

A round-up of recent issues

15 May 2018

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1. General

1.1 Resolution Foundation issues far-reaching report

The Intergenerational Commission of the Resolution Foundation has issued a 200 page report on healing the perceived intergenerational conflict through tax and other economic measures. It recognises that its proposals may sometimes be difficult and unlikely to be immediately espoused, but it hopes to inform political debate and therefore influence thinking over time. It includes wide ranging tax proposals that have made the headlines, including imposing NIC on pensioners, property tax reform and abolishing IHT in favour of a receipts tax.

The report, entitled 'A new generational contract', proceeds on the thesis that there is a generational conflict and that the intergenerational contract is under threat. The report is an analysis of this, proposes various solutions and includes several substantial proposals for tax. These include:

- replacing council tax with a progressive property tax; halving stamp duty to encourage moving and offering a time-limited CGT cut to encourage the sale of second properties to first time buyers;
- introducing an NHS levy through NIC on the earnings of those over State pension age and NIC on occupational pension income;
- abolishing IHT with a lifetime receipts tax levied on recipients rather than donors. The tax would have lower rates than IHT but fewer exemptions and a lower tax-free allowance.

The report accepts its proposals are at times difficult. The authors state '*We do not expect political parties to embrace them immediately, but hope that as the important issues we identify are increasingly recognised, our proposals can be a useful guide to action.*'

www.resolutionfoundation.org/app/uploads/2018/05/A-New-Generational-Contract-Full-PDF.pdf

1.2 Enablers of tax avoidance

HMRC has published guidance on who is classed as an enabler of tax avoidance, what is classed as an abusive and defeated tax arrangement, details regarding penalties and HMRC's use of the GAAR panel to decide whether or not tax arrangements are abusive.

The guidance includes:

- Who is an enabler?
 - FA (no.2) 2017 Sch 16 para 7 sets out the five descriptions of enabler activities. These include the designer of the arrangements, their manager or someone who finances them. Detailed explanations of each of the five descriptions are provided. Only one of the descriptions needs to be met for a taxpayer to be considered an enabler.
- What is classed as an abusive and defeated tax arrangement?
 - Definition of the terms 'tax arrangements' and 'abusive' are provided.
- Penalties for enablers.
 - Various administration details regarding penalties are provided, including details of when a penalty is due, time limits and how to appeal.
- GAAR advisory panel.
 - The guidance confirms that a penalty cannot be assessed unless the opinion of the GAAR advisory panel has been considered.

www.gov.uk/government/collections/tax-avoidance-enablers

1.3 Tax avoidance schemes: Accelerated Payment Notices

HMRC has updated its list of the avoidance scheme reference numbers (SRNs) whose users may be issued with an accelerated payment notice (APN).

HMRC confirms that this list is under continual review to ensure that only current and newly-disclosed schemes whose users may receive an APN are included.

Eight new scheme reference numbers have been added: 00825358, 02011115, 13428775, 33574398, 34947874, 39069300, 75774275, 91872323.

No scheme reference number has been removed.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701548/Reviewed_Tax_Avoidance_Scheme_Ref_Numbers_April_2018.pdf

1.4 HMRC updates non-statutory guidance clearance

HMRC has updated its non-statutory clearance service guidance. The guidance now includes a further bullet point as to the clearances or advice that HMRC will not provide under this service.

This states that: 'HMRC will not give a clearance on matters of fact, such as if certain activities constitute a business, or in relation to the application of the law at section 162 of the Taxation of Capital Gains Act 1992 to property income.'

The section quoted gives rollover relief on the transfer of a business to a company in exchange for shares where specific conditions are met.

www.gov.uk/guidance/non-statutory-clearance-service-guidance?utm_source=b1dc346b-73af-437f-98bc-4815d475b9ac&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate%20-%20

2. Private client

2.1 Simple assessment and dynamic PAYE coding

HMRC has paused the further implementation of both its simple assessment and dynamic PAYE coding programmes, citing two reasons: the problems raised in so doing as well as a reallocation of resources to be spent on Brexit and other matters.

Under simple assessment, HMRC uses the information it already holds to issue an income tax calculation to the taxpayer, avoiding the need for the submission of a tax return. This has been piloted with small state pension cases and simple PAYE cases, but problems have been reported.

Dynamic PAYE coding is the use of Real Time Information (RTI) to adjust PAYE codes automatically; but, again, problems have been reported. For example, problems with overpayments have occurred where bonuses have been paid early in the tax year.

