

**UPDATE ON THE RAMSAY APPROACH TO STATUTORY INTERPRETATION
OF TAX LEGISLATION**

One of the first things in HMRC's armoury, if it feels the taxpayer is seeking to avoid tax, is the *Ramsay* approach to statutory interpretation, which has evolved over the last 33 years.

This involves reading a mass of case law.

The tax editor has sought to distil this, taking into account recent cases which have changed the focus of the approach.

If the *Ramsay* approach were to be in statutory form at present it may look like the section set out below.

Perhaps an important feature of the approach, however, is that it has to stay nebulous.

It was given some of the attributes of a statute by Lord Brightman in *Furniss v Dawson* (1984) STC 153 at 166 but Lord Nicholls in *MacNiven v Westmoreland Investments* (2001) STC 237 pointed out the dangers of this at page 243[8] where he said:-

“It would be wrong..to set bounds to the circumstances in which the *Ramsay* approach may be appropriate and helpful”.

That said there is an irresistible temptation for tax advisers to reduce nebulous concepts to something which they can deal with on a day to day basis – something which takes a statutory form.

Having succumbed to that irresistible temptation I hope that the draft section set out below will help practitioners to ensure they take into account all the relevant features of the *Ramsay* approach in determining whether it applies to a particular set of transactions.

Note this approach is wholly unaffected by the statutory general anti-abuse rule (the GAAR) which became law 17 July 2013: any successful tax planner must not be caught by the *Ramsay* approach to statutory interpretation or by the GAAR or any of the targeted anti-avoidance provisions (TAAPs) found strewn throughout the tax code.

The *Ramsay* Section (if *Ramsay* were put into statutory form)

Section 1 Anti-Avoidance

- (1) The driving principle in interpreting a tax statute is to construe the relevant statutory provisions purposively and view the facts realistically.
- (2) In viewing the facts realistically one may need to determine whether: -
 - (a) there is a pre-ordained series of transactions; and
 - (b) steps are inserted into the pre-ordained series of transactions which have no commercial (business) purpose apart from the avoidance of a liability to tax.

- (3) In applying the driving principle steps inserted into a pre-ordained series of transactions exclusively for tax avoidance purposes may be disregarded for tax purposes and the end result looked at to determine how the provisions of the particular taxing statute shall be applied.
- (4) In applying the driving principle instead of just disregarding exclusive tax avoidance steps to counter the tax avoidance the courts can in addition or in the alternative recharacterise the tax avoidance steps in order to determine how the particular taxing statute shall be applied.
- (5) In determining whether there is a pre-ordained series of transactions steps introduced therein for no commercial purpose other than to take away the element of preordination shall be treated as part of the pre-ordained series of transactions.
- (6) If the particular transaction could have been carried out in two or more ways both or all of which would have avoided tax but the taxpayer was genuinely uncertain as to which way to adopt the element of preordination may be absent.
- (7) Steps can only be ignored or re-characterised if it is intellectually possible to do this taking into account the final state of affairs which will exist after the excision of the tax avoidance steps and/or the recharacterisation of the steps.
- (8) In situations where Parliament intended the tax legislation in question to be construed without taking into account the existence of a pre-ordained series of transactions the existence of a pre-ordained series of transactions shall not be taken into account in construing the tax legislation in question.
- (9) A pre-ordained series of transactions includes cases where there is an arrangement that the series of transactions be carried through even though the parties are not contractually bound to take the steps in the series of transactions.
- (10) Tax for the purposes of this section includes income tax, capital gains tax, corporation tax, stamp duty, stamp duty reserve tax, stamp duty land tax, inheritance tax and value added tax.
- (11) The section is deemed always to have had effect.

Commentary on the *Ramsay* Section and Relevant Case Law

Subsections (1) & (2): Ribeiro PJ in *Collector of Stamp Revenue v Arrowsmith* [2003] HK CFA 46, *Ramsay Ltd v IRC* (1981) STC 174 and *Furniss v Dawson* (1984) STC 153 at 166 g & h; *MacNiven v Westmoreland Investments* (2001) STC 237 at 243[7] and [8], *Barclays Mercantile Business Finance Ltd v Mawson* (2005) STC 1 at 14[42] and *IRC v Scottish Provident Institution* (2005) STC 15 at 26 [23] and *PA Holdings Ltd v R&C Comms* [2011] EWCA Civ 1414.

Subsection (3): “exclusive tax avoidance step”, see *Craven v White* (1988) STC 476 [2012] STC 582 at 508(e) and *IRC v McGuckian* (1997) STC 908 at 917 (f).

Subsection (4): “recharacterise steps”, see *IRC v McGuckian*: Lord Cooke at 919d and Lord Clyde at 992c.

Subsection (5): if taxpayers introduce steps into the transaction to take away the element of pre-ordination and there is no commercial basis for those steps there will still be a pre-arranged scheme caught by the section: *IRC v Scottish Provident Institution* (2005) STC 15 at 26[22].

Subsection (6): *Craven v White* (1988) STC 476 at 509c

Subsection (7): *Piggot v Staines Investments* (1995) STC 114 at 140j; *Craven v White* ibid at 508j at 509g and *Fitzwilliam v IRC* (1993) STC 502 at 513j.

Subsection (8): *MacNiven v Westmoreland Investments Ltd* (2001) STC 237 at 255[58] and 256[59] and *Barclays Mercantile Business Finance Ltd v Mawson* (2005) STC 1 at 14[42].

Subsection (9): *Furniss v Dawson* ibid at 166 and *MacNiven v Westmoreland Investments Ltd* ibid at 242[3].

Subsection (10): Some taxes such as stamp duty and value added tax are more likely to come within subsection (8) than others: *MacNiven v Westmoreland* ibid at 255[58].

Subsection (11): As the *Ramsay* approach is no more than an approach to statutory interpretation it is timeless: *MacNiven v Westmoreland* ibid at 243e.

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