to 8.4%) and Investments (as to 50.1%).

12. During the Total Period the Surrendering Company incurred substantial losses. For each of the Relevant Accounting Periods to which the claims for consortium relief relate all of the Applicants made trading profits of at least the amount of relief claimed by them.

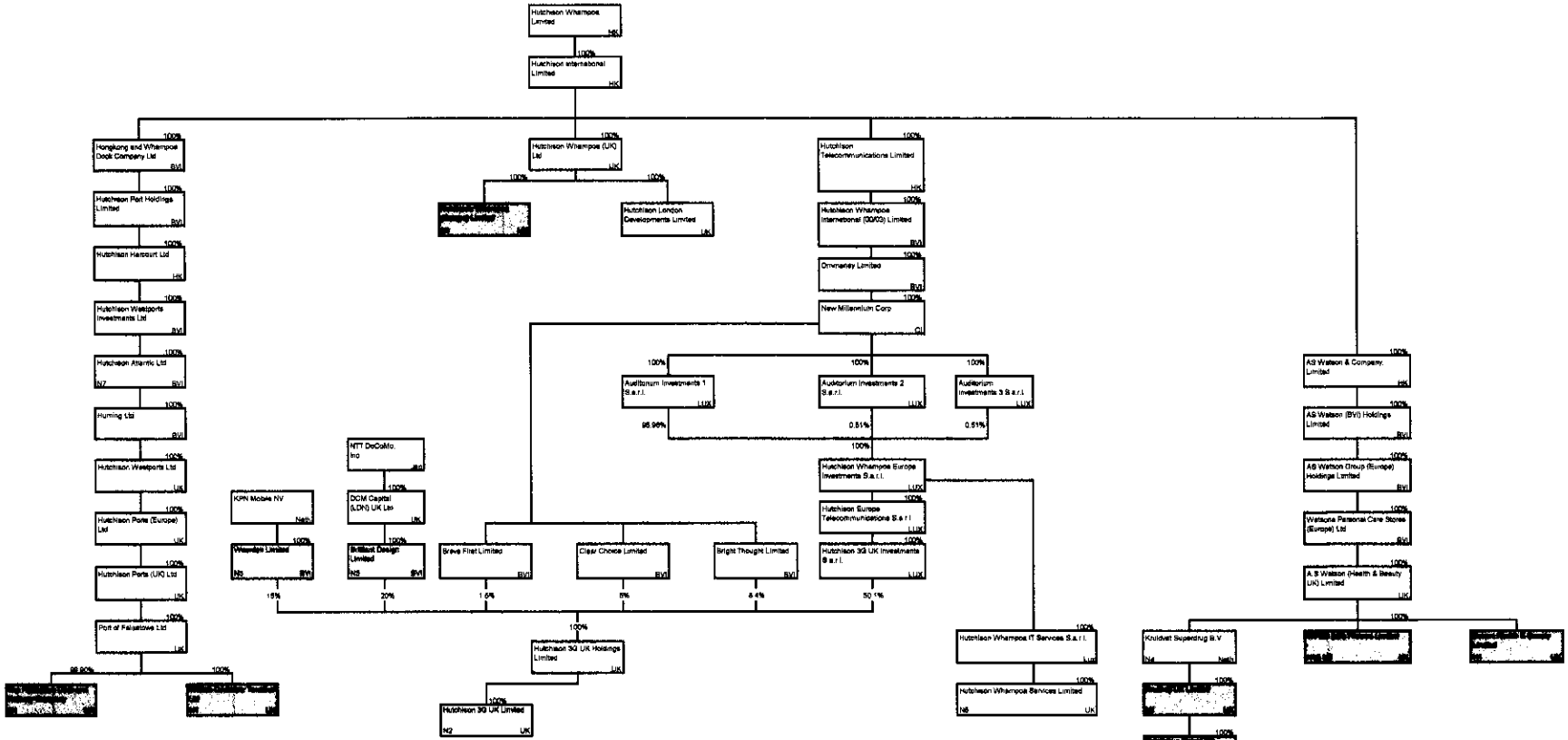
13. Pursuant to an arrangement within the Hutchison Whampoa Group, the Surrendering Company was entitled to receive 30 pence for every £1 of losses surrendered.

