CADWALADER

Changing Seasons, Changing Perspectives

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Miscellaneous Provisions: Least Important or Most Important

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Taken for granted, overlooked and generally not read very carefully are provisions ensconced with the moniker "miscellaneous." I would argue that while they are viewed as the "second fiddle" of legal provisions contained in many documents, they are actually the "first string" in terms of importance. While many provisions in legal documents can trace their lineage to case law and decisions of note, the miscellaneous provisions in documents are all derived from years and years of case law and precedent and should be afforded the care and precision they deserve.

So, what provisions fall into this cauldron of miscellany? Let's discuss a few of them as this piece is not intended to be the War and Peace of legal prose. No waiver, entire agreement or integration provision and no modification unless in writing provisions shall be the topic of this article.

A no waiver provision states that no failure or delay in acting, and no course of dealing with respect to any right, power or privilege afforded a party within documentation, at law or in equity shall constitute a waiver of same. No partial exercise or single exercise of such right, power or privilege shall constitute a waiver of any future exercise of same and that all remedies are cumulative and not exclusive. The words seem innocuous enough but serve to deflect and defend against various and specious defenses a party may raise. Generally speaking, the provision is an agreement amongst the parties that regardless of the facts, no one is waiving their rights (unless set forth in a writing-which we will discuss below). There are many defenses and claims in common law which are based on the concept of a party waiving their rights by a course of action, a statement, a delay in exercise, a misunderstanding, etc. This particular provision is intended by the parties to dispense with the need to defend against such claims. No doubt that in a dispute, such claims will be raised, but a clear and definitive provision in the agreement should prove to be quite helpful in dispensing with such allegations. I would also argue that such a provision is non-controversial as it serves to benefit all parties to any documentation.

An integration or entire agreement provision is another "standard" provision which is seemingly innocuous but rather important. The provision states that the four corners of the relevant agreement amongst the parties constitutes the "entire" agreement amongst the parties and that all other prior or contemporaneous agreements, whether written or oral, are superseded or "merged" into the relevant final documentation. This is designed to protect against parties pointing to term sheets, emails, or any other writings or oral statements or discussions to supplement or contradict the express terms contained in the relevant document. When parties have spent the time to draft, negotiate, execute and deliver a written document, they are clearly intending to be bound by the terms of such agreement. This provision merely reinforces that understanding and states that whatever was discussed along the way, whatever prior understandings of "what the deal was", are superseded by the final documentation. No doubt when a dispute arises at a later date, a parties memory of what was agreed to may become clouded by current events at issue in the relevant dispute. This provision is intended to preclude the introduction of extraneous documentation or conversations which are not codified in the final document. One additional thought on this issue is what is known as the parole evidence rule. Notwithstanding the express terms of this provision and the express terms of a relevant document, to the extent that a provision in a document is fraudulent, unclear or ambiguous, the parole evidence rule in certain circumstances would allow the contracting parties in a dispute to present oral or other extraneous evidence to aid in the interpretation of the provision at issue.

A no modification provision states that the relevant agreement cannot be modified, amended, extended, restated, terminated, etc. or any provision waived unless in a writing signed by all parties or at a minimum by the party to be charged or against whom enforcement would be sought. Again it seems pretty innocuous, but is quite an important provision. Over the course of the term of a relevant document the parties will undoubtedly engage in conversations, correspondence, notices, emails, etc. This provision is designed to codify the proposition that all of those conversations and correspondence do not and will not modify the express terms of the relevant contract unless and until it is reduced to a writing and signed by the relevant party. When a dispute arises, again undoubtedly parties will allege that the original document was modified due to these intervening conversations which inure to their benefit with respect to their allegations. While there can be no certainty in a litigated matter, this provision is designed to protect against such allegations.

These are but a few of the miscellaneous provisions which address numerous defenses, allegations and other matters which should not otherwise be in dispute when parties have reduced their agreement to a fully negotiated, legally binding document. It has been said that the “devil is in the details,” but with carefully crafted miscellaneous provisions, many of the details parties should not be haggling over should be off the table.

Hargreaves Property: What Does the Latest Decision Mean for UK Withholding Tax?

By **Adam Blakemore**
Partner | Tax

In many respects, the Upper Tribunal's decision in *Hargreaves Property* [1] will not have surprised tax practitioners as the decision reaffirms best practice considerations around a number of fundamental concepts in relation to UK withholding tax. However, the decision also raises questions concerning the interpretation of the UK's statutory withholding tax exemptions.

Facts

The case concerned a UK tax resident company, which was the ultimate parent company of a UK property group (Hargreaves Property Holdings Ltd ("Hargreaves")). Hargreaves had received financing from connected overseas lenders. Following tax planning advice, the terms of the loans were amended so that: (i) the loans were repayable on 30 days' notice by the lender or any time by the appellant; (ii) all payments were made in Gibraltar from a source outside the UK; (iii) no assets in the UK were secured; and (iv) Gibraltar or Jersey was the governing law and the courts of Gibraltar or Jersey had exclusive jurisdiction.

Shortly before the interest was paid by the borrower, the lender also assigned for consideration its right to interest to a third party. Initially, the third party was a Guernsey company ("Storrier") or Guernsey trusts. In later years, the loans were assigned to a UK resident company ("Houmet"). The consideration for the assignment was an amount equal to almost all of the interest which Houmet received.

