Tax update

A round-up of recent issues

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1. General

Tax Update will be not be published next week, due to the Bank Holiday.

1.1 CIOT responds to extension of offshore time limits consultation

The CIOT has submitted a response to HMRC's consultation on the extension of offshore time limits. It is highly critical of the proposal. The Low Incomes Tax Reform Group (LITRG) has also raised concerns over the proposals, particularly for low income pensioners and migrants.

The consultation follows the Government's announcement that the assessment time limit for offshore tax non-compliance will be increased to 12 years after the end of the relevant tax year or relevant period, even where behaviour is not careless. For deliberate behaviour, the current time limit of 20 years will remain. This was covered in more detail in our Update of 27 February 2018.

The CIOT believes that no case has been made for such a large and broad increase, and that it risks resulting in unfairness for taxpayers. Its comments include:

- that a more proportionate approach would be that the extended time limits should only be applied to offshore matters involving 'high risk' jurisdictions that attract a Category 3 territory classification; that is, those that have not agreed to share any tax information with HMRC;
- a suggestion of an option to build a process into the proposal that enables HMRC, within the existing time limits, to issue a notice to inform the taxpayer that an existing investigation will, for specific reasons, be subject to extended time limits;
- its concerns at the removal of certainty for taxpayers and businesses over the resolution of their tax affairs; and
- its concerns over record keeping requirements, and the costs of such requirements.

The LITRG stated: '*If HMRC are struggling to deal with the number of cases that involve offshore tax, that should be treated as a resource matter rather than an excuse to reduce taxpayer protection.'*

It also reiterates our concerns that the condoc mentions no general time limit extension for the rights to make claims, such as for overpayment relief.

www.tax.org.uk/media-centre/press-releases/press-release-concern-about-extension-time-limits-tax-investigations

www.tax.org.uk/policy-technical/submissions/extension-offshore-time-limits-ciot-response

www.tax.org.uk/media-centre/press-releases/litrg-press-release-increased-hmrc-powers-assess-offshore-tax-will

2. Private client

2.1 Entrepreneurs' relief consultation

The consultation on allowing Entrepreneurs' Relief (ER) on gains made before dilution has closed. The CIOT and ATT have highlighted their concerns for the proposals and the ATT has asked the Government to reconsider the 5% minimum shareholding requirement.

The CIOT and ATT have both submitted their responses to the consultation on allowing Entrepreneurs' Relief (ER) on gains made before dilution.

As previously reported, the consultation, issued in March 2018, sought views on the proposal that individual shareholders who have qualified for ER would be able to bank ER relief up to the date of a dilution caused by fund raising for the company's business. It was also proposed that, in addition to being able to claim the relief, the shareholder would also be permitted to defer the CGT charge until the actual disposal of the shares, notwithstanding that there has been no disposal at that time.

While it welcomes change, in its submission, the ATT believes the changes do not go far enough and it has also called for the Government to reconsider the 5% minimum shareholding requirement.

Both the ATT and CIOT raise concerns that the requirement to obtain a professional valuation will be too costly and outweigh the benefit of the relief. The CIOT has suggested consideration might be given to exempting any cost of valuation from being taxed as a benefit in kind if the company were to bear the cost. Both have also suggested alternatives to calculating gain, including on a time-apportioned basis.

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

www.att.org.uk/sites/default/files/180511%20Allowing%20Entrepreneurs%27%20relief%20on%20gains%20made%20before%20dilution%20-%20ATT%20response.pdf

www.tax.org.uk/sites/default/files/180511%20Allowing%20Entrepreneurs%27%20Relief%20on%20gains%20before%20dilution%20-%20CIOT%20comments.pdf

2.2 UT findings on 'reasonable excuse'

The UT has dismissed the taxpayer's appeal against an FTT decision that the fact that she honestly believed she had submitted her return was not a reasonable excuse for the late filing of the return. The UT went on to make some comments on the reasonable excuse defence; in particular, its view on whether or not 'ignorance of the law is no excuse' appears less rigid than some recent FTT decisions.

The taxpayer lost in her appeal to the FTT against daily penalties. She then appealed to the UT, limited to one ground only, that the FTT had wrongly rejected the view expressed by some FTTs that a genuine belief is sufficient for there to be a reasonable excuse.