The ATT has called for HMRC 'to use the extra time given to iron out the known problems with Simple Assessment and dynamic coding before they hit play on them again'.

Other minor digitalising services have also been paused such as those for IHT, tax-advantaged venture capital schemes and PAYE Settlement Agreements (PSAs).

The resources will be reallocated to be spent on Brexit as well as other major scheduled changes, such as the recent launch of the Trust Registration Service and announced changes in disguised remuneration and salary sacrifice arrangements.

www.att.org.uk/technical/news/press-release-opportunity-rethink-simple-assessment-real-time-changes-pay-tax-codes

www.att.org.uk/hmrc-reprioritisation-simple-assessment-dynamic-coding-paused

2.2 CA finds that reasonable excuse cannot not apply to non-mandatory provisions

The CA has overturned the UT decision in the Raftopoulou case, finding that the taxpayer cannot use a reasonable excuse defence in respect of a late overpayment relief claim. It also found that HMRC's letter refusing the late claim was not an opening or closure of an enquiry and, as such, could not be appealed to the FTT.

The taxpayer submitted a claim for repayment of overpaid tax, but HMRC rejected this, as it was out of time.

The CA has found that HMRC's letter rejecting the claim did not constitute a notice to enquire nor a closure notice. It stated that: '*a rejection by HMRC of a claim on the grounds that it is out of time, by reference to no more than the claim itself and a calculation of the applicable time limit, does not involve any use by HMRC of their statutory powers to enquire into the claim nor does it constitute notice of an intention to do so.*' The taxpayer therefore had no right to appeal to the FTT against the rejection of the claim.

The CA also found that a reasonable excuse defence cannot be used in relation to a late overpayment relief claim. It only applies to acts carried out by the taxpayer under mandatory taxation provisions.

Raftopoulou v HMRC [2018] EWCA Civ 818

www.bailii.org/ew/cases/EWCA/Civ/2018/818.html

3. Trust, estates and IHT

3.1 Trusts Registration Service (TRS) - unregistered pension schemes

HMRC has confirmed that pension schemes that are already registered online with HMRC, under the Manage and Register Pension Schemes or Pension Schemes Online, do not need to register separately on the TRS.

HMRC has published its May 2018 pension schemes newsletter, which confirms that it has updated its TRS guidance for pension schemes. The updated guidance confirms that where the scheme is registered online with HMRC, under the Manage and Register Pension Schemes or Pension Schemes Online, the trustees do not need to register separately on the TRS. This is on the basis that the TRS legislation provides HMRC with the discretion to determine the format by which trustees must submit the information about the trust.

www.gov.uk/government/publications/pension-schemes-newsletter-98-may-2018/pension-schemes-newsletter-98-may-2018

www.step.org/sites/default/files/Pension_Registration_Guidance020518.pdf

3.2 Trusts Registration Service (TRS) - IHT

HMRC has changed its view on the TRS position where an offshore trust owns an offshore company that in turn owns UK residential property, resulting in an IHT liability for the trustees.

HMRC was initially of the view that such trusts would need to register on the TRS when there was an IHT liability under the new rules that bring all UK residential property held directly or indirectly within the charge to UK IHT.

HMRC now agrees, however, that as the trustees do not themselves own a UK asset, there is no registration requirement in this case. This is provided that the trustees have no other UK source income or assets on which they are liable to pay one of the listed UK taxes.

This change in approach ties in to our understanding of the regulations. This change will not affect any previous registrations on the TRS, as the new rules on IHT and residential property did not come into effect until 6 April 2017.

www.step.org/sites/default/files/Policy/UK_residential_property_and_TRS.pdf

4. PAYE and employment

4.1 Employment income or compensation?

A taxpayer who was a judge asserted that a lump sum payment received for a historic underpayment of judge's fees, was compensation for a statutory tort and not employment income. The FTT disagreed.

Following litigation that ruled the taxpayer Mr Pettigrew's, employer, the Ministry of Justice, had discriminated against part-time employees, the taxpayer received a payment for a historic underpayment of judge's fees. PAYE was deducted on the compensation element but the taxpayer included a note on his 2014/15 tax return to argue that the PAYE deduction was incorrect. He believed the payment was compensation for the statutory tort of discrimination under the Equality Act 2010. HMRC amended the taxpayer's 2014/15 tax return to include the payment as taxable. The taxpayer appealed.

