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The Glasgow Rangers Tax Case

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Application by the Appellants to have HMRC assessments set aside.

Background

The Appellants, Murray Group Holdings (MGH), are a large holding company with diverse interests in over 100 companies including, until May 2011, Glasgow Rangers Football Club. Given Rangers' involvement and their subsequent administration, this case has been widely publicised and has become known as the Rangers tax case.

The case centres around an employment remuneration trust set up by MGH in April 2001 for the benefit of employees and their families. Effectively, companies within MGH would make payments into the trust, they would then make requests that the trustees set up sub funds for specific, high performing, employees and their families. Invariably, shortly after the sub fund was created, the employee would then make a request to the trustee for a loan. The loan was made at commercial rates on a discounted basis. The Appellants had stopped using the scheme some years earlier but there were, at the date of the hearing, 108 sub funds in place and approximately £48m had been paid through the trust.

The advantages of this structure were that the payments were not declared as an emolument to the employee's earnings, the employer did not pay PAYE or NIC on the payments into the trust and the loan was effectively a debt in the employee's estate for inheritance tax purposes.

HMRC disagreed with this analysis and issued assessments based on their understanding that the payments were emoluments and therefore PAYE and NIC were due. Notably, the assessments resulted in a £14m tax bill for Rangers which, by the time the case was heard, had increased to £94m with interest and penalties.
The Tribunal heard evidence from the directors and employees of MGH, lawyers for Rangers

players, tax advisors and the company accountants and the trustees but interestingly enough not from the advisors who set the scheme up. For the purposes of the case the Tribunal did treat distinctly the payments made to employees and those made to Rangers players but as the judgments were largely the same we will view them together.

The HMRC case relied heavily on the doctrine laid down in W T Ramsay v IRC (1982) AC300 and in particular the general anti avoidance principle that any non-commercial element in a tax avoidance scheme should be struck out. Thus in the case at hand, HMRC were purporting that the whole scheme was not commercial and should be struck out resulting in the employee being treated as though they received a direct payment which would be subject to tax and liable to NIC. It fell to the Tribunal to decide on three main issues:-

1. Was the trust valid?
2. Was HMRC correct in applying the doctrine in Ramsay?
3. Were the payments into the trust earnings or emoluments subject to tax and liable to NIC?

Decision

1. Was the trust valid?

As HMRC conceded in their own submissions that the trust was not a sham, the Tribunal were not significantly put to test on this issue. There was much criticism by HMRC, and ultimately the Tribunal, of the trustees as regards their approach, administration, exercise of discretion and record keeping, all of which were deemed to be lax but the trust was held to be valid.

2. Does Ramsay apply?

HMRC's case revolved more around the practical and commercial reality of the payments that were made into the trust and that these were made for specific people and were enjoyed exclusively by them. Further it was a scheme specifically devised to avoid tax and thus should be set aside.

The Tribunal considered Ramsay and the subsequent amendments and refinements made by successive cases and were in particular guided by Barclay's Mercantile Finance Ltd v Mawson (2005) UKHL 51 & 52 in making their decision. It refined the basic statement in Ramsay to say that non commercial arrangements may be ignored, rather than would be ignored, in cases where the legal nature of the transaction is of the essence. In reality the legal effect of the transaction should prevail even if the transaction appeared non commercial. When applying this the Tribunal considered the statutory provisions affecting loans, charging provisions for benefits in kind and the legal nature and effect of the trust structure. Critically, for HMRC, they found that even in cases of aggressive tax planning the application of the Ramsay doctrine is fettered by the highly prescriptive nature of the statutory provisions in place and also the reality that the trust was a genuine legal arrangement with legal effects. Accordingly, the Tribunal found that Ramsay did not

apply.

3. Were the payments into trust earnings or emoluments?

Again both sides sought to rely on substantial case law in this area and in particular the cases of Garforth v Newsmith Stainless (1979) STC 129, MacDonald v Dextra Accessories Ltd (2005) UK HL 47 and Sempra Metals Ltd v HMRC (2008) STC (SCD) 1062, the principle being that, until monies are at the absolute disposal of the tax payer no liability for tax arises. In applying this principle the Tribunal were satisfied that no employee had a contractual right to a bonus or payment into trust, nor was there any obligation on the trustees to make loans; even though an employee might expect it. The facts did not support the contention that the monies in the sub funds effectively belonged to the employee nor had they been put unreservedly at the disposal of the employee. Accordingly they found that the payments were not earnings or emoluments.

Interestingly, in the course of its deliberations, the Tribunal specifically asked HMRC to address whether or not they would allow a deduction of the loan from a deceased estate; HMRC declined to comment, presumably because by agreeing that the loan was deductible for IHT purposes they would in turn be impliedly accepting that the monies were not exclusively in the control of the employee.

The Tribunal found in favour of the Appellant and confirmed that the initial assessments would be greatly reduced as a result of their findings.

Conclusions and comments

This case makes it clear that, where there are statutory provisions and entities which have their own legal effect in place which govern the applicability of a scheme, even if it is a tax avoidance scheme, then the Ramsay doctrine cannot be applied.

The decision was not unanimous and Dr Heidi Poon gave a very significant dissenting judgement in which HMRC may find some comfort. They may also heed the comments made in the majority decision which rejected HMRC's submissions that the Sempra case had been incorrectly decided because HMRC had chosen itself not to appeal that case.

It is widely expected that HMRC will appeal and most commentators and advisors were surprised by the decision.

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Meet the Author

Edward Mackereth

Global Managing Partner

Jersey

E: edward.mackereth@ogier.com

T: +44 1534 514320

Key Contacts

Nick Williams

Partner

Jersey

E: nick.williams@ogier.com

T: +44 1534 514318

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