Case Digests

A Game of Two Halves: Petitions and Post-Winding Up Recoveries in Disguised Remuneration Tax Avoidance Cases

Rachel Sleeman

Jessica Powers

Corporate insolvency; Directors' liabilities; Disguised remuneration; Employee benefit trusts; Employer-financed retirement benefit schemes; Misfeasance; Professional negligence; Tax avoidance; Transactions at an undervalue; Transactions defrauding creditors; Wrongful trading

Introduction

The recent Panama and Paradise Papers data leaks have catapulted the issue of tax avoidance to the forefront of public consciousness and have reinforced a clear political and moral impetus to reduce the prevalence of tax avoidance by both corporate bodies and individuals.

Disguised remuneration tax avoidance schemes are particularly ubiquitous and have been the target of anti-avoidance legislation for the last seven years or so. However, it was only last year that the Supreme Court validated HMRC's longstanding view that such schemes are ineffective in *RFC 2012 Plc (In Liquidation) (formerly Rangers Football Club Plc) v Advocate General for Scotland*.[1] HMRC now have the judicial green light to pursue the collection of unpaid tax from employers and employees whom had previously been of the view that their liability to pay tax had been avoided through a disguised remuneration tax avoidance scheme.

The aim of the Government's legislative crackdown on tax avoidance is, naturally, to increase taxation income. However, unexpected demands for vast swathes of historic tax liabilities, particularly at a time of economic uncertainty and rising inflation, will have one unfortunate and perhaps politically unintended consequence: there will almost certainly be an increase in the number of liquidations and bankruptcies on HMRC petitions.

Disguised remuneration tax avoidance schemes

There are many varieties of disguised remuneration tax avoidance schemes, all of which are intended to reduce the amount of tax payable by employers and individuals, whether that be Income Tax and NICs, Corporation Tax or Inheritance Tax. As a general rule, such schemes involve payment of an employee's remuneration to a third party, rather than to the employee directly.

Historically, disguised remuneration tax avoidance scheme tended to utilise an Employee Benefit Trust (EBT). Under such schemes, an employer pays contributions to the EBT and the trustee of the EBT loans the payments received from the employer to the employee. The loans to the employee are typically interest free and on terms which mean that the employee does not have to repay the loan during their lifetime. Alternatively, the trustee of the EBT might invest the money paid by the employer for and on behalf of the employee. Another commonly used third party, as an alternative to an EBT, is an Employer-Financed Retirement Benefit Scheme (EFRBS). EFRBS are often non-registered pension schemes, and prima facie aim to make financial provision for employees upon their retirement or death. However, EFRBS are being used by employers to claim Corporation Tax deductions, or to avoid liability for Income Tax and NICs in much the same way as schemes which use an EBT.

As the Government takes steps to close tax avoidance loopholes, further schemes and attempts to avoid the consequences of newly enacted legislation are inevitably being devised. For example, the so-called "job board avoidance scheme" is a recent innovation. Pursuant to such a scheme, contractors are set up as the employee of an umbrella company and are paid in two parts: the first part is a small basic wage; and the second part is used to advertise the contractor's services on a job board. In return for advertising their services, the contractor receives "loyalty points". These "loyalty points" can be cashed in by the contractor, with no deduction for Income Tax and NICs.[2] HMRC is firmly of the view that such schemes do not work.

An overview of anti-tax avoidance legislation

The Finance Act 2011 introduced significant amendments to the Income Tax (Earnings and Pensions) Act 2003 (ITEPA), in order to prevent disguised remuneration tax avoidance schemes. The ITEPA Pt 7A came into force on 6 April 2011. The ITEPA s.554A(1) sets out that the provisions of Pt 7A apply if:

(a) a person (A) is an employee, or a former or prospective employee, of another person (B);
(b) there is an arrangement (the relevant arrangement) to which A is a party or which otherwise (wholly or partly) covers or relates to A;
(c) it is reasonable to suppose that, in essence:
  (i) the relevant arrangement; or
  (ii) the relevant arrangement so far as it covers or relates to A,

  is (wholly or partly) a means of providing, or is otherwise concerned (wholly or partly) with the provision of, rewards or recognition or loans in connection with A's employment, or former or prospective employment, with B;

(d) a relevant step is taken by a relevant third person; and

(e) it is reasonable to suppose that, in essence:

(i) the relevant step is taken (wholly or partly) in pursuance of the relevant arrangement; or

(ii) there is some other connection (direct or indirect) between the relevant step and the relevant arrangement.

