Tax Update

A round-up of recent issues

13 August 2019

1. General

1.1 Non-dom tax contribution falls by £2bn

HMRC statistics show a decrease of £2bn in the amount of tax paid by non-doms in 2017/18 compared to 2016/17. The number claiming non-dom status also fell by 13%. HMRC claims that there is no loss to the Exchequer because of the continued contribution of those who have become UK-dom.

HMRC's annual statistical update on non-domiciled individuals shows a 21% fall in the tax contribution made by those claiming non-dom status on their tax returns, from a peak of £9.5bn in 2016/17 to £7.5bn in 2017/18. The number in the group also fell, by 13%, following non-doms leaving the UK and switching to UK domiciled tax status in roughly equal numbers. From 2015-16 to 2016-17, the number of non-doms fell but their tax contribution as a group increased.

HMRC claims that there is no loss to the Exchequer, as a result of the continued contribution of those who have become UK-dom. It also notes an increase in the number of non-doms using business investment relief. 58% of UK resident non-doms live in London.

www.gov.uk/government/statistics/statistics-on-non-domiciled-taxpayers-in-the-uk

1.2 Reports of information requests to cryptocurrency exchanges

HMRC is reported to have written to cryptocurrency exchanges requesting lists of their customers and details of transactions.

Industry sources report that HMRC has written to at least three cryptocurrency exchanges that do business in the UK. The letters supposedly request lists of customer names and transaction data. One exchange, Coinbase, has previously fought information requests from the American Tax Authority in US courts.

HMRC has refused a freedom of information request to provide details about its investigation, on the grounds that it could jeopardise tax collection or assessment. HMRC guidance on the taxation of cryptoassets was published in December.

www.accountancyage.com/2019/08/07/hmrc-seeks-data-from-crypto-exchanges-to-combat-tax-evaders/

www.gov.uk/government/publications/tax-on-cryptoassets/cryptoassets-for-individuals

1.3 New solution to doctors' pension tax charges proposed

The Government has proposed a new solution to the ongoing dispute over tax charges and the NHS pension scheme. It would allow users of the defined benefit scheme to limit the pension contribution made by the NHS, and receive the remainder in salary, to avoid having to repay tax relief on excess pension contributions.

The standard yearly pension contribution limit is £40,000, but is reduced gradually for those earning over £110,000 to a minimum of £10,000, to limit the amount of tax lost to the Government in providing pension tax relief for high earners. If the limit is exceeded, the tax relief on the excess amount has to be paid back. It can be paid out of the scheme in many circumstances. Remaining within the limit is not as difficult for those on defined contribution schemes, but for defined benefit schemes the calculation of 'contribution' is more complex. It is based on the increase in value of the benefit in the year, so exceeding the limit can happen unexpectedly, and restricting the amount paid in is harder.

The NHS pension scheme is defined benefit, so as many staff are high earners they have been prominent in complaints about the clawback of tax relief. In response to large tax bills, some reportedly six figures, many have limited their working hours, resulting in staff shortages for the NHS. The proposed solution is to give full flexibility to senior doctors to limit the sums added to their pension, and receive the unused pension contribution as normal salary. A consultation on the proposals will be launched.

www.ftadviser.com/pensions/2019/08/09/doctors-will-not-be-compensated-for-tax-breaches/

2. Private client

2.1 Residence not sufficiently permanent for CGT relief

A taxpayer who sold three homes in four years has been denied private residence relief (PRR) on two disputed gains. The FTT found that although he lived in each property successively over the course of his matrimonial difficulties, it was not plausible that each was intended as a permanent residence and then found to be unsuitable.

The taxpayer left his marital home in 2005. Over the period until filing for divorce in 2008 he purchased and lived in four properties, three of which were sold. He did not claim PRR on the first disposal, as the flat had been purchased as a temporary residence whilst attempting reconciliation. He did not report the next two disposals, which occurred in the same tax year. He argued that both houses were purchased as permanent residences, but found to be unsuitable due to the size or location. He explained that he and his wife moved as often as every year prior to the birth of their first child, and he had lived in an additional four homes in the five years following the divorce in 2009. A previous separation of 2 to 3 years had been resolved.

HMRC contended that, as a local estate agent, the taxpayer would have been aware whether or not a property and its location were suitable before the purchases. He was also hoping to reconcile with his wife, so he did not live in the houses with a sufficient degree of permanence. The FTT agreed that the purchases and sales were made with a view to gain rather than as homes. One property was sold after four months of ownership, and one after six, and there was no evidence that he had intended to stay permanently, despite living in each. The taxpayer had not proved that the assessment was wrong, so the appeal was dismissed. The discovery assessment in 2016 was valid, as he had deliberately failed to declare the second and third sales on his return in 2008, and the penalties were upheld.

Fitzjohn v HMRC [2019] UKFTT 488 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07291.html

2.2 FTT clarifies definition of 'garden and grounds' for SDLT

The acquisition of a farmhouse and the surrounding land was found to be subject to the residential rates of SDLT because the land fell within the definition of 'garden and grounds'. A meadow, bridleway and barn were held to be available to the owners for use, even though they were physically separated from the house and the public had rights over the bridleway.

