



FIELD COURT TAX CHAMBERS

Purposive construction and restricted securities¹

The Supreme Court recently took a purposive construction of the legislation to deny the taxpayer relief. It would be nice to see this work the other way round

In the recent case of *UBS and DB v HMRC* [2016] UKSC 13 (reported in *Tax Journal*, 19 March 2016), the Supreme Court struck down a scheme involving restricted securities, which was designed to avoid the payment of income tax on employees' bonuses. The issues were inevitably complex. One important element was the meaning of 'restricted securities' in ITEPA 2003 s 423, about which the Supreme Court said:

“Applying section 423 to the facts, viewed from a commercially realistic perspective, it follows that the condition to which the UBS shares were subject should be disregarded, with the consequence that the shares are not “restricted securities” within the meaning of that section.”

This followed a good deal of analysis of the *Ramsay* doctrine and a purposive construction of s 423. Their Lordships concluded that the introduction of commercially irrelevant conditions, which had the purpose only of obtaining the exemption, should be disregarded.

The conclusion is interesting and it would be nice if it could work the other way round. I recall the position of poor Mr Finn (see *Finn and others v HMRC* [2014] UKFTT 426 (TC)), who was denied EIS relief on some shares because he was not an original subscriber to the memorandum of association when the company was formed. This interpretation meant that upon a reorganisation, there was a condition for EIS relief which in reality could never be satisfied.

The tribunal made reference to this interpretation making absolutely no sense, and entirely understood the claim that it was inconceivable that this was what Parliament had intended.

In the light of the Supreme Court judgment, a taxpayer in a similar position might be able to say that if the construction makes no sense, has no commercial relevance and could not be what Parliament intended, a purposive construction should be available to assist the taxpayer. Alternatively, an appropriate purposive construction could be adopted to interpret the legislation in the light of the transaction that took place.

Maybe HMRC would agree to adopt such an approach. Or maybe it wouldn't.

The Supreme Court also provided some authoritative guidance on the issues to be considered when valuing restricted shares. With regard to the decision on the substantive issue, it was necessary to consider the value on which the employees should be taxed. Their Lordships decided that although there were conditions which must be disregarded in determining whether or not the shares were restricted securities, these conditions should not be disregarded for the

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purposes of assessing the value of the shares. This is because ordinary taxation principles require the tax to be based on the true value of the shares.

At first sight, it would seem a bit odd for the restrictions attaching to these shares to be disregarded, so they are not restricted securities, yet for the employees to be taxed on the basis that they are regarded as restricted securities.

The answer would appear to be that the shares received by the employees had a value based on the actual terms on which they were issued; and that is the value on which they should be charged to tax. They may have been called 'restricted securities' but the label does not matter. However, when it comes to s 423, there is a specific definition of 'restricted securities' which applies for the purposes of the section – and the shares did not fall within that definition because, properly construed, the statute was not intended to apply to them.

Nevertheless, it is welcome that the taxpayers were able to be taxed only on the value they actually received, and the idea that the valuation of the shares could be calculated on a different basis might come in handy in other circumstances.

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