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EMPTY PROPERTY RATES IN ENGLAND; HOW CAN A BUSINESS MITIGATE ITS LIABILITY?

Oct 23, 2020

A tax on failure

Empty property rates is a tax on failure; the failure of the owner to find either a profitable use for the premises or a tenant to pay a rent. Since March 2020, reliefs have been available to cushion some ratepayers against the economic consequences of the pandemic. These reliefs are temporary measures.

The bigger picture, pre-COVID and post-COVID, is that there are empty buildings for which rates are payable by the person entitled to possess the premises.

No wonder that affected ratepayers look to mitigate their liabilities. The devolved administrations of the UK are developing their own rules. This note provides an answer for England.

Yes, you can

In England, the answer is “yes” you can mitigate using a variety of techniques. Here are two of them.

Art exhibitions

First, as The Times of London reported on 15 October 2020, that an arts charity could help property owners by organizing exhibitions in vacant buildings. The report featured a charity that hosts pop-up events to take advantage of the 80% relief on rates payable by charities. Some local authorities have declined to grant the relief and sued for the full amount due, leaving the local magistrates' court to decide what the liability is.

Equally, there are owners who have successfully used space for exhibitions and been successful in achieving savings.

Lease to an SPV

At the other end of the scale, the UK Supreme Court will hear an appeal on Monday 26 October. The case raises the issues whether ratepayers are liable to pay rates for periods when they leased their unoccupied properties to special purpose vehicle companies ('SPVs') on the basis that: (1) the leases were prearranged tax avoidance schemes and the relevant statute should be interpreted accordingly; or (2) the SPVs can be disregarded by a piercing of the corporate veil.

Property owners sought to avoid liability to empty rates by entering into schemes whereby SPVs took short leases of the properties and become liable to pay the relevant taxes. No taxation payments were ultimately made by those SPVs as they were then either wound up or struck off from the register of companies for separate reasons.

The local councils issued proceedings in the High Court for recovery of the rates from the owners. The councils argued that the court should apply a legal principle ("the Ramsay principle") which requires that any relevant statute be interpreted with reference to the fact that a tax avoidance scheme is in place. Also, they argued that the separate corporate identity (and therefore liability) of the SPVs could be disregarded because the corporate veil was pierced. The councils argued that if rating legislation should be interpreted taking into account the fact that this was attempted rates avoidance or if the court could go behind the corporate structuring involved, the scheme would fail.

The Court of Appeal found in favour of the owners. It determined that it was not open to the courts to pierce the SPVs' corporate veil and that the leases could not be disregarded by application of the Ramsay principle. Therefore, the mitigation strategy succeeded.

The councils now appeal to the Supreme Court.

What to look for

Hitherto, the leasing strategy using SPVs has been upheld on the basis that the court decides liability for rating based on the objective facts and not whether or not there is a subjective intent to mitigate the liability.

However, government is concerned that empty property rates are too easy to avoid and that the rules should be tightened up. Owners would say that the tax is a bad tax and if reformed, the necessity for avoidance would disappear.

Ratepayers will be hoping that the Supreme Court follows the reasoning of the Court of Appeal and leaves reform to Parliament. Nevertheless, the Supreme Court now has an opportunity to limit the scope for mitigation, notwithstanding the character of the tax on failure that is empty property rates.

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