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Fed Cuts Interest Rates by 4%: Check the Date!

April 1, 2024

Table of Contents:

- Not So Sweet Home Alabama
- The UK's Spring Budget 2024 and Its Impact on Real Estate
- Ex Parte Appointment of a Receiver Confirmed
- Recent Transactions

Not So Sweet Home Alabama

April 1, 2024

By **Steven M. Herman**
Senior Counsel | Real Estate

In a recent opinion out of the U.S. District Court for the Northern District of Alabama, the newly-effective Corporate Transparency Act**[1]** ("CTA") has been found unconstitutional. In *National Small Business United v. Janet Yellen*,**[2]** Plaintiffs Isaac Winkles and the National Small Business Association challenged Congress' authority to compel the disclosure of beneficial ownership information from entities incorporated at the state level. Judge Liles C. Burke agreed with the plaintiffs, finding that the CTA exceeds congressional authority under the Constitution because it lacks a sufficient nexus to Congress' enumerated powers.

The CTA was passed as part of the 2021 National Defense Authorization Act, and pursuant to a final rule issued by FinCEN in 2022, the CTA took effect on January 1, 2024. The CTA is designed to elicit certain identifying information from state-registered entities for the purpose of combating illicit activities such as money laundering and tax evasion. Specifically, the CTA requires "reporting companies" to disclose the identity and address of their beneficial owners to FinCEN. Remedies for the failure to disclose include civil penalties and criminal liability.

The plaintiffs challenged the CTA on a number of grounds, arguing that Congress lacked the authority to mandate such disclosures under its enumerated powers, and contending that said disclosure requirements violate the plaintiffs First, Fourth, and Fifth Amendment rights. The government offered four sources for congressional authority to implement the CTA, and Judge Burke addressed each in turn.

First, the government argued that the CTA was a valid exercise of Congress' foreign affairs powers and the Necessary and Proper Clause, because the collection of beneficial ownership information is necessary to protect national security interests and bring the United States into compliance with international financial standards. While acknowledging Congress' extensive foreign affairs powers and the deference typically given to Congress on policy matters, the court rejected the government's arguments because it found state-level incorporation to be an internal affair, not one of foreign affairs, because incorporation is a creature of state law and has historically remained within the purview of the states. Consequently, the CTA cannot be justified as an extension of Congress' foreign affairs powers, and instead must be justified under Congress' enumerated powers.

Second, the government argued that the CTA is a valid exercise of the Commerce Clause and Necessary and Proper Clause, because many CTA reporting companies are frequent users of the channels and instrumentalities of interstate and foreign commerce. The court, however, found no constitutional justification for regulation of the entire class of state-incorporated entities just because some members of that class may utilize the channels and instrumentalities of commerce at some point after formation. Judge Burke even remarked that the CTA could have been validly written to regulate the channels and instrumentalities of commerce, had it prohibited their use "for harmful purposes, even if the targeted harm itself occurs outside the flow of commerce."**[3]** Because the CTA imposes disclosure obligations upon state registration, and not when the entities actually engage in commerce, it cannot be sustained as a regulation of those channels and instrumentalities of commerce.

Third, the government argued that the CTA was justified under the Commerce Clause in that reporting companies have a substantial effect on commerce in the aggregate when they collectively withhold their beneficial ownership information from regulatory bodies. Judge Burke found the government's purported connection between entity formation and the illicit activity the CTA seeks to combat as far too attenuated to permit Congress to exercise its Commerce Clause authority. Likewise, Judge Burke rejected the government's argument that the CTA was a necessary and proper means of exercising Congress' power to curb illicit commercial activity, because the recipient of the disclosed ownership information, FinCEN, already receives such information under its Customer Due Diligence rules.