APPENDIX 1

Appendix [redacted]

7 November 2003

Hutchison Whampoa Group - Revelant companies on signed agreements with right to acquire Wesfarmers Ltd



Key to place of incorporation

BVI	British Virgin Islands
CI	Cayman Islands
HK	Hong Kong
Jap	Japan
Lux	Luxembourg
Neth	Netherlands
UK	United Kingdom

Notes

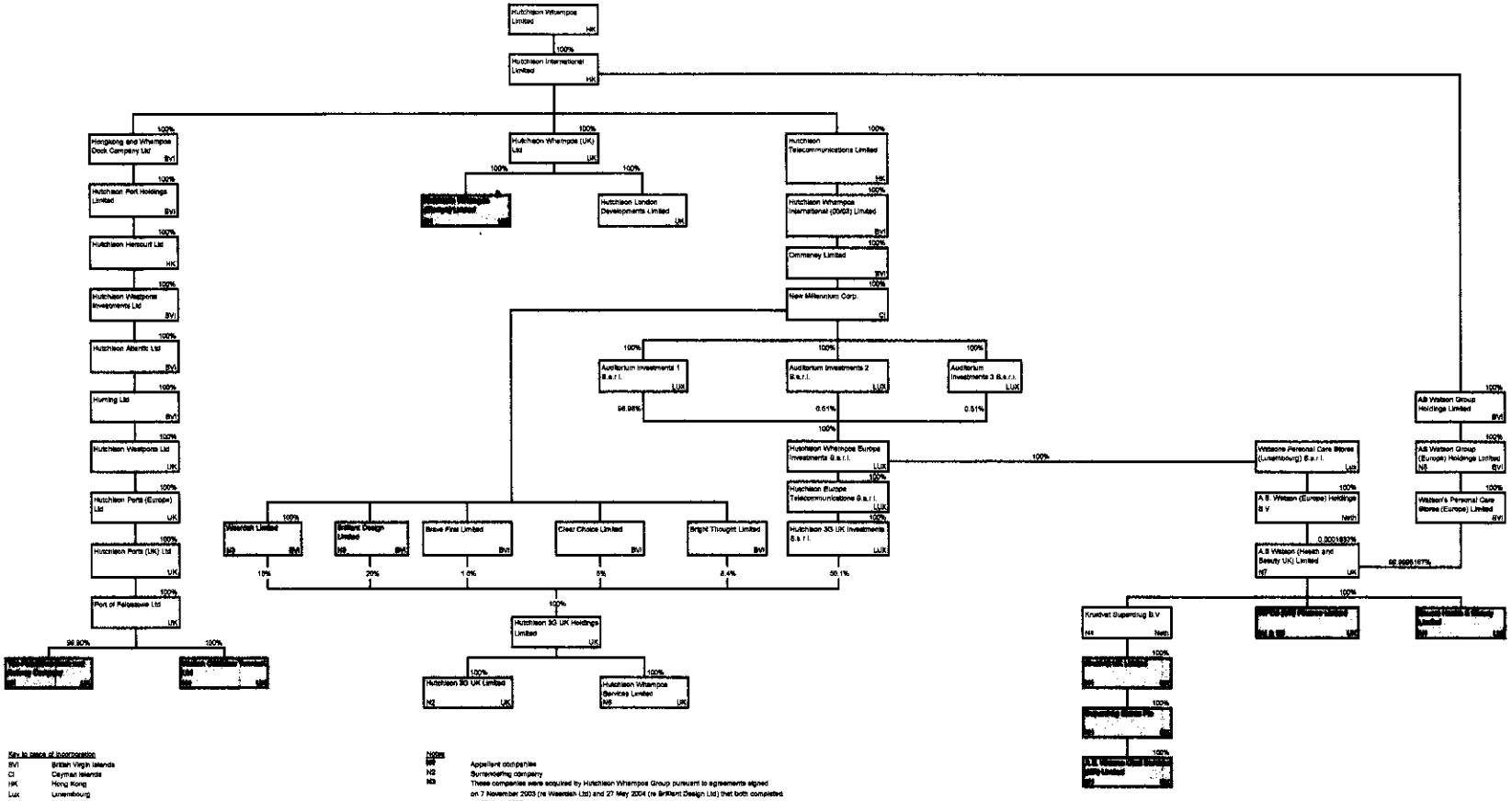
[redacted]	Appellant companies
N2	Surrendering company
N3	These companies were acquired by Hutchison Whampoa Group pursuant to agreements signed on 7 November 2003 (re Wesfarmers Ltd) and 27 May 2004 (re Brilliant Design Ltd) that both completed on 23 June 2005
N4	Kruidvat Superdrug B.V. and the three subsidiaries shown were acquired by the Hutchison Whampoa Group on 21 October 2002
N5	WPCS (UK) Finance Limited was incorporated 16 August 2002 under A S Watson (Health & Beauty UK) Limited
N6	Hutchison Whampoa Services Limited was incorporated on 28 May 2003 under Hutchison Whampoa IT Services S.a.r.l. Ownership was transferred by Hutchison Whampoa IT Services S a r l to Hutchison 3G UK Holdings Limited on 28 June 2004.
N7	Hutchison Atlantic Ltd became a 100% subsidiary of Hutchison Westports Investments Ltd on 19 December 2002. During the period from 26 April 2002 to 19 December 2002, Hutchison Atlantic Ltd was a 50% subsidiary of Hutchison Westports Investments Ltd
N8	Names of companies given as at 28 January 2011 only

