Purposive interpretations

Some good news and some bad news.

The Supreme Court has provided fresh guidance on purposive interpretations in the case of *Hancock v HMRC* [2019] UKSC 24.

In broad terms, the taxpayer disposed of his shares in a company for non-qualifying corporate bonds enabling the capital gain to be rolled over into the non-QCBs under the normal rules for reorganisations under TCGA 1992 s 127. When the non-QCBs were disposed of or redeemed, the capital gain arising on the disposal would become chargeable. No problem – so far.

However, the non-QCBs were subsequently converted into QCBs. This is very significant because QCBs are not chargeable to capital gains tax. The conversion into QCBs did not give rise to any charge to capital gains tax, and when the QCBs were eventually disposed of, no charge to capital gains tax arose then either. Magic.

It is no surprise that this disappearing trick attracted an unfavourable reaction from HMRC. The Upper Tribunal agreed with them that this did not work to eliminate the capital gain, and so did the Court of Appeal. The Supreme Court has now provided a definitive view on the matter. It certainly did not work.

However, the judgment of the Supreme Court contains some worrying passages. But, worrying or not, a decision of the Supreme Court represents the law and is beyond question. Its judgment is by definition correct. If I find it worrying, the fault is mine for failing to understand the analysis.

The concern from the decision in *Hancock* is how far a purposive interpretation can extend. The Supreme Court said that the wording of the legislation provided powerful support for the argument of the taxpayer, which I understand to mean that the wording of the legislation provided the relief he was seeking.

However, the Supreme Court explained that their view of the purpose of the legislation did not correspond with the wording, and it was therefore necessary for them adjust the wording, or leave out words, so that it did correspond to that purpose.

I was always taught that the intention of Parliament had to be found from the words used by Parliament in the statute, rather than the other way around, but perhaps my age is showing and this is too old fashioned a view.

The problem is – where does it stop. And how can any citizen ever know what the law is, if the clear words of the law can be adjusted many years later to what the courts think the law ought to have been.

I have in mind the words of Lord Simon in the House of Lords decision in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231:

'In a society living under the rule of law, citizens are entitled to regulate their conduct accordingly to what a statute has said, rather than by what it was meant to say or by what it would have otherwise said if a newly considered situation had been envisaged.'

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It might be hoped that such a purposive interpretation could be applied in favour of the taxpayer, and not confined to interpretations of HMRC. Indeed, the Supreme Court confirm exactly that, referring to *Luke v IRC* [1963] AC 557 where a purposive interpretation was applied to prevent an unreasonable tax charge.

That sounds very helpful – except that my mind goes to the case of *McQuillan* [2017] UKUT 344, where the Upper Tribunal felt bound to follow the wording of the legislation and deny entrepreneurs relief – although they said it was clear that the legislation was designed to give relief in the taxpayer's circumstances. And *Lobler*, where the FTT ([2013] UKFTT 141 (TC)) said the legislation was outrageously unfair but it dismissed the appeal (with heavy hearts) because there was nothing it could do about it.

However, maybe there is hope for such cases in the future.

And so there is…

Just before the decision of the Supreme Court was published, the FTT decision in the case of *Vermillion Holdings Ltd v HMRC* [2019] UKFTT 230 (TC) was released. Hold on to your hat.

This case concerned the grant of a share option to an employee and whether it should be taxed as earnings having been made available by reason of his employment.

In very broad terms, the tribunal found that as a question of fact, the option granted to the employee was an opportunity made available to him by the company. However, the tribunal also found that, as a question of fact, the option was not granted by reason of his employment.

OK so far – except for a deeming provision in ITEPA 2003 s 471(3) which says: 'a right or opportunity to acquire a securities option made available by a person's employer or a person connected with the person's employer, is to be regarded of the purposes of subsection 1 as available by reason of an employment of that person...'

HMRC argued that as this was exactly the case here and s 471 deemed the option to be provided by reason of his employment. End of.

However, the tribunal did not see it that way. The judge said that she had decided as a question of fact that the employment was not the reason for the grant of the option. She then explained that: 'an anomaly therefore arises between a statutory fiction as a result of the deeming provision under subsection 3 and my finding the fact that the option was not granted by reason of his employment ... The ambit of the deeming provision should be limited where the artificial assumption from deeming is absent with the factual reason that gave the right to require the option.'

I would respectfully suggest that the whole point of a deeming provision is to do exactly that – to override the factual position and to ensure that the opportunity is taxed on this basis, even where the real facts are otherwise. Indeed, one might say that a deeming provision is completely useless if it has to give way to the facts. If the facts show that this is the case, you would not need a deeming provision at all.

Anyway, the tribunal decided that the deeming provision could not be applied and the option was not taxable.

This is a very interesting interpretation and the analysis might prove extremely helpful in future. But before I get carried away, maybe I should wait and see whether there is an appeal. ■

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Cross-border loss relief: new CJEU decisions

Two recent CJEU decisions restrict the scope of the *Marks & Spencer* decision on cross-border loss relief.

On 19 June 2019, the CJEU published decisions in two cases on two aspects of Swedish law that allow a Swedish parent company to claim relief for losses of overseas subsidiaries in certain circumstances.

These decisions are of interest as they serve to limit the principle established in *Marks & Spencer* (Case C-446/03). In *Marks & Spencer*, the CJEU held that:

- A restriction of the freedom of establishment (limiting the right of a