

# Comment

## Views on topical issues

### £9m goes West

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**It's a long time since HMRC's press releases were usefully informative. Too often, now, they are simply misleading.**

*Bristol & West plc v HMRC* [2014] UKUT 0073 (TCC) (reported in 'Cases', *Tax Journal*, 28 February 2014) was a recent case in which HMRC's amendment to the taxpaying company's return was rejected in its entirety by the Upper Tribunal due to a simple error by an HMRC official, resulting in the loss of £9.2m in tax. The error was compounded by a lackadaisical failure to take a basic step which would have prevented the loss. One can see that HMRC would be embarrassed by such a mistake, but I was astonished at its effrontery in publishing a press release on the case boasting about the taxpayer's defeat and claiming for itself a notable victory.

The case concerned a tax avoidance scheme implemented by the Bristol & West Group in 2003. The Upper Tribunal found that the scheme failed on a close construction of the legislation. However, because the HMRC official responsible for raising a closure notice had issued a notice stating a conclusion which did not indicate that an amendment was required to the taxpayer's return, the return could not be amended.

Because of the nature of the receipt at issue, £30.6m fell to be assessed in the year under appeal and £60m in later years. Having won on the substantive issue, it may be that HMRC will collect tax on the latter amount; the corporation tax of £9.2m on the £30.6m of income which was actually at issue in the appeal has though been lost to the exchequer.

Having issued the incorrect closure notices, the Upper Tribunal noted that it was:

'possible for [the HMRC official concerned] to go and rummage through all the closure notices in its envelopes that were still in HMRC's clutches on 31 October 2007, but I assume that task was so large it was not considered worth doing. As my decision will show, had it stopped that closure notice being sent out none of the problems would have ensued.'

Tax of £9.2m would surely have paid for sufficient staff time to make the 'rummage' 'worth doing'.

#### The significance of the case

It does not appear that the tribunal's acceptance of HMRC's arguments on the substantive issue was of great significance in respect of other taxpayers. The planning exploited transitional provisions which ceased to apply shortly after the transactions at issue in the case. HMRC said in a 'news story' which was published on 20 February 2014 that:

'A further £215m was protected when other followers of the plan settled before being taken to tribunal.'

If these 'followers' had settled before the Upper Tribunal hearing, however, then the decision in that hearing cannot have been the trigger to their decision to settle. Significantly, what the 'news story' does not mention is that there are outstanding unresolved cases in respect of similar transactions.

So it would seem that the net result of the case, unless it is overturned on appeal, is that the assessment on Bristol & West was

dismissed in its entirety with a loss of tax of £9.2m, even though the planning failed technically. Although Bristol & West may have to pay tax on the receipt apportioned to future years, nothing indicates that the Upper Tribunal's decision has had any effect in prompting 'followers' to settle.

#### Disciplinary procedures?

It seems unlikely that a private sector organisation would suffer a loss of this magnitude resulting from a failure of a member of its staff without instituting some form of disciplinary procedure. We telephoned HMRC's press office to ask whether any disciplinary action had been taken in respect of any of HMRC's staff in connection with the case. At first we were told that HMRC would not comment. Two days later we received an email which said:

'... below is all we are saying about this judgment:

"We frequently review our processes and procedures to ensure that closure notices are only issued in appropriate circumstances."  
Kind regards ...'

#### HMRC's publicity machine

On 20 February 2014, HMRC issued a press release with a banner headline: 'Bristol & West tax avoidance plan loses again'. The opening paragraph of the press release said:

'Bristol & West PLC, owned by Bank of Ireland, has lost its second attempt to avoid £27m of corporation tax by claiming that there was a loophole in the law governing the taxation of derivatives.'

(The £27m figure appears to be corporation tax at 30% on the total receipt of £91m. It thus fails to reflect the £9.2m lost through HMRC's blunder.)

It then went on to quote David Gauke, exchequer secretary to the Treasury, as saying:

'This case is the result of HMRC's relentless work against a highly complex and speculative avoidance gamble that, unchallenged, would have deprived the country of over £27m in corporation tax.'

Only in a note to editors near the end of the press release did it refer to the fact that:

'The Upper Tribunal allowed Bristol & West's appeal on the point that was originally upheld in ... HMRC's favour in the First-tier Tribunal, involving a closure notice mistakenly sent out.'

What the note did not say is that, because of this error: the tribunal's decision was entirely in Bristol & West's favour; that the tribunal entirely rejected the amendment made by HMRC to Bristol & West's return; and that £9.2m of tax was not chargeable which would have been chargeable under the tribunal's view of the substantive issue had the error not been made. This misleading information was repeated in an HMRC 'news story' released on the same day which still appears on the government's website at the time of writing. Over two months later, HMRC's *Agent update 41*, published on 24 April 2014, continued to give the same misleading view of the case.

#### Information or propaganda?

Do you, like me, find the publication of misleading information by HMRC, presumably with the consent of Mr Gauke, deeply disturbing? This was not a one-off mistake. The material has been published by the government in at least three separate forms over a period of two months. It has been repeated, uncritically, by parts of the technical press and HMRC has taken no steps to correct the misapprehension it has created. In the light of this behaviour, can one really trust material published by HMRC to meet the most basic standards of accuracy and honesty?