APPENDIX 2

Appendix 3 2

23 June 2005

Hutchison Whampoa Group Chart - relevant companies on acquisition of Weerstin Ltd and Brilliant Design Ltd



Key to place of incorporation

BVI	British Virgin Islands
CI	Cayman Islands
HK	Hong Kong
Lux	Luxembourg
Neth	Netherlands
UK	United Kingdom

Notes

N1	Appellant companies
N2	Surrendering company
N3	These companies were acquired by Hutchison Whampoa Group pursuant to agreements signed on 7 November 2003 (re Weerstin Ltd) and 27 May 2004 (re Brilliant Design Ltd) that both completed on 23 June 2005
N4	Kruidvat Superstore B.V. and the three subsidiaries shown were acquired by the Hutchison Whampoa Group on 21 October 2002
N5	WPCS (UK) Finance Limited was incorporated 16 August 2002 under AS Watson (Health & Beauty UK) Limited
N6	Hutchison Whampoa Services Limited was incorporated on 28 May 2003 under Hutchison Whampoa IT Services S.a.r.l. Ownership was transferred by Hutchison Whampoa IT Services S.a.r.l. to Hutchison 3G UK Holdings Limited on 28 June 2004.
N7	AS Watson (Health & Beauty) UK Limited issued 99 shares to AS Watson (Europe) Holdings B.V. on 2 January 2005
N8	Ownership of AS Watson Group (Europe) Holdings Limited transferred by AS Watson (BVI) Holdings Limited to AS Watson Group Holdings Limited on 17 November 2009
N9	Names of companies given as at 26 January 2011 only.

Part C

The Legislation[1]

Consortium claims to group relief for losses

1. The United Kingdom system of group relief for losses in general, and consortium claims for group relief in particular, have been the subject of judgments of the European Court of Justice in Case C-264/96 ICI v. Colmer [1998] ECR I-4695, in Case C-446/03 Mark & Spencer plc v. Halsey [2005] ECR I-10837, and are the subject of the recent reference to the Court of Justice of the European Union in Case C-18/11 Commissioners for HMRC v. Philips Electronics UK Ltd. These cases explain the background to the UK group relief legislation.

2. The specific legislation at issue in this reference is found in section 402, 406 and 413 ICTA 1988.

Section 402

3. At the relevant time, Section 402 provided as follows:

> "(1) Subject to and in accordance with this Chapter and section 492(8), relief for trading losses and other amounts eligible for relief from corporation tax may, in the cases set out in subsections (2) and (3) below, be surrendered by a company ("the surrendering company") and, on the making of a claim by another company ("the claimant company") may be allowed to the claimant company by way of a relief from corporation tax called "group relief".
> (2) Group relief shall be available in a case where the surrendering company and the claimant company are both members of the same group.
> A claim made by virtue of this subsection is referred to as a "group claim".
> (3) Group relief shall also be available in the case of a surrendering company and a claimant company either where one of them is a member of a consortium and the other is—
>
> (a) a trading company which is owned by the consortium and which is not a 75 per cent subsidiary of any company; or
> (b) a trading company—
>
> (i) which is a 90 per cent subsidiary of a holding company which is owned by the consortium; and
> (ii) which is not a 75 per cent subsidiary of a company other than the holding company; or
>
> (c) a holding company which is owned by the consortium and which is not a 75 per cent subsidiary of any company;
>
> or, in accordance with section 406, where one of them is a member of a group of companies and the other is owned by a consortium and another company is a member of both the group and the consortium.
> A claim made by virtue of this subsection is referred to as "a consortium claim".

