Smith & Williamson

Tax update

A round-up of recent issues

4 June 2019

1. General

1.1 New Financial Secretary to the Treasury

Jesse Norman MP replaces Mel Stride MP as the Treasury Minister chiefly responsible for dealing with HMRC and the tax system.

Following Mel Stride's appointment as leader of the House of Commons, a new Financial Secretary to the Treasury has been appointed: Jesse Norman MP. We wish Mr Norman well in his new position.

www.accountancydaily.co/norman-replaces-stride-financial-secretary-treasury

2. Private client

2.1 FTT holds taxpayer to agreement despite reasonable excuse

The FTT has found that the 30 day time limit for resiling from a settlement agreed with HMRC cannot be extended, whether or not the taxpayer has a reasonable excuse for failing to inform HMRC in the period. The taxpayer was refused permission to take his appeal to a hearing, which is likely to lead to his bankruptcy.

A taxpayer settled HMRC enquiries into 16 years of his tax affairs, reaching an agreement for some years and withdrawing appeals against other assessments. When HMRC attempted to recover the amounts agreed the taxpayer, facing bankruptcy, appointed new advisers. They applied to resile from the agreement many months after the 30 day time limit. The tribunal was asked to determine (a) could the time limit be exceeded if a taxpayer has a reasonable excuse, and (b) did this taxpayer have a reasonable excuse?

The FTT found that the taxpayer did have a reasonable excuse in his reliance on his advisers. Rejecting his other two excuses, however, it also determined that the time limit for resiling from this type of agreement could not be extended by reasonable excuse, as they must be treated as final and conclusive. The FTT therefore had no jurisdiction to hear the appeal, and it was struck out.

In a contrast to the recent UT decision in *Ritchie v HMRC,* the judge relied on the taxpayer's witness statement that his former advisers had failed to obtain his consent to the settlements and had not ensured that he understood the consequences without offering the firm a chance to repudiate his allegations.

Bull v HMRC [2019] UKFTT 307 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07135.html

Ritchie v HMRC [2019] UKUT 71 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2019/71.html

2.2 HMRC comments on deemed domicile Q&As

HMRC has provided some initial comments on the Q&As relating to the new deemed domicile rules, including rebasing and adjustments to the foreign capital losses election.

Significant changes to the taxation of non-UK domiciliaries came into effect on 6 April 2017. There are a number of points that were unclear in the draft legislation, so professional bodies including the CIOT sent lists of their questions to HMRC, with suggested answers, asking for confirmation of their interpretations. HMRC has now provided its comments on the list for changes to the rules for deemed domiciliaries.

HMRC has agreed with the majority of the suggested answers, but has rejected the alternative approach to dealing with foreign currency gains, and there are a few other small differences. No further comments are expected.

www.tax.org.uk/policy-technical/technical-news/finance-no-2-act-2017-taxation-non-uk-domiciliaries-update-2

2.3 FTT rules against the disclosure of Mutual Agreement Procedure documentation

The FTT has ruled that Mutual Agreement Procedure communications between HMRC and the Belgian tax authority should not be disclosed to the taxpayer in question. There may be circumstances in which this documentation should be disclosed, but in this case it was of low relevance to the ongoing proceedings and outweighed by the need for confidentiality.

The taxpayer lived in both the UK and Belgium. He applied to the two tax authorities for a decision on his tax residency under the Mutual Agreement Procedure (MAP) in the UK/Belgium Double Taxation Agreement. The authorities decided that he was tax resident in the UK, but declined to provide him with the documents relating to the application of the MAP. He then made two appeals to the FTT: first, against the decision that he was UK tax resident, and second, that the documentation should be made available to him.

In respect of the second appeal, the FTT found for HMRC. It ruled that there may be some circumstances in which MAP documentation should be disclosed, but the relevance of the documents would have to outweigh the need for confidentiality. In this case, the documents were of low relevance to the first appeal. A degree of confidentiality is important for inter-governmental correspondence under the MAP; future co-operation may be inhibited if MAP documentation is disclosed without sufficient reason.

