Tax update

Smith & Williamson

A round-up of recent issues

21 March 2018

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1. General

1.1 Spring Statement 2018

On Tuesday 13 March the Chancellor of the Exchequer, the Rt Hon Philip Hammond MP, presented to Parliament the first Spring Statement under the ‘Better Budgets’ timetable, comprising a single major fiscal event or Budget in the autumn and a shorter statement in the spring.

The Chancellor gave his response to the Office for Budget Responsibility forecasts. Of interest to taxpayers and tax advisers, he also announced a number of public consultations and calls for evidence. There were, as promised, no announcements of immediate tax changes or other new spending or policy announcements. It also provides more time for planned consultation and consideration of feedback in advance of introducing tax measures to take effect from April 2019. This represents a welcome move towards more certainty for businesses and other taxpayers.

We set out in the relevant sections below some summaries of the key consultations with tax content.

www.gov.uk/government/topical-events/spring-statement-2018

1.2 Consultation - The role of online platforms in ensuring tax compliance by users

The Government has commenced a consultation to explore how online platform providers could work with HMRC so taxpayers making money through using the platforms, better understand and meet their tax obligations. The Government has confirmed that it needs to minimise opportunities for people to exploit this area of the economy to evade their tax obligations, at the same time as supporting those who want to comply.

The initial document is a call for evidence, to help the Government explore what role platforms could play in tax administration, in the way other intermediaries, such as employers, have done in the past and continue to do. It aims to help Government understand:

- how platforms interact with their users currently;
- what the platforms know about their users; and
- more about attitudes to tax among people earning money through platforms.

HMRC has carried out research into such users. This indicates that over half saw their sharing economy activity as just a way of making some extra money rather than employment or self-employment, suggesting many may not recognise this as a potentially taxable activity, although these problems are not confined to online platform users. HMRC is also looking at successes in other countries that have already started to address these issues.

Responses are due by 8 June 2018.

www.gov.uk/government/consultations/online-platforms-role-in-ensuring-tax-compliance-by-their-users

1.3 Tax policy consultation tracker – outcome of CIOT/IfG/IFS proposals

HMRC and HMT have published a helpful consultation tracker covering recent and live public consultations on tax policy matters.

Consultations on tax, or with tax content, tend to be spread around gov.uk, so it will be very useful for potential respondents to have a single list to help keep abreast of consultations and their deadlines, irrespective of which government department issued them. The tracker will be updated periodically, so interested readers may wish to bookmark the link.

A consultation tracker was one of the proposals in the 'Better Budgets – Making tax policy better' report, produced by the CIOT in partnership with the Institute for Government (IfG) – a think tank that works to make government more effective – and the Institute for Fiscal Studies (IFS). Importantly, the report also proposed reducing the flow of tax change by returning to just one annual fiscal event. This has clearly also been embraced by the Government by turning the Spring Statement into a welcome fiscal non-event.

The new tracker looks remarkably similar to Smith & Williamson's own consultation tracker, which in a small way demonstrates the usefulness of contributing to consultations.

www.gov.uk/government/publications/check-the-status-of-tax-policy-consultations

1.4 Cash and digital payments in the new economy

HMT has published a call for evidence to help it better understand the role of cash and digital payments in the new economy and ensure that legislation keeps pace with the way people pay for goods and services. It will examine the impact on different sectors, different regions and different demographics. The aim is for government to support digital payments and ensure that the ability to pay by cash is available for those who need it for legitimate purposes, whilst cracking down on the minority who use cash to evade tax and launder money.

In the UK the use of cash had fallen by 2015 to about 15% by value of all consumer spending. The growth of digital spending has rocketed, with contactless payments growing almost 20 times in the three years to June 2017. The Government wants to understand better about the use of cash, especially large cash transactions, why they are used and if there are barriers to using digital payments for larger transactions. This is an attempt to find ways to reduce tax non-compliance, much of which is in cash.

It hopes to learn from international experience; particularly, where in some countries restrictions have been placed on cash transactions to deter poor tax compliance. It is also seeking evidence to help determine what further action the Government should take to reduce tax evasion, hidden economy, and money laundering associated with cash to ensure a fair and level-playing field for tax compliant businesses. It is also looking at how government could encourage declarations of activity paid for by cash across the economy, including individuals, intermediaries and businesses; for example, by encouraging or mandating the use of receipts.

