Tax tribunal blows final whistle on Anderson (Anderson v HMRC)

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Tax analysis: Ben Elliot of Pump Court tax chambers, comments on the First Tier Tribunal's (FTT) decision in Anderson v HMRC and HMRC's assessment denying losses arising from trading activities.

Original News

Anderson v HMRC [2016] UKFTT 0565 (TC)

What was the case about?

In his return Mr Anderson claimed £3m of relief under sections 64 and 72 of the Income Tax Act 2007 (ITA 2007), for losses arising from trading activities described as 'football development'. Mr Anderson had invested in the Bafana soccer academy in South Africa that was set up to nurture young footballing talent and make money from the successful transfer of talented players.

HMRC raised a discovery assessment on the basis that the losses did not arise from a trading activity carried on commercially with a view to profit and the main purpose of the activities was to obtain a tax advantage.

Why did the appellant dispute the validity of the discovery assessment?

Primarily, the appellant argued that there was no 'discovery' because at the time that the assessment was made, HMRC did not have a reasonable basis for believing that Mr Anderson had been under-assessed to tax because HMRC lacked sufficient information to hold such a belief at the relevant time, in particular, the taxpayer argued that knowledge of the existence of a tax avoidance scheme (the Bafana Scheme) and how others had implemented it was not sufficient.

The appellant also argued that the condition in section 29 (5) of the Taxes Management Act 1970 (TMA 1970) was not met. However, the appellant recognised that recent decisions, including the Court of Appeal decision in *Sanderson v Revenue and Customs Commissioners* [2016] EWCA Civ 19, [2016] All ER (D) 164 (Jan), gave him a slim chance of succeeding on this issue.

What did the FTT decide on the discovery issue?

The tribunal found that HMRC did have sufficient information to form the basis of a reasonable belief that the losses claimed in the return were not due and therefore were entitled to raise the assessment. In particular, it was sufficient for HMRC to be aware that the Bafana Scheme was an orchestrated scheme with potential implementation issues and its participants included Mr Anderson. HMRC are not required to be certain of all the relevant facts in order to have a reasonable belief for the purposes of TMA 1970, s 29(1). The 'reasonable belief' must be more than a suspicion but can be less than certain knowledge.

The tribunal also held that it was irrelevant to the reasonableness of HMRC's conclusion at the time that Mr Anderson's participation in the Bafana Scheme turned out to be different to other participants, or that HMRC could have gathered further information. In addition, it was not necessary for HMRC to inform the appellant of all of the information on which their discovery assessment was based.

How does this decision sit with the Sanderson case?

Strictly speaking, there is no inconsistency between the decision in *Sanderson* and this case. In *Sanderson* it was held that, for the purposes of TMA 1970, s 29(5), the knowledge that a taxpayer has participated in a tax planning scheme does not lead to the hypothetical officer being imputed with the knowledge of the HMRC team investigating the scheme as the only information that can be considered is the information actually disclosed by the taxpayer.

In *Anderson v HMRC*, the tribunal was considering the actual knowledge of the particular officer (rather than a hypothetical officer) making the assessment for the purpose of determining whether they have a reasonable belief that there is an insufficiency. Therefore, HMRC's wider knowledge of the scheme and its efficacy was relevant.

That being said, the taxpayer might feel that there is some contradiction in practice since, if a taxpayer discloses his involvement in a scheme in his return, that information may be insufficient for the hypothetical officer to realise that there is a loss of tax for the purposes of TMA 1970, s 29(5), but that same disclosure may be sufficient for HMRC to make a discovery assessment based on their actual knowledge of the scheme and the taxpayer's involvement.

What did the FTT decide about the substantive issue?

The tribunal was asked to determine whether Mr Anderson's activities of selecting and developing talent as part of the Bafana Scheme constituted a trade carried on on a commercial basis with a view to the realisation of profits (within the meaning of ITA 2007, ss 66 and 74), and whether Mr Anderson carried on the trade in a non-active capacity by spending less than ten hours a week on the trade.

The tribunal held that Mr Anderson's activities failed to satisfy the statutory conditions. While the activities were not those of a 'dilettante', they did not satisfy the test of being a 'serious trader seriously interested in profits' and therefore the trade was not carried on on a commercial basis. In addition, the trade was not carried on with a view to the realisation of profits, Mr Anderson had not spent ten hours specifically on the trade relating to the Bafana Scheme, and his involvement was more analogous to an investment rather than a trade. Finally, Mr Anderson failed the anti-avoidance restriction because the tax benefits were at least as significant, if not more significant, than his interest in the activities at Bafana.

Are there any other interesting points arising from this decision?

In terms of hearing procedure, the tribunal confirmed that an appellant has no 'right' to be given a decision on the validity of the discovery assessment before the tribunal proceeds to hear the substantive appeal. However, the tribunal did direct that, since HMRC bear the burden of proof, they should open the hearing on the discovery issue and that the appellant was entitled to call no evidence on the discovery issue (therefore being able to argue that he had no case to answer) without precluding himself from calling evidence on the substantive issue.

What should lawyers be doing now?

The decision does not change the present obligations of taxpayers to make a careful and detailed disclosure on their returns in order to avoid discovery assessments. The various arguments raised by the appellant (unsuccessfully in this case) are a reminder that the validity of a discovery assessment is always worth careful consideration to confirm that HMRC have satisfied all of the relevant conditions in TMA 1970, s 29. This appeal failed but many others succeed.

The case is also an illustration of the tribunal's no-nonsense attitude to uncommercial tax avoidance arrangements as the relief claimed was denied on practically every possible basis. The tribunal's pragmatic approach should be borne in mind when considering whether it is worth litigating an arrangement of this sort.

Interviewed by Anne Bruce.

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