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07145.html

2.4 Taxpayer loses HC challenge to information notice issued by FTT

The HC has rejected an application for judicial review, holding that the information specified in the notice was reasonably required by HMRC to allow the Swedish tax authority (STA) to determine whether or not a taxpayer was resident in Sweden.

The taxpayer had been issued with an information notice that had been approved by the FTT. HMRC had been asked by the STA to obtain credit card statements, to assist with its investigation into his residence, in accordance with HMRC's obligations under the Double Taxation Agreement. The card had been issued in the UK, although the UK was not one of the countries where the taxpayer had been living in the period.

The taxpayer applied for judicial review on the grounds that the information specified in the notice not reasonably required for the purposes of checking his tax position. The STA believed that details of where the card had been used, and what airline tickets had been purchased with it, would assist them in establishing the dates the taxpayer was in Sweden, and possibly proving that he was resident there. Details of several other international bank accounts had already been obtained in this complex investigation where accusations included that his divorce was a sham.

The judge held that there was no need for HMRC to prove that a tax liability would arise from the investigation. This was a genuine and legitimate investigation, and it was reasonable for these documents to be required.

Kotton v FTT & Anor [2019] EWHC 1327 (Admin)

www.bailii.org/ew/cases/EWHC/Admin/2019/1327.html

2.5 HMRC updates ordinary share capital guidance following judgments

HMRC has amended its guidance on the definition of ordinary share capital, to reflect FTT judgments in the recent Entrepreneurs' Relief (ER) cases of Warshaw and Hunt.

HMRC has updated the definition of ordinary share capital in its Company Taxation manual, which is particularly important to ER cases. A table defining whether or not various different share types are ordinary share capital is included, but it is emphasised that this is only a guide, and some cases are finely balanced. Shares of the type described in *Warshaw (Warshaw v HMRC* [2019] UKFTT 268 (TC)) are defined as 'borderline', as the FTT judgment does not set a precedent.

www.gov.uk/hmrc-internal-manuals/company-taxation-manual/ctm00514

2.6 Conversion of bonds did not wipe out capital gain

The SC has held that gains are held over, rather than wiped out, on conversion of a mixed holding of qualifying corporate bonds (QCBs) and non-qualifying corporate bonds to a new QCB, as this was not a single transaction.

The taxpayers sold their business for loan notes, which were not QCBs. There was no CGT on the original sale, as the gain was rolled over into the loan notes, to be taxed when they were sold. A portion of the loan notes were then converted to QCBs by varying the terms of the notes, following which both the original loan notes and the QCBs were converted to one new type of QCB, which was then sold for cash. QCBs are exempt from CGT.

The taxpayers argued that the original gain was wiped out by the final conversion, to which, under the legislation, the hold over provisions did not technically apply, as this was a conversion of a holding including QCBs into a holding of QCBs. Ultimately, therefore, no CGT was due on the sale of their business.

HMRC argued, and the SC unanimously agreed, that the final conversion to the last QCBs was two separate conversions, of the original loan notes and the first QCBs, so the hold over provisions were looked at separately for each transaction and the drafting anomaly for conversion of a mixed holding was not applicable. The gains were therefore rolled over, but remained within charge, and were taxed on the final sale of the QCBs. The SC noted that, had the taxpayers' argument been valid, any chargeable gain could be removed from CGT, which was not the intention of Parliament. The taxpayer had previously won at the FTT, which held that there was a loophole in the legislation, but this judgment accords with the UT and CA.

Hancock & Anor v HMRC [2019] UKSC 24

www.bailii.org/uk/cases/UKSC/2019/24.html

2.7 FTT confirms property was occupied as a residence for short period

The FTT has ruled that a property was occupied as a residence, despite the period of occupation being just 10 weeks. This was on the basis that the taxpayer had intended to live in the property as his home for the foreseeable future, but changes in his circumstances had resulted in him moving out.