The taxpayer argued the lump sum payment was not taxable as employment income on two grounds:

- he was not contractually entitled to the lump sum payment; and
- the payment was merely compensation for the statutory tort of discrimination under the Equality Act 2010.

The judge dismissed these arguments, holding that a payment can still be employment income even if there is no contractual entitlement; and payments given under non-contractual term and a lump sum payment given in settlement of litigation do not prevent the payment being taxed as employment income following the CA decision in *Hamblett v Godfrey* [1987] STC 60. The case was authority for the proposition that the nature of statutory rights in question can be directly connected with the employment.

Pettigrew v HMRC [2018] UKFTT 0240

<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10435/TC06473.pdf>

4.2 Ex gratia payment partially exempt for injury to feelings

The CA has held that an ex gratia payment was taxable, but overturned the previous decisions of the FTT and UT and held that part was exempt following an injury to feelings.

The taxpayer, Mr Moorthy, received an ex gratia payment of £200,000 following a claim for unfair dismissal and unlawful age discrimination against his employer. The taxpayer treated the whole £200,000 payment as non-taxable and requested a refund of the PAYE deducted. He argued that the whole payment related to compensation for injury to his feelings following age discrimination by his employer and was not a payment in connection with his employment.

Two issues were contested:

- whether or not the payment was taxable as employment income - the 'taxability issue'; and
- whether or not it was an exempt payment for an injury or disability - the 'exemption issue'. The taxpayer claimed the injury was his 'feelings sustained in the context of his age discrimination claim'

The FTT found against the taxpayer on both the taxability issue and the exemption issue. The exemption issue was however, heard again by the UT following the intervention of The Equality and Human Rights Commission. Notwithstanding this intervention, the UT found against on the basis that 'injury' 'refers to a medical condition and does not include injury to feelings'.

The taxpayer appealed. The CA judge agreed with both the FTT and UT's decision regarding the taxability issue, stating that it was 'clear beyond reasonable doubt' the whole payment was taxable as employment income.

On the exemption issue, however, the judge overturned the previous decisions and held that £30,000 was exempt under ITEPA 2003 s.406 (exception for death or disability payments). He held that injury to feelings could apply in this case, stating that 'there is no definition of the word injury in section 406, and there is nothing to indicate that it should not be given its ordinary meaning'.

Moorthy V HMRC [2018] EWCA Civ 847

www.bailii.org/ew/cases/EWCA/Civ/2018/847.html

5. Business tax

5.1 Dealing in shares and financial instruments was trading with a view to a profit

The taxpayer had been dealing in shares and securities profitably for several years until 2010-11 when he made a substantial loss. HMRC argued that his trading activity was not carried on a commercial basis as it fell short of that of a professional financial trader for various reasons, including that he was overconfident and overtraded. The FTT disagreed and found that the taxpayer was indeed trading with a view to making profits.

Mr Gill the taxpayer had been successfully dealing in shares and securities for several years on a fairly intensive basis on his own behalf. He kept long hours being active on both the UK and American markets. He had no formal business plan, but it was clear that his activities were 'full on' and he treated his brokers as his back office. He did operate at home but through an office environment using a high powered computer, four screens, an office phone and a television with financial news channels. He was working towards setting up a hedge fund, although that did not materialise. He was given access to a trading platform by his broker as he was clearly experienced in using and understanding it. He did not just buy and hold stock but bought and sold according to price trends in the market.

After several years, he suffered a reverse in 2010-11 and made a substantial loss, which HMRC sought to deny as a trading loss. Gillett J examined the badges of trade and considered that they pointed to a trade being carried on. He also examined case law and found nothing to overturn the view that there was a trade. HMRC contended the trading was not commercial for a series of specific reasons, being in essence critique of how he carried out the trading in the year in question, that it was casual and haphazard. The judge accepted that the taxpayer had been over-confident but found nothing in the authorities that suggested this was a problem.

He concluded that the taxpayer was trading with a view to a profit.

Had the decision gone the other way, it would have set the bar very high indeed for such personal dealing ever to be considered trading with a view to a profit. The taxpayer's professional life's focus had entirely been on his business in which he had historically been very successful.