The Government is keen to understand better how digital payments can help people budget or keep a record of transactions. With the advent of MTD almost upon us, it also asks for input around the *'benefit to businesses from integrating their wider business models with a digital way of working, as money transferred digitally, rather than in cash, can be seamlessly integrated into digital accounting software.'*

The consultation does not venture into the use of cryptocurrencies, which is the subject of a separate consultation from the House of Commons Treasury Committee, and which closes on 13 April 2018.

This HMT consultation closes on 5 June 2018.

www.gov.uk/government/consultations/cash-and-digital-payments-in-the-new-economy

www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/inquiries1/parliament-2017/digital-currencies-17-19/

1.5 Brexit funding allocation to Government departments for 2018-19

A written ministerial statement from Liz Truss, Chief Secretary to the Treasury, published on the day of the Spring Statement, has set out new Government funding for various Government departments other than DexEU to help with expenditure on Brexit related matters.

This should be of particular interest to readers of Tax Update as the department with the third largest allocation is HMRC. This is indicative of the significant role HMRC has in helping the country prepare for Brexit and the impact on its resources, particularly in tying up experienced people.

We pass no comment on the fact that the National Archives have a larger allocation than Scotland, Wales and NI combined.

Department	£m
Home Office	395
Department for Environment, Food and Rural Affairs	310
HM Revenue & Customs	260
Department for Business, Energy and Industrial Strategy	185.1
Department for Transport	75.8
Department for International Trade	74
Cabinet Office	49.4
Foreign and Commonwealth Office	29.6
Department for Digital, Culture, Media and Sport	26.2
HM Treasury	24.8
Competition and Markets Authority	23.6
Department of Health and Social Care	21.1
Ministry of Justice	17.3
Food Standards Agency	14
Ministry of Defence	12.7
Office for National Statistics	2
The National Archives	1.2
Northern Ireland Office	0.4
Scotland Office	0.3
Wales Office	0.3

www.parliament.uk/business/publications/written-questions-answers-statements/written-statements/?page=1&max=20&questiontype=AllQuestions&house=commons%2clords&use-dates=True&answered-from=2018-03-13&answered-to=2018-03-13&member=4097

1.6 Report on reforming the taxation of income

The Institute for Public Policy Research Commission on Economic Justice has published a report proposing an overhaul of the current income tax system to make it more progressive and efficient.

Key findings include that the UK's current system of taxing individual incomes, combining income tax and employees' NIC, performs poorly when assessed against three simple principles of tax design; efficiency, progressivity and system coherence.

The key recommendations are two major reforms:

- combining all rates and allowances for income tax and employee NICs into a single tax schedule. All sources of income would be taxed under the same rates, irrespective of whether the income was from earnings, savings, trusts, dividends or property rents; and
- replacing the existing system of marginal bands with a formula-based system, such that every taxpayer's marginal rate would depend on their own precise level of income and tax cliffs would be removed.

The report also proposes that pension contributions are no longer deducted from gross earnings and instead attract a single, flat rate of relief.

www.ippr.org/research/publications/tapering-over-the-tax

1.7 Finance Act 2018

Finance (No.2) Bill 2017-19 received Royal Assent on 15 March 2018, becoming Finance Act 2018.

Some of the main measures included in the Act are:

- further anti-avoidance rules for offshore settlements;
- further disguised remuneration provisions;
- new risk to capital rules for EIS, SEIS and VCTs;
- changes for partnerships;
- changes to termination payments in respect of foreign service; and
- corporate interest restriction provisions.

HMRC has also published a note on Finance Act 2018. It states that the Act includes '*tough new measures including action to tackle VAT fraud, close loopholes on offshore tax avoidance and crack down on rogue illegal waste site operators*' and that this '*will help to raise an additional £1.2 billion from tackling tax avoidance, evasion and non-compliance.*'

It will be interesting to see if HMRC is able to substantiate the receipt of this additional tax revenue in due course.

https://services.parliament.uk/bills/2017-19/financeno2.html

www.gov.uk/government/news/new-clampdown-on-tax-avoidance-and-evasion-will-help-to-bring-in-12-billion

1.8 EU's list of non-cooperative jurisdictions updated

The European Council has updated the EU's list of non-cooperative jurisdictions.

Bahrain, the Marshall Islands and Saint Lucia have been removed from the list and the Bahamas, Saint Kitts and Nevis and the US Virgin Islands have been added.

The list is intended to promote good governance in taxation worldwide.

www.consilium.europa.eu/en/meetings/ecofin/2018/03/13/

1.9 Offshore tax liabilities – criminal offences

HMRC has published guidance on the three new criminal offences relating to offshore income, assets and activities.