The FTT had found that she did initially have a reasonable excuse as she had unwittingly omitted to complete the final stage of submission, but this excuse came to an end when HMRC informed her that the return was not filed, and she did not remedy this without undue delay. It found as a fact that she honestly believed that she had submitted her tax return, but that honest belief alone does not provide a reasonable excuse.

The UT agreed with the FTT's finding that '*to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account.'* The FTT did not err in principle and its decision fell well within the range of justifiable decisions on the basis of the facts. The UT could not therefore interfere with its decision.

The UT noted that it sees no basis for the argument that the defence of reasonable excuse cannot be available merely because 'ignorance of the law is no excuse.' The UT stated: '*It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long.'* This follows various non-resident CGT penalty cases where the FTT has found that ignorance of the law is no excuse.

Perrin v HMRC [2018] UKUT 0156 (TCC)

https://assets.publishing.service.gov.uk/media/5af9caf440f0b622d18b2e86/Christine_Perrin_v_HMRC.pdf

2.3 Discovery assessment valid and activity not trading

The UT has agreed with the FTT that the taxpayer was not carrying on a trade and could therefore not set the losses arising against his income. It also found that the discovery assessment raised by HMRC was valid.

The taxpayer took out a loan to invest in Bafana Soccer Developments Limited (Bafana). Bafana had been set up as a training scheme for young football talent. He claimed losses of just over £3 million on his 2008/09 tax return, and Bafana went into administration in 2011 without the taxpayer making any significant profits. HMRC become aware of his involvement through its enquiries into other scheme participants and issued a discovery assessment.

The FTT had found that the discovery assessment had been validly made, and that the taxpayer had not been entitled to the losses he had claimed. He appealed on both of these points to the UT, the first on the basis that the discovery assessment was premature.

The UT found that the HMRC officer did believe that there was an insufficiency of tax, and that this belief was more than a mere suspicion. Her belief was also one that a reasonable person could form on the information available to her, and the discovery was therefore valid.

It also found that the FTT was entitled to conclude on the basis of evidence that he was not carrying on a trade in his own right, as he did not have substantial active day-to-day involvement in the activities of Bafana. Even if he was, he was not carrying on that trade on a commercial basis and with a view of profit. In addition, his claim for loss relief was precluded on the basis that it arose in connection with 'relevant tax avoidance arrangements'.

Anderson v HMRC [2018] UKUT 0159 (TCC)

https://assets.publishing.service.gov.uk/media/5afd92f7ed915d30f04c0987/Jerome_Anderson_v_HMRC.pdf

3. PAYE and employment

3.1 EMI share options – State Aid approval given

The European Commission has now approved the UK's EMI scheme under EU State Aid rules.

Readers may recall that we reported last month that HMRC had issued a warning that EMI share options granted from 7 April 2018 may not qualify for tax relief, as the Government had not been able to obtain continued EU approval for State Aid. There was therefore a period of uncertainty for employers as to the tax position on the grant of new EMI share options.

The European Commission has now agreed the extension, which will run at least until the UK ceases to be a Member State.

http://europa.eu/rapid/press-release_MEX-18-3803_en.htm

3.2 Short term business visitors from overseas branches

HMRC has published a consultation on ways to improve the tax and administrative treatment of short term business visitors (STBVs) from overseas branches of UK companies, as announced at the Spring Statement. It is seeking views on whether or not changes to the existing rules are necessary, and on its two proposed options.

Currently, where a STBV comes to work for a UK company from an overseas subsidiary, there is a PAYE relaxation such that, where particular conditions are met, the UK employer does not need to operate PAYE, easing administrative costs and burdens. This relaxation does not extend, however, to STBVs from overseas branches.

HMRC has set out two broad policy options as follows:

1. Extending the PAYE special arrangement UK workday rule. This can currently be used for STBVs, not eligible for the relaxation, with 30 or fewer UK workdays in the year. The Government is considering extending this to 60 days.
2. A new tax exemption for STBVs from overseas branches. The intention is to align the effective tax treatment of STBVs from overseas branches to the existing exemption.