Lastly, the government argued that CTA's collection of beneficial ownership information can be justified as a necessary and proper method of effectuating efficient tax administration, thereby validating the CTA under Congress' taxing powers. Again, the court rejected this argument for its attenuation, finding that the mere provision of access to a new database of information for tax administration does not establish a close enough relationship between CTA's disclosure provisions and Congress' taxing power, so as to justify it under that taxing power. To find differently, opined Judge Burke, would constitute a "substantial expansion of federal authority."**[4]**

Given the court's determination that the CTA is unconstitutional for its lack of justification under Congress' enumerated powers, the court did not need to address whether it violated Plaintiffs' First, Fourth, or Fifth Amendment rights. While this decision raises questions about the viability of the CTA, it must be noted that the decision only applies to the plaintiffs in this case. The CTA remains fully enforceable against all other reporting companies, and it does not affect similar state-level legislation such as the New York LLC Corporate Transparency Act. As expected, this decision has been appealed and we will monitor and report on any future developments.

[1] 31 U.S.C. § 5336

[2] No. 5:22-cv-01448-LCB, 2024 WL 899372 (N.D. Ala. Mar. 1, 2024).

[3] Memorandum Opinion, *Nat'l Small Bus. United v. Yellen*, No. 5:22-cv-01448-LCB, at 32.

[4] *Id.* at 52.

The UK's Spring Budget 2024 and Its Impact on Real Estate

April 1, 2024

By **Adam Blakemore**
Partner | Tax

The Chancellor of the Exchequer delivered the United Kingdom (UK) Spring Budget for 2024 on 8 March 2024. The Budget was delivered against the backdrop of an anticipated general election in the summer or autumn of 2024 and featured a raft of measures which are intended to catch the eyes of the voting public. As with several previous Budget announcements, encouraging pieces of good news sit alongside tax-raising measures and anti-avoidance proposals which – although targeted – serve to chill the optimism.

The same is true of the Spring Budget 2024, with a number of key announcements impacting real estate, from the genuinely promising news of the introduction of the Reserved Investor Fund, to the extension of the transfer of assets abroad legislation and the wholesale replacement of the UK's current system for taxing non-UK domiciled individuals. In this article we explore these announcements in more detail.

Reserved Investor Funds (RIFs)

The government has announced in the Spring Budget 2024 that it will legislate to introduce the Reserved Investor Funds (RIF) – a new tax transparent unauthorised vehicle designed to enhance the UK's existing funds regime. The RIF will be open to professional and institutional investors. It is expected to be particularly attractive for investment in commercial real estate.

The government will proceed with the three "restricted" RIFs proposed in its consultation, namely RIFs where:

- at least 75% of the value of its assets are derived from UK property;
- all the investors are exempt from tax on gains; and
- the RIF does not directly invest in UK property or UK property-rich companies.

The Finance (No 2) Bill 2024 will define a RIF and allow for regulations to be made setting out the tax treatment of a RIF.

The regulations will set out the qualifying criteria for each type of RIF (including entry and exit provisions) and provisions concerning breaches of qualifying criteria (including providing for a deemed disposal and reacquisition of units by investors if a RIF ceases to meet the criteria). The qualifying criteria will largely follow that proposed in the HM Treasury and HM Revenue and Customs public consultation on RIFs, but with some modifications.

The regulations will also set out the chargeable gains treatment of RIFs and their investors. Broadly, the chargeable gains rules that apply to co-ownership authorised contractual schemes (including the rules concerning the taxation of gains by non-UK residents on UK property) will apply to RIFs, such that RIFs are not tax-transparent, the units in a RIF are treated as assets for capital gains tax purposes, and RIFs can make exemption elections.

RIFs will be treated as companies for stamp duty land tax (SDLT) purposes. To prevent avoidance, elections by unauthorised contractual schemes that are not RIFs to become a RIF will be treated as a land transaction subject to SDLT. Additionally, the regulations on SDLT seeding relief, stamp duty, SDRT, and capital allowances rules available to authorised contractual schemes will be available to RIFs.

RIFs will be added to the list of permitted property categories to allow individual policyholders to select RIFs within their life insurance policy without the policy being classified as a personal portfolio bond. For capital gains purposes, RIFs will be added so that insurance companies can invest in RIFs subject to provisions equivalent to those already in place for insurance companies. For SDLT purposes, the rules for REITs will be amended and RIFs will be added to the list of institutional investors. The exemption from tax on gains realised by REITs on disposals of certain property-rich entities will also be extended so that it applies to disposals of units in RIFs.