The guidance lists the three new criminal offences:

- if you fail to notify HMRC of your chargeability to income tax or CGT before the end of the notification period *(earliest date can be committed: 6 October 2018);*
- if you are required to deliver a tax return and fail to do so before the end of the withdrawal period *(earliest date can be committed: 6 April 2020*); and

- if you provide a return which, at the end of the amendment period, contains an inaccuracy *(earliest date can be committed: 1 February 2020).*

It notes that the additional tax must exceed the threshold amount of £25,000 and be chargeable in respect of offshore income, assets or activities.

The guidance goes on to explain the terms used, possible defences and what can happen.

While the relevant legislation came into force on 7 October 2017, the earliest dates when the offences can be committed are listed in brackets above.

www.gov.uk/guidance/offshore-tax-evasion-offences-relating-to-offshore-income

1.10 Making tax digital (MTD) - HMRC directions for participants

HMRC has issued two sets of Directions for MTD for income tax and CT. These directions set out some of the rules that explain how taxpayers using the new income tax pilot will be able to use the new MTD system. They have been issued to coincide with the start of the public MTD for business income tax pilot.

The first amended directions set out the mechanism of signing up and giving and withdrawing consent for communications in both directions with HMRC, by extending the self assessment (SA) regulations to cover not only MTD but also other electronic communications with HMRC, such as by email. For MTD or SA, the giving and withdrawal of consent generally has to be through the relevant service. In other cases, where taxpayers communicate electronically with HMRC, such as in compliance checks, the authority can be by email.

The second batch of directions set out the requirements for authorising participants to submit information electronically to HMRC under MTD. This includes quarterly updates, end of year submission as well as any self-assessment of other income to be included in the end of year submission. There is no stipulation so far on how to keep electronic records. In addition, once the submission has been made, the records can be retained in either electronic or hard copy format. This will potentially be useful for people that do not have their own computer and software including where a business has closed.

www.gov.uk/government/publications/directions-under-regulation-31za-of-the-income-and-corporation-taxes-electronic-communications-regulations-2003

www.gov.uk/government/publications/directions-under-regulations-33-to-36-and-53-of-the-income-and-corporation-taxes-electronic-communications-regulations-2003

2. Private client

2.1 Spring Statement – consultation on entrepreneurs' relief on gains before dilution

In preparation for legislation to be introduced in Finance Bill 2018-19, the Government is proposing to allow individuals (but not trusts) who no longer hold the qualifying 5% of shares in a company as a result of dilution to claim CGT entrepreneurs' relief (ER). This will be permitted only where the company issues capital for trade purposes.

The Government is consulting on what looks to be a welcome proposed amendment to the ER rules. This consultation had been trailed in the Budget Statement last autumn as part of its response to the Patient Capital Review. The proposal is that individual shareholders who have qualified for ER will be able to bank ER relief up to the date of a dilution caused by fund raising for the company's business. In addition to being able to claim the relief, notwithstanding that there has been no disposal at that time, the shareholder will also be permitted to defer the CGT charge until the actual disposal of the shares. The relief will not be available to trustees, for whom any reform would, the Government argues, be too complex, or to shareholders who acquired through Enterprise Management Incentive options, as the 5% shareholding threshold does not apply to them.

The consultation is set to run until 15 May.

www.gov.uk/government/consultations/allowing-entrepreneurs-relief-on-gains-made-before-dilution

2.2 UK tax legislation changes as a consequence of the Scottish Budget resolutions

In replacing the Scottish basic rate with a tiered Scottish starter rate, Scottish basic rate and Scottish intermediate rate (before applying the Scottish higher rate) creates a number of problems. The UK legislation is therefore being adjusted to recognise that anything not Scottish basic rate does not necessarily mean the higher or additional rate equivalents apply.

Secondary legislation has been drafted to recognise within UK taxation the tiered approach to what would otherwise be the Scottish basic rate by the Scottish Government. This includes recognising the new terms and how these bands are match to the UK basic rate band in determining reliefs, limits and threshold.

In general terms, these three rates are being matched to the UK basic rate band and take into account that additional relief is available at the Scottish intermediate rate where appropriate.

The main changes are that Scottish taxpayers who:

- pay income tax at a rate higher than the Scottish basic rate making pension contributions, net of relief at source, will be entitled to have their Scottish basic rate limit and any other Scottish rate limit above the Scottish basic rate limit increased by the amount of the grossed up contribution;
- receive a social security pension lump sum can be taxed at the new Scottish starter rate;
- are taxed only at the new Scottish rates are eligible to elect to transfer marriage allowance to their spouse or civil partner, or to receive this allowance;
- give under gift aid the rate limit, then any Scottish rate above the Scottish basic rate limit (including the new intermediate rate) is increased by the grossed up amount of a qualifying gift.

