Briefing

Private client review for January

Speed read

In *Rialas*, the Upper Tribunal effectively deferred its decision to allow the Court of Appeal to decide where to draw the line in the *Fisher* appeal. In *Mackay*, the High Court considered whether an individual must consent to their appointment as trustee to make it effective and whether in this case the appellant had been subject to undue influence. Argentina has introduced a one-off wealth tax as a response to the pandemic. The US Congress has approved the creation of the first federal beneficial ownership registers. Simplifying changes have been made to the UK's implementation of DAC 6 as a result of Brexit. Practitioners should be aware of the expansion of the UK trust register and that there is no general exemption for bare trust and joint ownership situations.

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Rialas: has HMRC lost the 'quasi-transferor' argument?

Shortly before Christmas, the Upper Tribunal (UT) published its decision in *HMRC v A Rialas* [2020] UKUT 367 (TCC).

The decision is the latest in the series of cases, that shows no sign of abating, examining the scope of the charging provision in the transfer of assets abroad (TOAA) regime (now contained in ITA 2008 s 720). As it stands, at least until the Court of Appeal considers the issue later this year, where an offshore structure has acquired an asset at market value from a third party, it is extremely *unlikely* that another individual, who is not a transferor in relation to the structure, can be treated as being a transferor by having procured the transfer and so be taxed on the income received by the structure.

In this case, the issue was whether Mr Rialas was liable to income tax (under what is now s 720) by virtue of procuring arrangements under which shares in a UK company were transferred, not to him, but to a non-UK resident company whose shares were owned by an offshore discretionary trust (of which he was a beneficiary). He was UK resident but not UK domiciled. The UK company shares in question were previously owned by a business partner and, as a result of the transfer to the offshore discretionary trust structure, Mr Rialas was not liable to income tax on dividends paid up through the trust structure. Mr Rialas' involvement comprised helping to arrange the transaction and arranging funding for the share purchase from a third party on favourable terms.

The First-tier Tribunal (FTT) had rejected HMRC's submissions that Mr Rialas ought to be regarded as a 'quasi-transferor' of the assets. HMRC had argued that, although Mr Rialas had no legal right to control or direct the transfer, he nonetheless amounted to a transferor as he helped to arrange the transaction. The FTT relied on a plain language reading of the legislation to find that the concept of a 'quasi-transferor' has no legal basis. Instead, for s 720 to bite, the taxpayer must themselves effect the transfer. In other words, the term 'transferor' 'does exactly what it says on the tin'.

HMRC's appeal to the UT was unsuccessful. In essence, the UT determined that the core issue in dispute in *Rialas* was the same as the one in *Fisher v HMRC* [2020] UKUT 62 (TCC), which is due to be heard by the Court of Appeal later this year. In *Fisher*, the individuals in question were shareholders in the company which made the transfer; but the question which the Court of Appeal will be asked in relation to both appeals is where do you draw the line? HMRC's position, which the UT had rejected, is that individuals who have been involved in the creation of a structure should be treated as transferors. We are aware of other cases where HMRC has made the same argument, so it will be interesting to see what the Court of Appeal thinks.

It is also worth bearing in mind the potential impact of ITA 2007 s 731. That section was introduced following the House of Lords decision in *Vestey v IRC* [1980] AC 1148, a case which also considered a taxpayer who was not, strictly speaking, a transferor. Section 731 imposes a tax charge on those who (even if not transferors) receive a benefit provided out of assets available as a result of a transfer of assets abroad. So, Mr Rialas is presumably not out of the woods: if he received a benefit from the offshore discretionary trust whilst UK resident, he could potentially be liable under s 731, notwithstanding the ruling in December.

If HMRC fails in a conjoined *Fisher* and *Rialas* appeal, the Treasury could well seek to implant the legal concept of a 'quasi-transferor' into the TOAA regime by way of amending legislation.

In *Rialas*, the FTT also held that EU protections for the free movement of capital shielded the share transfer from the TOAA regime. Although the UT declined to rule on the issue, this issue is of declining importance as the UK has now left the EU single market.

Mackay: trustee escapes tax liability

The High Court handed down its judgment in *Mackay v Wesley* [2020] EWHC 3400 (Ch) on 14 December 2020. The case serves as a reminder of the liabilities that can be inadvertently assumed by incoming trustees. It also highlights the hardship caused to many by failed 'round the world' avoidance schemes that were popular for many years in the 2000s and 2010s.

The claimant had been pressured by her father in 2003 to sign a deed of retirement and appointment of trustees. This was found to be undue influence on his part, and that was not disputed on appeal. The claimant had no idea that her appointment was being used to effect a tax avoidance scheme. The deed appointed the claimant as a trustee whilst Mauritian trustees retired. It had the effect of migrating the trust from Mauritius to England part way through a tax year. As a result, the remaining value of the trust dwindled from £3.6m to about £61,000. HMRC subsequently assessed a CGT liability of £1.6m arising from the failed scheme under TCGA 1992 s 65.

Meade J reversed the initial decision of Deputy Master Henderson and found in the claimant's favour. The claimant's appointment as trustee was ineffective; she was granted relief in the form of partial rescission of the deed, on the basis that her appointment was a self-contained and severable part of the deed which could be rescinded for undue influence. As an equitable remedy, rescission is only available as a remedy where it is not unfair on other parties (including third parties). Given the circumstances of the claimant's appointment, it was not unfair to grant rescission as a remedy. The fact that HMRC would be unable realistically to recover the vast majority of the £1.6m tax liability as a result of partial rescission was not enough to make rescission unfair. The remaining trustees had either been dissolved or were impecunious.