"Relevant steps" include earmarking a sum of money or assets, payment of sums or transfer of assets, and making assets available.[3] Disguised remuneration tax avoidance schemes involving sub-funds, loans, or the making available or loaning of real property are therefore all caught by Pt 7A (save that there are express statutory exclusions[4]). A "relevant third person" is defined as either the employer or employee acting as trustee, or a third party.[5]

The above-mentioned changes to the ITEPA put beyond doubt that any employment income paid through a third party is subject to Income Tax and NICs as if it had been paid directly to the employee by the employer: Pt 7A provides that the value of any relevant step counts as employment income of A in respect of A's employment with B.[6] The "value" of the relevant step is either the amount of money involved, or the market value or cost of the relevant step.[7]

The Finance Act 2014 Pt 4 gave HMRC new powers to pursue disputed tax claimed to have been avoided by the use of disguised remuneration schemes. A "follower notice" may be given to tax-payers involved in tax avoidance schemes where HMRC is of the opinion that there is a judicial ruling relevant to the scheme being used. If the tax-payer does not take the required corrective action, they will be liable to pay a penalty. HMRC may also serve an "accelerated payment notice" (APN) in tax avoidance cases where a tax enquiry or appeal is in progress and either a follower notice has been given, the tax avoidance scheme is notifiable under the disclosure rules, or a general anti-abuse rule notice has been given. The equivalent of an APN in partnership cases is a Partner Payment Notice (PPN). APNs and PPNs require payment of disputed tax before any dispute is determined: payment must be made within 90 days of the APN/PPN being given or, if the tax-payer makes representations in response, within 30 days of notification of HMRC's determination. Penalties are due and payable where the APN/PPN is unpaid.

HMRC's decision to issue APNs and PPNs has been the subject of recent, and unsuccessful, judicial reviews and subsequent appeals by tax-payers in *R. (on the application of Rowe) v Revenue and Customs Commissioners*.[8] Noting that the powers to issue APNs/PPNs were "unusual", Arden LJ construed the statute as requiring HMRC's designated officer to be positively satisfied on the information before them that the tax avoidance scheme in question is not effective.[9] However, she was satisfied that HMRC is currently taking those necessary steps before issuing APNs/PPNs, and that therefore it had not been unreasonable to issue the APNs/PPNs. On the issue of the duty of fairness and principles of natural justice, the Court of Appeal accepted that the court could imply an additional duty to act fairly, even where legislation contains a prescribed procedure for consultation and written representations. As such, the duty of fairness requires that tax-payers can make further representations to the designated officer as to the effectiveness of the tax avoidance scheme in question, albeit that the designated officer has to reach his own view.[10] As to the European Convention on Human Rights (ECHR) ground of appeal, the Court of Appeal did not reach a decision as to whether art.1 of Protocol 1 ECHR was engaged, but considered that the State's interference is provided by law and is proportionate. Further, although satisfied that tax matters fell outside of art.6 ECHR, she considered that judicial review provides the tax-payer with equivalent protection.

Further legislative initiatives to tackle disguised remuneration tax avoidance schemes were introduced in the Budget 2016 and have been gradually enacted since then. The Finance Act 2016 added a targeted anti-avoidance rule to the ITEPA, so that transitional relief on investment growth is only available where there is no connection, directly or indirectly, with a tax avoidance arrangement, and restricted the relief available on relevant steps taken after a settlement with HMRC to the value of the disguised remuneration.[11] The Finance Act 2017 amended the ITEPA to make clear that Pt 7A applies to the transfer, release, or write-off of disguised remuneration loans.[12] The Finance Act 2017 also included rules to prevent double taxation.[13] The Finance (No. 2) Act 2017 introduced a PAYE and NIC charge on disguised remuneration loans made to employees or directors on or after 6 April 1999 which remain outstanding, in whole or in part, on 5 April 2019.[14]

The Finance Bill 2017–2018, published on 1 December 2017, will seek to further strengthen the existing anti-tax avoidance legislation, with a particular focus on disguised remuneration tax avoidance schemes.

