

# Corporate tax finding does not aim to discriminate

**IN A** significant judgment, the House of Lords handed down its judgment in *Boake Allen Ltd and Others v Commissioners for HMRC* (2007 UKHL 25) on May 23. This case is significant as it dealt with alleged discriminatory conduct on the part of the UK revenue authorities with reference to the treatment of advance corporation tax (ACT), which is similar to secondary tax in SA.

Under the ACT law, a UK subsidiary could not make an election to avoid the payment of ACT in circumstances where its holding company was a nonresident. It was argued that, because a UK subsidiary could make this election in circumstances where its holding company constituted a UK holding company, the inability to do so in circumstances

where its holding company was a nonresident parent discriminated against foreign holding companies.

In other words, a UK subsidiary could not pay a dividend to its for-



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ign holding company without avoiding advance corporation tax, to its UK holding company by making the relevant election.

This argument is similar to the argument that has been raised by South African taxpayers in the context of the group relief provisions contained in the Income Tax Act insofar as it relates to group relief.

In other words, because it is not possible for a South African subsidiary to use the group relief exemptions when it pays a dividend to a nonresident holding company, taxpayers argue that this restriction is discriminatory when it compares the position of a South African subsidiary paying a dividend to its South African holding company.

The House of Lords held that

these provisions are not discriminatory in view of the fact that the legislative framework is different in the context of ACT compared to the discriminatory provisions contained in double taxation treaties.

The argument of the UK revenue authorities was accepted that the ACT liability was merely shifted from a subsidiary to a parent. In other words, one cannot compare the situation of a UK group with that of a transnational group. It was also indicated that ACT did not constitute a tax on income, resulting in it not being covered by the relevant treaty.

The judgment of the House of Lords is significant in view of the fact that many South African taxpayers have prepared themselves to raise an argument that a number of provi-

sions contained in the Income Tax Act are discriminatory to the extent that they result in a different tax treatment depending on whether or not one is dealing with a South African holding company compared to a foreign holding company. The decision of the House of Lords is that much more surprising in view of the fact that all lower courts held in favour of the taxpayer.

The decision may result in taxpayers reconsidering their position. The intention is not to discriminate against nonresident holding companies, but to preserve a scenario that secondary tax on companies is to be payable at some stage.

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