In addition:

- for all taxpayers giving under gift aid, the 'grossed up amount of a gift' will be the amount of that gift grossed up by reference to the main UK basic rate only.

www.legislation.gov.uk/ukdsi/2018/9780111167229/contents

2.3 HMRC's decision on Eclipse LLPs and interest payments

HMRC has confirmed its view that interest payments in relation to the Eclipse LLPs are not deductible against LLP income.

HMRC has been reviewing its position in relation to the Eclipse LLPs. HMRC successfully argued in the Courts through a lead case that the LLP was not trading and members were therefore not able to claim relief for interest payments.

Following the SC decision in this case, initially, HMRC only sought correction to returns where interest relief had been set against other income, while it considered further the position regarding offset against LLP income.

HMRC has now gone one step further, confirming its view that the interest is not in fact deductible at all, even against LLP income, but that the LLP income remains taxable. As the LLP income has been used to fund the interest payments, this will create a dry tax charge for members in these LLPs.

HMRC is likely to take steps to try to finalise matters on this basis, and we will wait to see if this point is now challenged in the Courts.

www.thetimes.co.uk/edition/news/tax-scheme-investors-face-bankruptcy-9gl5hrhpw

2.4 A review of the ISA regime

The Association of Accounting Technicians ISA working group has published a report containing various recommendations to simplify ISAs, and to ensure that they are fairer, more easily accessible and that take-up rates are increased.

The recommendations in the report include:

- creating a new, flexible ISA wrapper into which other products can fit: the Everything ISA. The Junior, Cash, Stocks & Shares and Innovative Finance ISAs should be folded into this new ISA wrapper. The annual ISA limit would be removed and a lifetime Everything ISA limit of £1million introduced;
- closing the Lifetime ISA to new entrants;
- ensuring any pension changes are considered separately to ISA reform; and
- continuing the Help-to-Buy ISA but without the ISA title.

www.aat.org.uk/prod/s3fs-public/assets/AAT-ISA-Working-Group-Time-change-review-ISA-regime.pdf

2.5 Notice of enquiry valid even if only received by agent

The UT has found that a notice of enquiry that was sent to a taxpayer's old address in error, but copied to his agent, remains valid.

HMRC opened an enquiry into the taxpayer's return, which resulted in an income tax loss of £2.5 million being disallowed. HMRC sent a notice of enquiry to the taxpayer, but sent it in error to an old address that was not his usual or last known place of residence. The letter was copied to the taxpayer's agent, who had been authorised to act on his behalf by a signed form 64-8.

The taxpayer claimed that the enquiry was not valid as he had not received the notice of enquiry himself, but the FTT found in favour of HMRC.

The case has now been heard by the UT, who also found in favour of HMRC but for differing reasons.

The UT found, contrary to the FTT, that the agent had apparent and actual authority to receive a notice of enquiry on the taxpayer's behalf and therefore the enquiry notice was valid.

Tinkler v HMRC [2018] UKUT 0073 (TCC)

https://assets.publishing.service.gov.uk/media/5aa7b040ed915d4f563b72ac/William_Andrew_Tinkler_v_HMRC.pdf

3. Trust, estates and IHT

3.1 Review of charity tax treatment

The Charity Tax Commission has announced a call for evidence in respect of charitable tax reliefs. This will be the first comprehensive review of charity taxation and reliefs in over 20 years.

The call for evidence '*seeks views and evidence from anyone with relevant knowledge, expertise or experience of the system of charitable tax reliefs in the UK, including charities, donors, academics, think tanks, representative bodies, accountants, philanthropy and financial advisers, tax professionals and members of the public.'*

In particular, the review is seeking comments on the following:

- the effectiveness of current reliefs;
- whether or not the existing system could be improved in order for charities to serve their beneficiaries better; and
- ideas about how the tax system can help to create an operating environment in which charities can maximise the public benefit they generate.

The deadline for responses is 6 July 2018.

www.ncvo.org.uk/policy-and-research/funding/tax-and-reliefs/charity-tax-commission/call-for-evidence

4. PAYE and employment

4.1 Taxation of self-funded work-related training

HMRC has launched a call for evidence on extending tax relief for training expenses incurred by employees and the self-employed. This follows its announcement in the Autumn Statement 2017.

