11 December 2018

1. General

1.1 House of Lords report on HMRC powers

The House of Lords has published a report on HMRC powers. The report concludes that the balance between clamping down to tackle tax avoidance and evasion and treating taxpayers fairly has tipped too far in favour of HMRC.


The report recommends a review of HMRC powers, and an independent review to consider new oversight arrangements for HMRC.

Its recommendations include that:

- the clauses of the Finance Bill that extend HMRC time limits to assess offshore matters to 12 years should be withdrawn;
• the proposal to remove oversight by the tax tribunal of HMRC’s request for information from third parties should be withdrawn, and a consultation should be opened on how better to target new legislation;
• HMRC should urgently review all loan charge cases where the only remaining consideration is the individual’s ability to pay, and establish a dedicated helpline for those affected by the loan charge;
• HMRC should make a clear and publicly assessable statement as soon as it begins investigating a potential tax avoidance scheme, and should notify a taxpayer as soon as possible if the scheme was declared in a tax return;
• all HMRC determinations and notices should be appealable to the tax tribunal;
• General Anti-Abuse Rule (GAAR) and follower notice penalties should be abolished;
• clearer distinctions are needed in the Government’s approach towards tax avoidance; for example, between deliberate and contrived tax avoidance by sophisticated, high-income individuals, and uninformed or naive decisions by unrepresented taxpayers;
• an independent review should be undertaken, commissioned by the Treasury, to consider the establishment of an independent body to scrutinise the operations of HMRC.


2. Private client

2.1 HMRC allowed to request personal bank account statements

The FTT has found that an HMRC information request for personal bank statements was reasonably required for the purpose of checking tax returns.

The taxpayers, a married couple, were directors and shareholders of a company from which they received employment and dividend income. This income was declared on their tax returns. HMRC enquired into their 2015/16 tax returns and various certificates of interest were provided. Information notices were issued to the taxpayers requesting all personal bank statements for the relevant tax year.

HMRC claimed that the information requested was part of the taxpayers’ statutory records, so there was no right of appeal against the information notices. In any event, HMRC maintained that they were reasonably required for the purposes of checking the taxpayers’ tax positions. The taxpayers disagreed and claimed that personal bank statements were not required to be provided as their returns were correct, other than for trivial amounts of omitted interest, and only included employment and dividend income.

The FTT was unable to say whether or not the documents and information requested amounted to statutory records without first finding if the taxpayers’ tax returns correctly identified all sources of income. It went on to find, however, that there was evidence of a disparity between declared income and personal expenditure. While there may have been a perfectly proper explanation, the request for personal bank statements was reasonably required for the purpose of checking the returns.

Holmes & Knight v HMRC [2018] UKFTT 0678 (TC)

3. Business tax

3.1 EU Digital Services Tax reduced in scope

A joint proposal put forward by France and Germany at the meeting of the Economic and Financial Affairs Council (ECOFIN) has significantly reduced the scope of the EU Digital Services Tax (DST).

The joint declaration calls for the 3% tax to be limited to revenues from advertising sales, dropping parts of the original proposal which also included intermediary activities and selling user data. France and Germany want to focus their efforts on the OECD international agreement for taxing the digital economy.
If no international agreement is reached by 2020, the revised EU DST would come into force in 2021, including a sunset clause requiring the tax to expire by 2025. Sweden, Finland, Ireland, Denmark continue to oppose any interim EU tax before agreement at OECD level.


3.2 A review of the UK’s Double Taxation Treaties

The CIOT has responded to the HMRC Tax Treaty team’s request to review the UK’s Double Taxation Agreements (DTAs). In their letter, the CIOT answered specific questions around whether existing DTAs and aspects of recently signed DTAs could be improved and whether existing DTAs are uncompetitive.

The main points that were put forward by the CIOT were that:

- certain DTAs should be renegotiated after Brexit to match tax rates under the EU Parent/Subsidiary and Royalties/Interest Directive;
- the Permanent Establishment requirements should be streamlined across the DTA network;
- DTAs should be amended to match any changes implemented by the OECD Multilateral Instrument.

The CIOT also argued that implementing the Diverted Profits Tax and Digital Services Tax before an international agreement has been made is more harmful to the competitiveness of the UK than negotiating a less competitive treaty.

www.tax.org.uk/sites/default/files/181130%20Review%20of%20Double%20Taxation%20Treaties%202018%20-%20CIOT%20comments%20FINAL.pdf

3.3 Tax treaty with Poland updated for Multilateral Instrument

HMRC has published the ‘synthesised’ text of the UK’s Double Taxation Agreement (DTA) with Poland, as modified by the OECD multilateral instrument (MLI). The MLI came into force for the UK on 1 October 2018 and for Poland on 1 July 2018.

The MLI permits jurisdictions to integrate elements of the OECD/G20 BEPS project into their existing DTAs without having to renegotiate the DTA. The MLI amends the 2006 Poland/UK DTA with key dates for taxpayers being 1 January 2019 for taxes withheld at source; 1 April 2019 for corporation tax; 6 April 2019 for IT and CGT; and 1 April 2019 for all other taxes levied by Poland for taxable periods beginning on or after that date.

www.gov.uk/government/publications/poland-tax-treaties

3.4 UT allows exchange losses arising on change in functional currency

Following a company reorganisation, three UK tax resident companies changed their functional currency from sterling to US dollars, resulting in foreign exchange losses of £445,868,096, £138,188,096 and £90,652,234. HMRC challenged the nature and accounting of these losses.

The taxpayer companies claimed that the losses arose as a result of the fall in the value of sterling against the US dollar. HMRC did not accept that the losses arose for corporation tax purposes, and issued closure notices that disallowed the losses. The companies appealed to the FTT against the closure notices and the appeals were allowed on the basis that the accounts were drawn up in accordance with Generally Accepted Accounting Practice (GAAP), the claimed exchange differences gave rise to ‘exchange losses’ within the meaning of the legislation and those exchange differences did ‘fairly represent’ losses within the meaning of the legislation. The FTT found in favour of the taxpayer and HMRC appealed to the UT.

The UT dismissed the appeal on the basis that the evidence the FTT used to support GAAP compliance was correct, that the relevant regulations required there only to be a ‘gain or loss arising at different times’ without the need for an economic loss and finally as there was no tax avoidance motive, no material asymmetry and no absurd result, the exchange losses did fairly represent losses as required by the legislation.
4. Tax publications and webinars

4.1 Webinars

The following client webinars are coming up over the next few months.

- 9 January 2019: Making Tax Digital
- 6 February 2019: Property (TBC)

https://smithandwilliamson.com/en/events#?page=1

5. And finally

5.1 Overpowering

For those of us who have been nervous about the recent increases in HMRC’s powers and over the shift of rights away from taxpayers, the House of Lords Report mentioned at 1.1 above comes as a breath of fresh air.

If you read nothing else tax-related this week, we invite you to read the summary of conclusions and recommendations of the House of Lords Committee report.

The committee is no supporter of tax evasion or tax avoidance, as they are at pains to make clear. But the document is rigorous in pointing out the resultant development of injustices in our system. They are too many to number here, but we agree with all their points. Creating a system of oversight of these new powers, as they recommend, cannot come soon enough.

This also raises the question as to how this has been allowed to happen. The report mentions that ‘Witnesses noted that it was difficult for parliamentarians and others to challenge the proportionality of new powers without being perceived as apologists for tax avoiders’.

Understandable, but that too has got to stop; the House of Lords has elegantly shown just how it can.


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**Glossary**

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