NIC liabilities are not within the scope of the consultation. The closing date for comments is 6 August 2018.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706700/Tax_and_Administrative_Treatment_of_Short_Term_Business_Visitors_from_Overseas_Branches.pdf

3.3 FTT finds for the taxpayer in an IR35 case

The FTT found for the taxpayer, a business analyst who provided his services through a personal services company, in an appeal against the IR35 intermediaries legislation

The taxpayer, Mr Wells, worked on a 10 month project full time for the Department of Work and Pensions (DWP) through his personal services company and HMRC argued his work amounted to that of an employee. HMRC argued that his work was not casual, his daily rate charged was analogous to a salary, his agent contract described him as an 'interim personnel' and he went through a recruitment process rather than a tender process. These factors pointed towards an employee relationship with the DWP.

The judge disagreed with HMRC and allowed the taxpayer's appeal, finding that, in a hypothetical contract between the taxpayer and his personal services company, there would be no employment contract. She stated she was satisfied the 'relationship is consistent with a contract for services not a contract of services' on the following basis:

- the taxpayer's contract could be terminated before the expiry of the term;
- the taxpayer was free to work at any location he chose and was not under direct supervision or direction from DWP;
- there was no requirement to work set hours and the hours worked by the taxpayer varied;
- the taxpayer could have sent a suitable substitute;
- the taxpayer could have worked on other projects but did not due to the level of work involved in the project; and
- the taxpayer bore financial risk for any defects in his work and had insurance in place.

Jensal Software Limited v HMRC [2017] UKFTT 00667 (TC)

www.contractorcalculator.co.uk/docs/TC2017.00667Jensal-Software-Limited.pdf

3.4 Off-payroll working – IR35

HMRC has published its research into off-payroll working in the public sector as well as launching a consultation into off-payroll working in the private sector.

Following the Government's statement that it was losing millions of pounds of tax revenues because it estimated only 10% of taxpayers were correctly applying the off-payroll working rules, it amended the rules for those working in the public sector. The new rules came into force in April 2017 and the published research explores the impacts on the work force structures of the public sector.

Early indications showed the new rules have increased compliance in the public sector and HMRC hopes to make similar changes in the private sector. As announced in the Autumn Budget, HMRC has now therefore launched a consultation to obtain views and comments on tackling the issues in the private sector.

The consultation closes on 10 August 2018.

www.gov.uk//government/consultations/off-payroll-working-in-the-private-sector

www.gov.uk/government/publications/off-payroll-reform-in-the-public-sector?utm_source=9f6f1422-f998-4110-af68-a7538fa0dc0f&utm_medium=email&utm_campaign=govuk-

4. Business tax

4.1 HMRC to appeal FTT decision in Hargreaves Lansdown case

It has been reported that HMRC has confirmed that it will appeal the recent FTT decision, which found that loyalty bonuses were not taxable.

The FTT had found that 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. This case, *Hargreaves Lansdown Asset Management Ltd v HMRC* [2018] UKFTT 127 (TC), was reported in our Update of 21 March 2018.

HMRC is reported as stating that *'the current rules will continue to apply until we are satisfied that the litigation process is complete.'* HMRC's view is that such rebates should be taxed as income and paid net of basic rate tax.

https://economia.icaew.com/en/news/may-2018/hmrc-to-appeal-hargreaves-lansdown-case

http://citywire.co.uk/wealth-manager/news/hmrc-appeals-hargreaves-discount-tax-ruling/a1119877

4.2 FTT allows HMRC information request for a tax avoidance scheme

A group of taxpayers has lost an appeal at the FTT against a HMRC request for documents. The FTT confirmed there are circumstances where HMRC might reasonably request sight of written tax advice for the purpose of checking the tax position.

The taxpayer, Uppercut Films Ltd was the lead case for a number of other appeal cases. It had used a known tax avoidance scheme, called Aikido. HMRC requested five documents, including copies of the letter setting out the tax advice for the use of the scheme and the client engagement letter, so that it could check the tax position.

The FTT agreed to HMRC's request for all five documents. In relation to the engagement letter, the judge noted that she accepted the evidence provided by HMRC. She agreed that it was *'reasonably required for the purpose of checking the company's corporate tax position as Uppercut has claimed a corporate tax deduction for the fees incurred under the terms of the engagement letter.'* She also agreed that a request for a copy of the tax advice given was a legitimate request on the basis that *'it is reasonably required for the purpose of checking the company's tax position because it will assist HMRC to consider the nature and purpose of the expenditure incurred and the payments made.'*

The FTT also examined where the burden of proof lies and confirmed the onus of proof lies with HMRC unless the notice specifies statutory records, in which case the burden shifts to the taxpayer to prove the document cannot be produced.