Gill v HMRC [2018] UKFTT 245 (TC)

<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10439/TC06477.pdf>

5.2 FTT strikes down SDLT sub-sale scheme

The FTT found that the operation of the transfer of rights rules meant that a share subscription into an intermediate corporate purchaser of a property was consideration for the subsequent in specie distribution for SDLT purposes. SDLT therefore arose in the context of the scheme transactions at hand.

The FTT has considered an SDLT sub-sale scheme that involved a company being set up to acquire a property. The company was funded by share subscription by the taxpayers and entered into a contract to acquire a property. Prior to completion of that contract the company resolved to distribute the property in specie to its shareholders, funded by a reduction of share capital. This kind of onwards transfer of a property before it is acquired is referred to as a transfer of rights for SDLT purposes.

The taxpayers argued that the companies were not liable to SDLT because of the operation of the disregarding in FA 2003 s.45(3), which prevented a double charge to SDLT from arising in certain sub-sale arrangement. Further, they were not liable to SDLT on the transfer of rights, as they had not given any direct consideration for the distribution made by the company. HMRC agreed that the company was not liable to SDLT, but contended that the taxpayers were, because the original share capital subscription into the company was indirect consideration that counted for the purposes of establishing the consideration for

the transfer of rights. HMRC also contended that, should that argument fail, the broad anti-avoidance rule in FA 2003 s.75A would apply to charge the taxpayers to SDLT in any event.

The FTT found that the share subscriptions were consideration that ought to be counted for the purposes of s.45 and, as such, the taxpayers were liable to SDLT as HMRC contended. The FTT also decided that s.75A would have operated to bring the same conclusion, had the taxpayers' arguments on s.45 succeeded.

The decision on s.75A is interesting as it provides some useful guidance on how 'involved in connection with' should be construed when considering the operation of s.75A. The taxpayers argued that the sub-sale transaction was carried out without any knowledge on the part of the original vendor, so it cannot have been 'involved in connection with' the disposal by the original vendor. The FTT concluded that there was nothing in the statute that required any knowledge on the part of the original vendor and that, as it was clearly contemplated that the transfer in specie of the property would take place immediately after and dependent on the initial disposal, the second, sub-sale transaction was 'involved in connection with' the disposal by the original vendor and the acquisition by the taxpayers.

Geering & Geering and Robinson v HMRC [2018] UKFTT 0233 (TC)

<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10426/TC06466.pdf>

5.3 Consultation on potential reliefs from LBTT

The Scottish Government has published a consultation on the potential introduction of reliefs from land and buildings transaction tax (LBTT) to bring parity with SDLT for some property authorised investment funds (PAIFs).

It is considering, in particular, providing seeding relief on the initial transfer into PAIFs and co-ownership authorised contractual schemes (CoACS). It is also looking at reliefs on the exchange of CoACS units.

This is an effort to prevent institutional investors from leaving the Scottish property market in favour of the more benign tax regime elsewhere in the UK.

The consultation closes on 2 August 2018.

<https://consult.gov.scot/fiscal-responsibility/seeding-relief/>

5.4 Consultation on revisions to the transfer pricing guidelines

On 9 May 2018, the OECD announced the launch of a consultation on the changes being considered to the transfer pricing guidelines. Comments should be submitted by 20 June 2018.

Comments have been specifically invited for the following chapters in the transfer pricing guidelines:

- Chapter IV - administrative approaches to avoiding and resolving transfer pricing disputes; and
- Chapter VII -special considerations for intra-group services.

www.oecd.org/tax/oecd-invites-public-comments-on-the-scope-of-future-revision-of-chapter-iv-and-chapter-vii-of-transfer-pricing-guidelines.htm

6. VAT

6.1 Distance selling - place of supply if customer arranges for transport

The FTT has referred a question regarding goods transported 'by or on behalf of the supplier' to the CJEU, to determine the place of supply for deliveries by post to online and mail order customers.

The taxpayer Healthspan sold non-prescription health products via internet, phone and mail orders. The goods were dispatched from a warehouse in the Netherlands and delivered to UK retail customers by mail or courier. In HMRC's view, the goods had been delivered by or on behalf of the supplier, and therefore the sales were subject to UK VAT. Healthspan contended that the customers arranged for the transport, and therefore the place of supply was in the Netherlands and not in the UK.

The FTT examined the facts and found that Healthspan's supplies of goods to phone customers, and all supplies of goods sent by courier, were made on behalf of the supplier and therefore taxable in the UK. To determine the place of supply for deliveries by post to online and mail order customers, however, a reference to clarify the meaning 'by or on behalf of the supplier' has been made to the CJEU.