RFC 2012 Plc

Despite the Government's overt anti-tax avoidance stance, and the consequential enactment of legislation bestowing powers upon HMRC to pursue avoided tax, it appears that HMRC were cautious in presenting winding-up petitions founded upon APNs/PPNs. As at 17 July 2017, only 12 such petitions had been presented.[15] No doubt part of the reason for HMRC's caution stemmed from the first-instance and first appeal decisions in *RFC 2012 Plc*,[16] which were decided against HMRC on the question of whether disguised remuneration schemes were effective in avoiding liability to tax.

In 2001, Murray Group Management Ltd, a company which provided management services to the group of companies of which RFC 2012 Plc was part, set up a remuneration trust. RFC 2012 Plc remunerated its employees, including footballers, by making payments to the trustee of that remuneration trust and then recommending that the trustee resettle those payments on to a sub-trust, with the income and capital of the sub-trust to be applied in accordance with the wishes of the employee. HMRC assessed RFC 2012 Plc and the other group companies to Income Tax and NICs on the sums paid to the remuneration trust. RFC 2012 Plc and the other group companies appealed to the First-tier Tribunal (Tax Chamber). The FTT recognised that the scheme was an aggressive tax avoidance scheme, but held that it was effective in avoiding liability to Income Tax and NICs. HMRC then unsuccessfully appealed to the Upper Tribunal (Tax and Chancery Tribunal).

The Advocate General for Scotland, on behalf of HMRC, appealed to the Inner House of the Court of Session. The Advocate General succeeded on a legal argument that the payments to the remuneration trust were simply a redirection of the employee's earnings, and thus Income Tax and NICs were due on those sums. RFC 2012 Plc appealed the decision of the Inner House to the Supreme Court.

The key issue before the Supreme Court was whether it was necessary that the employee themselves receive, or be entitled to receive the remuneration for their work in order for that remuneration to be subject to Income Tax.[17] Having considered the relevant statutory provisions as to income taxation, the unanimous decision of the Supreme Court was that the appeal should be dismissed. The Supreme Court concluded that, as a general rule, Income Tax was chargeable on any employment income which an employee was entitled to have paid as their remuneration, regardless of whether it was paid to the employee, or to a third party.[18] Having reached that conclusion, the Supreme Court found that the payments made by RFC 2012 Plc to the trustee of the remuneration trust for the employees constituted the employee's earnings, and were thus subject to Income Tax.[19]

That general rule was held not to apply to "perks", benefits in kind, and arrangements which give the intended recipient of the employer's payment a contingent interest, as opposed to an immediate vested beneficial interest.[20] The reason given for the first exception was that current legislation requires receipt of the "perk" by the employee.[21] Benefits in kind which cannot be converted into money do not fall within the statutory definition of "earnings"; rather, there is a "benefits code" which makes special statutory provision for benefits in kind within the income tax regime.[22]

In determining the issue of whether the employer was obliged to make deductions for PAYE, the Supreme Court held that references to making a relevant payment "to an employee" or "other payee" in the PAYE Regulations were to be construed as meaning payment either to the employee or the person to whom payment is made with the agreement or acquiescence of the employee, or as arranged by the employee.[23] The consequence of that construction was that RFC 2012 Plc was liable to make PAYE deductions from payments made to the trustee of the remuneration trust.[24]

HMRC's current stance

On 29 September 2017, HMRC published "Spotlight" guidance which reiterated HMRC's view, bolstered by the Supreme Court's decision in *RFC 2012 Plc*, that a wide range of disguised remuneration tax avoidance schemes were ineffective, no matter what type of third party was used. Significantly, the guidance stated that "HMRC intends to use this decision to take action against many of the disguised remuneration schemes using the full range of our available tools".[25]

The tools available to HMRC include their powers under the Finance Act 2014 to serve follower notices and APNs/PPNs, and, consequentially, the instigation of insolvency proceedings. It appears to be very likely that the coming months and years will see a significant increase in the numbers of both corporate and personal insolvencies as a consequence of demands by HMRC for payments of historic tax liabilities, which tax-payers had thought had been successfully avoided.

