Tax Update

Smith & Williamson

A round-up of recent issues

1 May 2018

1. General

Tax Update will be not be published next week, due to the Bank Holiday.

1.1 CIOT proposes improvements to scrutiny of tax legislation

The CIOT has issued a press release making a number of proposals for improving Parliamentary scrutiny of the Finance Bill and other tax legislation.

The CIOT summarises its proposals as follows:

- the Finance Bill Public Bill Committee taking oral evidence from tax experts and others;
- more effective liaison between select committees and the Finance Bill Committee;
- increasing the resources available to Parliament for scrutinising tax matters;
- using technology to make it easier for those outside Parliament to comment on Bills; such as an online facility to input comments by clause numbers, so that MPs can see who says what against each clause; and
- asking the OTS to publish simplification assessments of new tax proposals.

The CIOT also calls for a debate on whether or not the House of Lords should play a greater role in scrutinising tax legislation as it goes through Parliament, without detracting from the powers of the House of Commons over tax matters.

As tax legislation is generally of a highly technical nature, improved scrutiny before a Finance Bill becomes law resulting in higher quality legislation would always be welcome.

www.tax.org.uk/media-centre/press-releases/press-release-institute-proposes-improvements-scrutiny-tax-legislation

1.2 Tax avoidance: withdrawn Scheme Reference Numbers

HMRC has published an updated list of scheme reference numbers (SRNs) where the duties to report for promotors and users have ceased.

Promoters and clients who have received SRNs no longer have a duty to notify the SRN to HMRC on their tax returns or on form AAG4, from a specified date, where HMRC has issued the relevant notice.

Two further SRNs (35804418 and 63428312) have been added to the list with effect from 17 April 2014.

www.gov.uk/government/publications/tax-avoidance-withdrawn-scheme-reference-numbers

2. Private client

2.1 Court finds deceased had a domicile of choice in England

The HC has found that an individual remained domiciled in England at the date of his death. He had spent 14 years living in England but had flown to India, his domicile of origin, where he lived for a month before his death.

The case considered a preliminary issue in a claim by a dependant of the deceased, being whether or not the deceased was domiciled in England and Wales at the date of his death.

His domicile of origin was India, where he was born in 1956. He was married and had two sons in India, where he lived and worked until around 2002/2003, when he bought a property in England. He also registered for VAT with HMRC, registered with a local GP practice, opened a UK bank account and both his sons enrolled at university in Kingston. He started a property development business in the UK, and amassed a significant property portfolio, including residential property and two restaurants.

A draft will stated "*I declare that I am domiciled in India and I do not consider England to be my permanent home*". This statement was, however, never confirmed by the deceased and the will was not finalised. There was also a suggestion that the deceased was looking to buy a permanent home in England around the time of his death in 2015. Various pieces of correspondence reviewed by the HC, including text messages, led it to understand that the trip to India was merely for some rest and recuperation from the deceased's cancer treatment, and that he intended to return to the UK to complete the treatment.

The HC found that that by the date of his death the deceased's business life had been firmly based in England for 14 years, and that his emotional centre of gravity and social life had moved from India to England.

The Court found that the deceased had acquired a domicile of choice in England during his residence there, as it was his intention to live in England indefinitely. In addition, he did not abandon this domicile of choice by travelling to India, where he lived until his death just over a month later. In particular, the judge, Master Clark, stated that *"indeed, even if the deceased had travelled to India intending to die there, this would not, in my judgment, be an abandonment of his domicile of choice…. Where, for practical purposes, a person has no life left to live, then a decision to go to his/her country of origin to die, is not a decision to spend any significant part of one's life ("the end of one's days") in that country - it is a decision that the specific event of his/her death should be in that country*".

Proles v Kohli [2018] EWHC 767 (Ch)

www.bailii.org/ew/cases/EWHC/Ch/2018/767.html

2.2 Residence: was there a distinct break?

The FTT found that a taxpayer remained UK resident despite moving abroad and staying under the 90 day limit described in IR20 (withdrawn in 2009), as he had not made a distinct break from the UK.