[1] References throughout this part are to the provisions of the Income and Corporation Taxes Act 1988 ("ICTA 1988") unless otherwise stated, and are references to that legislation as it applied in the relevant period.

(3A) Group relief is not available unless the following condition is satisfied in the case of both the surrendering company and the claimant company.
(3B) The condition is that the company is resident in the United Kingdom or is a non-resident company carrying on a trade in the United Kingdom through a permanent establishment.
(4) A consortium claim shall not be made if a profit on a sale of the share capital of the other company or its holding company which the member owns would be treated as a trading receipt of that member.
(5) Subject to the provisions of this Chapter, two or more claimant companies may make claims relating to the same surrendering company, and to the same accounting period of that surrendering company.
(6) A payment for group relief—

(a) shall not be taken into account in computing profits or losses of either company for corporation tax purposes, and
(b) shall not for any of the purposes of the Corporation Tax Acts be regarded as a distribution ...;

and in this subsection "a payment for group relief" means a payment made by the claimant company to the surrendering company in pursuance of an agreement between them as respects an amount surrendered by way of group relief, being a payment not exceeding that amount."

Section 406(1) and (2)

4. At the relevant time, Section 406 (1) and (2) (so far as relevant) provided as follows:

"(1) In this section—

(a) "link company" means a company which is a member of a consortium and is also a member of a group of companies; and
(b) "consortium company", in relation to a link company, means a company owned by the consortium of which the link company is a member; and
(c) "group member", in relation to a link company, means a company which is a member of the group of which the link company is also a member but is not itself a member of the consortium of which the link company is a member.

(2) Subject to subsections (3) and (4) below, where the link company could (disregarding any deficiency of profits) make a consortium claim in respect of the loss or other amount eligible for relief of a relevant accounting period of a consortium company, a group member may make any consortium claim which could be made by the link company; ....."

Section 413

5. At the relevant time, Section 413 contained definitions for the purposes of the group relief provisions and provided as follows:

"(1) The following provisions of this section have effect for the interpretation of this Chapter.
(2) In this Chapter -

"claimant company" has the meaning given by section 402(1);
"company" means any body corporate;
"consortium claim" means a claim for group relief made by virtue of section 402(3);

"group claim" means a claim for group relief made by virtue of section 402(2);

"group/consortium company" means a company which is both a member of a group of companies and a company owned by a consortium;

"group relief" has the meaning given by section 402(1);

"non-resident company" means a company that is not resident in the United Kingdom;

"relevant accounting period" means an accounting period beginning after 31st July 1985; and

"surrendering company" has the meaning given by section 402(1).

(2A) For the purposes of group relief an accounting period of the claimant company which falls wholly or partly within an accounting period of the surrendering company shall be taken to correspond to that accounting period of the surrendering company.

(3) For the purposes of this Chapter —

(a) two companies shall be deemed to be members of a group of companies if one is the 75 per cent subsidiary of the other or both are 75 per cent subsidiaries of a third company; or

(b) "holding company" means a company the business of which consists wholly or mainly in the holding of shares or securities of companies which are its 90 per cent subsidiaries and which are trading companies; and

(c) "trading company" means a company the business of which consists wholly or mainly in the carrying on of a trade or trades.

(4) In applying for the purposes of this Chapter the definition of "75 per cent subsidiary" in section 838, any share capital of a registered industrial and provident society shall be treated as ordinary share capital.

(5) In determining for the purposes of this Chapter whether one company is a 75 per cent subsidiary of another, the other company shall be treated as not being the owner —

(a) of any share capital which it owns directly in a body corporate if a profit on a sale of the shares would be treated as a trading receipt of its trade; or

(b) of any share capital which it owns indirectly, and which is owned directly by a body corporate for which a profit on a sale of the shares would be a trading receipt;

(6) References to a company being owned by a consortium shall be construed in accordance with paragraph (a) below except for the purposes of the definition of "group/consortium company" in subsection (2) above and of sections 403ZA(3), 406(1)(b) and 409(5), (6) and (7), and for those purposes shall be construed in accordance with paragraph (b) below—

(a) a company is owned by a consortium if three-quarters or more of the ordinary share capital of the company is beneficially owned between them by companies of which none beneficially owns less than one-twentieth of that capital;

(b) a company is owned by a consortium if—

(i) it is either such a trading company as is referred to in paragraph (a) or (b) of subsection (3) of section 402 or such a holding company as is referred to in paragraph (c) of that subsection, and

(ii) three-quarters or more of the ordinary share capital of the company or, in the case of a company within section 402(3)(b), of its holding company is beneficially owned between them by companies of which none beneficially owns less than one-twentieth of that capital;

and the companies which so own three-quarters or more of that ordinary share capital are in this Chapter called the members of the consortium.

