

## A CAUTIONARY NOTE ON EXPLANATORY NOTES

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With the increasing complexity of taxing statutes, we are increasingly looking for ways to understand the purpose behind provisions where this is not immediately clear from the words of the statute. Recently, these attempts have been frustrated by the courts, which have held that certain statements on which the taxpayer has traditionally relied (most recently in *Gaines-Cooper* [2010] EWCA Civ 83) cannot, in fact, be relied upon by the taxpayer. In this article I look at one particular variety of statements upon which those giving tax advice tend to rely in order to understand the intentions of parliament – explanatory notes.

Explanatory notes are produced and published at the same time as the bill which they accompany. They are designed to be guidance for politicians as they go through the bill. They are, however, also published to the public and can be, and often are, read in conjunction with both the bill before it becomes law and the subsequent act evolving from the bill. It should be noted that this is the first point at which caution should be exercised when relying on explanatory notes: the explanatory note usually relates to the first draft of the bill and the act may not, of course, reflect the first draft of the bill.

### *Pepper v Hart*

Most people are, of course, aware of the case of *Pepper v Hart* [1993] AC 593 and the principle established therein. The principle established in *Pepper v Hart* was set out by Lord Browne-Wilkinson when giving his opinion:

*“... reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning*

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*of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria ..."*

But does the decision in *Pepper v Hart* extend to explanatory notes? This will depend on whether or not they are "Parliamentary materials".

### **What are explanatory notes?**

Explanatory notes are published with bills, but in the context of taxing statutes we are normally looking at the explanatory notes which accompany finance bills. Whether or not explanatory notes are "parliamentary materials" will depend on several things: (A) on whose authority are explanatory notes published; (B) who publishes Finance Bills; (C) the authorship of the explanatory notes; and (D) do explanatory notes have the status of a ministerial statement made in parliament.

### **The publication of explanatory notes and Finance Bills**

Take two examples, the Finance Bill 2004 ("**FB 2004**") and the Finance (No. 2) Bill 2005 ("**FB (No.2) 2005**") and with FB 2004, the "**Finance Bills**") to look at how finance bills and explanatory notes are published. The explanatory notes to each of the Finance Bills (the "**Notes**") contains the following information on their publication:

*"The Explanatory Notes contained in this publication are designed to further understanding of the Finance Bill 2004 as published. Finance Bill 2004 is published by TSO...*

*Published with the permission of HM Treasury on behalf of the Controller of Her Majesty's Stationery Office"*

This gives, at least, partial answers to questions (A) and (B) above on the publication of explanatory notes. They are published by TSO (The Stationery Office Limited a company which produces the material published by HMSO), and with the permission of HM Treasury. The fact that the permission of HM Treasury is required appears to indicate that the Notes emanate from HM Treasury. This short passage is also useful because it explains that the purpose of the Notes is to "further the understanding of the Finance Bill ..." While this is not conclusive of explanatory notes' authority, it is indicative that they were not intended to provide anything other than a guide to the proposed legislation.

The Finance Bills were also published by TSO (again on behalf of HMSO) but are published "*by authority of the House of Commons*". Thus explanatory notes can be said to emanate from HM Treasury, whereas the Finance Bills emanate from the House of Commons.

Explanatory notes cannot, therefore, be said to have the authority of ministerial statements: they are merely HM Treasury's understanding of the provisions of the Finance Bills. To the extent that explanatory notes have been considered by the courts, they have been treated as distinct from ministerial statements.

### **Case law on the use of explanatory notes to interpret statutory instruments**

Explanatory notes have been considered by the courts and there is a short line of cases relating to their use in interpreting statutory instruments. In *Pickstone v Freemans plc* [1989] AC 66 Lord Oliver said (at 127):

*"It is worth noting that the explanatory note (which is not, of course, part of the Regulation but is of use in identifying the mischief which the Regulations were attempting to remedy states that ..."*

While *Pickstone v Freemans plc* [1989] AC 66 made use of the explanatory notes to the regulations in determining the meaning of section 1(2), Equal Pay Act 1970 as amended by the Equal Pay (Amendment) Regulations 1983, it is of only limited use in determining the treatment of explanatory notes. The reasons for this are twofold: (i) the decision pre-dates that of the House of Lords in *Pepper v Hart* [1993] AC 593, which while referring specifically to the use of Hansards, also had an impact on the use of "pre-parliamentary" materials; and (ii) the explanatory notes consulted were the explanatory notes to regulations, not to a bill and the regulations are not subject to the same parliamentary procedures as bills, and therefore the relevance of explanatory notes may not be the same in each case.