The claimant's father was not represented and HMRC also declined to make submissions. The claimant argued that, in the alternative to undue influence, Meade J should also rescind her appointment on the ground of mistake. However, Meade J found it unnecessary to consider mistake in light of the successful undue influence ground, and observed that the mistake arguments were complex and would benefit from being fully ventilated in a contested hearing.

Ultimately, the claimant was fortunate to have been unduly influenced to accept her appointment. Such 'round the world' tax schemes were often promoted by tax advisers as *bona fide* at the time. Had she been aware of the scheme at the time of her appointment and entered into the arrangement with open eyes, she could have been liable to HMRC for the vast majority of the £1.6m tax liability because trustees are jointly and severally liable for trust liabilities, including those arising from the activities of their predecessor trustees. As helpful as this case is for a taxpayer, it may in reality be confined to its own egregious facts, informed by a desire to get a victim out of trouble; trustees rarely find the stars aligned in their favour to this degree when it comes to the assumption of liabilities of the trust.

Wealth tax

As the debate over wealth taxes continues in the UK, readers may be interested to note that the first covid-related wealth tax came into force in Argentina in December 2020. The Solidarity and Extraordinary Contribution of Great Fortunes Law is intended to be a one-off rather than annual tax. Levied only on individuals declaring more than 200m pesos in wealth (approximately £1.8m), the tax has a very narrow base (a fraction of 1% of Argentinians). The tax rate rises to 3.5% for wealth in Argentina and 5.25% on offshore assets.

US beneficial ownership registers: 'Sammy' come lately...

The US Congress has now approved the Corporate Transparency Act ('the Act'), despite an attempt by President Trump to veto it. The Act includes bipartisan measures which will require existing and future reporting companies – corporations, limited liability companies and other similar entities – to file annual reports of their beneficial ownership. The Act applies to non-US companies registered to do business in the US, as well as to US-registered corporations.

Once the Act comes into force, the US Treasury Department's Financial Crimes Enforcement Network (FinCEN) will create the first federal register of beneficial owners of companies. Reports will have to be filed on formation and annually thereafter. The information will be available to US federal law enforcement agencies, non-US enforcement agencies and financial institutions attempting to meet their customer due-diligence requirements, although not to the general public.

The definition of beneficial ownership will be similar to the one in the UK's People with Significant Control regime: it will include individuals who directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise exercise substantial control over the entity; or own or control not less than 25% of the ownership interests of the entity. Exemptions include minors and those who whose only interest in a reporting company is through a right of inheritance.

There are some major exceptions to the new requirements, such as entities with a physical presence in the US that employ more than 20 people with gross reported receipts in excess of $5m.

Penalties for wilfully providing false information, extending to lawyers helping with corporate-registration paperwork, will include fines of up to $10,000 and prison terms of up to two years.

DAC 6: a rare Brexit bonus

Included within the Brexit legislation published at the end of December were the International Tax Enforcement (Disclosable Arrangements) (Amendment) (No. 2) (EU Exit) Regulations, SI 2020/1649.

The key provision states that: '(5) For the purposes of these Regulations, the DAC is to be read as if … (h) in Annex IV, Part 1 [the main benefit test] and hallmark categories A, B, C and E in Part II were omitted.'

Hallmark D, concerning the automatic exchange of information and beneficial ownership, is the only hallmark retained. HMRC has confirmed that this more restricted reporting requirement will only apply for a limited period, as the government intends to repeal the UK's implementation of DAC 6 entirely and replace it with new legislation specifically to implement the OECD's mandatory disclosure rules. The government will consult on the new legislation later in 2021. In any event, the reduction in the administrative burden for practitioners is to be welcomed.

The UK trust register: TRS guidelines start to take shape

The significant expansion of the UK trust register as a result of the transposition into UK law of the EU's

Fifth Money Laundering Directive (5MLD) took effect on 6 October 2020. Some uncertainties remain, but it is hoped these will be clarified in HMRC's forthcoming guidance which is expected soon.

Among the highlights, there is no general exemption for bare trust and joint ownership situations and UK resident bare trustees will – in many cases where the legal and beneficial owners are not identical – need to register. This will include situations where assets are held by parents as bare trustee for their minor children or one spouse holds property for themselves and the other spouse.

Pilot trusts established since 6 October 2020, for example to receive death benefits under a pension policy or to receive assets under a will, will be required to register even if they hold less than £100 of assets. Pre-2020 pilot trusts need to register when property is added.

Trusts holding the benefit of life policies which pay out *only* on death, illness or disability will not have to register until the policy pays out (unless this is on death and the trust is wound up within two years of the death). Identifying such trusts may be the new logistical challenge for estate planners, to replace much DAC 6 soul-searching.

Trustees and their advisers should bear in mind the expanded class of trusts to be registered for the first time later this year when the new TRS service becomes available. The deadline for registration is 10 March 2022. Guidance is awaited on issues like the treatment of trusts which end in the interim and on access to the register by non-governmental actors.

Self-assessment

Finally, a reminder for those who opted to defer July 2020 self-assessment payments on account due to the covid-19 pandemic: these payments remain due and are payable by the 31 January 2021 deadline. Covid-19 related delays may also now be grounds for reasonably excuse for late filing. Full details can be found on the ICAEW's website (at bit.ly/3sqVZXF). ■

For related reading visit www.taxjournal.com

- Cases: *HMRC v Rialas* (14.1.21)
- The Wealth Tax Commission's final report (P Barclay, G Price & T Schlee, 6.1.21)
- DAC 6 update: UK narrows scope of mandatory reporting (S Bhogal & A Kaye, 12.1.21)
- 5MLD: major changes to the UK trust register (J Smithson, S Epstein & E Yu, 5.11.21)