Broadly, under current rules, tax relief for work-related training is available to employers who provide training to their employees or reimburse employees who incur work-related training costs, or for the self-employed where the training maintains or updates existing skills.

Tax relief is not available to employees who incur work-related training costs that are not reimbursed by their employer, or to the self-employed that are for a new skill. Similarly, tax relief is not available for recreational or non-work related training.

The Government wants to understand how it can learn from previous training initiatives or how tax relief for training costs is provided in other countries. It is also seeking views as to how the rules could be reformed to allow a tax deduction for self-funded training for retraining for a new employment/self-employment; extending the rules to allow relief where an employee funds their training; how to incentivise individuals to undertake more work-related training.

The objectives of the extension should ensure that tax relief is not available for recreational activities, is sustainable and affordable for the public finances, and is simple to understand and administer.

The Government is seeking responses from businesses, consultancies, individuals or representative bodies and the deadline for responses is 8 June 2018.

www.gov.uk/government/consultations/taxation-of-self-funded-work-related-training

4.2 Contribution to SIPP of assets in satisfaction of debt

The FTT found that income tax relief was available on contributions paid to self-invested pension plans (SIPPs) by way of a contribution of shares in satisfaction of a debt.

The taxpayer executed a 'contribution form' that stated '*I propose to make a net contribution of the amount shown below to the SIPPCHOICE Bespoke SIPP and this notification constitutes an irrevocable and binding obligation to make this contribution.*'

He subsequently confirmed that his contribution would be made by way of an in-specie transfer of specified assets to satisfy the obligation. The assets were transferred, along with a minimal amount of cash to ensure the correct agreed contribution.

The FTT found that there was a legally binding obligation on the taxpayer to make a contribution of the specified amount and therefore, as detailed in HMRC's manuals, income tax relief was available.

For completeness, it went on to consider the legislation and specifically the phrase 'contribution paid'. It found it to be wide enough to cover a transfer of assets in satisfaction of a debt as occurred in this case.

The FTT therefore allowed the taxpayer's appeal.

SIPPCHOICE Limited v HMRC [2018] UKFTT 0122 (TC)

http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10342/TC06378.pdf

5. Business tax

5.1 Consultation on EIS fund for knowledge-intensive companies

HMT has launched a consultation to explore the possibilities for a new Enterprise Investment Scheme (EIS) fund model focused on investment in knowledge-intensive companies

A consultation has been launched to explore the possibilities for a new EIS fund model focused on knowledge-intensive companies, as currently defined in EIS legislation. HMT intends that such a fund

would be subject to its approval and require fund managers to undertake additional reporting to it on investments, investors and other relevant information. This would be accompanied by the removal of the current EIS approved fund structure, which is not widely used. Options being considered include:

- a 'patient' dividend tax exemption, which would apply after a fixed holding period (5 or 7 years has been suggested);
- the ability to write off a portion of capital gain on reinvesting into a knowledge-intensive EIS fund, in a similar way to the current Seed Enterprise Investment Scheme (SEIS) mechanism, but at a lower rate;
- the ability to carry back income tax relief to earlier periods than currently permitted; and/or
- giving income tax relief and CGT deferral relief for investment in the fund, rather than the underlying investee companies, provided capital is invested within a certain timeframe, for example 2 years.

The consultation runs until 11 May and attempts to address the difficulties that knowledge-intensive firms, which are R&D and capital intensive, have in obtaining the capital they need to scale up.

www.gov.uk/government/consultations/financing-growth-in-innovative-firms-enterprise-investment-scheme-knowledge-intensive-fund-consultation

5.2 Extension to CT and CIS of the existing security deposit legislation

HMRC has launched a consultation seeking views on proposals to extend the existing security deposit regime to CT and Construction Industry Scheme (CIS) deductions from April 2019. It will target non-compliant businesses and phoenixism cases. The deposit is likely to be in the form of cash, or a performance bond issued by a financial institution.

Under the current regime, businesses can be required to deposit funds with HMRC where there is a risk to the Exchequer and is currently used in a very small minority of cases (less than 0.1% of businesses are approached, of which only about 1,100 ultimately receive a formal security notice). The addition of CT and CIS is only expected to increase these figures by around 10%.

Currently, there is separate security legislation for different taxes. CT is expected to raise particular issues, due to the length of time between the start of an accounting period and the reporting deadline, which is much longer than for other taxes, such as VAT, already covered by the legislation. While the condoc asks if this is now an opportunity for a single cross-tax piece of legislation, which would give potential for simplification, it goes on to proposing to retain separate legislation for each tax and possible extension to other taxes in the future.