The taxpayer left the UK for Monaco on 5 April 2005 and returned to the UK after April 2010, spending fewer than 90 days in the UK in each interim year. He therefore contended he was non-UK resident for the tax years 2005/06 to 2009/10. In 2005/06, he paid himself a dividend of £24.59m on which UK income tax of £5.5m would be due if he was found to be UK resident.

This decision to leave the UK was influenced by the tax saving. The taxpayer noted his additional reasons for going non-resident were that he would find himself drawn back into the property business if he did not make a total break, and that he wanted a totally different lifestyle from the one that, for many years, he had found to be drudgery. He planned to follow the guidance in IR20 and keep his day count of return visits to the UK well below the suggested average figure of 90 days a year.

He and his wife acquired a substantial apartment in Monaco. He retained various connections with the UK including his UK property that he usually stayed in during visits to the UK. He made 22 visits to the UK in the year 2005/2006 for various purposes, including children's birthdays, but kept well within the day count.

The FTT reiterated that, under case law, where a person has been resident in the UK, he will cease to have a settled or usual abode in the UK only if he makes a distinct break in the pattern of his life in the UK.

The FTT found that while the taxpayer did clearly have an established life and a home in Monaco during the relevant period and he spent more time there than in the UK, in all the circumstances of his life his existing ties with the UK were not so substantially loosened that he made a distinct break with the UK. He was therefore found to have remained UK tax resident.

This case pre-dates the statutory residence test now in force, but may still be relevant to some cases yet to be determined.

Glyn v HMRC [2018] UKFTT 0219 (TC)

http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10412/TC06452.pdf

2.3 Penalties for late filing of NRCGT return cancelled

The FTT has allowed a taxpayer's appeal against penalties for the late filing of a non-resident CGT (NRCGT) return. It found that the taxpayer had a reasonable excuse as he had told his UK tax advisers of the disposal and could have reasonably expected them to inform him of the need to file a return.

The taxpayer was resident in Australia, and in August 2015 sold a UK residential property. No CGT liability arose as it was covered by a mixture of private residence relief and lettings relief. The NRCGT return was filed 418 days late.

HMRC issued penalties that the taxpayer appealed. The taxpayer was not aware of the NRCGT filing requirements, but he did inform his tax advisers of the sale, once shortly before the disposal and once shortly after. His advisers did not tell him about the NRCGT filing requirement until a much later date, when the return was subsequently filed.

The FTT agreed with recent FTT decisions that ignorance of a NRCGT filing obligation is not a reasonable excuse. It went on to find however that by informing his regular UK tax advisers of the disposal of the property at the time of disposal, he could reasonably have expected them to advise him of the need to submit a NRCGT return. The FTT found therefore that he had a reasonable excuse for the late filing and cancelled the penalties.

Hart v HMRC [2018] UKFTT 0207 (TC)

http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10428/TC06446.pdf

2.4 Invalid late filing penalties

The FTT found that late filing penalties issued by HMRC were invalid, as the notice to file a return was not issued for a correct purpose.

The taxpayer was in the PAYE system during 2014/15 in respect of five different employments. There was an underpayment of tax during the year of £321 and HMRC issued a tax calculation and asked for payment of the tax, as HMRC said it was not capable of being coded out.

As he did not make the payment, HMRC issued a notice to file a return. The return was subsequently filed late and penalties were issued.

The FTT found that HMRC did not serve a valid notice to file a return on the taxpayer, and as such there could be no penalties. This was on the basis that a notice must be "f*or the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment*". This amount had already been established.

This follows the recent decision in *Goldsmith v HMRC* [2018] UKFTT 5 (TC).

Lennon v HMRC [2018] UKFTT 0220 (TC)

http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10413/TC06453.pdf

3. Trusts, estates and IHT

3.1 OTS Inheritance tax review call for evidence

Following the Chancellor's letter to the OTS of 19 January 2018 confirming that he was most interested in hearing its proposals for simplification, the OTS has now launched a formal consultation to run to 8 June 2018.

The aspect that the OTS mentions it is interested in is the ease or complexity of the legislative rules and the processes that have to be followed.