The taxpayers purchased a farmhouse with approximately 3.5 acres of land and submitted an SDLT return for the acquisition of a residential property. They later amended the return on the basis that the property was for 'mixed use' and therefore subject to the lower, non-residential, SDLT rates. The taxpayers argued that the meadow and public bridleway were not residential land, nor was the derelict barn that had been classified as non-residential by the local council authority.

The FTT agreed with HMRC and found that the meadow and bridleway were part of the grounds of the dwelling, and therefore residential in nature. The barn was a structure built on the grounds, so it also fell within the definition of grounds. 'Grounds' was found to mean '*land attached to or surrounding a house which is occupied with the house and is available to the owners of the house for them to use'*. It is not necessary for the land to be used actively by the owner of the dwelling, and it was not fatal that the land was physically separated from the house by hedges or fences. The fact that the public had the right to use the bridleway did not affect this outcome. The judge noted that land used for a commercial purpose would be land on which a business is conducted and therefore not part of the grounds of the house. The claim for a repayment failed.

Mr David Hyman and another v HMRC [2019] UKFTT 469 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07271.html

2.3 FTT chooses time apportionment of gain over valuations

The FTT has found that the increase in value of shares must be time apportioned over the whole period of ownership under the statutory provisions. A CGT relief was only available for the latter part of the ownership period of shares. A valuation showing that the increase in value largely occurred in this period was accepted, but the FTT found no scope to prefer a just and reasonable basis of apportionment to a time apportionment.

Two taxpayers made large gains on a share sale in 2003. The shares had been held as non-business assets, but became business assets on 6 April 2000. Taper relief is only available for gains on business assets. The time periods were not in dispute, just the method of apportionment.

The taxpayers argued that the gains should be apportioned on a just and reasonable basis, which happened to be that more of it was in the period where relief was available. They called a valuer as expert witness, who considered that the market value of the shares on 5 April 2000 was much lower than it would be under a straight time apportionment of gain over the ownership period. The FTT agreed that the taxpayers' valuation was fair, but agreed with HMRC that under the legislation only a time apportionment could be allowed. The appeal was dismissed.

Lee & Ors v HMRC [2019] UKFTT 467 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07269.html

2.4 Discovery made during hearing valid

An HMRC assessment has been upheld where the discovery in question was made during an FTT hearing relating to a previous tax year. The taxpayer had succeeded in that appeal, but on HMRC finding out that he used the accruals basis, not the cash basis, an enquiry was opened into the previous tax year.

The taxpayer was self-employed. The majority of his income came from one source. HMRC disputed his treatment of income and expenses. He had previously won an appeal against a discovery assessment for 2011-12, though some penalties were upheld. Shortly after the hearing, before judgment was given, HMRC raised a protective assessment and penalty for 2010-11. It contended that this discovery was not stale, as the fact that the taxpayer operated on the accruals basis had only come to light at the hearing when he produced documents for the first time. The fact that HMRC's assessment, based on third party documents from his main income source, was prepared on the cash basis was one of the reasons the taxpayer succeeded in overturning it at the first hearing.

The taxpayer argued that HMRC had had enough information to raise that assessment during the course of the enquiry into 2011-12, so the discovery was stale. He did not agree that it had only discovered his use of the accruals basis at the first hearing. The quantum of the assessment was also disputed. The FTT agreed with HMRC that the discovery was made at the hearing and upheld the assessment and penalties. The FTT principally differed from the previous judgment as it found the taxpayer's accountant to be an unreliable witness, whereas in the first hearing, where he conducted the case rather than acting as a witness, he persuaded the judge to cancel the assessment. It held that the first assessment was set aside incorrectly, though it could not be reinstated at this hearing.

Kantopoulos v HMRC No. 2 [2019] UKFTT 470 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07272.html

2.5 Bermudan litigation settlement subject to CGT

The FTT has dismissed an appeal by a taxpayer who received a payment in settlement of Bermudan litigation that he claimed was exempt as compensation for personal damages. He had contended that the litigation had had to be commenced under the fair value for shares provision in the Bermudan Companies Act because there was no method open to his to sue for reputational damage, but his motive was irrelevant for the FTT.

The taxpayer was the third largest shareholder of a Bermudan company, who commenced litigation against it after his removal from the board of directors. He complained that it had failed to provide him with information, and that he had suffered reputational damage. The company made a payment to him in settlement. He argued that the payment was personal compensation, and thus came within the specific exemption from CGT. He had applied for findings in Bermuda, under the Bermudan Companies Act, but explained to the FTT that he had been advised that bringing a defamation action in the UK courts would be unenforceable.

The FTT agreed with HMRC that the payment was compensation for the reduction in value of the taxpayer's shareholding, and therefore subject to CGT. The payment was made in settlement of a claim brought under a provision relating to fair value of shares, so could not come under the CGT exemption for personal damages, regardless of his motivation.