Statutory claims against directors of insolvency companies

Having specifically entered into disguised remuneration tax avoidance schemes in order not to pay tax, it is exceptionally unlikely that any company will have maintained a contingency fund in the event that HMRC deemed the scheme to be ineffective. Therefore, in perhaps the vast majority of cases, if a company is wound up as a consequence of a demand for significant historic tax liabilities, it is probable that the company's assets alone will not satisfy the debts and insolvency expenses. Insolvency practitioners will therefore have to look elsewhere to make recoveries for the benefit of the company's creditors.

Almost inevitably, the insolvent company's liquidator will firstly want to consider whether there is any merit in any of the statutory claims available under the Insolvency Act 1986 (IA) against the company's directors. In short, the potentially relevant statutory claims include actions for misfeasance, transactions at undervalue and transactions defrauding creditors, and wrongful and fraudulent trading.

Misfeasance

IA s.212 provides a summary remedy against delinquent company officers where they have "… misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company".

The common thread which connects the various disguised remuneration tax avoidance schemes is that employees' remuneration is paid to a third party without any deduction for PAYE or NICs being made at source, in the belief that liability to tax is avoided. Consequently, most, if not all disguised remuneration schemes will result in money owed by the company to HMRC being paid over to a third party. It is, in those circumstances, potentially arguable that company money has been misapplied.

Alternatively, the liquidator, on behalf of the company, may be able to make out a breach of the directors' fiduciary duties, or statutory duties under the Companies Act 2006. It is trite that the directors of a company are considered and treated as trustees of company property which is under their control.[26] It is therefore a breach of fiduciary duty for a director to exercise their powers of management and control otherwise than in good faith and in a way which they believe is in the best interests of the company.[27] The 2006 Act s.172 similarly provides that directors have a duty to act in a way which they consider, in good faith, would be most likely to promote the success of the company. The statutory duty to exercise powers for the purpose which they were conferred, pursuant to the 2006 Act s.171(b), and the duty to exercise reasonable care, skill and diligence, pursuant to the 2006 Act s.174, are also likely to be relevant in tax avoidance cases.

Bearing in mind the complexity of disguised remuneration tax avoidance schemes and, in many cases, the considerable sums of money at stake, it is expected that tax-payers engaged in such schemes would have sought professional advice. The risk of a claim under the IA s.212 being met with a defence seeking relief in reliance upon the 2006 Act s.1157 is therefore heightened in these cases. It is well established that, in order to be granted total or partial relief by the Court under the 2006 Act s.1157, a director must establish three things: that they acted honestly (a subjective requirement), that they acted reasonably (an objective requirement), and that having regard to all the circumstances they ought fairly to be excused.[28] Whether it was reasonable for the director to rely upon any advice given may turn on when the advice was sought and received: even before the definitive legislative changes in 2011, HMRC's widely-published stance was that disguised remuneration tax avoidance schemes do not work.

Alternatively, directors might have a limitation defence to any misfeasance claim. Because the IA s.212 is procedural and does not create any new cause of action, the relevant limitation period will be that which applies to the company's underlying claim against the directors.[29] The appointment of the company's liquidator is entirely irrelevant to the question of when time begins to run. A breach of fiduciary duty is treated as analogous to a breach of trust; a six-year limitation period will therefore generally apply, albeit that the period of limitation may not begin to run or may be disapplied entirely if the director has acted fraudulently or where the company's money is or has been in the director's possession.[30] The latter exception to the usual limitation period may be particularly relevant in cases where directors themselves have received or become entitled to the company's money as beneficiaries of an EBT. Claims alleging breach of the duty to exercise reasonable care, skill and diligence will be statute-barred six years after the company suffered the relevant damage, as they are analogous to negligence claims.[31] In light of the usual six-year limitation period, in the absence of fraud or receipt of the company's money by the directors themselves, there is a good chance that claims under the IA s.212 which rely upon payments to third parties made before 2012 are statute-barred.

