Tax and the City Review

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The Court of Appeal in *Farnborough Airport* confirms that the appointment of a receiver triggers degrouping but does not have to consider whether the narrow interpretation of ‘control’ taken by the Upper Tribunal is correct. In *Morrison Trustees*, the Court of Appeal dismisses the taxpayers’ appeal concluding that there cannot be a strict requirement for ‘arrangements’ for the final sale to have been made by the time of the first transaction, for *Ramsay* to apply. The Court of Appeal in *Jimenez* decides that HMRC has the power to serve information notices to a taxpayer resident abroad. In *Blackrock* the Upper Tribunal concludes that the provision of a technology platform can qualify as a substantive VAT exempt financial service (rather than as a standard rated supply of IT services) although a reference is being made to the CJEU on apportionment of the consideration.

Farnborough Airport: degrouping and the control test

Farnborough Airport Properties and another v HMRC [2-19] EWCA Civ 118 concerns HMRC’s refusal to allow £10.5m of group relief because of the appointment of a receiver over the surrendering company. Group relief surrenders cannot be made at a time when there are arrangements in place whereby the relevant group relationship could be broken (CTA 2010, s154 onwards). An intermediate parent company, Kelucia, had indirect control of the claimant companies and the surrendering company before the appointment of the receiver. The question was whether Kelucia still had the requisite control after the appointment of the receiver.

The Court of Appeal unanimously agreed with the Upper Tribunal (UT) and the First-tier Tribunal (FTT) that group relief should be denied. CTA 2010 section 154 applied to deny group relief because the appointment of the receiver severed the group by depriving Kelucia of control of the surrendering company. It did not matter that the receiver did not by itself have control of, nor the ability to obtain control of, the surrendering company. The crucial point was that Kelucia lost control of the surrendering company when the receiver was appointed. The appointment of the receiver constituted ‘arrangements’ for the purposes of s154. It had the effect described in ‘Effect 2’ in CTA 2010, s154(3).

Although the powers the receivers were granted in this case were described as very extensive, the Court of Appeal emphasises (at para 10) that they are standard powers granted to receivers. A distinguishing factor in this case was, however, that the receivership was not limited in time but appeared to be the end of the road for the surrendering company.

HMRC maintained their primary case that the UT was correct to dismiss the appeals for the reasons that it gave. In case the Court of Appeal disagreed with the UT, however, HMRC raised other arguments including that the UT was wrong to hold that the debenture (which provided for the appointment of the receivers and set out the terms of the receivership) was not an ‘other document regulating’ the surrendering company within the meaning of CTA 2010 s1124(2) and that the UT should have held that the receivers did have control of the company as a result of the powers conferred by the debenture. As the Court of Appeal dismissed the appeal, however, there was no need to consider these points. This means that, unfortunately, we are still left with the problems raised by the UT's narrow construction of the

definition of 'control' (CTA 2010, s1124). This definition refers to a company's articles 'or other document regulating' the company.

The UT's view is that the debenture in question is not an 'other document regulating' the company because 'other document' in this context means a constitutional document, akin to articles of association, which is binding on members by virtue of its status as such and does not include a document to which accession requires a separate agreement. This narrow construction is potentially unhelpful in the context of other provisions using similar language. One such example is in the context of consortium relief in a joint venture. It is generally considered that a similar reference in the consortium relief rules, providing that a suspension of voting rights falls within a safe harbour, is apt to include a suspension set out in a shareholders' agreement. (The suspension of voting rights in a joint venture is often included in the relevant shareholders' agreement rather than in the articles to avoid details of the commercial arrangements being filed at Companies House.)

The UT's decision led to concerns about its impact on a considerable number of joint venture projects if the suspension of voting rights has to be relocated to the articles in order to fall within the safe harbour provisions. Might there now be some comfort to be taken from the fact that HMRC were prepared to argue before the Court of Appeal for a broader construction of 'other document' - namely, that HMRC will continue to treat a shareholders' agreement as a 'constitutional document', as that term is defined in the safe harbour rules?

Morrison Trustees: Ramsay applied to defeat anti-avoidance scheme

In *Morrison Trustees v HMRC [2019]* EWCA Civ 93, Lord Justice Newey reminds us that: "The *Ramsay* approach is intended to be liberating, not to spawn technical rules of its own." The case concerned a CGT avoidance scheme designed to take advantage of a (now repealed) provision which disapplied the market value rule to options when determining the consideration for the disposal of the asset in favour of the actual price paid.

The Scottish trustees of trusts established for the benefit of the Morrison family held some shares in AWG Plc which they wished to dispose of without giving rise to substantial CGT. An intermediate transfer of the AWG shares was made to Irish trustees (pursuant to the exercise of a put option way below market value) and the Irish trustees sold the shares to Merill Lynch and transferred the proceeds to the Scottish trustees. HMRC assessed the Scottish trustees to CGT on the basis that they disposed of the AWG shares themselves to Merrill Lynch at market value rather than selling to the Irish trustees in exercise of the put options.

