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### **IS THE TAX MAN BOUND BY THE HUMAN RIGHTS ACT?**

#### **There may be times when a tax payer can seem to be deprived of the right to a fair trial.**

Article 6 of the Human Rights Act provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty and shall be informed promptly and in detail, of the nature and cause of the accusation against him.

HM Revenue and Customs' own internal guidance recognises that the legal position is evolving, and that a limited number of tax penalties could be deemed as 'criminal' for the purposes of Article 6.

In other words if a client has penalties raised against him then he is entitled to be provided with details as to how and why those penalties were calculated.

However this is not the case if HM Revenue and Customs has merely issued tax assessments (and no penalties).

In a recent case in which the writer was involved, tax assessments for a six figure tax liability were raised by the Criminal Taxes Unit against a tax-payer who was believed to have engaged in criminal activities. The assessments related to the alleged under-declaration of self-assessment profits from self-employed trading activities.

The tax-payer asked for an explanation as to how the assessments had been calculated but it appears that, in the absence of any penalties, HMRC is under no obligation to provide any substantiation to its figures. On the contrary the burden of proof is on the tax-payer to show that he did not earn the profits suggested by the assessments.

Proving a negative is always notoriously difficult and is especially problematic in the case in question in which the tax-payer will have to demonstrate that he was able to fund his Ferarri and luxury home on a declared income of less than £30kpa!



# **NIIFA** THE BENEFITS OF AN EXPERT DETERMINATION

Some disputes are ideally suited to be settled by means of this relatively little used procedure. In this article we consider when expert determination might be appropriate and how to get the best out of it.

## **What is Expert Determination?**

Expert Determination is a dispute resolution process by which an independent expert is appointed by the parties to provide a determination of the matters at issue. The determination is legally binding and the process is entirely confidential.

## **How are experts appointed?**

Often appointments of experts are made pursuant to pre-existing legal agreements that provide for specific matters to be determined by an expert with relevant expertise. For example agreements for the sale of businesses in circumstances in which the purchasers are due to pay part of the consideration by way of an earn-out, often provide for the appointment of an expert to determine the quantum of the earn-out on a pre-agreed formula if it becomes a matter of dispute.

Typically agreements provide for an expert to be chosen by agreement between the parties or, in the absence of an agreement, by the President of the Institute of Chartered Accountants in England and Wales.

In the absence of a pre-existing written agreement any parties to any dispute can agree to appoint an expert to determine it.

As the expert's decision is legally binding, it is very important that the parties select an expert who has the relevant expertise and experience as well as an understanding of the determination process.

## **What can the expert determine?**

It is possible for the parties to instruct the expert to determine such matters as they think fit including:

- i. The technical accounting matters at issue;**
- ii. The allocation of the expert's fees between the parties; and**
- iii. The allocation of the parties' respective legal costs between them.**

If the expert is appointed pursuant to a pre-existing agreement, then he or she will only be able to give a determination in relation to those matters for which the agreement itself gives him or her the relevant authority. If the parties want to extend the scope of the determination, so as to include consideration of costs, for example, then they can only do so by agreement.

In the writer's experience expert determinations tend to be more effective if all the relevant parties jointly instruct the expert. If the appointment is unilateral, great care should be taken to avoid the process being frustrated as was highlighted in the recent case of *Cream Holdings Limited & Other -v- Stuart Davenport* [2008] EWCA Civ 1363 (see inset box).

## **How does expert determination work?**

Once appointed, the expert will usually invite the claimant to submit details of its claim within a relatively short time-frame (typically 14 or 28 days).

The defendant will then be asked to submit a response to the claim together with any counter-claim with a similar deadline. Once the claimant has had a chance to reply to any counter-claim, the expert can make the determination although, in practice, the expert often raises questions or requests further documentation from the parties before doing so.

On rare occasions, the expert can invite oral submissions at a substantive hearing.

## **Why use expert determination?**

The appointment of an accountant to give a determination is clearly only appropriate in disputes concerning matters of accountancy. However, it need not be the case that the dispute is only about accountancy. Sometimes it can be cost-effective for the parties to instruct an expert to give a determination on relevant preliminary issues.