Transactions at undervalue/transactions defrauding creditors

Pursuant to the IA s.238, the liquidator may apply to the Court for an order restoring the position to what it would have been if the company had not made a gift to someone, or entered into a transaction with someone on terms that the company was to receive no consideration, or entered into a transaction with someone for consideration which has a significantly smaller value than the consideration provided by the company. It should be remembered that, to establish a claim under the IA s.238, the transaction in question must have taken place in the claw-back period.[32]

It could be said that remuneration payments by an employer to a third party with whom the employer has no contractual relationship are transactions at undervalue. However, as the Supreme Court recognised in *RFC 2012 Plc* that an employee's remuneration could be paid to a third party at his request, a realistic appraisal of disguised remuneration tax avoidance schemes might lead to the conclusion that the payments to the third party are good consideration for the employee's services. However, that conclusion surely does not apply to the money paid over to the third party which should have been deducted by the employer for PAYE and NICs.

In respect of the portion of the money paid over which should have been deducted for PAYE and NICs, the liquidator might also be able to establish a transaction defrauding creditors, pursuant to the IA s.423. The inherent difficulty in succeeding on a claim under the IA s.423 is that an intention to legally avoid tax does not necessarily amount to entering into a transaction for the purpose of putting assets beyond the reach of HMRC or prejudicing HMRC's interests. If a claim under the IA s.423 can be made out, the liquidator will avoid the potentially fatal requirement that the transaction take place within the two-year period preceding the onset of insolvency.

Wrongful/fraudulent trading

Directors who carry on the business of a company which becomes insolvent with an intention to defraud the company's creditors may be found liable to contribute to the company's assets, pursuant to the IA s.213.

As with a claim under the IA s.423, there is a real question as to whether the Court will find that entering into a failed tax avoidance scheme, as opposed to illegal tax evasion, amounts to carrying on the company's business with the intent to defraud HMRC. Establishing dishonesty is never easy, particularly when that burden falls upon a liquidator whose involvement with the company often begins years after the relevant events.

Because of the difficulty in proving dishonesty, generally a liquidator's preference will be to bring a claim pursuant to the IA s.214 for wrongful trading. Under the IA s.214, a director may be ordered to contribute to the company's assets if, prior to the commencement of the winding up of the company, they knew, or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or administration.

It may be an insurmountable challenge to prove that the director knew or ought to have concluded that the company's insolvency was inevitable, judged against the partially subjective and partially objective standard set out in the IA s.214(4), for a number of reasons. The company may have been professionally advised that there was no or little risk that the company would ever be found liable to tax. Further, the prevailing judicial view, until the decision in *RFC 2012 Plc*, was that disguised remuneration tax avoidance schemes were effective. Finally, the factor which leads to the conclusion that insolvency is inevitable may be the service of a follower notice or APN by HMRC; such notices will generally post-date payments into disguised remuneration schemes by months or years, and will be temporally close to the date of liquidation.

A director can escape a declaration of liability by relying upon the IA s.214(3) if, after becoming aware that there is no prospect of the company avoiding insolvency, the director took every step with a view to minimising the potential loss to the company's creditor. Determining what steps would be required by the IA s.214(3) will always be fact-specific, but taking advantage of the EBT Settlement Opportunity (which was withdrawn on 31 July 2015) or reaching a settlement agreement with HMRC may be sufficient.

Claims against third parties

If there is no prospect of recovery, or sufficient recovery from directors, either because there is no merit to a statutory claim or because the director lacks the personal assets against which to enforce judgment, the liquidator might wish to consider claims against third parties. Tax or legal advisors who recommended and advised upon the ineffective disguised remuneration tax avoidance scheme are obvious prospective defendants.

The scheme used by RFC 2012 Plc was devised and operated by Baxendale Walker Solicitors (BWS). That firm specialised in tax advice, particularly tax planning and avoidance schemes. In 1998 BWS recommended the use of an EBT scheme to Iain Barker, the owner of a management and business software company, in order to avoid a liability to Capital Gains Tax and, eventually, Inheritance Tax. Mr Barker entered into the scheme recommended by BWS. Having conducted an enquiry, in 2010 HMRC issued assessments on Mr Barker and challenged the validity of the EBT. Mr Barker reached a settlement with HMRC, pursuant to which he paid more than £11m in tax and interest.