Robinson v HMRC [2019] UKFTT 483 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07286.html

3. PAYE and employment

3.1 Termination payment found to be relevant benefit

A termination payment was held by the FTT to be a relevant benefit under an Employer-financed retirement benefit scheme (ERFBS). As such, it was fully liable to employment income tax. The FTT also decided that in the alternative, if this analysis was incorrect, the payment constituted a termination payment which was not on the grounds of ill health. The taxpayer could not therefore claim relief against the exemption for death or disability payments or benefits.

The appellants were the executors of the late taxpayer who had died after leaving service, having been seriously ill. The taxpayer enjoyed an unusual remuneration package that effectively continued his remuneration after retirement. He entered into a settlement agreement with the employer that was based in part on actuarial projections.

The appellants argued that the payment was not earnings as it was not in respect of either past or future service. The appellants did accept that the settlement agreement was an EFRBS but argued that the payment under it was not a benefit under it.

In the alternative, they argued that the payment was one relieved for death or disability. The FTT rejected this latter argument finding that the settlement agreement was simply buying out the previous rights. It found that the payment was caught by the EFRBS legislation, which meant that it automatically could not qualify as such a relievable payment. It also found that if it was not an EFRBS the payment was a straight forward termination payment and taxable as such.

Clark (deceased), The Executors of v HMRC [2019] UKFTT 473 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07276.html

4. Business tax

4.1 Capital allowances denied for gas storage companies

The FTT has ruled that de-brining and leaching expenses incurred in preparing underground cavities for gas storage were not eligible for capital allowances. The cavities, despite having some characteristics of plant, had a predominant and significant function of shelter and containment and were therefore premises.

The taxpayers were both companies within a group that generated and distributed energy in the UK. Their specific business involved creating underground cavities by dissolving salt rock, then removing the brine and filling the cavities with gas. When the gas was removed, it was purified and treated before re-entering the national energy transmission system. The taxpayers claimed capital allowances on the costs of de-brining and leaching the cavities to prepare them for the insertion of gas. HMRC denied this claim on several grounds.

The FTT found that the expenses were not eligible for capital allowances because they were not incurred in relation to plant or machinery. The predominant purpose of the cavities was the storage of gas, which amounted to premises. The fact that the cavities had plant-like functions did not change this outcome; it is possible for sites to have both plant and premises functions, but the principal function is a matter of degree. The FTT went on to find that even if the cavities had been plant, capital allowances would not be available because they were structures that did not qualify for any of the specific exemptions in the capital allowances legislation. Specifically, the business of storing gas did not fall within the exemption for extracting, producing, processing or distributing gas. The treatment of gas on removal was a necessary incident of storing the gas, rather than the business of the companies. The claims were dismissed.

Cheshire Cavity Storage 1 Limited and another v HMRC [2019] UKFTT 498 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07301.html

4.2 FTT rules HMRC cannot 'discover' the same information twice

A discovery assessment issued by HMRC was found to be 'stale' and therefore invalid. The same information had been discovered twice, and the earlier discovery was held to be the relevant discovery. Had the assessment not been stale, it would have been upheld because the taxpayer had made an invalid claim for rollover relief. The construction of buildings on land it already owned did not amount to the acquisition of land.

The taxpayer had realised a gain on a sale under a compulsory purchase order, and reinvested the entire proceeds in the construction of industrial workspace on land it already owned. It claimed rollover relief on the basis that the construction qualified as the acquisition of land. An enquiry was opened in 2014 and an officer of HMRC amended the return to deny the relief on the grounds that the claim was invalid. An assessment, however, was not raised at that time. An unrelated UT case in 2017 clarified that amending a return was not an appropriate approach in these circumstances. Following this case, a different HMRC officer considered the claim, agreed that it was invalid, and issued a discovery assessment in 2018. At least three years had passed since the original discovery.

The FTT ruled that HMRC could not discover the same information twice; the earlier discovery was the relevant discovery, and it had become stale because of the long delay until assessment. It also found that the provisions in the rollover relief legislation that suspend the time limit restrictions for assessments and amendments do not apply to the staleness of discovery assessments.

If the assessment had not been stale, it would have been upheld because the rollover relief claim was invalid. The FTT found that the construction of buildings on land that the company owned was enhancement expenditure, not the acquisition of land. In light of related statutory provisions, the general approach in CGT legislation and the established principles of land law, the statute must be construed to distinguish between land and the buildings on that land.

Oriel Developments Limited v HMRC [2019] UKFTT 503 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07306.html

5. Tax publications and webinars

5.1 Tax publications published

International tax reporting changes: Directive on Administrative Cooperation 6 and the Mandatory Disclosure Rules

6. And finally

6.1 Staying put?

We note with interest the comments on the apparent departure from the UK of non-doms reported at 1.1 above. We heard echoes of a comment of our now-favourite author Sarah Caudwell when describing tax haven Monte Carlo. '*We looked out, as we drank our coffee and ate our croissants, at the neat rectangular harbour, glittering in the sunlight and crowded with the yachts of those too rich to afford to live elsewhere.*' (From *The Sirens Sang of Murder*).

www.gov.uk/government/statistics/statistics-on-non-domiciled-taxpayers-in-the-uk

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	RS – Revenue Scotland	SC – Supreme Court	IT – Income Tax	VAT – Value Added Tax
HMT – HM Treasury		UT – Upper Tribunal		