If the dispute does not settle after determination of the preliminary issues, then the litigation that follows can at least be focussed on a narrower range of questions, thereby reducing the costs of any subsequent trial.

Expert determination has many advantages. It is particularly relevant in cases in which:

- i. There are several parties to a dispute
- ii. The parties are keen to avoid the publicity of a trial
- iii. The legal costs are in danger of becoming disproportionately high relative to the sums in dispute, especially if expert evidence is likely to be required in any event
- iv. There is an ongoing business relationship between the parties that they are keen to preserve if possible and which is likely to be prejudiced by litigation but which might be salvaged if the dispute can be settled quickly.

In short, the process is confidential, quick, cost-effective, final and most important of all it has a proven track record and really works.

### **How can you avoid one party frustrating the process?**

Provisions in Articles of Association providing for transfers of shares often include a mechanism whereby, if the parties are unable to agree on a transfer price, a third party 'expert' will be appointed to carry out a valuation of the relevant shares.

This was the case in *Cream Holdings Limited & Other -v- Stuart Davenport* [2008] EWCA Civ 1363, where a director had been removed from office, thereby triggering the compulsory share transfer provisions in the company's Articles. Although the parties agreed on the identity of the accountants who would carry out the valuation exercise, only the company signed an engagement letter with those accountants. The director was not party to their engagement and reserved his position concerning their appointment.

The Court of Appeal said that it would be 'very surprising' if the firm of accountants could become the independent accountant under the Articles solely as a result of the nomination of the parties, and without any agreement between the parties and the firm of accountants on the terms of their engagement. The Court therefore held that because the departing shareholder had not signed the engagement letter, the valuation was not binding on them.

The decision was important as it effectively gave a departing shareholder the ability to frustrate the share transfer provisions by refusing to agree to the terms of engagement of the relevant accountants (even where the identity of the accountants had been properly agreed or determined).

One lesson from this case is the need to ensure that the transfer provisions in the Articles are more clearly drafted. The provisions could be amended so that, once the identity of the third party accountant has been agreed or determined, then the company is effectively appointed as the agent of the relevant shareholder for the purpose of agreeing the terms of that accountant's engagement.

In the absence of this, the independent accountant's engagement letter, which sets out the terms of appointment, should be signed by the departing shareholder as well as the company, even if the fees are to be wholly borne by the latter.

The decision in the *Cream Holdings*' case also has similar implications for the extensive range of commercial agreements under which disputes are to be referred to a third party expert for determination. The contentious nature of the circumstances in which an expert determination is typically required, means that great care should now be taken to ensure that the relevant provisions of the commercial agreement are carefully drafted in order to prevent, as far as possible, a recalcitrant party from frustrating an expert determination process by simply refusing to jointly engage the agreed expert.

## PERIODIC PAYMENTS IN FATAL ACCIDENT CASES - a hypothetical option or one worthy of serious consideration?

Periodical payments are hardly ever considered as an option in fatal accident cases but that does not reflect the legislative position.

Since 1 April 2005, it has been possible for the Court to award damages in personal injury claims by way of periodical payments.

However, under section 7 of the Damages Act 1996 “personal injury” includes “any disease and any impairment of a person’s physical or mental condition and references to a claim or action for personal injury include references to such a claim or action brought by virtue of ...the Fatal Accidents Act 1976”

Accordingly there does not appear to be any reason why consideration of periodical payments ought not to be considered in fatal accident cases.

That said, it is difficult to envisage circumstances in which periodical payments might be appropriate. Typically dependants in fatal accident cases do not have the type of care needs that arise in personal injury cases.

Furthermore, any periodical payments are likely only to be payable until the earlier of the death of the last surviving dependant and the date on which it is deemed that the deceased would have died had it not been for the fatal accident. In other words, the dependency can only last for the joint lives of both the hypothetically uninjured deceased and the dependant(s).

Even if a dependant had identifiable care needs, the flexibility of a lump sum would be likely to outweigh the benefits of a periodical payment. For example a lump sum allows for any capital needs of the dependant to be met as and when they arise in a manner unlikely to be easily achieved under a periodical payment regime.

Notwithstanding all the foregoing comments, those advising dependants who have costly care needs in fatal accident cases should ensure that relevant financial advice is obtained, if only to confirm the presumption that lump sums should be favoured.

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