Mr Barker then issued a professional negligence claim against BWS. The claim was heard by Roth J in early 2016.[33] At first instance, the claim was unsuccessful. The Court accepted that BWS were in breach of their duty of care in not giving Mr Barker an adequate general health warning about the risks of the tax avoidance scheme, but found, on the facts, that Mr Barker would have gone ahead with the scheme even if he had been so warned because he wanted to aggressively avoid tax. The Court acknowledged that Mr Barker would not have entered into the scheme if BWS had given him a high-level warning of the risks, but was satisfied that BWS were not in breach of their duty for failing to admit their advice was wrong in law. Roth J noted that experienced tax specialists for several years had not interpreted the law in any way which was different to BWS' advice and thus it could not be said that a competent adviser would have given a high-level warning to Mr Barker.

At first instance, BWS sought to argue that Mr Barker's claim was statute-barred, as their advice had been given about 15 years before the claim was issued. However, Roth J accepted that, as Mr Barker did not have actual or constructive knowledge of his potential claim more than three years before he commenced proceedings, he was entitled to rely on the Limitation Act s.14A.

Mr Barker appealed to the Court of Appeal, and judgment was handed down on 8 December 2017. The issue before the Court of Appeal was whether a reasonably careful practitioner with the degree of expertise claimed by BWS would have warned Mr Barker that there was a significant risk that the EBT would fail to deliver the hoped-for tax advantages.[34] Determination of that issue proceeded on the basis that no allegation was made that BWS had been negligent in construing the relevant provisions of the Inheritance Act 1984 in the way in which they did.

The Court of Appeal applied the following principles:

(1) it is a highly fact-sensitive question as to whether a legal adviser has a duty to explain to their client the risk that a court may reach a different interpretation from that which the legal adviser has advised is correct;

(2) in a case where the construction of the relevant provision is clear, there will be no need to caveat the advice given as the threshold of "significant risk" will not be met;

(3) it is possible in any given circumstance not to be negligent in reaching a particular construction of a provision, but nevertheless to have a duty to point out the risks involved, and be negligent if that is not done;

(4) if litigation has already commenced, or the point as to the contrary construction has already been taken, it is more likely that there will be a duty to point out the risks involved; and

(5) whether there is a duty to point out the risks involved is nuanced, and does not simply boil down to percentages or whether contrary constructions are "finely balanced".[35]

Two factors were held to be particularly relevant to the question of whether BWS should have advised Mr Barker about the risk of their construction of the Inheritance Act 1984 being incorrect. First, the scheme was a very aggressive tax avoidance scheme which had been marketed to Mr Barker as producing an outcome which might appear too good to be true. Secondly, the consequence of the scheme failing would be a very large tax liability of £2.4 million. Those factors pointed to a real risk that HMRC would at some point take the Inheritance Act 1984 construction point, and pursue it through litigation.[36] The Court of Appeal therefore concluded that BWS had been "clearly negligent" in failing to give a specific warning to Mr Barker that there was a significant risk that their advice was wrong, and that the EBT scheme would not work.[37]

Professional negligence claims against professional advisers are always fact-sensitive, but *Barker* demonstrates that such claims can succeed in the context of failed tax avoidance schemes. Claims against professional advisers have two clear advantages over claims against directors: *Barker* illustrates that limitation issues might not arise in such cases, and it is highly likely that professional advisors will have professional indemnity insurance, thereby increasing the prospects of recovery post-judgment.

Conclusions

Whilst it appears certain, following the decision in *RFC 2012 Plc*, that there will be a rise in the number of insolvencies consequential upon the failure of disguised remuneration tax avoidance schemes, that in itself will not achieve the Government's goal of increasing taxation income.

Following a winding up or bankruptcy order being made, insolvency practitioners will face the task of attempting to recover cash and assets for the benefit of creditors. Establishing a statutory claim under the IA is fraught with problems, even before the specific facts of any given case are considered. The judgment of the Court of Appeal in *Barker* indicates that professional negligence claims by insolvent companies against their professional advisers may be a promising alternative route to recovery, but is by no means guaranteed.

It is essential that insolvency professionals seek early and comprehensive advice as to recovery options in the liquidation of companies forced into insolvency by the failure of tax avoidance schemes, especially where they may be a limitation issue.

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[1] *RFC 2012 Plc (In Liquidation) (formerly Rangers Football Club Plc) v Advocate General for Scotland* [2017] UKSC 45; [2017] 1 W.L.R. 2767.

[2] See HMRC, *Disguised remuneration: job board avoidance scheme (Spotlight 37)* (Published 17 March 2017).