The use of explanatory notes has, however, been considered in three cases since *Pepper v Hart* [1993] AC 593. In *Coventry and Solihull Waste Disposal Co Ltd v Russell (Valuation Officer)* [2000] 1 All ER 97 the House of Lords considered Article 3(2) Electrical Generators (Rateable Values) Order 1989. Lord Hope of Craighead explained (at page 107(g)):

*"In the Court of Appeal both Robert Walker and Hobhouse LJ declined to attach any importance to the explanatory note which was attached to the 1991 amending order. But Waller LJ said that it supported the view which he took, which was favourable to the respondent's argument. In my opinion an explanatory note may be referred to as an aid to construction where the statutory instrument to which it is attached is ambiguous ... but in any event,*

*for other reasons which I have given, I consider the balance of the argument strongly favours the respondent's interpretation as being the correct one."*

Lord Clyde (at page 109(j)) made it clear that he had not "*taken particular account of the explanatory note to the latest amending order*". Thus in this case, Lord Hope's comment on the use of explanatory notes in the interpretation of statutory instruments should be considered *obiter* only. In addition, the second objection above (that the case refers to a statutory instrument and not a bill) applies equally to *Coventry and Solihull Waste Disposal Co Ltd v Russell (Valuation Officer)* [2000] 1 All ER 97.

Lightman J considered the use of explanatory notes in interpreting statutory instruments in *Westminster Council v Haywood* [2000] 2 All ER 634 (at 645(c)) stating:

*"I should add that I find limited assistance in the explanatory note attached to the 1997 regulations which is relied on by the ombudsman as indicative of retrospectivity. The note is admissible to identify the mischief which the regulation was attempting to remedy: Pickstone v Freemans plc..."*

This is another example of the use, or at least the recognition of the use of, explanatory notes to interpret statutory instruments. Lightman J takes the more circumscribed view, given in *Pickstone v Freemans plc*, that the explanatory note can only be used to identify the mischief which the regulation aims to remedy.

Thus there are two views on the use of explanatory notes to aid the interpretation of secondary legislation: the wider view given by Lord Hope, that they can be used as a general aid to construction and the view of Lightman J (also that given in *Pickstone v Freemans plc*) that they can only be used to identify the mischief the provisions were intended to counteract.

In *Pepper v Hart* [1993] AC 593 Lord Browne-Wilkinson stated

*"... given the purposive approach to construction now adopted by the courts in order to give effect the true intentions of the legislature, the fine distinction between looking for the mischief and looking for the intention in using words to provide the remedy are technical and inappropriate".*

Unfortunately there is no authority to indicate whether this will apply equally to the use of explanatory notes, though it seems likely it will.

The explanatory notes to a statutory instrument were also used as an aid to interpretation in *R (CPT UK) v Humber Bridge Board* [2004] 4 All ER 549. However, there are objections to using explanatory notes to interpret a statute. Once again, the first is that statutory instruments do not receive the same parliamentary treatment as do statutes; under these circumstances the explanatory notes may be the only source of information alluding to the intention of the statutory instrument.

Explanatory notes can be used in the interpretation of statutory instruments; this is certainly the case to determine the mischief that the instrument is designed to combat, and is likely also to be the case in relation to other aspects of interpretation. It should not be simply assumed that the same rules apply to statutes.