It is proposed that the CT legislation would mirror the PAYE legislation whereby failing to provide a deposit on time would be an immediate criminal offence. (For VAT the criminal offence is conditional upon the business continuing to make taxable supplies.) For CIS, the proposal is that it would be an offence for a contractor to make a payment under a construction contract, for work carried out after the requirement to give security had been notified, to a subcontractor when the contractor has been required to give security and has not done so.

The consultation closes on 8 June 2018.

www.gov.uk/government/consultations/extension-of-security-deposit-legislation

5.3 Government updates its position paper on CT and the digital economy

With the Spring Statement the Government has updated its position paper on CT and the digital economy following the consultation launched at the Budget in November and which closed on 31 January. The preferred solutions are for the users of digital platforms to be treated as a source of value for tax purposes. Pending agreement to this on a multilateral basis, the Government proposes an interim measure to tax the revenues (as opposed to profits) of businesses with significant value derived from those users in the UK. There would be both scoping issues and other challenges particularly over protecting start-up businesses.

The Government makes it clear that this update still does not represent its final thinking in the area: hardly surprising, given the complexity and potential controversy that could arise. At its heart, however,

the proposal is designed to tackle, not just the difficulties in taxing cross-border digital businesses without a physical presence in the UK commensurate with its activities here, but also with public acceptability of a system that has failed to keep pace with changes in business practice.

The nub of the Government's thinking is that the participation and engagement of users of digital platforms is an important aspect of value creation for some digital business models. For example, on social media sites, the content is largely created by the users themselves (think Facebook or Instagram). This is different from the value derived from purchasing customers. At present, this user-created value is not recognised under international rules. This failure is has created a mismatch between the location in which business profits are taxed and where it is created. Recognising it will be novel, as the Government recognises.

Capturing this value is will take long term reform, given the need for multilateral international consensus and action, hence the need to look at an interim solution. Its interim measure is a tax on revenues of digital businesses deriving significant value from UK user participation. This would be irrespective of any physical present that they have in the UK. The Government may take unilateral action. This would involve a scoping exercise. Wider considerations would include challenges in establishing user location and dealing with start-ups growth companies and loss-makers

International discussions continue and written feedback on the updated can still be made by stakeholders. No final date for this feedback is given.

www.gov.uk/government/consultations/corporate-tax-and-the-digital-economy-position-paper

5.4 CGT Company reacquisition of shares at an undervalue fails to generate a CGT loss

After a series of complex commercial arrangements, a company repurchased deferred shares from two minority shareholders who made capital losses as a result. The FTT decided that the CGT value shifting rules in TCGA 1992 operated with the effect that the disposers of the shares did not enjoy a loss. In addition, the transaction was not a bargains at arm's length and therefore market value was substituted for consideration actually given. In the circumstances of the case, this led to no capital loss arising. No capital loss was available and therefore the Targeted Anti-avoidance Rule (TAAR) for CGT losses in TCGA 1992 s.16A could not apply, but the court found that nevertheless its requirements were also met, so the loss would have been counteracted by the TAAR anyway.

In 2010, the appellant company Conegate Limited, wholly-owned by David Sullivan, together with a linked pension fund, had acquired a minority holding in WHH, the holding company for West Ham United Football Club. Following this acquisition, it was agreed that there needed to be an injection of cash into the club and this was done through a financing exercise. The final step of this transaction was the conversion of some of the shares held by Conegate into £1 deferred shares and their repurchase by WHH at par. This effectively created a loss on the shares for Conegate that it was hoped could be set off against other gains.

The issue was whether or not the value shifting rules in TCGA 1992 s.29 applied. These apply where a person exercises control of a company to pass value from shares owned by the person into other shares. Value had clearly passed out of the shares through their conversion, so the question was whether a 'person having control of the company' had exercised that control to pass the value. Conegate and the pension fund together only enjoyed a minority holding and the remaining shareholders were not otherwise connected to them. Could they, in those circumstances, 'exercise control?' The FTT said yes. The singular 'person' included the plural 'persons' and those persons did not have to be connected.

Although the point was not relevant to the decision, the FTT also found both that the transaction was otherwise than at arm's length and that under TCGA 1992 s.17, the deemed market value of the shares in the deemed disposal under s.29 meant there was no gain or loss. In any event, if the arrangement had created a loss it would have been counteracted by TCGA 1992 s.16A (the TAAR) as having for one of its main purposes the creation of the loss to create a tax advantage.

