

HMRC Anti-Avoidance Review; making Wicked problems Snow White?

It is pretty much common ground with all practitioners that the UK tax code is the most complex in the Western world. With rafts of anti-avoidance provisions and differing approaches by the accountancy profession, HMRC and the Court's interpretation of the limits and specifics of applications, disputes become protracted, sometimes acrimonious and always expensive.

Tax professionals are usually faced with:

- much uncertainty as to how to advise clients presented with tax-saving 'schemes'.
- difficulty in establishing how wide a net may be cast : who are the 'innocents' in any particular arrangement?
- the consequent virtual impossibility of completing SA returns with any certainty of accuracy when schemes are in the frame.
- problems with advice about the limits of a 'commerciality' defence when looking at clients' business plans
- issues of quantification of potential tax at stake e.g. restriction of relief against absolute denial of relief

The Treasury have accepted that these difficulties arise and, consequently launched a wide-ranging anti-avoidance review in the Pre-Budget Report 2007, with updates in the 2008 Budget and July 2008. The 2008 documents looked at the specific areas of Transaction in Securities, various CG transactions including intergroup loss transfers, depreciatory/value shifting, the treatment of lease premiums, and Employment – Related securities; the current review is concerned with general concepts underlying the generic 'Unallowable Purposes', a term most specifically familiar in the Loan Relationships regime, now embodied in Part 5 Corporation Tax Act 2009.

Historically, the UK tax code has never had a general anti-avoidance rule, and it can be argued that this has resulted in interpretation over the past century. In response to this, over the years the focus has been on acknowledging the intention of both legislators and consumers. Two of the Big Three cases of anti-avoidance in *WT Ramsay v IRC* {1981} and *McGuckian v CIR* {1997}, focused on the principles that 'clear words' should be *considered within the context and scheme of the relevant act as a whole*, thus moving away from the 'island of literal interpretation' on which it once stood.

In a way, the search for a general anti-avoidance provision has been regarded as a mythical dream and quite reasonably, HMRC have not opted for such a quest. The preamble in the July 2008 document indicates this general approach, acknowledging that one size cannot fit all:

Businesses and their advisers accepted the need for Government to ensure that anti-avoidance legislation provides effective protection to the Exchequer. However, they wanted legislation that is clear, well targeted and easier to use. They also wanted to be able to understand the tax consequences of complex commercial transactions with reasonable certainty.

‘Unallowable Purpose’ September 2009 – main features

The HMRC discussion paper proposes a document:

- To set out a draft framework for policy makers
- Describe the underpinning principles involved
- Suggest draft HMRC guidance on ‘purpose’ tests

This final element is, of course, the one with most practical application. Housed in Appendix B of the document, it presents a comprehensive approach, with considerable legal analysis, to matters of interpretation of allowability and purpose along with their application.

The headlines:

An analysis identifying:

- i) **Area of tax code affected**
 - A relief, multiple reliefs, a regime, a specific tax, all taxes?
- ii) **Filters to limit the number of transactions to which provisions can apply**
 - positive filter: circumstances to be present before purpose test can apply
 - negative filter: indicator of commercial behaviour where the test should NOT be applied
- iii) **Entity affected**
 - individual, trust, company, group etc, general person or construct ie (resolving confusion in such areas as Manufactured Payments Sched 23 TA88)
- iv) **Purpose tested**
 - issues with arrangements, whether or not legally enforceable
 - with transactions and parties to transactions, innocent and otherwise
- v) **Nature of Unallowable Purpose**
 - seeking a tax advantage?
 - benefiting from relief not intended by legislators?
 - using tax provisions for non-commercial purposes?
 - or for facilitating activities not in charge to tax?
 - to what extent are subjective intentions significant?
- vi) **Threshold**
 - A purpose, main purpose/es, dominant or sole purpose?
- vii) **Consequences**
 - effect of transactions are disregarded/voided? Or a different outcome implied?
 - Qualitative or quantitative restriction: deny or restrict relief?
 - If restricted on what basis should additional tax be sought; by reference to advantage intended or achieved or objectively disallowable?

It should be emphasised that this is a discussion document and representations are invited by 30 October 2009; naturally the Tax Planning Industry is likely to be most active in this area, but the document in its final form is likely to become valuable in the context of technical disputes with HMRC.

To access go to <http://www.hmrc.gov.uk/consultations/index.htm> and follow the link to 'current consultations'.

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