The taxpayer owned the property for just under five years. After purchase, substantial renovation work was undertaken, and the property was then let for a period. The taxpayer then moved into the property with his partner and they lived there for 10 weeks, before moving out following incidents of domestic abuse. The flat was then let again. The taxpayer had previously confirmed to HMRC that the primary reason for buying the property was as an investment. The FTT however accepted that his intentions had changed and noted his contention that when he and his partner moved into the property, it was at that point their intention to make it their long-term home.

The FTT found that the property had been his main residence for the 10 week period, as when he and his partner moved into the subject property they expected to continue to live in the property, as their home, for the foreseeable future.

This is in line with other recent decisions where the judges have found that residence did have the requisite degree of 'permanence, continuity or expectation of continuity' even though it was only for a short time.

Davidson v HMRC [2019] UKFTT 300 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07128.html

3. PAYE and employment

3.1 Government confirms proposed early NIC payment on termination awards

It has been confirmed that, under the proposed laws, Class 1A NICs arising on termination payments that exceed £30,000 will be payable in the year of payment.

In evidence given to the Public Bill Committee, HMRC and HMT explained that under the NIC (Termination Awards and Sporting Testimonials) Bill 2017-19 Class 1A NICs on cash elements of termination awards exceeding £30,000 would be payable in the tax year. In all other circumstances, Class 1A NICs are payable in the July following the end of the tax year. The early payment will not apply to non-cash elements of termination awards; the payment date for termination payments involving both cash and non-cash elements has not been confirmed. The Committee criticised this approach for the additional complexity, which effectively creates a new sub-class of NICs. HMRC and HMT argued that this approach was simpler than creating an entirely new class of NICs.

The new laws are expected to come into effect in April 2020.

https://hansard.parliament.uk/Commons/2019-05-14/debates/369dd437-d430-4d4c-9f84-38e0d153c9f2/NationalInsuranceContributions(TerminationAwardsAndSportingTestimonials)Bill(FirstSitting)#contribution-645AA33E-8046-4E64-897B-A7DEDD9AF161

4. Business tax

4.1 Penalties overturned for lack of HMRC evidence

Thirty-three penalties for late filing of Contractors' Monthly Returns were cancelled by the FTT because HMRC did not produce any evidence to show the penalty notices had ever been delivered. Two letters from the Debt Management department were put forward, but these did not support the whole case against the taxpayer.

The taxpayer had filed its Contractors' Monthly Returns under the Construction Industry Scheme late for many months. HMRC, for an undisclosed reason, only issued penalty notices for thirty-four of the late returns, which the taxpayer claimed were never received. The only evidence provided by HMRC was two letters from the Debt Management department. These letters, however, only referenced two specific penalties, one of which was not the subject of the appeal. The FTT noted that this was inconsistent with HMRC's case: if so many penalties were outstanding, why did the letters only reference a single penalty each? One penalty referenced in a letter from Debt Management was upheld; the remaining thirty-three were dismissed.

ESE Rendering Solutions Limited v HMRC [2019] UKFTT 0309 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07137.html

4.2 New consultation on Offshore Receipts in respect of Intangible Property rules

HMRC has published draft regulations, draft guidance and the draft explanatory note for amendments to the newly-introduced Offshore Receipts in respect of Intangible Property rules.

The Offshore Receipts in respect of Intangible Property (ORIP) measures came into effect on 6 April 2019. The rules impose an IT charge on large multinational groups that divert offshore UK income relating to intangible property. The amendments will ensure that the legislation operates as intended. They also introduce an exemption for companies in jurisdictions that will be specified in future regulations.

The consultation closes on 19 July 2019.

www.gov.uk/government/consultations/draft-regulations-offshore-receipts-in-respect-of-intangible-property?utm_source=8b522155-1bb1-4f21-a6b1-89478594b4b7&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily

5. VAT

5.1 EC launches new tool to combat VAT fraud

The EC has announced the launch of a new tool to help EU Member States identify and reduce criminal VAT fraud. The estimated cost of VAT fraud to public finances is €50 billion per year.