It is looking, in particular, for the views of all those with an interest, including individuals with personal experience of having to go through the process of establishing, when a relative has died or as the executor of a will, if there is a liability for inheritance tax. It stresses that it wants to hear from those with such first-hand experience as well as from advisers, to help ensure its analysis is as fully informed as possible, and to that end has launched an on-line survey. This is the first such survey that the OTS has issued to the public generally.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/677301/CHX_letter_to_OTS_on_IHT_review.pdf

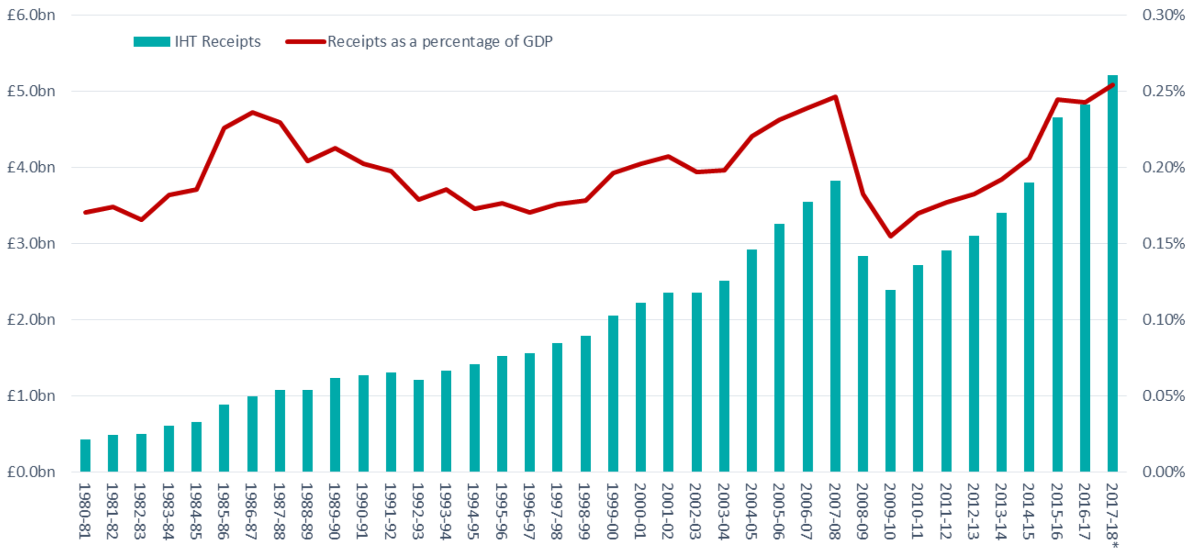
www.gov.uk/government/consultations/inheritance-tax-review-call-for-evidence-and-survey?utm_source=8cf4e735-bb36-49ea-b11e-46284635bab4&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

3.2 Inheritance tax receipts rise sharply

Government statistics indicate increasing levels of IHT are being paid.

The latest Government statistics for tax and NIC receipts show the both the record levels of inheritance tax being paid each year and the increasing proportion of GDP. This is illustrated by the chart reproduced below from the latest HMRC summary.

Inheritance Tax receipts, 1980-2018



https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701149/Mar18_Receipts_NS_Bulletin_Final.pdf

4. Business tax

4.1 Application of separate and distinct principle under Double Tax Agreement (DTA)

Two US corporations each had substantial permanent establishments (PE's) in the UK. They sought to take corporation tax deductions for intangible fixed assets on the basis that the USA/UK DTA required the PEs to be treated as separate and distinct from their companies. HMRC however took the view that the trade actually being carried on in the UK was carried on in partnership and looked at from the partnership point of view there had been no acquisition of intangibles but only a change in the profit sharing ratio. The FTT agreed with HMRC that the claim was invalid.

Bloomberg Inc and BLP Acquisition Holding LLC each had a PE in the UK. They made elections under the intangibles regime in relation to the writing down of capital intangible fixed assets (IFA) costs. The elections arose in relation to a transaction through which the taxpayers increased their holding of units in a specific partnership (Bloomberg LP). In a nutshell, it was possible to construct notional accounts for the PEs as separate entities as envisaged by the DTA showing these amounts. If viewed in isolation, the elections would be applicable. In reality, however, no IFAs were acquired at partnership level since all that was happening was a change in partnership profit sharing ratio.