Conegate Ltd v HMRC [2018] UKFTT 82 (TC)

http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10307/TC06340.pdf

5.5 Company limited by guarantee cannot be a qualifying subsidiary of an EIS company

The FTT dismissed an appeal by Hunters Property PLC (Hunters) against the refusal of HMRC to grant EIS 3 certificates to investors. The appellant had a subsidiary that was limited by guarantee and therefore had no share capital, which prevented Hunters from meeting the requirement to have only qualifying subsidiaries.

The FTT dismissed an appeal by Hunters against the refusal of HMRC to grant EIS 3 certificates to investors. The case concerned the relationship between the appellant and Greenrose Network Marketing Association Ltd (Greenrose), a company limited by guarantee. HMRC argued that, as a result of the relationship between the two, the EIS provisions relating to control and/or qualifying subsidiaries were not met, such that EIS relief was not available to investors. It was decided that the appellant controlled Greenrose by reference to the definition of control in section 450(2) CTA 2010 and that Greenrose was a subsidiary of the appellant applying the definition in the Companies Act 2006. However, where a company has no share capital it cannot be a qualifying subsidiary because it cannot be a '51% Subsidiary'. Hunters therefore failed to meet the requirements of a qualifying subsidiary

Hunters Property PLC v HMRC [2018] UKFTT 0096 (TC)

http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10312/TC06354.pdf

5.6 Investor loyalty payments paid by a platform provider not annual payments

Amounts of loyalty bonuses or trail commission paid by Hargreaves Asset Management Limited (HL) to investors who invested in funds on their platform were annual income in the hands of the recipient, and paid under a legal obligation, but were not pure income profit and therefore not an annual payment for income tax purposes.

HL was a platform service provider that provided a platform for the distribution to investors of investment products offered by different fund providers. HL made payments to investors, described variously as loyalty bonuses or trail commission, on two conditions: that the investor retained a minimum amount invested and has paid an annual management charge (AMC). The AMC was not in fact paid personally by the investor but was deducted from the fund and therefore borne by the investor. The issue boiled down to whether these payments to the investor could be characterised as annual payments under ITTOIA 2005 s.683. If they could, the parties agreed they were qualifying annual payments with basic rate deductible.

Although HL retained discretion over the payments, the FTT found they were nevertheless paid under a legal obligation, and were income in the hands of the recipient. The issue was whether they represented 'pure income profit.' HMRC argued that they did, because although the expense of the AMC was borne by the fund it was not actually paid by the investor. The FTT found however that the true nature of the payment was not a profit for the investor but rather a mechanism for the reduction of his net cost. It therefore followed they were not pure income profit and therefore not annual payments.

Hargreaves Lansdown Asset Management Ltd v HMRC [2018] UKFTT 127 (TC)

http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10347/TC06383.pdf

5.7 EU proposes digital turnover tax

The EC is reported as preparing a proposal to tax cross-border digital companies with a turnover tax to target advertising revenues, fees raised from users and subscribers to digital services and the income made from selling personal data to third parties.

The Financial Times reports that the tax proposal will be unveiled next week and is seen to be an interim measure to tax the large digital companies. The report indicates that both Britain and France have called for a tougher approach to these companies, whose current effective tax rate is on average 9.5% in the EU as against a rate of 23.3% for more traditional companies.

The threshold for the tax is said to be €750m with taxable revenues of €50M in the EU. The levy is likely to be set at a rate of 3% generating €4.8bn rising to a possible €7.8 bn to be at the possible highest level of 5%.

It remains to be seen, if it proceeds, both whether the lower tax jurisdictions will be happy with the proposal and how is will dovetail with the proposed UK proposals for a turnover tax on digital companies, (see 5.3 above), which is similar in concept to this proposed tax but significantly different in detail. Like the UK's turnover tax proposals, it is seen as an interim measure pending OECD consensus on digital taxation.

www.ft.com/content/e38b60ce-27d7-11e8-b27e-cc62a39d57a0

6. VAT

6.1 Construction of a garden wall fails to qualify the sale of land for zero rating

In 2016, the FTT ruled that the sale of a development site by Cavendish Green Limited was a standard rated supply. Although the construction of a garden wall did qualify the development site as under construction (as this was an integral part of the design), there was no effective planning permission in place at the time. Cavendish then appeased to the UT.

