

PUMP COURT  
TAX CHAMBERS

# **Main Purpose Tests in Anti Avoidance Rules**

Michael Thomas

Ronan Magee

JULY 2020

# Key Points

- HMRC are increasingly looking to attack using TAARs and GAARs
- Contemporaneous evidence of purpose is required in the event of a dispute, which does not begin with the enquiry
- The drafting of anti-avoidance rules is increasingly moving away from the classic test of “avoidance” and indeed main purpose tests altogether
- Litigating cases for the taxpayer where the purpose test, or the absence of one, within the anti-avoidance rule favours HMRC is difficult and so it is important to do everything possible to prevent disputes
- Absence of clearance procedures and rulings means that taxpayers and their advisors will need to reach their own conclusions and evaluate risk

# Terminology

# Bona Fide Commercial

- “[W]hen the question of carrying out a genuine commercial transaction ... is considered, the fact that there are two ways of carrying it out—one by paying the maximum amount of tax, the other by paying no, or much less, tax—it would be quite wrong as a necessary consequence to draw the inference that in adopting the latter course one of the main objects is, for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out commercial transactions except upon the footing of paying the smallest amount of tax involved.” CIR v Brebner [1967] 2 AC 18 per Lord Upjohn
- “EU law, like English law, treats parties as free to arrange or structure their relationship so as to maximise its commercial attraction, including the incidence of taxation.” Secret Hotels2 [2014] UKSC 16 per Lord Neuberger
- What might not be bona fide commercial?
- Moving assets to defeat creditors including HMRC?

# Tax Avoidance

- *"The fact that steps taken for the avoidance of tax are acceptable or unacceptable is the conclusion at which one arrives by applying the statutory language to the facts of the case. It is not a test for deciding whether it applies or not."* Lord Hoffmann in BMBF v Mawson
- Identifying avoidance (aka abuse) involves an element of subjective value judgment
- Problem is uncertainty – see the approach of the GAAR (double unreasonableness and the Advisory Panel)
- Trend is away from new statutory clearance schemes

# Tax Avoidance

- A result which does not fit the scheme of the tax, typically involving a mismatch between the (claimed) tax and economic consequences and often involving contrived and artificial steps
- *"The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option."*
- *"[I]t would be absurd ...to describe as tax avoidance the acceptance of an offer of freedom from tax which Parliament has deliberately made. Tax avoidance within the meaning of s 741 is a course of action designed to conflict with or defeat the evident intention of Parliament"* Lord Nolan in IRC v Willoughby [1997] 1 WLR 1071 at 1077
- See also the CJEU in Newey [2014] STC 2432 in the context of VAT and abuse of rights which applies to purely artificial arrangements which do not correspond with economic and commercial reality

# Tax Advantage

- Almost inevitably defined in detailed terms in the legislation
- *"[The test] as I understand it, presupposes a situation in which an assessment to tax, or increased tax, either is made or may possibly be made, that the taxpayer is in a position to resist the assessment by saying that the way in which he received what it is sought to tax prevents him from being taxed on it; and that the Revenue is in a position to reply that if he had received what it is sought to tax in another way he would have had to bear tax. In other words, there must be a contrast as regards the "receipts" between the actual case where these accrue in a non-taxable way with a possible accruer in a taxable way, and unless this contrast exists, the existence of the advantage is not established."* Lord Wilberforce in IRC v Parker [1966] AC 141 at 178-9
- Summarised: *"if the taxpayer could have received what it is sought to tax in any other way which would have resulted in its being subject to tax, then that was enough for him to have obtained a tax advantage."* (Emery v IRC [1981] STC 150 (HC), 172 per Nourse J)
- Generally requires a comparator to be identified – but what sort of comparator (IRC v Sema Group Pension Scheme [2003] STC 95 (CA) at [107] to [111])?
- 'An easier concept than tax avoidance'? Frequently used as necessary pre-condition for application of other sorts of measures dealing with tax avoidance (e.g. DOTAS)

# Arrangements

- Identification of the scope of the arrangements is often critical
- How wide are the arrangements at the relevant time?
- Snell [2006] EWHC 3350 [2007] STC 1279; Coll [2010] UKUT 114 [2010] STC 1849
- Can a disqualifying main purpose relate, in effect, only to part of the transaction?
- Brebner (cited above)
- But see also Conegate at [2018] UKFTT 82 at [95]:

*"We agree with the Appellant that the overarching reason for the transactions taking place was for the Appellant to provide funds to the football club. However, we agree with the Respondents that Section 16A refers to "one of the main purposes" and not "the main purpose", and so we should look at the underlying factors which caused the transactions to take place in the way that they did, as well as the overall reason for the arrangements. It is clear from our findings of fact that there was more than one way to provide funding to the football club and that one of the reasons that Mr Sullivan chose to provide funds to the football club in the specific way that transpired was so that the Appellant could claim a capital loss. Therefore we consider securing a tax advantage to have been "one of the main purposes" of the arrangements."*

8



# Whose purpose?

- Have to pay attention to the question posed by the particular test (and at the relevant time)
- Corporate bodies
- Advisors
- Subjective or objective

# Which Taxes?

- Classically, main purpose tests in anti-avoidance rules in Tax A would not concern themselves with avoidance of Tax B
- Avoiding corporation tax might deny you a corporation tax advantage, but would not affect the stamp duty or stamp duty land tax position
- More and more often now, purpose tests for specific taxes cast in wider terms

# Applications

# A Classic Example – section 137(1) TCGA 1992

**Subject to** [a safe harbour provision and **a clearance procedure**] neither section 135 nor section 136 shall apply to any issue by a company of shares in or debentures of that company in exchange for or in respect of shares in or debentures of another company unless the exchange or scheme of reconstruction in question is effected for **bona fide commercial reasons** and **does not form part of a scheme or arrangements** of which **the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax or corporation tax.**

Snell v HMRC [2006] EWHC 3350 [2007] STC 1279

# A Key Battleground? – Loan Relationships TAAR

s 441 CTA 2009 Loan relationships for unallowable purposes

...  
(3) *The company may not bring into account for that period for the purposes of this Part so much of any debit in respect of that relationship as on a just and reasonable apportionment is attributable to the **unallowable purpose**.*

...  
s 442 Meaning of “unallowable purpose”

(1) *For the purposes of section 441 a loan relationship of a company has **an unallowable purpose** in an accounting period if, at times during that period, the **purposes for which** the company—*

*(a) **is a party to the relationship**, or*

*(b) **enters into transactions which are related** transactions by reference to it, include a purpose (“the unallowable purpose”) which is **not amongst the business or other commercial purposes** of the company.*

...  
(4) *For the purposes of subsection (1) the **tax avoidance purpose** is **only** regarded as **a business or other commercial purpose of the company if it is not—***

*(a) **the main purpose** for which the company is a party to the loan relationship or, as the case may be, enters into the related transaction, or*

*(b) **one of the main purposes** for which it is or does so.*

(5) *The references in subsections (3) and (4) to a tax avoidance purpose are references to any purpose which consists of **securing a tax advantage for the company or any other person**.*

Tax advantage is then defined at s 476, cross-reference to s 1139 CTA 2010

# *Oxford Instruments* [2019] UKFTT 254

How did the Tribunal examine the main purpose of the taxpayer?

- UK tax position important to the Scheme as a whole
  - Expenditure on tax advisors
  - Two options to produce desired UK result (the Scheme or a CFC structure)
- Although US objective most significant purpose of the Scheme as a whole, test in s 442 looks at the purpose in being a party to the particular loan relationship or entering into related transaction
- US Objective already achieved at the relevant time so can't be one of the purposes of Step 8
- Real commercial return ('the Spread') found to be the "*means of justifying the step within the context of the Scheme as a whole ... not the driver for the step*"

# *Oxford Instruments*

- Can't say Spread was a purpose *because* it was necessary to securing the tax advantage purpose
- Looking at the documents and the evidence, plain that the directors would not have resolved to implement Step 8 if would give rise to the commercial return but *not* to the tax advantage
- Therefore, looking at the subjective purposes of the directors, obtaining it did not constitute a freestanding purpose, merely an inevitable known consequence of resolving to enter into the transactions whereby tax advantage purpose could be secured
- Bolstered in conclusion that Spread played no part in purposes because when it later became clear that, post-BEPS, the deductions were likely to be lost, that part of the new structure was unwound and replaced by a CFC finance company structure without any note being taken that this unwinding would lose the benefit of the Spread
- Also interesting *obiter* comments on the apportionment exercise in s 441 and the scope of clearance

# An anti-avoidance rule without an express purpose test – s.75A FA 2003

## s75A Anti-avoidance

- (1) This section applies where—
- (a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,
  - (b) a number of transactions (including the disposal and acquisition) are **involved in connection** with the disposal and acquisition ("**the scheme transactions**"), and
  - (c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

...