The taxpayers have no further right of appeal.

Uppercut Films Ltd v HMRC [2018] UKFTT 0232 (TC)

http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10425/TC06465.pdf

4.3 Review of intangible fixed asset (IFA) regime

HMRC's consultation on the IFA regime closed on 11 May 2018. The ICAEW submitted a response highlighting the importance of intellectual property in the success of the UK economy and the need for amendments in the current regime that effectively is two separate regimes.

The consultation was launched to seek views on various points such as the perceived complexity of the current regime and its international competiveness.

The ICAEW welcomed change and stated that while a few minor changes had been made since introduction 'it had not been subject to any detailed review or amendment'. It also highlighted the problems with the pre and post-2002 rules that made for two separate regimes such as the administrative burden and stated that the '"view of enduring nature of goodwill is contradictory to modern accounting'.

https://ion.icaew.com/taxfaculty/b/weblog/posts/review-of-the-corporate-intangible-fixed-assets-regime

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682159/Review_of_the_corporate_Intangible_Fixed_Assets_regime_consultation.pdf

5. VAT

5.1 Is 'free' wine in a meal deal really free?

The FTT found that where wine was provided under a 'Dine In for £10 with Free Wine' offer, output tax was due on the wine element.

Marks and Spencer (M&S) ran a promotional offer where customers could buy three specified food items for £10 and receive a 'free' bottle of wine. It should be noted that food items are zero-rated but wine is standard-rated. Marks and Spencer argued that the £10 the customer paid should be apportioned between the three food items only, because the wine was supplied free of charge.

The FTT agreed with HMRC that, although being marketed as 'free', the terms and conditions of the promotions made clear that the customer paid for the food items and the wine and therefore output tax was due on the wine element. The taxpayer's bespoke retail scheme agreement could not change this interpretation.

The figures supplied to the FTT by M&S show that the VAT at stake in the appeal averages approximately 70p per £10.

Marks & Spencer plc v HMRC [2018] UKFTT 238 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2018/TC06471.html

6. And finally

6.1 Kicking the can't down the road

Readers will have noticed that EMIs are back on the menu following a period of uncertainty. Business, then, as usual.

The mischievous in us is disappointed because a nice little controversy was brewing. HMRC had issued a statement to the effect that tax relief was effectively no longer available and *EMI share options may necessarily fall to be treated as non-tax advantaged employment-related securities options.* What we shall now perhaps never know is how bold a statement that was. After the initial shock of dismayed advisers and clients had passed, commentators started slowly to put their heads above the parapet.

The EMI legislation had not been repealed and was still very much in force. The question was therefore how the State Aid rules worked to claw back tax relief already given. Or did it? Was the employee caught at all? Not least, the State Aid rules appeared to include some reasonable de minimis rules that could have meant that small schemes might not have been caught at all, such that some advisers were suggesting that the hardier employer could just go ahead. Who overreacted? Who was right?

Well; the EC has just found that EMI was indeed anyway within the State Aid rules and in a sense everyone was wrong because the problem was only ever theoretical. It's all gone away with no further comment necessary, except perhaps to ask who knows where the State Aid rules, as far as they are applicable to the UK, will go anyway in the next couple of years?

http://europa.eu/rapid/midday-express.htm

Glossary

Organisations		***Courts***	***Taxes etc***	
CIOT – Chartered Institute of Taxation	ICAEW - The Institute of Chartered Accountants in England and Wales	CA – Court of Appeal	ATED – Annual Tax on Enveloped Dwellings	NIC – National Insurance Contribution
EU – European Union	ICAS - The Institute of Chartered Accountants of Scotland	CJEU - Court of Justice of the European Union	CGT – Capital Gains Tax	PAYE – Pay As You Earn
EC – European Commission	OECD - Organisation for Economic Co-operation and Development	FTT – First-tier Tribunal	CT – Corporation Tax	R&D – Research & Development
HMRC – HM Revenue & Customs	OTS – Office of Tax Simplification	HC – High Court	IHT – Inheritance Tax	SDLT – Stamp Duty Land Tax
HMT – HM Treasury		SC – Supreme Court	IT – Income Tax	VAT – Value Added Tax
		UT – Upper Tribunal		