MYPSU

LIMITED

ADVICE

1. MyPSU Limited ('MyPSU') operates its business in the recruitment sector, providing generally low-paid workers to agencies, who in turn provide those workers to the end client.

Ultimately, MyPSU failed spectacularly, with £37m missing. The director behind MyPSU, Scott Rooney, was disqualified, in highly suspicious circumstances.

The timing of this opinion is interesting. It is dated October 2015. PDF metadata dates it at 23 October 2015, modified 14 January 2016. The MUCs started being created around April 2014, but started being "activated" (with Philippine directors appointed) on 7 October 2015. The Goodfellow opinion was obtained in April 2016.

Commercial parties usually seek opinions before establishing a structure, and that is how the Goodfellow opinion is written (future tense). One possibility is that the promoters did not disclose to Mr Goodfellow that the structure was already in place.

This opinion is ambiguous as to whether the structure is historic or proposed.

The opinion only covers the employment allowance, not the flat rate scheme VAT. We do not know why that is.

Background

2. The details of the structure have been set out in my instructions of 7 October 2015. In very broad terms, MyPSU enters into a service agreement with an agency client, but effectively subcontracts the employment of the workers to a UK company ('CA company') owned by an unconnected third party

director/shareholder. MyPSU trades with a view to profit, charging the CA company 0.8% for finding the work.

This opinion has different nomenclature – a "CA" instead of an "SCI". We will continue to refer to them as mini-umbrella companies – MUCs.

We don't have the instructions. So we cannot know exactly what the KC was told, and must be cautious about making assumptions. In particular, it is not clear that the KC understands the third party directors/shareholders will be Philippine individuals (which is what happened around the same time as the opinion, and in some cases had already happened at the date of this opinion).

3. There are a large number of CA companies and each one employs a small number of workers, all of whom are included on that company's payroll and PAYE and NI operated, making returns under RTI.

A "CA company" is a MUC. Again query if the KC appreciated quite how many MUCs would be created.

4. My instructions note that the overarching commerciality of the arrangement lies in enabling the agencies to de-risk the whole employment proposition. In the current market this is something that agencies are insisting upon and the solution was developed by MyPSU as a new and innovative employment management solution to address the agencies' concerns.

This assumption is absolutely key: the structure was commercial because it "enables the agencies to de-risk the whole employment proposition". That is gobbledegook. There is no purpose or benefit to the structure other than obtaining the employment allowance (and VAT flat rate scheme). Agencies liked it because they shared in some of the economic benefit of this tax avoidance.

They already had the separation between employees and employment agency, because historically the industry used "umbrella companies" that employed

thousands of individuals, and were subcontracted by employment agencies. This structure splits that business into thousands of "mini-umbrella companies". That's a high uncommercial thing to do, creating significant coordination difficulties – and where the directors are outside the UK, and largely unknown to you, those difficulties are even greater.

It would be in our view entirely improper to advise on the basis of instructions that a barrister knows are false. But the KC is an experienced barrister – why did he think this claim was credible?

Once opinions can be given on the basis of false instructions, tax opinions become a game. All difficulties can be assumed away. The opinion is of no technical value; it is merely window dressing that enables the parties to say they have a "KC opinion", and provides a valuable potential defence against HMRC penalties and any attempt at a prosecution for tax evasion.

This was obviously a tax avoidance scheme, and a properly independent KC should have advised on that basis.

5. By having MyPSU as part of the structure as well as the individual CA companies this provides a single contact point for the agency whilst outsourcing the supply of workers to the CA companies allows for numerous bespoke solutions as individual CA companies may operate in particular sectors, allowing workers to be grouped by job type (in particular the provision of healthcare workers, particular skill-sets, language specialisms); provide bespoke branding for the agency or end client; managing holiday pay exposures etc. There are many intricacies in the supply chain and this structure gives MyPSU a point of difference from its competitors as it enables a bespoke solution, rather than 'one-size-fits-all' meaning different groups of workers could be separated off or terminated without any impact on other aspects of the business.

   More window-dressing. Recruitment companies had operated for decades with numerous employees in one company. MUCs make management more difficult, not easier.

NIC Employment Allowance

6. As each CA company is a stand-alone entity

"As" is doing a lot of work here. We do not know what was in the KC's instructions. Mr Goodfellow was told about the agency arrangement under which all the day-to-day activity of the MUCs was run by a promoter company. Was this KC told?

If not, he is very naïve for not having realised that there had to be some basis for coordinating the MUCs, or the structure would not work commercially. He surely can't have thought they would behave as genuinely independent market businesses?

But he misses this point, and proceeds on the – clearly false – assumption each MUC is a stand-alone. In this regard, this opinion is worse than Goodfellow's – we think Mr Goodfellow's analysis of this point is clearly wrong, but at least he had an analysis.

it claims an employment allowance for national insurance contributions under section 1 of the National Insurance Contributions Act 2014 ("NIC Act 2014").

7. Section 2(10) of the NIC Act 2014 disqualifies a person from claiming the employment allowance if they would qualify in consequence of "avoidance arrangements", which are defined as "arrangements the main purpose, or one of the main purposes, of which" is to secure the benefit of the allowance: section 2(12). "Arrangements" are widely defined to cover any agreement, understanding, scheme, transaction or series of transactions.

