'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).

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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 ruing 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 fire-service 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 taxation consequences, some basic tax planning can go a long way.

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對法律執業者所作的「健康」忠告

賀雅德提醒各法律執業者注意關於稅務事宜的近期趨勢

忠告一：「稅務規劃」與專業顧問

讀者們可能已經留意到，近期在普通法系的法域裡作出的判例，均顯示了一種明確的趨勢，這趨勢是明顯地厭惡以稅務為動機所作的交易。就稅務規劃而言，這趨勢無疑可影響到各項反避稅條文，例如對《稅務條例》(第 112 章) 第 61 及 61A 條的釋義。

R v Charlton [1996] STC 1418 一案，並非關於繁複艱澀的稅務條文的釋義，而是涉及就欺騙稅務當局的普通法罪行所作的刑事檢控。案中各被告人是專業顧問。本案冷峻地提醒了各專業顧問，「避稅」與「逃稅」兩者之間的分界線並非如一般人所想的那樣清楚。

Charlton 案是關於一項「二重開立發票」的規劃。該規劃涉及了一家相關的離岸公司，先由它購進各類貨品及服務，然後再以高價轉售予一些英國公司。該規劃使得有關集團在境外賺取大部分利潤。主審法官對於該交易在性質上屬於虛謀作法的看法極為堅決。他說：「本席不接受以下論點 … 即買賣的目的若是為了不誠實地減輕稅務責任，買賣的真實性不會受影響的論點。」陪審團最後裁定參與規劃的數名專業顧問（會計師及一名大律師）罪名成立。

英國上訴法院維持定罪的原判。法院在判決中指出，有關的「二重開立發票」規劃並非真誠的，而離岸公司所作的工作亦無商業利益（可進一步參閱 Adams 所著 *'Regina v Charlton'*，載於《稅務期刊》1998 年第 2(1) 冊第十六至十七頁）。

一般人所理解的「避稅」不是非法的。但在知道一項稅務規劃以非法形式實行的情況下參與構思及策備該規劃，便可招致刑事責任。最後，撇開 *Charlton* 案中各法院採用的華麗語言，我們應注意到，被定罪的大律師曾協助發起有關規劃及向稅務當局隱瞞資料。

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Charlton 案涉及的「稅務規劃」的性質顯然相當普遍，了無新意。但這對於過份牽涉入客戶商務內的專業顧問來說，並不能帶來任何安慰。

忠告二：為資本免稅額而部署交易

這忠告與 *Charlton* 案中以稅務規劃為主導的情形絕無關係。然而，此忠告與維持稅務知識及將其運用在商業世界內有著不可分割的關係。

讀者們或許也知道，分別適用於工業裝置及機械、工業建築物及商業建築物的折舊免稅額，雖同是依遞減級數方式計算，但三者之間之折舊率相當不同。因此，任何人購買樓房而連固定附著物及（使用一個中性的詞語）其他「項目」（例如公用設施）時，須非常小心，以確保在各項不同資產間正確地分配買價。

這一點在 *D 49/97* 12 IRBRD 324, (1998) HKRC § 80-529 案中得到充分闡明。案中一家公司以一筆綜合價錢購買一幢商業建築物的其中五層連同各項公用設施。公司聲稱，該等公用設施（當中包括了扶手電梯、升降機、火警系統、空氣調節和通風系統，以及電子和保安系統）屬於工業裝置及機械，因而可享有折舊免稅額。計算免稅額的方法，是根據該公司在公用設施的價值中所佔的比重，而該比重乃根據該公司在建築物的樓面空間所佔的百分比計算。

稅務局局長向稅務上訴委員會指出，並非所有有關的公用設施均屬於工業裝置或機械；再者，公司也未能證明它在提供該等項目上產生了任何開支。上訴委員會同意，公用地方及設施必定有其擁有人，而案中公用地方乃由分權共有人所擁有。但上訴委員會裁定，公司並未能舉證它佔有的份數為何，亦未能證明買價中什麼部分是用作購買公用設施。在這方面，單單提供建築物內的公用設施及其估價的計算表不足以完成舉證。因此上訴委員會駁回了該公司的上訴。

香港稅制向來以簡單及容易遵從見稱。但是，從稅務的角度來看，在一宗買賣商業資產（或股權）的交易中，買賣雙方的利益可以有天淵之別。當交易涉及的資產於出售或購入時足以產生重要稅務後果時，一些基本的稅務規劃便可起著積極的作用。

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