Section 75A is an anti-avoidance provision. HM Revenue & Customs (HMRC) therefore takes the view that it applies only where there is avoidance of tax. On that basis, HMRC will not seek to apply s.75A where it considers transactions have already been taxed appropriately – SDLTM09175 (now removed)

***Project Blue v HMRC* [2018] UKSC 30 [2018] STC 1355**

***Hannover Leasing and anor v HMRC* – [2019] UKFTT 262 [2019] SFTD 1231**



# Section 75A – judicial interpretation

- Taxpayer's subjective intention is irrelevant in applying the connection test (Project Blue)
- Section 75A(1)(b) does not require transactions to have a connection in the sense of combining together to produce a saving of SDLT which when viewed objectively runs contrary to the scheme of the tax (a.k.a. "objective tax avoidance" of the kind identified by Lord Nolan or, per Lord Hodge, an "unintended tax holiday".) (Hannover Leasing)
- Transactions are connected where they are commercially interdependent (Hannover Leasing)
- HMRC have no discretion in applying s.75A (Project Blue)
- So does s75A catch innocent transactions?
- Is this satisfactory?
- And what is really going on?

# NRCGT Anti-avoidance rules

- Para 11 Sch 1A TCGA contains the targeted anti-avoidance rule for indirect disposal of land
- This “applies if a person has entered into any arrangements the main purpose, or one of the main purposes of which is to obtain a “**tax advantage**” as a result of Sch 1A applying or not applying or through it being overridden by a double tax treaty
- Tax advantage includes “relief or increased relief from tax” and “avoidance or reduction of a charge to tax or an assessment to tax”
- HMRC say this is based on a motive test: CG73952
- Ability to dispute this?

# NRCGT AA Rule for Exemption Election

*TCGA 1992 Sch 5AAA para 18 (introduced by FA 2019)*

*(1) In addition to the case set out in paragraph 15(5)(a) [breach of conditions], a designated HMRC officer may revoke an election under paragraph 12 if, in order to safeguard the public revenue, the officer considers it is appropriate to revoke the election.*

*Para 19(4) In the case of an appeal which is notified to the tribunal (see Part 5 of the Management Act), the tribunal must not allow the appeal unless it considers that a designated HMRC officer could not reasonably have been satisfied that there were grounds for revoking the election.*

# A New Breed of Anti-Avoidance Rule?

- Para 18(1) Sch 5AAA enables HMRC to revoke an exemption election if “the officer considers it is appropriate to safeguard the public revenue”
- Guidance states “*HMRC will not revoke an election except in response to arrangements ... where tax avoidance is one of the main objects*”. Tax avoidance means a result inconsistent with the principles behind Sch 5AAA
- But appeal can only be allowed if Tribunal “*considers that a designated HMRC officer could not reasonably have been satisfied that there were grounds for revoking the election*”: paragraph 19(4)
- What does this mean in practice?

# Conclusions

# Direction of Travel

- Drafting of rules increasingly wide and favours HMRC
- Move away from having purpose tests at all in anti-avoidance rules
- HMRC want to determine the application of the rules (discretion)
- Absence of clearance procedures or rulings

# Maximising Prospects of Success

- Consider the statutory test in detail. What terminology is used? How do you pass it?
- Disputes do not begin with the enquiry
- Starting point is the facts: consider how HMRC and judges will react as you plan and implement transactions (and write emails)
- Gather contemporaneous evidence of commercial purpose
- What kind of evidence?
- Is it a good idea not to take advice?
- Showing that the taxpayer chose to structure a genuine transaction in the most tax efficient (but still) commercial way does not guarantee success but it will reduce the chances of a successful attack from HMRC







**The content of these slides and this seminar are strictly for academic discussion purposes only and must not be relied upon without independent professional advice.**

**[clerks@pumptax.com](mailto:clerks@pumptax.com)**

**0207 414 8080**