(7) Notwithstanding that at any time a company ("the subsidiary company") is a 75 per cent subsidiary or a 90 per cent subsidiary of another company ("the parent company") it shall not be treated at that time as such a subsidiary for the purposes of this Chapter unless, additionally at that time—

(a) the parent company is beneficially entitled to not less than 75 per cent or, as the case may be, 90 per cent of any profits available for distribution to equity holders of the subsidiary company; and

(b) the parent company would be beneficially entitled to not less than 75 per cent or, as the case may be, 90 per cent of any assets of the subsidiary company available for distribution to its equity holders on a winding-up."

6. It is common ground that the Applicants and "Investments"[2] were members of a group of companies for the purposes of the group relief legislation, and that the "Surrendering Company" was owned by a consortium.

The contested provisions: Section 402(3A) and (3B) and 406(2)

7. The combined effect of section 402(3A) and (3B) and of section 406(2) was that the "link company" for the purposes of a consortium claim to group relief had to be a company resident in the United Kingdom or a non-resident company carrying on a trade in the United Kingdom through a permanent establishment. The "link company" in respect of the Applicants was "Investments", a company incorporated in and resident for tax purposes in Luxembourg which was unable to satisfy this requirement.

[2] Abbreviations are those used in the Agreed Statement of Facts set out in Part B of this Schedule.

Part D

The Contentions of the Parties

1. In brief summary, the Applicants contend:

Note: certain of the issues raised in this reference overlap with those raised in Case C-18/11 Commissioners for HMRC v. Philips Electronics UK Limited ("the Philips case"). The judgment in that case will clearly be of relevance to his case.

Question 1: "The Third Country Parent" Issue:

1.1 The Respondents (i.e. the Commissioners for HMRC) now accept that, where all members of a group of companies are established in the European Union, the "UK link company requirement" (i.e. the requirement that the "link company" for a consortium claim for group relief should be resident in the United Kingdom or carrying on a trade in the United Kingdom through a permanent establishment) is not compatible with the freedom of establishment in Article 49.[3] However, the Respondents in this case raise a novel argument: that the "UK link company requirement" is not an infringement of Article 49 where the ultimate parent company of the group is not established in any Member State.

1.2 On this, the Applicants contend as follows:

> 1.2.1 companies in the Hutchison Whampoa Group that were established in Luxembourg exercised their freedom of establishment by establishing a subsidiary ("Holdings") and a sub-subsidiary ("the Surrendering Company") in the United Kingdom;
>
> 1.2.2 the refusal of the Respondents to recognise that the Surrendering Company could surrender its losses (which losses arose in the United Kingdom) to the Applicants to offset against their profits (which also arose in the United Kingdom) by way of group relief constitutes a restriction on the exercise of the freedom of establishment. Had the link company in Luxembourg ("Investments") been established in the United Kingdom, the losses could have been surrendered – the refusal to allow a surrender of losses arose solely because it was established in Luxembourg;
>
> 1.2.3 it is completely irrelevant that the ultimate parent company of the Hutchison Whampoa Group is resident outside the European Union:
>
> > 1.2.3.1 it is irrelevant as a matter of United Kingdom law: nowhere in the group relief provisions does that law distinguish between groups whose

[3] Before the First-Tier Tribunal in Philips Electronics UK Limited the Respondents argued that such a requirement was not an infringement. They abandoned that position after the decision of the First-Tier Tribunal and did not argue the point on appeal.

ultimate parent is established in the United Kingdom, in the European Union, or in a third state;

1.2.3.2 it is irrelevant as a matter of European Union law since it constitutes an additional restriction on the exercise of the freedom of establishment by a company established in a Member State. Put simply, the Respondents' argument is that, in the context of group relief, a company established in a Member State may not enjoy the freedom of establishment if its ultimate parent is established outside the European Union, but only if the ultimate parent is established in a Member State;

1.2.3.3 it is contrary to the decision of the European Court of Justice in Case C-1/93 Halliburton Services BV; ("Halliburton") which involved a group whose parent was established in the United States.