<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10436/TC06474.pdf>

6.2 Input tax recovery in relation to an attempted strategic takeover

The Advocate General (AG) of the CJEU opined in the Ryanair case that related costs incurred by the acquiring company have a direct and immediate link with its taxable activity and therefore it is entitled to input tax recovery.

Ryanair made a bid to take over the Irish airline Aer Lingus, which eventually failed for competition law reasons. Ryanair sought to recover the input tax incurred on consultancy and other costs in connection with the planned takeover, but the Irish tax authorities refused.

While it is established case law that input tax can be claimed for abortive investments, the question was whether a holding company carries out an economic activity, as otherwise the input tax will be disallowed.

The AG stated that in this case the holding is not a conventional holding but an operating undertaking (and thus a taxable person). She further pointed out that in this case it is not necessary to look at the existing economic activity, but that the acquisition of a company's entire share capital with the intention of thereby bringing about a direct, permanent and necessary extension of the taxable activity of the acquiring company constitutes an economic activity. As a result, the input tax should be recoverable.

It remains to be seen whether the court will follow the AG's recommendation.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=201705&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=766763>

6.3 Are hire-purchase agreements taxable supplies?

The Advocate General (AG) has opined that the UK has been treating hire-purchase agreements incorrectly in the past and that the correct approach would be to regard them as single taxable supplies.

The taxpayer Volkswagen and HMRC disagreed on how input tax relating to hire-purchase agreements should be allocated and deducted. Surprisingly, the AG stated that the real problem in this dispute, 'the elephant in the room', was actually the UK's incorrect view of the output tax liability of hire-purchase agreements. Instead of treating these agreements as a taxable supply of a vehicle and an exempt supply of credit, the correct interpretation would be to treat such an arrangement as a single taxable supply with the right to the related input tax recovery.

If the Court follows the AG's opinion, this will obviously have significant ramifications for suppliers and also customers, and businesses affected should review their VAT position.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=201709&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=762713>

7. And finally

The Sense of an Ending

There are rare times when you can find tiny diamonds in the mud. We loved this recent HMRC revision of an information notice on avoidance schemes, follower notices and accelerated payments. It was unpromising material to be sure; there was simply a removal of a reference to Article 6 of the European Convention on Human Rights: too trivial for our Update readers, we thought, and were about to pass on.

And then we checked the text just to make sure and discovered someone had quietly been at work. All the apostrophised verbs ('isn't'; 'doesn't') had been changed and written out in full: 'is not'; 'does not'.

We were intrigued by the alterations. What caused the change of mind? Did HMRC think that a document about penalties should have perhaps fiercer, more formal, prose? Is it a general style change? What was so wrong with the first version that it just had to go? We may infer, after all, that this had to be checked and approved and goodness knows what else by some manager probably struggling under that extra Brexit workload that has stymied MTD progress, which we report above.

We smiled, and liked to think that somewhere in the bowels of the great organisation is someone who, whatever the cost in time and effort, will just not put up with such sloppiness and informality: an unsung, unbending, old school stylist, whom we salute.

As to the changes themselves, well; we couldn't possibly comment on them and don't.

New version:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/703765/CC-FS27_04_18.pdf

Old version:

<http://webarchive.nationalarchives.gov.uk/20180309152434/https://www.gov.uk/government/publications/compliance-checks-tax-avoidance-schemes-follower-notices-and-accelerated-payments-for-income-tax-and-nics-through-payee-ccfs27>

Glossary				
<i>Organisations</i>		<i>Courts</i>	<i>Taxes etc</i>	
ATT - Association of Tax Technicians	ICAEW - The Institute of Chartered Accountants in England and Wales	CA - Court of Appeal	ATED - Annual Tax on Enveloped Dwellings	NIC - National Insurance Contribution
CIOT - Chartered Institute of Taxation	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
EU - European Union	OECD - Organisation for Economic Co-operation and Development	FTT - First-tier Tribunal	CT - Corporation Tax	R&D - Research & Development
EC - European Commission	OTS - Office of Tax Simplification	HC - High Court	IHT - Inheritance Tax	SDLT - Stamp Duty Land Tax
HMRC - HM Revenue & Customs		SC - Supreme Court	IT - Income Tax	VAT - Value Added Tax
HMT - HM Treasury		UT - Upper Tribunal		

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