RIFs would be unregulated collective investment schemes (UCIS) and an alternative investment fund (AIF) that is not authorised by the FCA. Managers of RIFs would need to be FCA authorised or registered and there would be no direct regulatory limits on the assets or investment strategies that could be pursued. As a UCIS, RIFs would be subject to the FCA's marketing rules for non-mass market investments. Accordingly, RIFs could only be promoted to professional

investors and certain other investor categories, such as certified high net worth investors, certified sophisticated investors, and self-certified sophisticated investors.

The new tax rules will take effect from a date to be specified in a statutory instrument.

Replacing Tax Rules for Non-UK Domiciliaries Rules With a Residence-Based Regime

One of the Chancellor's most significant announcements in the Spring Budget was the proposed reformation of the UK's regime for taxing non-domiciliaries. There has been increasing political pressure to substantially restrict or abolish the regime in previous years.

Currently, UK non-domiciliaries who do not have their permanent home in the UK do not have to pay UK tax on their foreign income or gains unless they remit any such income gains to the UK. Such non-UK domiciled individuals also have to pay an annual charge of either £30,000 or £60,000, depending on how long they have lived in the UK.

As announced at Spring Budget 2024, the Government will "abolish" the remittance basis of taxation for non-UK domiciled individuals and replace it with a simpler residence-based regime, which will take effect from 6 April 2025. The Government has announced that individuals who opt into the regime will not pay UK tax on foreign income and gains for the first four years of tax residence, offering a generous grace period for new arrivals to the UK.

In addition, certain transitional provisions for existing users of the remittance-based regime were announced in the Spring Budget, to soften the effect of the changes for current non-UK domiciled individuals living in the UK and using the remittance-based regime. It is clear that the government has attempted to tread a careful path between appeasing political pressure for reform of the "non-doms" regime (which has suffered from adverse publicity in certain parts of the UK's media), and maintaining an attractive system for foreign individuals who provide investment into the UK's economy.

The government also announced an intention to move to a residence-based regime for inheritance tax, with plans to publish a policy consultation on those changes, followed by draft legislation for a technical legislation, later in 2024.

Given that there will be a general election prior to these changes coming into force, it is not clear whether these changes will take place or whether a different government may opt for an even more radical overhaul of the current regime.

Changes to Anti-Avoidance Legislation: Transfer of Assets Abroad Provisions

The government will introduce legislation in Spring Finance Bill 2024, partially reversing the Supreme Court's decision in *HMRC v Fisher* [2023] UKSC 44, so that the anti-avoidance legislation in the Transfer of Assets Abroad (TOAA) rules set out in Chapter 2 of Part 13 of the Income Tax Act 2007 will apply to certain indirect transfers of assets abroad by UK resident individuals acting through companies.

The background to the measure is that the Supreme Court in *HMRC v Fisher* found that the existing TOAA rules were expressly limited to transfers made by individuals and that transfers by shareholders of a company, even if they were also the directors, were not covered by the existing TOAA rules. The decision of the case meant that the TOAA rules applied in significantly narrower circumstances than HMRC had argued. The changes to the TOAA rules proposed in the Spring Budget 2024 will treat individuals who are participators in close companies (or non-resident companies that would be close if they were UK resident) as the transferors for the purposes of the TOAA rules.

The changes will take effect from 6 April 2024; however, the proposed legislation has not yet been published (as of 7 March 2023). Therefore all shareholders (not just majority holders) in close companies will be keen to understand the impact of the legislation and whether there will be income tax charges when assets of their close company are transferred outside of the UK tax net.

Stamp Duty Land Tax — Abolishing Multiple Dwellings Relief

The Spring Finance Bill 2024 will abolish the Multiple Dwellings Relief (MDR) for SDLT. MDR is a bulk purchase relief in the SDLT regime that is available to any purchaser buying two or more dwellings in a single transaction, or linked transactions, and allows the purchaser to calculate the tax based on the average value of the dwellings purchased as opposed to their aggregate value.

The abolishment of MDR will come into effect for transactions with an effective date on or after 1 June 2024. The MDR can still be claimed for contracts which are exchanged on or before 6 March 2024, regardless of when completion

takes place. This is subject to various exclusions, for example, that there is no variation of the contract after that date. MDR will also continue to apply to contracts which substantially perform before 1 June 2024.