Since the FTT ruled the garden wall was over the height restriction for general planning permission to apply, (see our Update of September 2016) Cavendish Green sought to submit new evidence to the UT, suggesting the wall was within the limits at the time of sale. Although the UT agreed this new evidence would likely affect outcome of the decision they chose not to excise their powers to do so; stating the appellant had the opportunity to submit this evidence to the FTT. Therefore the UT relied on the same facts made available to the FTT, ultimately coming to the same conclusion. The appeal was dismissed.

Cavendish Green Ltd v HMRC [2018] UKUT 66

www.bailii.org/uk/cases/UKUT/TCC/2018/66.html

6.2 Infraction proceedings regarding the Terminal Markets Order (TMO)

The TMO is a UK VAT derogation allowing zero-rating on specified commodity markets. Since the UK notified that derogation to the Commission in 1977, the UK has considerably extended the scope of the measure and it is no longer limited to trading in the commodities originally covered by the derogation. Arguably, this leads to a distortion of competition within the EU.

The EC is now challenging the UK's TMO, which in itself is not unexpected but seems odd in light of the UK exiting the EU. It would appear that the Commission is concerned that the zero-rating has been extended to include newer forms of commodity trading such as carbon emissions contracts and energy derivatives.

The challenge however currently has no impact on UK businesses and UK tax law stands unless and until such time as it is changed.

https://ec.europa.eu/taxation_customs/node/1066_en

6.3 VAT consultation on VAT registration threshold

The Government has launched a call for evidence to help establish whether or not the VAT registration threshold is a barrier to growth because small businesses are trying to avoid breaching it.

The OTS had noted that the current design of the VAT registration threshold, which is currently the highest in the EU, may be disincentivising small businesses from growing their business and improving their productivity. The Government has therefore now launched a consultation to explore this. This also takes into account an EU proposal to extend the local threshold to small businesses established in other Member States and to introduce an EU-wide VAT registration threshold and further simplification schemes.

www.gov.uk/government/uploads/system/uploads/attachment_data/file/689228/PU2151_VAT_threshold_web.pdf

6.4 VAT consultation on 'split payments'

Following on from the feedback received in the call for evidence on an alternative method of VAT collection, the Government is now asking for views on potential options for a split payment mechanism.

The expansion of e-commerce has posed a significant challenge to the UK VAT system, as some businesses fail to charge VAT when they are supposed to on sales of goods to UK consumers. This non-compliance not only leads to a loss of revenue but also distorts competition for the majority of honest traders.

In addition to the joint and several liability rules to hold online marketplaces responsible for the unpaid VAT of sellers on their platforms, the Government now also wants to utilise payments industry technology to collect VAT on online sales and transfer it directly to HMRC. This would significantly reduce the challenge of enforcing online seller compliance and offer a simplification for businesses.

Through this consultation, the Government is asking for views on potential options for a split payment mechanism while also further assessing the overall viability of split payment by seeking the views of a wider range of stakeholders. This consultation sets out the Government's emerging thoughts on how it thinks the potential mechanism could work, how it could be enforced, and considers a number of options for how the VAT could be accounted for.

www.gov.uk/government/consultations/alternative-method-of-vat-collection-split-payment

6.5 Different VAT rates for printed and digital newspapers

The FTT has found that digital newspapers should not qualify for the VAT zero rating that printed newspapers benefit from.

Digital editions of newspapers (namely, *The Times* and *The Sunday Times* in this case) are standard rated supplies for UK VAT purposes. The FTT decided that the zero rating provisions applicable to printed newspapers *(VATA 1994, Schedule 8, Item 2, Group 3)* should be construed strictly and does not extend beyond the supply of goods (newspapers) to cover the supply of services (digital newspapers). The taxpayer contended that daily digital versions of the titles are 'newspapers' and the VAT treatment should follow that of printed newspapers on the basis that (a) *The Times* and *The Sunday Times* do not distinguish between a 'print story' and a 'digital story', (b) customers do not consider the tablet edition to be any different from the print edition and (c) the purpose of the zero rating provision was to promote literacy, the dissemination of information and democratic accountability which digital versions did. Although the Tribunal was minded to accept that the digital editions of the titles do indeed serve the same general principles as the newsprint editions, it did not consider that this permits the zero rating to apply. The case decided, furthermore, that the principle of fiscal neutrality could not operate to extend the scope of zero rating from its original application to goods to services.

News Corp UK & Ireland Limited v HMRC TC/2016/00963

http://financeandtax.decisions.tribunals.gov.uk//judgmentfiles/j10349/TC06385.pdf