

# The Scambler Case: Tax Law in Plain English?

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A recent decision of the Upper Tribunal (Tax and Chancery Chamber) (UT) in *Scambler and another v HMRC [2017] UKUT 1* (TCC) considers the question of when it is appropriate to look back to earlier versions of tax legislation when seeking to construe a Tax Law Rewrite (TLR) statute.

## **Scambler in Context**

The TLR project (which ran from the late 1990s to 2010) was established with the aim of rewriting the UK's primary direct tax legislation (including, for example, legislation on capital allowances, corporation tax, income tax and PAYE Regulations) to make it clearer and easier to understand whilst preserving the technical effect of previous tax law.

In reaching its decision in *Scambler*, the UT provided guidance on the narrow range of circumstances in which one should be permitted to refer to antecedent legislation in order to ascertain the meaning of TLR provisions.

Given the significant volume of consolidation and re-write tax legislation, the type of question addressed in *Scambler* was bound to arise and it seems unlikely to be the final word on the interpretation of TLR statutes.

## **The Facts**

A married couple running a commercial farming business had appealed the decision of the First-tier Tribunal in respect of their claim for trade loss relief against general income ("*sideways relief*") in 2010/11.

HM Revenue & Customs (HMRC) and the taxpayers both accepted that there was a genuine difficulty in interpreting the legislative restrictions on claiming sideways relief, in particular, the application of the "reasonable expectation of profits" test which must be met. That test referred to "the activities" and it was unclear whether that phrase referred to the activities of the current tax period or those carried out during a previous tax period. The uncertainty was compounded by case law that seemed to show both of these alternative interpretations having been adopted on separate occasions.

## **TLR Statute Interpretation**

In *Scambler*, the UT found that, irrespective of which interpretation prevailed, the taxpayers' appeal would fail on the facts. However, the UT usefully stated the following guidance on the construction of a TLR statute:

1. Examine the actual language used.
2. Adopt the usual canons of statutory interpretation, giving consideration to the "clear words" of the legislation. Ascertain this using normal principles. Consider the context and scheme of the Act as a whole and its purpose.
3. Only adopt an interpretation that the statutory language is reasonably capable of bearing.
4. Only where there is a real and substantial difficulty in interpreting the provisions, or there is an ambiguity which classical methods of construction cannot resolve, should recourse be had to the antecedent legislation.

A subordinate issue of interpretation was also considered. The UT stated that, whilst headings can be an aid to the construction of the sections that follow, they are no more than an aid. Headings cannot govern the language used in the sections. Words in single quotation marks within the heading of a statute have a limited role. In *Scambler*, the heading was found to be not relevant to the construction of legislative provisions and, accordingly, no weight was placed on it.

*Scambler* can be viewed as a timely reminder of the rules of construction, but also as an example of the difficulties that are likely to arise in the future in the interpretation of TLR legislation.

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