1.2.4 the Respondents are incorrect in contending as a basis for their position that group relief is a benefit for the group as whole (by which they seem to understand that it only benefits the ultimate parent of a group). It also benefits the Surrendering Company as it is able to ensure the earlier use of its losses than would be the case if it could only carry those losses forward against its own future profits. It also benefits the Surrendering Company because it is able to seek payment from the claimant companies for the losses surrendered.[4] It also benefits the direct and indirect parent companies of the Surrendering Company, specifically if that Surrendering Company receives payment for the surrender of its losses.

Question 2: "the Remedy" issue

1.3 Whether claimant companies, which have not exercised the freedom of establishment, are entitled to a remedy by way of offsetting losses is the fourth question posed by the reference in the Philips case. The Applicants contend that the only way to remedy the infringement of the freedom of establishment is by allowing the Surrendering Company to surrender its losses. The correlative to the surrender of losses by the Surrendering Company is that the claimant companies (the Applicants here) must be able to claim to offset those losses against their profits. Surrender of losses (which losses arose in the UK) by one company and offsetting the losses against profits (which also arose in the UK) by another are two sides of the same coin.

1.4 However, the Respondents have raised an additional issue here, not raised in the Philips case. This argument is stated in the second bullet point to question 2. The argument is that, for there to be a remedy, the "chain of companies" that links the Surrendering Company to the claimant company must consist of companies all of which are established in the EU/EEA.

1.5 On this additional issue, the Applicants contend that such a requirement for a link between the Surrendering Company and the claimant company is completely irrelevant. It is sufficient that the claimant companies and the Surrendering Company form a

[4] The common practice of making payment for the surrender of losses is recognised in the UK legislation at s.402(6).

group+consortium as a matter of UK domestic law, and would be able to surrender losses but for the fact that the link company was not a resident of the UK. If the Court answers the first question in the sense that there is an infringement of the freedom of establishment, then the group relief legislation must be read compatibly with EU law so as to permit the Surrendering Company to surrender its losses, whether there is a link with the claimant companies only through companies established in the EU/EEA or not. The Respondents have referred to no provisions in primary or secondary EU law or any authority in any judgments of the Court of Justice for this additional requirement. This requirement is again not consistent with the decision of the Court of Justice in Halliburton where the link between the transferor and transferee companies was through a company established in the United States. It is, in effect, another way of putting the Respondents' argument on the first question: that the presence of a parent company (or, it would seem, any other company in the chain) outside the EU/EEA denies the Surrendering Company and the Applicants a remedy.

2. In summary, the Respondents contend:

2.1 In the Respondents' submission the question that arises in the present case is whether the Link Company Requirement could hinder or discourage the establishment, most obviously by Investments, of a subsidiary in the UK. In this connection Investments is not the company surrendering losses. The Applicants and the company surrendering losses ("the Surrendering Company") are companies whose rights under the Treaty have not been exercised and such rights cannot therefore be said to be infringed. Nevertheless, as the Respondents understand it, the Applicants say that the rule in question means that Investments suffers a detriment because its holding of shares in its intermediate holding company have been devalued by the inability of its subsidiary company, the Surrendering Company, to surrender losses and receive compensation for the losses from the Applicants. On this basis it is said that there is a restriction not on the Applicants but on Investments' right of establishment. The Respondents deny this and say:-

> (a) In order to be a relevant restriction on the right of establishment the loss/discrimination must be suffered by an EU National or a company established in a member state. In the present case if anyone is disadvantaged by the Link Company Requirement, it is the parent company, a company established in Hong Kong, which has no EU law rights.
>
> The relief in question is group relief, which, properly analysed is an advantage to the group as a whole (see Marks and Spencer plc v Halsey [2006] STC 237 Adv Gen para 52, ECJ para 32). Discrimination against the group as a whole is properly to be seen as discrimination in relation to a parent's right of establishment. In the present case, however, the parent has no EU Law rights.
>
> For the Applicants to claim that they are entitled to group relief is in effect a claim by them that a benefit should be enjoyed by a company, the parent company, established outside of the EU. Treaty rights are intended to benefit EU Nationals, not nationals outside the EU.

(b) Any detriment capable of being suffered by an intermediate group company, such as Investments, is in any event too remote to amount to discouragement to the setting up of an establishment in the UK.

