

# STRATEGIC TAX PLANNING

UK & International Tax Lawyers

3<sup>rd</sup> September 2013

## **A CASE WITH ENORMOUS IMPLICATIONS FOR ANYONE GIVING TAX ADVICE...**

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The recent High Court Case of **Mehjoo v Harben Barker (A Firm) [2013] EWHC 1500** has created a lot of confusing and ill-informed comment in the Accountancy and Tax Press. It is important for Advisers to appreciate the true implications of this case. (The case is now under appeal).

This is a Professional Negligence case brought by a Client against his Accountants. It is not as such a tax case.

### The Wrong Conclusions

The Judgment is incredibly long, legally complex and confusing. It is therefore not surprising that the analysis of non-lawyers has drawn several incorrect conclusions including that Accountants must offer their Clients "Tax Schemes"!

### The Facts

The essential facts of the case are that Mr Mehjoo had shares in a Bank Fashion Limited, a successful retail clothing business.

This was sold to Venture Capitalists in 2005 and he received approximately £8.8 million for his shares.

His Accountant did not really realise that as an Iranian with family connections there, he might be able to claim Non-Domicile status. Although not specifically retained to advise on tax, the Accountant ended up doing so by default.

Instead, after the sale they introduced him to some *Scheme* Promoters who sold him a CGT savings scheme involving a Capital Redemption Policy or "CRP" that failed, costing him the scheme's fee of £200k plus penalties and interest on the 10% CGT owed.

He sued his Accountant on the basis he should have advised him he was a *Non-Dom* and in which case he would have used a *Non-Dom* planning scheme called the Bearer Warrants Scheme "BWS" to convert UK shares to non UK situated shares therefore avoiding UK CGT and never used the CRP.

The Case, the Trial and the Judgment are fraught with procedural errors, misunderstandings of law and in fact numerous attempts by the defence to change their case and an Expert Witness who arguably wasn't an Expert on the specific area of *Non-Dom* Tax. The Defence was led by a Tax Q.C. rather than a Professional Negligence Barrister and this also seemed to have added to the problems.

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The Judge himself even mentions that the case should have been tried in the Chancery Division of the High Court by a Judge who had a better understanding of tax law. That in itself is probably enough to found an appeal.

The crux of this case is NOT that Accountants are obliged to advise Client's to enter "Tax Schemes". In fact, the opposite is true.

What is key and even if the decision is overruled on appeal (which I believe is inevitable given some of the Judge's misunderstandings of fact and critically tax law) is that Accountants and Tax Advisers who are not specialists in more complex tax issues; must get advice from a specialist in order to discharge their legal duty to their Client.

In this case, the Accountants and his Tax Partner did not have any specialist knowledge of *Non-Dom* Clients and their tax planning issues (nobody could expect such a firm to possess such knowledge).

What they didn't do (and had they done so, there would have been no liability!) was to take advice from a *Non-Dom* tax specialist.

## Incorrect Conclusion

I actually believe, as a *Non-Dom* Tax Specialist (and contrary to the Judge's findings) that the Client would NOT have gone ahead with the "Bearer Warrants Scheme" (BWS). That is actually what is known as "Remedial Tax Planning" because it is done for a Client who has not taken good advice from the start.

A *Non-Dom* Client should never directly own shares in a UK Incorporated and Resident Company, if advised from the start.

A BWS Scheme was seen at the time as risky and I know relatively few Clients who, given the option, took it! One expert witness was able to say he carried out a few and the other it transpired knew indirectly of one or two his firm had done.

I also believe it is not clear that the Claimant Mr Mejhoo was Non-Domiciled and the Judge misunderstood the value of an HMRC Ruling on Domicile (no longer available) that is subject to full disclosure and review and relied on the Client answering some questions on a form rather than a proper assessment of his legal status.

Nobody pointed the Judge to another Tax related Professional Negligence case on Domicile.

A decision of the Court of Appeal Langsam v Beechcroft LLP (2012 EWCA Civ 1230) and the words of Lord Longmore, who cast doubt on the Appellants Domicile status in Law in that case.

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## **The Real Lesson**

**So, if you have tax issues that could benefit from a more specialist tax law view, the lesson of this case is clear: Do not try and go it alone, or assume you know enough, when that mistake could cost you millions of pounds and years of protracted litigation!**

**Taking the benefit of our advice to review your clients complex tax issues, may not only provide useful reassurance, it will most importantly protect your practice from a negligence action.**