The Transaction Network Analysis (TNA) is a new system created as part of the EC's initiative to establish a modern and fraud-proof VAT system. The TNA was developed to allow tax authorities to access and share cross-border transaction information quickly, leading to a faster response when potential VAT fraud is flagged. It is now available to all Member States and will significantly increase information exchange between tax authorities.

http://europa.eu/rapid/press-release_IP-19-2468_en.htm

5.2 HMRC clarifies VAT treatment of forfeited deposits on aborted land transactions

HMRC has confirmed that the VAT treatment of forfeited deposits retained by a vendor will be the same as the treatment that would have applied to the aborted transaction.

Revenue & Customs Brief 13 sets out HMRC's policy on the VAT treatment of unfulfilled supplies. HMRC considers that VAT is due on all retained payments for unused services and uncollected goods. The Property VAT Liaison Group has received a response from HMRC regarding the application of this policy to forfeited deposits on aborted acquisitions of land. HMRC has confirmed that the VAT treatment of the deposit will be the same as that which would have applied had the transaction not been aborted:

- if the deposit was in respect of an unfulfilled taxable supply, the deposit is subject to VAT at the appropriate rate;
- if the deposit was in respect of an exempt supply, the deposit is exempt from VAT; and
- if the deposit was in respect of a transfer of a going concern, the deposit is outside the scope of VAT.

www.gov.uk/government/publications/revenue-and-customs-brief-13-2018-change-to-the-vat-treatment-of-retained-payments-and-deposits

5.3 CA upholds the decision that overpayments are subject to VAT

The CA has ruled against National Car Parks Limited (NCP), who argued that it was due a refund of VAT paid on overpaid car parking charges. The approach adopted by the CA is similar to that taken in other cases and applies more widely in cases addressing the nexus between the amount of consideration received and the services supplied.

The taxpayer operated private parking facilities across the UK. The ticket machines used by customers when parking their vehicle did not provide change, thus creating an overpayment where a customer does not hold the exact amount in coins. The taxpayer argued that any overpayments should be treated as voluntary and non-contractual because the additional amount did not grant any additional parking time or service entitlement. The receipts were therefore outside the scope of VAT and claim for overpaid VAT was submitted to HMRC.

The FTT and UT had decided in favour of HMRC. The CA examined the basic principles of VAT: there was a legal relationship between NCP and its customer, created by payment of a fee in exchange for a service. The taxable amount is assessed as the consideration paid, not the consideration that could have been paid. The consideration, therefore, is the total amount collected in exchange for the provision of a car parking facility. The overpayment was not separate to the contractual agreement, as the overpaying customer made a conscious decision of the amount to pay. Although the CA did not completely agree with the reasoning taken by the UT, the same conclusion was reached. VAT is due on the 'consideration', which is the total amount paid by the customer.

National Car Parks Limited v HMRC [2019] EWCA Civ 854

www.bailii.org/ew/cases/EWCA/Civ/2019/854.html

6. Tax publications and webinars

6.1 Briefing Notes published

The following Briefing Notes have been published

- *The Profit Diversion Compliance Facility – Do I need to take action.pdf*

7. And finally

7.1 Fun job

A qualified tax professional is sought by the Government, as one of the two specialist advisers who help to examine each year's draft Finance Bill. Naturally, there is a long list of requirements for the person who will take over this onerous duty. Reviewing the technical detail of a Finance Bill is highly skilled work, and the nine Peers with whom this work is shared are, though doubtless excellent at their task, not tax experts.

This, then, is serious. Read the job spec and see just how qualified, skilled, experienced and well placed this individual has to be.

Just pause there and think what the chargeout rate should be.

We suspect that, unlike their Lordships, you didn't come up with £40 an hour. We'll take a deep breath and say this probably isn't meant as it might appear to our absolutely top professionals. Or it may just simply say that that is all there is to spend because that is what they think the advice is worth.

What it may really say is that they think said top individual will do it as a favour, at least in part, for the fun of it. This may not be the ideal way to choose. 'I'll take your appendix out for the fun of it': not always what you want to hear from the doctor.

www.parliament.uk/business/committees/committees-a-z/lords-select/economic-affairs-committee/news-parliament-2017/fbsc-specialist-adviser-recruitment/

Glossary

Organisations		*Courts*	*Taxes etc*	
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		