

## A round-up of recent issues

### 13 February 2018

1.	General	1
1.1	Requirement to correct factsheet published	1
1.2	Issue of PPNs found to be lawful by the HC	2
1.3	New European Parliament special committee	2
1.4	EC launches new website on Brexit	3
2.	Private client	3
2.1	New guidance on enveloped UK dwellings and related finance	3
3.	PAYE and employment	3
3.1	Further extra-statutory concessions to be put on statutory basis	3
3.2	Simplifying the process of operating a PSA	3
3.3	'Good Work' - a response to the Taylor Review of Modern Working Practices	4
3.4	Spotlight 32 updated	4
4.	Business tax	5
4.1	CIOT and ICAEW respond to HMT Position Paper on CT and the Digital Economy	5
5.	VAT	5
5.1	Input tax recovery and fraudulent transactions	5
5.2	The Tour Operator Margin Scheme (TOMS) must also apply to business customers	6
5.3	Input VAT on services to a company outside the EU or a UK Fixed Establishment?	6
6.	And finally	6

#### 1. General

##### 1.1 Requirement to correct factsheet published

*HMRC has published a factsheet on the new requirement to correct (RTC) legislation.*

Finance (No.2 Act) 2017 introduced the RTC legislation. It requires those with undeclared UK tax liabilities that involve offshore matters or transfers, relating to IT, CGT or IHT for the relevant periods, to disclose those to HMRC on or before 30 September 2018.

The factsheet gives a brief overview of the rules, refers to the new failure to correct penalties that will apply from 1 October 2018 and contains a reminder that HMRC is beginning to receive a significant amount of information about foreign income and assets under the Common Reporting Standard (CRS) exchange of information. It also includes a link to previously published detailed technical guidance on the RTC.

[www.tax.org.uk/sites/default/files/RTC%20Information.pdf](http://www.tax.org.uk/sites/default/files/RTC%20Information.pdf)

## 1.2 Issue of PPNs found to be lawful by the HC

*The HC found that the taxpayers had failed to establish either ground on which they had permission to apply for judicial review, challenging Partner Payment Notices (PPNs) issued to them.*

The taxpayers were members of various LLPs that invested in commercial property with a view to taking advantage of business premises renovation allowances. The taxpayers claimed loss relief on their personal returns. HMRC opened enquiries into the partnership returns and then issued PPNs to the taxpayers, requiring them to pay a given amount calculated as a percentage based on the losses claimed.

The taxpayers challenged the PPNs by judicial review, although only two grounds were considered, as the remaining grounds were stayed behind the *Rowe & Ors, R (On the Application of) v HMRC* [2017] EWCA Civ 2105 appeal:

- Ground 1: the partnerships were commercial in nature and did not constitute tax avoidance - the HC noted that the fact that the taxpayers derived (or hoped to derive) commercial benefit from the partnerships is not sufficient to defeat the PPN legislation. Specifically, a PPN can be issued that notifies an amount which relates to part only of the tax advantage obtained. It went on to find that there was no reason, such as mistake of precedent fact, abuse of powers, unreasonableness or irrationality, to impugn HMRC's exercise of those powers in this case.
- Ground 3: HMRC's decision to issue the PPNs was ultra vires because the statutory conditions had not been met - the HC found that the statutory conditions were met. In particular, the arrangements were expected to generate losses that the taxpayer could use to reduce their tax liabilities and the obtaining of that tax advantage was at least one of the main benefits which might be expected to arise from those arrangements. They were therefore notifiable under DOTAS under Hallmark 6 as a loss scheme.

The HC found that the issue of PPNs was lawful.

*Carlton v HMRC* [2018] EWHC 130 (Admin)

[www.bailii.org/ew/cases/EWHC/Admin/2018/130.html](http://www.bailii.org/ew/cases/EWHC/Admin/2018/130.html)

## 1.3 New European Parliament special committee

*The European Parliament has set up a special committee on financial crimes, tax evasion and tax avoidance, called TAXE 3.*

It will spend 12 months focusing on various matters, including:

- building on and completing the work carried out by the PANA inquiry committee;
- evaluating the impact of VAT fraud and administrative cooperation rules in the EU;
- contributing to the evaluation of tax evasion and tax avoidance related to the digital economy;
- assessing national schemes providing tax privileges for new residents or foreign income, such as citizenships programs; and
- monitoring improvements and existing gaps in the exchange of information with third countries in respect of tax evasion and tax avoidance, with particular attention to be given to the Crown Dependencies and Overseas Territories.