8. As I infer from my instructions, the above arrangements were put in place for predominantly commercial reasons.

At this point the opinion becomes meaningless. This is obviously a tax avoidance scheme, and yet the KC pretends that is not the case.

I would therefore conclude that there are good grounds for contending that the main purpose, or even one of the main purposes, of these arrangements was not to secure the employment allowance.

"Good grounds" is surprisingly cautious given the supposedly commercial nature of the scheme.

There are usually several different ways in which a lawyer's confidence in a point can be expressed:

"Will" means the lawyer is almost certain – common in, e.g. relatively straightforward law firm enforceability opinions, but very rare in a KC opinion.

"Should" is the more common KC expression of certainty – probably around 70% likelihood (although putting numbers on a legal analysis is a rather artificial endeavour). Mr Goodfellow's opinion was mostly at this level.

"The better view", "on balance" or "more likely than not" means better than 50-50. The general view amongst tax professionals is that it is improper to file a tax return if you do not think the position is better than 50-50. You need a "filing position". There is an excellent article on this by my former colleague David Harkness – sadly paywalled.

It is not clear what "good grounds" means. Possibly a reveal that the KC knows what is really going on?

It is possible that one purpose would be to gain the benefit of the allowance, but it is difficult to see how it could be a main purpose. A leading case in this area is *CIR v Brebner* 43 TC 705, in which the House of Lords held, in the context of the transactions in securities legislation, that obtaining a tax advantage was not a "main purpose" if it is incidental to a larger commercial purpose.

9. Lord Upjohn said:

> "… when the question of carrying out a genuine commercial transaction, as this was, is considered, the fact that there are two ways of carrying it out – one by paying the maximum amount of tax, the other by paying no, or much less, tax – it would be quite wrong as a necessary consequence to draw the inference that in adopting the latter course one of the main objects is, for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out commercial transactions except upon the footing of paying the smallest amount of tax involved."

The Goodfellow opinion did not cite a single case. This KC at least cites *Brebner* – but it is a strange choice of authority. *Brebner* dates from the 1960s, when the judicial attitude to tax avoidance was very different. The transaction in that case was a genuine commercial transaction with an element structured to create a tax benefit. The MyPSU structure is entirely tax-driven.

By 2015, there were several important cases. *Snell* (2008) had concerned the "main object" test in the transactions in securities rules, In that case, the High Court had focused on the tax-motivated elements of the transaction, considered that the relevant "arrangement", and because they were solely motivated by tax, had had no difficulty in finding that there was a tax main purpose.

In Sema Group Pension Scheme (2003), Lightman J considered the extent to which tax had to feature in the objects of a transaction to become a "main object". He concluded that "if the tax advantage is mere 'icing on the cake' it will not constitute a main object".

In *Lloyds TSB Equipment Leasing (No. 1) Ltd* (2014), the Court of Appeal held that, in a complex transaction where each element served a commercial purpose, the overall arrangement could still have a tax main purpose.

More recent caselaw (post-dating the opinion) has weighed the tax and non-tax benefits of a structure – so in Euromoney (2021), the tax advantage was less than 5% of the overall sale consideration for the transaction, and the taxpayer spent relatively little time considering it – hence tax was found to be not a main purpose.

All of these approaches seem fatal for the structure.

10. This provides MyPSU with a good basis for arguing that obtaining the employment allowance was, and is, not a main purpose of these arrangements.

"Good basis" is again cautiously expressed, and it is not entirely clear what this means.

11. Section 3 of the NIC Act 2014 also restricts the employment allowance for 'connected companies'. Part 1, Schedule 1 (1) (b) defines connected parties as being under the 'control' of the same person(s). Under section 450 and section 451 of the Corporation Tax Act 2010 ("CTA 2010") 'control' covers direct or indirect control over the CA company's affairs. The director/shareholders of each CA company are unconnected to either each other or MyPSU, CC and Anderson.

The Anderson Group denied to the Guardian that it was connected to this scheme.

12. Section 451(3) CTA 2010 would attribute rights where an individual is required to exercise rights or powers on behalf of another. My instructions are however that the directors and shareholders of the CA company's make their own operational decisions and are not required to act in accordance with directions from any other party. I therefore agree with my instructing accountants that the companies would not be connected.

Again, the KC is accepting a factual claim that realistically cannot be true; there must in a commercial sense be control over the companies, or the structure cannot work in the way the KC explains in paragraph 5. This is also a very shallow analysis of what are complex control provisions.

13. For both the purposes of the employment allowance and the national minimum wage legislation it is important that the CA, rather than MyPSU, is the true employer.

Why is it important that the MUC is the employer for national minimum wage purposes? This is perhaps explained in the instructions. But the NMW wage rules will apply whether the employer is a MUC company or MyPSU. So what is going on? Is this an attempt to pay less than the national minimum wage, and then walk away from the consequences?