[3] Income Tax (Earnings and Pensions) Act 2003 (ITEPA) ss.554B–554D.

[4] ITEPA ss.554E–554Y.

[5] ITEPA s.554A(7).

[6] ITEPA s.554Z2(1).

[7] ITEPA s.554Z3(1), (2).

[8] *R. (on the application of Rowe) v Revenue and Customs Commissioners* [2017] EWCA Civ 2105.

[9] *Rowe* [2017] EWCA Civ 2105 at [61]–[62], [69] per Arden LJ.

[10] *Rowe* [2017] EWCA Civ 2105 at [107] and [111] per Arden LJ.

[11] Finance Act 2016 s.18, amending ITEPA s.554Z8(5) and the Finance Act 2011 Sch.2, para.59.

[12] Finance Act 2017 Sch.6, para.3 (amending ITEPA s.554C).

[13] Finance Act 2017 Sch.6, paras 10–11 (amending ITEPA s.554Z5, and inserting ITEPA s.554Z11B).

[14] Finance (No. 2) Act 2017 Sch.11.

[15] Grant Shapps MP submitted a question to HM Treasury on 12 July 2017 as to the criteria applied by HMRC in determining whether to present a winding-up petition based upon an unpaid APN. The response of Mel Stride MP confirmed that 12 winding-up petitions had been presented in respect of companies with APN debt as at 17 July 2017 (see Tax Avoidance: Written question — 4528).

[16] *RFC 2012 Plc* [2017] 1 W.L.R. 2767.

[17] *RFC 2012 Plc* [2017] 1 W.L.R. 2767 at [36] per Lord Hodge.

[18] *RFC 2012 Plc* [2017] 1 W.L.R. 2767 at [39]–[41] per Lord Hodge.

[19] *RFC 2012 Plc* [2017] 1 W.L.R. 2767 at [64] per Lord Hodge.

[20] *RFC 2012 Plc* [2017] 1 W.L.R. 2767 at [42]–[49] per Lord Hodge. See also the decision of the Supreme Court in *Forde & McHugh Ltd v Revenue and Customers Commissioners* [2014] UKSC 14; [2014] 1 W.L.R. 810.

[21] ITEPA s.62(2)(b) states "any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth". See discussion in *RFC 2012 Plc* [2017] 1 W.L.R. 2767 at [42]–[45] per Lord Hodge.

[22] The "benefits code" is currently contained in the ITEPA Pt 3, Chs 2–11. Lord Hodge's comments on benefits in kind are at *RFC 2012 Plc* [2017] 1 W.L.R. 2767 at [46].

[23] *RFC 2012 Plc* [2017] 1 W.L.R. 2767 at [51]–[58] per Lord Hodge.

[24] *RFC 2012 Plc* [2017] 1 W.L.R. 2767 at [67] per Lord Hodge.

[25] HMRC, *Disguised remuneration: a Supreme Court decision (Spotlight 41)* (Published 29 September 2017).

[26] *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347; [2011] 3 W.L.R. 1153 at [34] per Lord Neuberger MR.

[27] *Sinclair Investments (UK) Ltd* [2011] 3 W.L.R. 1153 at [36] per Lord Neuberger MR.

[28] See *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch); [2014] B.C.C. 337 at [108] per Mr John Randall QC.

[29] *Re Eurocruit Europe Ltd* [2007] EWHC 1433 (Ch); [2007] B.C.C. 916 at [24]–[27] per Blackburne J.

[30] See the Limitation Act 1980 ss.21 and 32.

[31] See the Limitation Act 1980 s.2.

[32] See the IA s.240.

[33] *Barker v Baxendale Walker Solicitors* [2016] EWHC 664 (Ch); [2016] S.T.I. 1266.

[34] *Barker v Baxendale Walker Solicitors* [2017] EWCA Civ 2056 at [2] per Asplin LJ DBE.

[35] *Barker* [2017] EWCA Civ 2056 at [61] per Asplin LJ DBE.

[36] *Barker* [2017] EWCA Civ 2056 at [65]–[67] per Asplin LJ DBE.

[37] *Barker* [2017] EWCA Civ 2056 at [71] per Asplin LJ DBE; per Henderson LJ at [89].

