FIELD COURT TAX CHAMBERS

Transactions in Securities :Motive Test[1]

***Brebner* confirmed.**

One of the difficulties involved in claiming a relief or undertaking a transaction is that you are sometimes faced with a motive test. That is to say, the relief you are claiming, or the tax treatment you are expecting, will be denied if the main purpose was the avoidance of tax.

Unfortunately, not all the motive tests are the same (why on earth not, would be a very good question) and although they do not all have the same meaning, there is a broad theme: there must be a purpose of avoiding tax. (I say broad theme, but 'purpose' and 'avoid' and even 'tax' are all terms which can have different meanings. Don't ask.)

Nowhere is this more important than in the transactions in securities legislation in ITA 2007 s 6872 et seq, which can effectively turn a capital receipt, on which the tax might be 10% (or maybe zero), into an income receipt chargeable to income tax at somewhat higher rates.

Section 684 provides that these provisions will not apply if: 'the main purpose or one of the main purposes of the transaction in securities … is to obtain an income tax advantage'.

The application of this motive test was examined (not for the first time) in the recent case of *A Allam v HMRC* [2020] UKFTT 26 (TC). Dr Allam sold some shares in a company to another company under his control. This is the paradigm case of a transaction in securities. The issue was whether the main purpose or one of the main purposes of the transaction was to obtain an income tax advantage. Dr Allam was able to persuade the tribunal that it was not.

Of course, the conclusion was inevitably special to its facts, but some of the arguments before the tribunal are of much wider application.

A central element of HMRC's argument was that, although the transaction may have had a commercial purpose, Dr Allam could have structured his transaction in a different way which would have given rise to more tax. Therefore, one of his main purposes must have been the obtaining of an income tax advantage.

This is a horrific argument. If Newton was still around, he would no doubt have coined a fourth law: that any course of action necessarily involves the rejection of alternative courses of action and their consequences. I could have flown to Paris this morning instead of going by train and I therefore avoided the air passenger duty on the flight. Should I therefore be charged the tax which I have avoided by making this deliberate choice? And what about my new car which I bought instead of the new Porsche, and the £25,000 tax which would have arisen on the purchase? Or what about the 100 new Porsches I did not buy?

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This is obviously bonkers, but it is not a new argument – and it does not get any better by being repeated. Anyway, the tribunal rejected it – which is helpful because it clearly has a significance to other taxing provisions where a tax avoidance motive is relevant.

The Tribunal referred to the celebrated case of *IRC v Brebner* [1967] 2 AC 18 in which it was said:

> 'When the question of carrying out a general commercial transaction, as this was, is reviewed, the fact that there are two ways of carrying it out – one by paying the maximum amount of tax the other 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 the avoidance of tax.'

What could be clearer?

I had feared that the developments in the law relating to taxation since 1967 had meant that *Brebner* had kind of got lost, so it is a comfort to see this principle confirmed … if only for the moment.

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