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‘Health’ Warnings for Practitioners

Andrew Halkyard warns practitioners to be aware of the latest legal trends in matters relating to taxation

Warning: ‘Tax Schemes’ and the Professional Adviser
Readers may very well be aware that a clear recent trend of authority throughout the common law world shows a marked distaste for tax-motivated transactions. In a tax-planning context, this can undoubtedly affect the interpretation of anti-avoidance provisions such as ss 61 and 61A of the Inland Revenue Ordinance (Cap 112).

The case of *R v Charlton* [1996] STC 1418 was not a matter involving statutory interpretation of arcane or convoluted taxation provisions. Rather, it involved a criminal prosecution for the common law offence of cheating the revenue. The defendants were the professional advisers. This case provides, for professional advisers, a chilling reminder that the apparently clear distinction between tax ‘avoidance’ and tax ‘evasion’ may not be as clear as one might think.

The facts of *Charlton* concerned a reinvoicing scheme involving the interposition of a related offshore company to purchase goods and services for resale to United Kingdom companies at highly inflated prices. The scheme resulted in the bulk of the corporate group’s profits being captured offshore. At trial, the judge took an extremely robust view of the nature of a fictitious transaction. The judge stated: ‘I do not accept the proposition ... that sales and purchases do not cease to be real if the objective is to seek the dishonest reduction of tax liability.’ In the event, the jury found several professional advisers (accountants and a barrister) participating in the scheme guilty of the offence charged.

In the course of its decision upholding the criminal convictions, the English Court of Appeal stated that the reinvoicing transactions were not bona fide and that the function performed by the offshore companies had no commercial benefit (see further, Adams, ‘*Regina v Charlton*’ (1998) 2(1) The Tax Journal 16-17).

... it was not sufficient simply to provide a list of common facilities in the building and their valuations

Tax avoidance, as that term is commonly understood, is not unlawful. But participation in devising and planning a tax scheme, with knowledge that it is being effected in an unlawful manner, can give rise to criminal liability. Finally, notwithstanding the extravagant language used by the courts in *Charlton*, it is noteworthy that the convicted barrister assisted in promoting the scheme and in withholding information from the Inland Revenue.

It is trite to point out the apparently commonplace nature of the ‘tax scheme’ in dispute in *Charlton*. But this will be of no comfort to the professional advisers who are doubtless rueing their involvement in the business affairs of their clients.

Warning: Transactional Planning for Capital Allowances
This next warning has nothing to do with the world of tax planning that formed the background to *Charlton*. Instead, it has everything to do with maintaining tax knowledge and applying it in a commercial world.

Readers will be aware that very different rates of depreciation allowances apply (in descending order) to plant and machinery, industrial buildings and commercial buildings. Therefore, a person acquiring a building together with its fixtures and, to use a neutral term, other ‘items’ (such as common facilities) must be very careful to correctly allocate the purchase price between these various assets.

This conclusion is well illustrated by *D 49/97 12 IRBRD 324*, (1998) HKRC §80-529 where a company purchased five floors of a commercial building together with various common facilities for a composite consideration. The company claimed that the common facilities in the building, including escalators, lifts, the fireservice system, air conditioning and ventilation systems, and the electrical and security systems were plant or machinery qualifying for depreciation allowances. The allowances were calculated by reference to the percentage of the floor space in the building owned by the company as applied to the value of the facilities.

The Commissioner argued before the Board of Review that not all these facilities constituted plant or machinery and, in any event, the company had not proved that it incurred expenditure on the provision of these items. The Board accepted that the common areas and facilities must be owned by someone and also that the co-owners owned the common areas. However, in dismissing the appeal, the Board found that the company could not prove what its share was and what part of the
purchase price was incurred to purchase the common facilities. In this regard, it was not sufficient simply to provide a list of common facilities in the building and their valuations.

Hong Kong's taxation system prides itself on simplicity and ease of compliance. Nevertheless, in a commercial transaction such as the sale and purchase of business assets (or shares), from a taxation perspective, the interests of vendor and purchaser may be very different. When the subject matter of the transaction involves assets which, when sold or acquired, have significant tax consequences, some basic tax planning can go a long way.

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