Both the FTT and the UT had concluded that the scheme failed on *Ramsay* grounds - the disposal of shares by the Scottish trustees as part of a tax avoidance scheme had amounted to a single composite transaction in which the shares were disposed of by the Scottish trustees at or about market value, and so substantial CGT was chargeable. The Court of Appeal concluded that the FTT was right to conclude that *Ramsay* had been in point at the date of the exercise of the options and that the Scottish Trustees should be regarded as having effected a 'disposal' of the AWG shares to Merrill Lynch within the meaning of TCGA 1992.

The Scottish trustees raised the technical argument that the transactions could not be regarded as pre-ordained because, at the date of the exercise of the options, the buyer and the price at which the Irish trustees would sell had not been determined. Indeed it was, until the last minute, the plan to sell the AWG shares directly to the market rather than selling to Merrill Lynch. The Court of Appeal dismissed this argument concluding it must be possible for the *Ramsay* approach to apply to schemes under which assets are sold in the market.

The FTT had found that there was "no practical likelihood that the .. shares would not forthwith be re-sold in the market". The Court of Appeal

concluded that there cannot be a strict requirement for 'arrangements' for the final sale to have been made by the time of the first transaction. Where, as in this case, the asset to be disposed of is quoted shares, very little advance preparation is required to dispose of them. The fact that the AWG shares were in the end sold to Merrill Lynch rather than direct to the market was considered unimportant (a 'minor variation on the intended theme') and did not render the *Ramsay* approach inapplicable.

Jimenez: extra-territorial scope of HMRC's power to issue a taxpayer notice

In *The Queen on the application of T M Jimenez v HMRC* [2019] EWCA Civ 51, the Court of Appeal had to consider the territorial scope of HMRC's power to issue a notice to a taxpayer to obtain information and documents. Mr Jimenez is a UK national who now resides in Dubai. He resided in the UK for a time and both his past and present tax position is currently under investigation by HMRC. As part of this investigation, HMRC served a notice under Finance Act 2008, Sch 36, para 1 on Mr Jimenez at his address in Dubai asking him to produce details of bank and credit card accounts since 6 April 2004 and a schedule of his visits to the UK between that date and 5 April 2013.

Mr Jimenez contended that HMRC's information powers do not have extra-territorial effect and succeeded before the High Court in his judicial review action to get the notice quashed. Charles J held that the paragraph 1 power could not be exercised extra-territorially. The Court of Appeal has allowed HMRC's appeal, unanimously concluding that the sending of a taxpayer's notice to Mr Jimenez in Dubai under Sch 36, para 1 does not contravene any international obligation of the UK. Paragraph 1 does not have any territorial limits.

It would be different if HMRC sought to enforce in Dubai a penalty for non-compliance with the notice - that would offend the sovereignty of Dubai - but merely sending Mr Jimenez a notice requesting information reasonably required for the purposes of checking his tax position in the UK does not violate the principle of state sovereignty.

This case is an important win for HMRC in its battle against tax evasion. Although the disputed notice in this case was a notice to the taxpayer himself, this case could pave the way for HMRC to argue that a notice under para 2 to a third party could extend to third parties outside the UK in relation to someone who is or may be liable for tax in the UK. Although HMRC would not be able to enforce a penalty for non-compliance, a third party such as a bank may feel compelled from a reputation perspective to comply with the notice in any event.

One of the influential factors in relation to a taxpayer notice is the sufficient connection between the recipient and the jurisdiction. The Court of Appeal found that the status of someone as a UK taxpayer, rather than his place of residence is key to the availability and operation of the para 1 power. This connection is obviously lacking in the context of the third party notice power. Other factors, however, such as the lack of overt or express restriction on the geographical operation of para 2 and Lord Justice Legatt's comment that Sch 36 is intended to have the widest territorial reach that is consistent with international law, could form the basis of an argument on the scope of the third party notice power.

Blackrock: VAT exemption and apportionment of consideration

The UT in *Blackrock Investment Management (UK) Ltd v HMRC* [2018] UKUT 415 confirmed the FTT's decision that the service of the use and functionality of an investment management platform can qualify as a substantive VAT exempt financial service rather than as a standard rated supply of IT services.

The service was used partly for managing SIFs (VAT exempt funds) and, mostly, for managing taxable non-SIFs. The FTT found that as it related to a single supply, the consideration could not be apportioned to reflect the liability of the

underlying supplies and treated the platform supply in this case as standard rated.

The Upper Tribunal found that the consideration could arguably be apportioned so as not to frustrate the purpose of the VAT exemption by preventing its application in practice. As the point is not clear, however, the question of apportionment is being referred to the CJEU. The CJEU's decision will be eagerly awaited to see whether it supports HMRC's 'tainting' approach (denying the VAT exemption on the basis that the non-SIFs taint the supply) or if the CJEU will permit apportionment in some single supply cases.

What to look out for:

- The Chancellor will deliver his Spring Statement on 13 March. We are not expecting significant tax or spending announcements at the Spring Statement 'unless the economic circumstances require it', but consultation documents may be published.
- With effect from 1 April 2019, HMRC is withdrawing the VAT exemption for pension fund management services provided by regulated insurance companies where the pension fund is not a SIF.
- Targeted relief will be permitted by Finance Act 2019 for goodwill and certain other assets acquired in business acquisitions occurring on or after 1 April 2019.

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