[www.sven-giegold.de/wp-content/uploads/2018/02/adopted-tax3-mandate-2018-02-08.pdf](http://www.sven-giegold.de/wp-content/uploads/2018/02/adopted-tax3-mandate-2018-02-08.pdf)

## 1.4 EC launches new website on Brexit

*The EC has launched a new website providing information about the UK's withdrawal from the EU in the area of customs and taxation.*

It reports that, unless a ratified withdrawal agreement establishes otherwise, the UK will become a 'third country' towards the rest of the EU countries from 30 March 2019.

[https://ec.europa.eu/taxation\\_customs/uk\\_withdrawal\\_en](https://ec.europa.eu/taxation_customs/uk_withdrawal_en)

## 2. Private client

### 2.1 New guidance on enveloped UK dwellings and related finance

*HMRC has published new guidance on the excluded property rules applying to enveloped UK dwellings and related finance.*

Further to the raft of new and updated guidance covered in last week's Update relating to non-domiciliaries and offshore trusts, HMRC has also published this new guidance.

These rules were introduced in Finance (No.2) Act 2017 and apply from April 2017. They bring overseas property representing UK residential property into the scope of IHT. This includes relevant loans to finance the acquisition, maintenance or enhancement of UK residential property interests.

[www.gov.uk/guidance/enveloped-uk-dwellings-and-related-finance](http://www.gov.uk/guidance/enveloped-uk-dwellings-and-related-finance)

## 3. PAYE and employment

### 3.1 Further extra-statutory concessions to be put on statutory basis

*HMRC has published a response to its consultation on draft legislation to put four further extra-statutory concessions (ESCs) on a statutory basis. The ESCs relate to the treatment of directors' fees received by partnerships and companies, other incidental income for professional practitioners, payments for loss of earnings when undertaking public duties and payments from Local Medical Committees.*

HMRC has continued reviewing its ESCs and, where they stray beyond HMRC's administrative discretion, they are being withdrawn or put on a legislative basis.

HMRC states that responses to the consultation were positive. Respondents generally approved of the draft legislation and agreed that the effect of the extra-statutory concessions had been successfully replicated. Minor changes were made to the draft legislation and the order is expected to come into effect on 6 April 2018. Guidance will also be issued.

[www.gov.uk/government/consultations/extra-statutory-concessions-escs-technical-consultation-on-draft-legislation](http://www.gov.uk/government/consultations/extra-statutory-concessions-escs-technical-consultation-on-draft-legislation)

### 3.2 Simplifying the process of operating a PSA

*The Government has announced another consultation, with accompanying draft legislation, to simplify the process of operating a PAYE settlement agreement (PSA).*

A PSA allows an employer to settle the employment tax and NIC on benefits provided to employees where the benefits are minor, irregular or it would be impractical to operate PAYE in relation to the individual employees.

The draft legislation is expected to apply from 6 April 2018. The key simplifications are that after the new legislation applies:

- a single application to operate a PSA will apply indefinitely. It will no longer be necessary to make a new application to operate a PSA for each individual tax year; and

- it will not be necessary to specify in advance and receive agreement from HMRC what particular benefits will be covered under the PSA. Instead, after the end of each tax year, the eligible benefits that have actually been provided must be disclosed as part of the calculation submitted to HMRC.

Both these simplifications are welcome, reducing the amount of administration required on a yearly basis. Employers should note that having a PSA in place for the 2017/18 UK tax year will not under current proposals be automatically renewed. It will still be necessary for one final application to be made after 6 April 2018, but that application should be able to apply indefinitely.

While not mentioned in the consultation, the draft legislation does include a suggested amendment that would require employers with employees who will be subject to the Scottish Rate of Income Tax (SRIT) to factor this in to their PSA calculations. This will be an additional piece of information to keep track of where benefits are provided to individuals or populations including individuals subject to the SRIT.

[www.gov.uk/government/consultations/draft-legislation-simplification-of-payee-settlement-agreements](http://www.gov.uk/government/consultations/draft-legislation-simplification-of-payee-settlement-agreements)

### 3.3 'Good Work' - a response to the Taylor Review of Modern Working Practices

*The Government has released its response to the Taylor Review and has announced a range of measures to ensure there is fairness and security across the workforce in the UK. The measures announced aim to align the rights of employees and workers to ensure that workers pay the right amount of tax.*

All but one of the 53 Taylor Review recommendations have been accepted. The proposal to align NICs between the employed and self-employed was rejected and there are no plans to revisit this.

The main tax points of interest to note in the Government's proposals are:

- enforcing a worker's right to holiday and sick pay, which will result in an added cost of employer's NICs on these payments;
- providing assistance to the self-employed in respect of planning for the future, including retirement planning and paying the right amount of tax; and
- legislating for employment status to make it clearer for employers to know what their responsibilities are.

