

A late night and too much avoidance

Anton Lane explains why HMRC and the government need a clearer vision when it comes to its anti-avoidance legislation

Tax anti-avoidance by HMRC: messy, inconsistent, illogical, ineffective, commercially absurd, not thought through, poorly implemented, poorly drafted, ridiculous case law/judicial review decisions and possibly lacking consideration of taxpayer's rights.

At 1am this morning I proudly finished writing my seventh Tax Digest, which included this observation relating to HMRC's approach towards avoidance schemes: "HMRC's (and the Treasury's) approach has been (in some people's minds and not necessarily the view of the author although he can appreciate the viewpoint) **messy, inconsistent, illogical, ineffective, commercially absurd, not thought through, poorly implemented, poorly drafted, ridiculous case law/judicial review decisions and possibly lacking consideration of taxpayer's rights.**"

At 1pm this afternoon I caught up on the latest tax news to discover two cases that should be included within the Tax Digest. That is how fast tax moves – about as fast as Boris spends on decorating!

Premiere Picture Ltd [2021] TC 08043

HMRC applied to the First Tier Tribunal (FTT) for orders under the Disclosure of Tax Avoidance Scheme rules that the arrangements were notifiable – namely, they should have sought a scheme reference number. The order was against two film schemes promoted by Premiere Picture Ltd.

The arrangement was attractive to investors because at the end of the accounting period of the partnership in which the acquisition and disposal of film rights occurred, the partnership was required by accounting practice to apply a low value to its interest in the film rights under the distribution agreement. The result that the partners expected to realise a loss from the activities of the partnership. That loss could then be set off against the income or capital gains through sideways loss relief.

Evidently, had the partners contributed the full capital with which to acquire the rights (and pay the provider's fees), there would more likely be a genuine loss. However, the arrangements used a limited recourse loan. A partner would effectively receive a large return on their small capital contribution. If the rights produced no or little income, the partner would still have a better economic position.

The arrangements:

- Amounted to those within DOTAS.
- Fell within the tax loss scheme hallmark.
- Fell within the standardised tax products hallmark.
- Enabled or might have been expected to enable the obtaining of a tax advantage.
- The main or one of the main benefits was the obtaining of the tax advantage.

For those that remember the acceptable use of film schemes, followed by the onslaught of HMRC's attack the opinion is probably not a surprise. However, a couple of interesting points relate to the provider, the advice received and of course whether the users were informed of that advice:

On 19 October 2005, the respondents attended Jonathan Peacock QC who advised in relation to the scheme that the sole traders who participated in the arrangements should not buy film rights jointly with other participants to avoid being treated as being in partnership with them.

On 12 December 2006, the respondent obtained advice from DLA Piper UK LLP on the application of the disclosure legislation and advice was given to the effect that it was arguable that the main benefit of the arrangement was not the potential returns to be derived from the acquisition and disposal of film rights.

R & C Commrs v Cornhill P W Ltd [2021] TC 08034

HMRC suspected that Cornhill P W Ltd (Cornhill) was a promoter of a scheme which may have been notifiable under DOTAS. HMRC issued Cornhill with a pre-disclosure enquiry notice. HMRC later requested information and documents from Cornhill to support its contention that arrangements were not notifiable, and that Cornhill was not a promoter. Information was not provided although an explanation was given. HMRC applied to the Tribunal for an order requiring Cornhill to provide the specified information and documents previously requested.

The FTT found that:

- Any information and documents that Cornhill should be ordered to provide under s. 313B should be limited to those in support of the notifiable arrangements reason.
- Cornhill's assertion it could not be a promoter in the absence of a notifiable arrangement was rejected.
- It was not necessary for the arrangements concerned to be notifiable for Cornhill to be a promoter. Cornhill was a promoter and as such had to provide the information required and further specified information and documents HMRC could request although restricted to supporting the notifiable arrangements reason.
- Cornhill's contention that HMRC's application should be rejected because the scheme was one promoted by Baxendale Walker which had been the subject of appeals in relation to some of the users and therefore HMRC had sufficient information to allocate a DOTAS scheme reference number.

The FTT ordered Cornhill to provide the information and documents.

My pontification

The government's approach has been unclear and legislation introduced to deter schematic planning has continually revised the approach. It would have been fairer on taxpayers for HMRC to have been clear on their intentions over a decade ago. More recent changes have demonstrated the Government became either:

- Dissatisfied with its own deterrents introduced.
- Frustrated by those holding themselves out to provide tax advice who continued to structure and implement avoidance scheme.
- Annoyed at the supposed willingness of some UK taxpayer's to be deterred by provisions introduced.

Another view may be that HMRC were very ill informed of how avoidance schemes were devised and promoted.

The measures introduced make HMRC's task to deter and combat tax abuse easier to an extent. However, the market to provide schematic planning lives on and HMRC will inevitably have to use their powers and even provide for new ones. The relaxation of the need for a main purpose or a purpose to be tax avoidance to any purpose being tax avoidance may provide more scope for combatting tax abuse. However, for a time and until the use of powers and sanctions has significant effect on the market, there will continue to be tax avoidance schemes that are allegedly not for the purpose of avoiding tax

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