Together, these changes were made with the intention of ensuring that the interest was:

- in the case of interest paid to the Houmet, regarded as being paid within the statutory exemption under the Income Tax Act 2007 ("ITA 2007"), section 933 (*i.e.* interest paid to UK resident companies) and specifically that Houmet was "beneficially entitled" to the interest;
- in the case of interest paid to Storrier, protected by the UK-Guernsey double tax treaty;
- not regarded as "yearly interest"; and
- not regarded as having a UK source.

The Upper Tribunal's decisions on each of these issues are considered below.

Beneficially Entitled

Under section 933 ITA 2007, interest paid to a UK resident company that is "beneficially entitled" to such interest may be exempt from the obligation to withhold on account of UK income tax.

Hargreaves contended that Houmet was "beneficially entitled" to the interest for the purposes of section 933 ITA 2007, notwithstanding that Houmet had an obligation to pay an almost similar amount to Storrier as consideration for the assignment of the loans.

Hargreaves argued that "beneficial entitlement" should be interpreted in accordance with its ordinary English law meaning as given by Evans-Lombe J in *Indofood* [2], and specifically that a contractual obligation to pay income on to a third party should not preclude beneficial ownership (this being the case even though both parties and the First-tier Tribunal ("FTT") recognised that the definition adopted by Evans-Lombe J was not upheld on appeal [3]).

The Upper Tribunal considered that the words should be construed "in their statutory context and with regard to their purpose" and went on to consider that Houmet should not be regarded as beneficially entitled to the interest given its lack of business purpose in the transaction. The Upper Tribunal went on to hold that the exception at section 933 ITA 2007 is "for the benefit of companies who are substantively entitled to receive and enjoy the income, not those who are beneficially entitled only in the narrower technical sense used to distinguish between legal and equitable interests in English common law." This interpretation raises questions as to whether this has narrowed the scope of the UK's

domestic statutory exemptions and imported an interpretation that is more consistent with the "international fiscal meaning" that was found in Indofood.

Double Tax Treaty

Hargreaves argued that notwithstanding that the UK-Guernsey double tax treaty did not contain an interest article, the business profits article exempted the interest paid by Hargreaves to Storrier from the obligation to withhold on account of UK income tax. In any event, HMRC contended that two procedural requirements needed to be satisfied, in order for the UK-Guernsey double tax treaty to be relied upon, were not met. Firstly, that Storrier, as the recipient of the interest, did not make any claim for relief, and secondly that Hargreaves, as the payer of the interest, was not issued with a statutory notice for payments to be made gross. The Upper Tribunal upheld the decision of the FTT that both a claim for relief and corresponding direction from HMRC must be issued in order for the benefits of the business profits article of the UK-Guernsey double tax treaty to be relied upon.

Whilst the completion of procedural formalities in order to enable reliance on the interest articles of the UK's double tax treaties (such as under HMRC's double tax treaty passport scheme) is a familiar process, *Hargreaves Property* serves as a salient reminder that the obligation to comply with certain procedural formalities can extend to other articles of the UK's double tax treaties.

Yearly Interest

The obligation to withhold on account of UK income tax applies where, amongst other things, the interest is regarded as "yearly interest." A number of loans received by Hargreaves were advanced and repaid within a year. The FTT gave consideration to the fact that the loans were unsecured, and repaid on a regular basis within, or very shortly after, a year from the initial advance. The Upper Tribunal agreed with the FTT's decision that the loans were intended to form part of Hargreaves' longer-term financing arrangements when considered from "a business-like rather than a dry legal assessment of its likely duration." [4] Accordingly, the Upper Tribunal held that the interest was "yearly interest" in respect of which an obligation to withhold on account of UK income tax could arise.

This aspect of *Hargreaves Property* reiterates that structuring longer-term financing arrangements as a series of shorter-term loans is ineffective in avoiding the obligation to withhold on account of UK income tax.

UK Source

Another fundamental requirement which must be satisfied in order for an obligation to withhold on account of UK income tax is that the interest "arises in the UK" – that is, whether the interest has a UK source. Here it was held that the interest had a UK source given that Hargreaves was a UK resident company and carried on its business exclusively in the UK, notwithstanding the changes that had been made to the terms of the loan relating to where the payments were made from, the governing law and jurisdiction for enforcement proceedings each being outside the UK.

Given the Court of Appeal's decision in *Ardmore* [5], the decision of the Upper Tribunal in *Hargreaves Property* was also unsurprising on this ground.

Final Thoughts

Whilst the Upper Tribunal's decision in *Hargreaves Property* has reaffirmed best practice considerations when dealing with a number of questions relating to UK withholding tax, the reasoning for the decision relating to the issue of "beneficial entitlement" will require more careful consideration, particularly in the context of intragroup financing arrangements and given that permission to appeal has been refused.

[1] *Hargreaves Property Holdings Limited v HMRC* [2023] UKUT 120 (TCC)

[2] *Indofood International Finance v JP Morgan* [2005] EWHC 2103 (Ch).

[3] [2006] EWCA Civ 158.

[4] *Lindley LJ in Goslings and Sharpe v Blake (Surveyor of Taxes)* (1889) 23 QBD 324, 23.

[5] *Ardmore Construction v HMRC* [2018] EWCA Civ 1438.

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Recent Transactions

Here is a rundown of some of Cadwalader's recent work on behalf of clients.

- Represented the real estate investment arm of an investment management firm in the acquisition of a loan portfolio consisting of 106 loans secured by 308 medical office properties in 33 states from a regional bank.
- Represented lender under a revolving credit facility in connection with the $25 million increase in the facility to a total facility amount of $275 million and the financing of multifamily properties located in Orlando, Florida and Austin, Texas under the facility.