The Government has announced a number of consultations as a result of this, and one covers employment status. For tax, the consultation considers the tests that define the boundary between those currently taxed as employees and those who are taxed on a self-employed basis. It notes that employment status is at the core of both employment law and the tax system, but that clarity is needed by individuals and businesses. Interested parties are invited to respond by 1 June 2018.

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/679767/180206\\_BEIS\\_Good\\_Work\\_Report\\_Accessible\\_A4\\_.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/679767/180206_BEIS_Good_Work_Report_Accessible_A4_.pdf)

[www.gov.uk/government/consultations/employment-status](http://www.gov.uk/government/consultations/employment-status)

### 3.4 Spotlight 32 updated

*HMRC has updated Spotlight 32 regarding the managed service company legislation. This follows the UT's agreement with the FTT decision in the case of Christianuyi Ltd v HMRC [2018] UKUT 0010 (TCC).*

The Spotlight also highlights two additional areas that the UT considered and states:

*'Firstly, the definition of a MSC provider as 'a person who carries on a business of promoting or facilitating the use of companies to provide the services of individuals'. This decision confirms HMRC's view that if the answer to both of the following questions is yes, a person is a MSC provider:*

- *does the person promote or facilitate the use of a company?*
- *does that company provide the services of individual?*

Secondly, the UT decided that 'influences' or 'control' has a wider meaning than that expressed in the FTT decision. In this case, Costelloe Business Services Limited influenced how payments were made to workers through the use of a standard product, by causing the workers to receive wages and dividends instead of just wages.

When workers buy into such products, allowing the MSC provider to determine the amount to be paid as a dividend and to carry out the administrative steps to affect this, it amounts to 'control'.

[www.gov.uk/government/publications/spotlight-32-managed-service-company-legislation-tax-avoidance-scheme-involving-unpaid-payee-and-class-1-national-insurance-contributions/spotlight-32-managed-service-company-legislation-tax-avoidance-scheme-involving-unpaid-payee-and-class-1-national-insurance-contributions](http://www.gov.uk/government/publications/spotlight-32-managed-service-company-legislation-tax-avoidance-scheme-involving-unpaid-payee-and-class-1-national-insurance-contributions/spotlight-32-managed-service-company-legislation-tax-avoidance-scheme-involving-unpaid-payee-and-class-1-national-insurance-contributions)

## 4. Business tax

### 4.1 CIOT and ICAEW respond to HMT Position Paper on CT and the Digital Economy

*The CIOT finds no easy answers to the challenges posed by digital businesses to the effectiveness of the international corporate tax rules but stresses the need to arrive at a multilateral solution.*

HMT published a Position Paper on 'CT and the digital economy' in November 2017 setting out the Government's belief in the principle that a multinational group's profits should be taxed in the countries in which it generates value. It accepts that the international tax framework must be responsive to the changing nature of economies in the digital age and to accommodate businesses creating value in new ways. It includes the possibility of taking interim action while pressing for international action.

In welcoming the paper, CIOT accepts that broad principle, but takes the view that value creation is represented by long term investment in platforms rather than user participation. It considers that a long term multilateral solution is important, and is very sceptical about the value of interim measures.

The ICAEW has also responded along similar lines, calling for a much deeper understanding of the different components of user generated value. It too says there are no easy answers.

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/661458/corporate\\_tax\\_and\\_the\\_digital\\_economy\\_position\\_paper.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/661458/corporate_tax_and_the_digital_economy_position_paper.pdf)

[www.tax.org.uk/sites/default/files/Corporate%20tax%20and%20the%20digital%20economy%20-%20CIOT%20comments.pdf](http://www.tax.org.uk/sites/default/files/Corporate%20tax%20and%20the%20digital%20economy%20-%20CIOT%20comments.pdf)

<https://ion.icaew.com/taxfaculty/b/weblog/posts/taxing-the-digitalised-economy>

## 5. VAT

### 5.1 Input tax recovery and fraudulent transactions

*The Advocate General (AG) of the CJEU opined that a taxable person who has made a payment on account for goods or services ultimately not supplied cannot be refused the right to deduct input tax if he was not, and could not have been, aware of the supplier's intention not to honour the contract of supply.*

These were the joint cases of Kollroß and Wirtl. Both taxpayers paid advance invoices plus VAT for supplies of heat units from the same supplier where the delivery date was not set. The units were never delivered and the supplier was subject to unsuccessful insolvency proceedings. The persons acting for the supplier were convicted of 88 counts of fraudulent trading practices and conspiracy to defraud and of intentional bankruptcy to the detriment of purchasers of combined heat and power units, but not of tax evasion.

The taxpayers' input tax deduction was refused by their respective German tax authorities.