If the detriment arises as a result of the inability of the Surrendering Company to surrender losses the detriment is suffered by the parent company of the parent company whose subsidiary has this inability. The detriment said to exist in these circumstances is too remote from Investments and should be disregarded.

(c) The restriction is s.402(3)(3A)(3B) does not discourage the establishment in the UK of a subsidiary. It has precisely the opposite effect.

2.2 If contrary to their principal submission, the EU law rights of any company have been infringed, then nevertheless, the Respondents say that the Applicants cannot rely on such infringement. The Applicants have not sought to exercise their right of establishment in other member states and their rights have never been infringed. What is more they have no link with Investments or the Surrendering Company save through a parent company that is not established in the EU. In these circumstances they cannot rely on any infringement of another person's rights.

(a) As a matter of general principle it is for the domestic legal system of each member state to lay down the detailed procedural rules governing actions for safeguarding rights which persons derive from EU law, provided, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by EU law (the principle of effectiveness) see Case C-446/04 Test Claimants in the FII Group Litigation [2007] STC 326).

(b) In the present case if Investments or any other company has rights which have been infringed then they may claim damages from the UK for any loss suffered (see Joined Cases C-6/90 and C-9/90 Francovich v Italy [1991] ECR 1 – 05357 paras 31-37 and Re Claimants under Loss Relief Group Litigation Order [2005] STC 1357). The principles of equivalence and effectiveness simply do not require entities whose EU law rights have not been infringed to be given a remedy. It is not the case, that unless the Applicants can make the claims in question there would be a breach of EU law without remedy.

This issue has been considered by the Tribunal in the case of Philips Electronics, which case has now been referred to the ECJ. The Tribunal concluded that the Applicants in that case could rely on a breach of directly enforceable EU law rights of another company. The Respondent in this case do not accept the correctness of the conclusion of the Tribunal on this point. In any event there is an important factual difference between the facts of the present case and those in Philips Electronics. In Philips Electronics all the relevant companies were resident in the EU. In the present case the Applicants are unconnected with Investments and the Surrendering Company, save through their ultimate parent company established in Hong Kong. Even if the correctness of the decision in Philips Electronics is accepted, it is not the case that merely because one person may have its EU law rights infringed that any other person, who is in some way indirectly affected, can seek to say that the infringement means

that legislative provisions are of no effect against it. What is required at a minimum is a relationship between the complainant and the entity whose rights have been infringed. That relationship must be found in the EU, and must be relevant to the right of establishment in order for reliance on EU law rights to exist. In the present case the relationship between the Applicants and Investments can only be found by going outside the EU, to Hong Kong, to find the common parent company. In such circumstances even accepting the correction of the Tribunal's decision in Philip's Electronics, the Applicants are unable to rely on any infringement of rights alleged to exist.

Part E

The Referring Tribunal and History of the Proceedings

The Referring Tribunal

1. The referring tribunal is the First-Tier Tribunal (Tax Chamber). It was established by Parliament under the Tribunals, Courts and Enforcement Act 2007.

2. In the present proceedings the First-Tier Tribunal is constituted by Judge Roger Berner and Sir Stephen Oliver QC.

History of the Proceedings

1. The Applicants made the disputed claims for consortium relief in their UK corporation tax returns (as originally filed and, the case of some of the Applicants, then amended) for each relevant year. HMRC duly opened enquiries into each year's returns under the normal UK statutory process. One issue in each enquiry is the validity of the claims for consortium relief.

2. Three questions on the validity of the claims for consortium relief were the subject of a joint referral to the First-Tier Tribunal pursuant to paragraph 31A of Schedule 18 to the Finance Act 1998 by the Applicants and the Respondents. The joint referral was notified to the First-Tier Tribunal on 27th May 2010.

3. The first question in the joint referral asked as follows:

> In relation to the claims for group relief, does the requirement in section 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 infringe the EU law rights of any company in the Hutchison Whampoa Group, and, if it does, can the Claimant Companies rely on that infringement in support of their claims for group relief?

4. The remaining two questions related to the impact of Article 26 of the UK/Luxembourg Double Taxation Convention on the claims for group relief and the impact of section 410 ICTA 1988 on the claims. Those questions do not raise issues of EU law.

5. The joint referral was heard on 24th, 25th and 26th May by the First-Tier Tribunal (Tax Chamber). During the hearing the judges of the Tribunal heard argument from the parties in relation to EU law on the first question in the joint referral and concluded that, in order to answer that question, a preliminary ruling from the Court of Justice of the European Union was necessary.