The starting point here is that the employment contracts are with the CA company and so they should be the actual employer for these purposes. It is of course important that the CA company properly understands and implements all its obligations under the employment contract, to avoid the risk of the Revenue contending that it is not genuine and that, in substance, the true employer/employee relationship lies with MyPSU.

Another unrealistic assumption. The tax benefit of the MUCs is only around £5,000. At scale this becomes very significant, but it means there is very little "slack" in each MUC to pay as fees to directors/advisers etc. So how could the MUCs realistically understand and implement their contracts? Of course in practice it's implemented by recruiting random Philippine individuals from social media and then having them click buttons on a web portal. At which point it becomes a fraud. The KC likely did not know that; and this KC did not know about the Philippine element.

DOTAS

14. I am also asked to advise whether the arrangements are disclosable under DOTAS as notifiable arrangements. The term 'arrangements' is very widely defined and I agree that the structure is capable of being described as an arrangement for these purposes.

15. In order for the DOTAS rules to apply, the arrangements need to be linked to the obtaining of a tax advantage, the definition of which includes the obtaining of relief from tax. As the employer allowance provides employers with relief from national insurance (now within the scope of DOTAS) I agree that there is therefore potentially a 'tax advantage' as a result of the structure.

16. Subject to the point below, I also agree with my instructing accountant's analysis that the arrangements should not fall within any of the descriptions of 'prescribed arrangements' (known as the hallmarks) within the Tax Avoidance

Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 *SI 2006/1543*.

17. I agree that the documents establishing the various companies should not be viewed as "standardised" within Description 5: standardised tax products. If (and this would depend on the facts) the CA companies all enter into very similar contracts with MyPSU, such documents might be regarded as standardised.

"Might" is a considerable under-statement. They would, in practice, have to be standardised (or "substantially standardised", which is the test).

However, the Revenue would still need to show that the main purpose of the arrangements was to obtain the tax advantage: see the definition of "tax product" in regulation 10(3), which for the reasons discussed above would in my view be difficult.

This skates over the fact that regulation 10 at the time applied an objective test:

> **" For the purpose of paragraph (1) arrangements are a tax product if it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage."**

So, even if the employment allowance analysis had been correct, that does not necessarily imply the same conclusion follows for DOTAS:

It is unusual for a KC to simply get legislation wrong.

18. For completeness, I would add that if for any reason the arrangements fell within the scope of DOTAS, I would in any event agree with my instructing

accountants analysis on the absence of any relevant 'promoter" within the meaning of the rules.

We do not know who the instructing accountants were, and we do not have their instructions. In reality there absolutely was a promoter who designed the scheme – plausibly Alan Nolan of Aspire. But we do now know if the KC knew that.

GAAR

19. I do not consider that the GAAR should apply to the arrangements. As my instructions point out, this rule was brought in to deal with "abusive" arrangements intended to obtain a tax advantage. For these purposes, the concept of "abusiveness" was fairly strictly defined to cover only those arrangements "which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions": section 207 of the Finance Act 2013. This test of 'double-reasonableness' emphasises that the GAAR was intended to target schemes aimed at exploiting some weakness in the legislation to obtain some advantage that was clearly not intended.

20. My instructions are right that in making this judgement it is possible to consider whether the arrangements are consistent with the policy objectives underlying the relevant legislation, whether there are any artificial or abnormal steps, and whether the arrangements seek to exploit shortcomings in the legislation – see section 207(2).

21. For the reasons given above, as there is a commercial purpose behind the arrangements, and they do not appear to have been designed to obtain the employer's allowance, I do not consider that they would be regarded as abusive within this definition.

Once more, an unrealistic assumption of fact makes the opinion meaningless. The most favourable interpretation is that the KC was naïve. It is also plausible he knew exactly what was going on.

22. The case law on the GAAR will no doubt develop. But I would expect the Revenue to apply it first to the aggressive and artificial 'pre-packaged' tax

schemes which have prevalent in recent years. So one needs to keep an eye on developments, but I would not regard the present structure as likely to challenged under the GAAR as the law now stands.

23. I note the explanatory notes and policy objectives when the Employer Allowance was introduced. The stated policy objective was to "reduce the barriers faced by small business which wish to grow by supporting them with the costs of employment" and the relief was designed to have a positive impact on individuals. In analysing the impact on individuals and households the document states that one of the goals of the measure is to support employment and growth "and thereby benefit individuals **especially those in the lower income groups**". This is echoed in the equalities impact section which also talks about the benefits for lower income groups. Although the majority of the workers in the structure fall into these lower income groups and a key benefit deriving from the structure is that it helps them to keep more of their pay,

It is very doubtful any of the tax benefit from the structure was passed to employees, but we do not know what the KC was told.

I would not place too much weight on this as a defence if the structure were otherwise viewed as abusive (which I do not consider it to be). If the intention were that employers should not have the relief in these circumstances, then I do not consider the fact that the employees are in lower income groups would make a significant difference.

24. For the reasons given above, I do not consider that HMRC could issue a counteraction notice to any 'participant' in the structure under section 209 FA 2013. If they did, the most likely recipient would be the CA company.

[redacted] QC

[redacted]

October 2015