The AG stated that the supplier's fraudulent intent should not have any bearing on the recipient's right to deduct the VAT paid on account, unless the latter was, or should have been, aware of that fraudulent

intent. The mere fact that the date of delivery was not indicated in the contract does not render the fulfilment of that contract uncertain for the purposes of that provision.

As always, it remains to be seen whether the Court will follow the AG's opinion.

*Kollroß and Wirtl* CJEU Cases C-660/16 and C-661/16

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=198846&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=589694>

## 5.2 The Tour Operator Margin Scheme (TOMS) must also apply to business customers

*The CJEU ruled against Germany in recent infraction proceedings. German VAT law currently excludes TOMS services that are sold to businesses and used within their business from the scheme.*

The UK does not exclude such services from TOMS but the different application of the TOMS rules across the Member States can make it extremely difficult for businesses to manage their VAT affairs. The main reasons are that businesses that do not regard themselves as 'tour operators' may unwittingly be caught in the scheme and services deemed to fall under TOMS do not entitle the supplier to any related input tax recovery. This does not create a level playing field across the Member States.

The OTS has also picked up on this and suggested simplifications in its recent report.

The CJEU also ruled that German VAT rules to calculate the suppliers' tax base in certain scenarios do not comply with EU law.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=199207&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=926214>

## 5.3 Input VAT on services to a company outside the EU or a UK Fixed Establishment?

*The FTT has found in favour of Hastings in allowing input tax recovery (reported to be c.£20m) in relation to services it provides to a company located in Gibraltar.*

Hastings provides broking, claims handling and underwriting support to Advantage Insurance (Advantage), a related party located in Gibraltar. In turn, Advantage provides insurance services to UK customers. As a result of providing services to a customer located outside the EU, such as Gibraltar for VAT purposes, Hastings considered that it was entitled to recover UK VAT incurred on costs that related to the services provided. HMRC contended that the services provided to Hastings were in fact to a UK 'Fixed Establishment' of Advantage and were VAT exempt in nature. If this was correct, Hastings would not be entitled to input VAT credit. HMRC did not contest that Advantage had a Business Establishment in Gibraltar but considered that the services provided by Hastings should be viewed as being made to a UK Fixed Establishment. The FTT found in favour of Hastings and concluded that (a) Advantage did not have the necessary human and technical resources and the services provided did not have the required degree of 'permanence' to constitute a Fixed Establishment in the UK; and (b) Even if there was a Fixed Establishment in the UK, there was no reason to depart from using the Business Establishment (Gibraltar) for determining the place of supply in these specific circumstances as Advantage was carrying out its business of underwriting risk and providing insurance from Gibraltar. *Hastings Insurance Services Limited* [2018] UKFTT 0027 (TC)

<http://financeandtax.decisions.tribunals.gov.uk//judgmentfiles/j10281/TC06306.pdf>

## 6. And finally

### *Stale News*

Biscuits, rusks, pastries and cakes: time to think back to New Year's Day breakfast. Why then? Read on. We remember with fondness a scrumptious Polish VAT case that we reported late last year. Ever since the Great Jaffa Cake Debate, (*United Biscuits (UK) Ltd (2001) VAT Decision 173910*), VAT has thrown up some delicious tax snacks and this one was a cracker. We waited, though, because the point is the case has to be enjoyed stale. The AZ case involved Polish pastries such as croissants, which had a sweet filling. Were

these delicious treats fresh? If they were, they enjoyed a reduced VAT rate. You might have thought that, with croissants, the issue was pretty plain. It turns out, however, that Polish croissants are made of stern stuff. They have a best before date of 45 days. Yes; a croissant bought for New Year's Day is still fresh and at its best, just as a Jaffa Cake is not a chocolate covered biscuit. Of course it isn't. We love VAT.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=196498&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1929837>

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		

smithandwilliamson.com

Offices: London, Belfast, Birmingham, Bristol, Cheltenham, Dublin (City and Sandyford), Glasgow, Guildford, Jersey, Salisbury and Southampton.

Smith & Williamson LLP: Regulated by the Institute of Chartered Accountants in England and Wales for a range of investment business activities. A member of Nexia International. The word partner is used to refer to a member of Smith & Williamson LLP.



We have taken care to ensure the accuracy of this publication, which is based on material in the public domain at the time of issue. However, the publication is written in general terms for information purposes only and in no way constitutes specific advice. You are strongly recommended to seek specific advice before taking any action in relation to the matters referred to in this publication. No responsibility can be taken for any errors contained in the publication or for any loss arising from action taken or refrained from on the basis of this publication or its contents. © Smith & Williamson Holdings Limited 2018.