This change will not impact individuals purchasing a single dwelling. It will only increase the SDLT payable by individuals purchasing two or more dwellings in single or linked transactions. This change will also impact businesses purchasing multiple dwellings in single or linked transactions.

Ex Parte Appointment of a Receiver Confirmed

April 1, 2024

By **Steven M. Herman**
Senior Counsel | Real Estate

The New York County Supreme Court recently held that in the event of foreclosure, a receiver can be appointed, regardless of necessity, when the parties have contracted for such appointment.

24 West 57 APF LLC ("Defendant") refinanced outstanding debt by obtaining a mortgage of $60 million dollars from Wells Fargo ("Plaintiff"), secured by the property located at 24/26 W 57th Street, New York, NY. The parties signed the loan documents in 2019, and specifically a mortgage and security agreement (the "Agreement") on September 27, 2019. After multiple extensions, the loan matured on August 1, 2023. Defendant failed to repay the loan in full on the maturity date. Thus, Plaintiff declared an event of default on August 3, 2023. On January 25, 2024, Plaintiff filed a complaint with the New York County Supreme Court to foreclose on the property and appoint a receiver.**[1]**

The Agreement allowed Plaintiff to apply for the appointment of a receiver, regardless of circumstance. A receiver takes possession of the property, collects rent and otherwise operates and preserves the property during foreclosure. The applicable provision of the Agreement is as follows:

Upon the occurrence and during the continuance of any Event of Default, Borrower agrees that Lender may [. . .] in its sole discretion [. . .] apply for the appointment of a receiver, trustee, liquidator or conservator of the Property, without notice to Borrower, which notice Borrower expressly waives, and without regard for the adequacy of the security for the Debt and without regard for the solvency of Borrower, any guarantor or indemnitor under the Loan or any other Person liable for the payment of the Debt and whose appointment Borrower expressly consents to take possession of and to operate the Property and to collect the Rents and to otherwise protect and preserve the Property.

Plaintiff filed an *ex parte* motion to appoint a receiver on February 6, 2024. The Court granted this motion on February 13, 2024.**[2]** The Court granted Plaintiff's motion because (1) the parties' mortgage provided for it and (2) there was an event of default. In support of its decision, the Court relied on Real Property Law § 254(10), which states that "the appointment of a receiver in the event of a default is proper where parties to a mortgage agree to same even without notice or regard to the sufficiency of security."**[3]** The Court further relied on Real Property Actions and Proceedings Law § 1325 which states that in the case of foreclosure, if the mortgage allows a receiver to be appointed without notice, then notice of a motion for such appointment is not required.

Defendant argued that Plaintiff's motion should be denied because Plaintiff did not make the requisite showing of necessity.**[4]** Justice Khan rejected this argument and NY CPLR § 6401's need for cause because the cases referenced by Defendant lacked an express contractual right to an *ex parte* receivership. The Court stated that precedent is clear; when there is an express right to appoint a receiver, a mortgagee does not have to prove necessity.

Justice Khan stated that Defendant had not demonstrated that a denial of the appointment would be an appropriate exercise of the Court's discretion. This case affirms settled case law that when parties have contracted for the appointment of a receiver, one will be appointed, regardless of necessity.

[1] Complaint, *Wells Fargo Bank, Nat'l. Ass'n v. 24 West 57 APF LLC et. al.*, (Index No. 850014/2024).

[2] *Wells Fargo Bank, Nat'l Ass'n. v. 24 West 57 APF LLC,* 2024 N.Y. Slip Op. 30483(U) (Trial Order), (2024).

[3] *Id.*

[4] Memorandum of Law of Defendant at 1, *Wells Fargo Bank, Nat'l Ass'n. v. 24 West 57 APF LLC,* 2024 N.Y. Slip Op. 30483(U) (Trial Order), (2024).

Recent Transactions

April 1, 2024

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

- Represented a group of two national banks in the refinance of a Class A office building located in Burbank, California
- Representation in a $145 million financing with respect to the construction of an approximately 532-key hotel commonly known as the Great Wolf Lodge & Resort on the real property located in Webster, Texas