HMRC - OT13220 - - Amendment Of A Section 10 Exempt Contract

Most of the OTA75\S10 exempt contracts have been subject to numerous amendments since they were made. In each case this has raised the question of whether the gas continues to be sold under a contract made before 30 June 1975, i.e. whether the “amendment” constitutes a new contract.

Each such case needs to be examined on its own facts but in general, where the legal relationship between the parties continues to be governed, in substantial part, by the original agreement, the amendment is not likely to constitute a new contract. A minor amendment will not therefore normally lead to a loss of the exemption. This may not however be the case where the cumulative effect of amendments is to alter fundamentally the legal relationship as set out in the original agreement thereby rendering that agreement redundant.

The issue was considered in Shell UK Ltd v Revenue and Customs Commissioners [2008] STC (SCD) 91. This involved a contract which had an original term of 20 years. The contract was amended by agreement between the parties, in particular changes were made to the price, the quantities of gas to be sold, and the term of the contract was extended from 20 years to 30 years. Applying the purposive approach to statutory construction the Special Commissioners held that the amended contract was not a contract made before the end of June 1975.

“Adopting that approach, it was clear that the purpose of S10(1)(a) of the 1975 Act when enacted was to exempt from tax gas sold under a contract negotiated and made before the end of June 1975 with the monopoly purchaser, British Gas, where the price payable was not the market price but the statutory ‘reasonable price’ which had been negotiated before the impact of the tax was known. The 2002 agreement did not answer to the statutory description: it was an agreement freely negotiated in 2002 to a purchaser, British Gas, who was one of a number of possible purchasers at what was a market price negotiated at a time when the impact of the tax was known. Therefore, a purposive construction, where the words of S10(1)(a) were considered within the context and the scheme of the 1975 Act, led to the conclusion that the words ‘a contract made before the end of June 1975’ did not include the 2002 agreement.”

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