### **Use of explanatory notes to interpret statutes**

The only case law relating to the use of explanatory notes in interpreting statutes is a positive *obiter* statement of Lord Steyn in *R (Westminster City Council) v NASS* [2002] 4 All ER 655 (at 656 et seq). Lord Steyn agreed with the opinion of Lord Hoffmann in that case, but gave a lengthy opinion on the use of explanatory notes, starting at page 656(d):

*"There is, however, a point on which I want to comment. It relates to the status of explanatory notes ... Lord Hoffmann has not relied on this material. I would also not do so in this case ... in 1999 a new system was introduced. It involves publishing explanatory notes alongside the majority of public bills ... the texts of such notes are prepared by the government department responsible for the legislation."*

In this opening paragraph Lord Steyn mentions one of the principle dangers of using explanatory notes: they are prepared by a government department and it is therefore dubious that they reflect the intentions of parliament (Lord Steyn discusses this at greater length - see below). He goes on (at 656(g)):

*"The explanatory notes do not form part of the Bill, are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it. The purpose is to help the reader get his bearings and to ease the task of assimilating the law ... Unlike Hansard material there are no costly researches involved ..."*

In mentioning this he deals with one objection raised to using Hansard in *Pepper v Hart* - that the research to obtain the texts of parliamentary debates was time consuming and costly - and opines that it does not apply in relation to explanatory notes. In addition he points out that the explanatory notes should be neutral, i.e. it shouldn't reflect the views of the government department in question. Lord Steyn does not address the issue of determining whether, in fact, explanatory notes are neutral, or their use if they are seen to reflect a political view.

Lord Steyn is of the opinion that explanatory notes may be of greater value than pre-parliamentary aids, already used as an aid to interpretation under the principles in *Pepper v Hart*. At page 657(g) he says:

*"Used for this purpose explanatory notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, government Green or White papers, and the like ... the connection of explanatory notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see Cross Statutory Interpretation (3<sup>rd</sup> edn, 1995) pp 160 - 161 ..."*

While it is true that explanatory notes are more closely linked with the bill, being produced alongside it and as a guide to its provisions, because it is the work of a government department and not produced by parliament, it is hard to see how explanatory notes throw light on the intentions of parliament, rather than on what one government department understands the provisions to mean. In the case of the Notes, they express HM Treasury's understanding of the Finance Bills.

Despite his strongly expressed views that explanatory notes should be allowed as aids to interpretation under any circumstances (not just in the case of an ambiguity - see page 657(a) to (g)) Lord Steyn does not depart entirely from the principles as expressed in *Pepper v Hart* when giving his *obiter* view of the use of explanatory notes. At page 657(j) he states:

*"If exceptionally there is found in explanatory notes a clear assurance by the executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court."*

This is important because even Lord Steyn circumscribes the circumstances under which explanatory notes can be relied upon. Finally Lord Steyn says:

*"What is impermissible is to treat the wishes and desires of the government about the scope of the statutory language as reflecting the will of Parliament. The aims of the government in respect of the meaning of clauses as revealed in explanatory notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."*

Given Lord Steyn's view, it is easy to see that explanatory notes should be treated with circumspection. They are, at best, HM Treasury's interpretation of parliament's intention. Lord Steyn's opinion was merely *obiter* (albeit an *obiter* statement given in the House of Lords) but is in accordance with the use of explanatory notes as an aid to interpretation of statutory instruments. While it is not settled law that explanatory notes can be used as an aid to interpretation Lord Steyn's opinion and their recognised use with statutory instruments, are indicative that they may be looked to in the future.

They should not, however, be relied upon as a statement of the law. They are not published by Parliament, and they are produced (in the case of explanatory notes to Finance Bills) by HM Treasury. They cannot, therefore, be a clear expression of the intention of Parliament.

Unfortunately there is very little that can be relied on by the taxpayer in interpreting increasingly complex tax legislation. Frequently we look to explanatory notes to help us to understand legislation. This does not mean, however, that explanatory notes should be relied upon. They are HM Treasury's interpretation of the provisions and while they may prove useful to the taxpayer in that they show HM Treasury's understanding, it is becoming increasingly clear that the only thing which can be relied upon is the legislation itself and the court's interpretation of that legislation.