The question was therefore in each instance whether it was appropriate to keep to the fiction of a separate body as required by the treaty or to look at the position from the point of view of the partnership, as HMRC argued. The FTT agreed with HMRC that although the PE's were not a partnership, the relevance of the partnership was that it informed the calculation mechanism by which the profits of the PE was calculated. There was nothing in the "separate and distinct" principle of the DTA that required the transaction to be regarded as an acquisition of assets by the PE.

Bloomberg Inc (UK Permanent Establishment) & Anor v HMRC [2018] UKFTT 205 (TC)

http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10409/TC06449.pdf

5. VAT

5.1 Loan administration services are taxable as 'debt collection'

Following a number of referrals to the CJEU on what are exempt payment services and what constitutes taxable debt collection, the FTT has now examined in detail how case law should be applied to loan administration services.

The taxpayer, Target, had argued that it provided an outsourced function of financial services to a bank and should therefore benefit from the VAT exemption for "transactions…concerning…payments, transfers, debts" and/or "transfer(s) or… dealing(s) with money". The taxpayer had submitted that, although its service included an element of debt collection, it would be inaccurate and distortive to qualify the whole service as a taxable debt collection service.

HMRC had argued that the service was indeed one of debt collection, or failing that, one of taxable credit management.

The FTT dismissed the taxpayer's appeal after analysing European and domestic case law. It ruled that while the service did fall under "transactions…concerning …payments, transfers, debts" and/or "transfer(s) or… dealing(s) with money", it also fell under the debt collection carve out and was therefore taxable. The FTT did not share the taxpayer's view, that this interpretation would have adverse repercussions by making it almost impossible to disentangle debt collection from other activities.

Target Group Limited v HMRC [2018] UKFTT 0226 (TC)

http://financeandtax.decisions.tribunals.gov.uk//judgmentfiles/j10419/TC06459.pdf

5.2 Change of use for capital goods

The Advocate General (AG) of the CJEU confirms in this Polish case that a change of use of capital goods triggers input tax adjustments.

The municipality of Ryjewo in Poland had a local community centre built that was initially used for governmental, and therefore non-business, purposes. It did not therefore reclaim input tax on the construction costs. Four years after completion, however, the municipality started using the community centre for taxable rental supplies and sought to adjust its input tax.

The Polish tax authorities disagreed as, in their view, the subsequent use of the capital goods for an economic activity did not mean that the municipality had acted as a taxable person at the time of acquisition.

The AG looked in detail at the principle of fiscal neutrality and previous case law. She recommended the Court rule as follows: a municipality has the right to deduct part of the input tax on its investment expenditure if it makes taxable supplies. This is also the case where the capital goods acquired were initially used for non-taxable purposes, but where the use has changed to taxable purposes within the period provided for in the Principal VAT Directive.

It is irrelevant whether or not an intention to use those goods for future taxable transactions was expressed at the time of acquisition.

It is further irrelevant that the capital goods are used for both taxable and non-taxable transactions or that it is not possible to allocate the goods to any of these categories, as this would only affect the apportionment but not the right to recover input tax as such.

Ryjewo AG opinion Case C-140/17

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130de92b5680703f241d4a687917d27c2d514.e34KaxiLc3eQc40LaxqMbN4Pb3aOe0?text=&docid=201270&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=796169

6. And finally

6.1 ATT backs tax evaders

We note with interest that so august and respectable a body as the ATT is this week celebrating tax evaders and convicts, calling for their wider recognition. Even the name of the law breaking organisation involved is suitably in-your-face: 'Women's Tax Resistance League'.

The clue may be in 'Women's'. Yes; we are talking about the events of a hundred years ago, and the ultimately successful campaign of civil disobedience, in part through not paying taxes, to obtain votes for women.

The past, as LP Hartley said, is a foreign country; they do things differently there. According to the ATT (and we've no reason to disbelieve them), husbands could and did go to prison for offences committed by their wives. If that were not enough, they report that married women were classed under tax law in the same category as 'infants, lunatics and the insane'. It is also chilling, if true, that the Government had the power of life imprisonment for non-payment of taxes. We too admire the undaunted campaigners.

Our thanks go to ATT for its timely press release for so worthy a cause, and for such an evocative glimpse of tax history.

https://www.att.org.uk/technical/news/att-press-release-hope-greater-recognition-tax-rights-campaigners

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		

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