

Tax Update

A round-up of recent issues

8 October 2019

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1. General

1.1 New Interim Chief Executive for HMRC

Jim Harra has been appointed Interim Chief Executive of HMRC as a temporary replacement. He was previously Deputy Chief Executive. Three new non-executive directors have also been appointed to the HMRC Board.

Following Sir Jonathan's Thompson's departure, the current Deputy Chief Executive of HMRC, Jim Harra, has been appointed Interim Chief Executive of HMRC. He also holds the post of Interim Accounting Officer.

In addition, three new non-executive directors have been appointed to the HMRC board. One, Paul Morton, was formerly head of the Office of Tax Simplification.

www.gov.uk/government/news/hmrc-interim-chief-executive-appointment-confirmed

www.gov.uk/government/news/three-non-executives-join-hmrc-board

1.2 Abolishing IHT 'on Chancellor's mind'

The Chancellor has commented on abolishing IHT, saying that it was 'on his mind' although 'sensible changes' had already been made.

The Chancellor, Sajid Javid, was asked at the Conservative Party Conference about abolishing IHT. He said that sensible changes had been made, but he understood the arguments against it, and when asked if he would consider scrapping it he responded that 'it's something that's on my mind'.

During the rest of the Conference, very little tax policy was commented on, but Mr Javid also mentioned that there would be a Budget before the end of the year.

www.ftadviser.com/pensions/2019/10/02/chancellor-hints-at-scrapping-ih/

1.3 Tax arrangements held to be notifiable tax avoidance

The FTT has issued a declaration that a scheme sold by a tax advice company was notifiable under the disclosure of tax avoidance schemes (DOTAS) regulations. It compared the work undertaken for four of the company's clients, and found that the advice given was a scheme with a pre-determined series of transactions designed to give a tax advantage, which was intended to be the main benefit of the arrangements.

In this case, a company sold tax arrangements, but did not notify HMRC, as it did not consider that the arrangements met the criteria to be a DOTAS scheme. HMRC applied to the FTT for a declaration that the arrangements were notifiable under DOTAS.

The correspondence between the company and HMRC set out the company's view that there was no tax advantage, as no tax was paid on the monies received by the directors, there was only a loan. As the loan was made from an employee benefit trust, with an initial 20 year term open to extension, the FTT rejected this suggestion. The second defence was that the steps were not pre-determined, so it was not a scheme.

The FTT compared advice given to four of the company's clients, and found that it was virtually identical. The documents purported to offer advice on tax planning with different options, and gave the impression that the latter steps were not considered in the earlier stages. The scheme as put into operation, however, was identical for each: no time was taken to consider alternatives in the planning, and the resultant tax saving was exactly that advertised in the marketing material. The FTT found that this was a pre-planned series of steps, part of a single scheme that was likely to have been agreed orally before the start of the scheme.

The FTT found that the advice was a notifiable scheme for the DOTAS regulations and the company was a promoter. The scheme met several of the relevant criteria, though only one hallmark had to be met to prove that the scheme was notifiable.

EDF Tax Ltd (in creditors' voluntary liquidation) v HMRC [2019] UKFTT 598 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07381.html

1.4 HMRC events to assist businesses preparing for Brexit

HMRC is hosting several free events to help businesses prepare for Brexit. The events currently listed cover issues such as importing and exporting goods and services, transferring data and employment.

The events are being held in multiple locations and include workshops and webinars. They are being run in cooperation with other Government departments, such as the Home Office and Department for Business.

www.gov.uk/government/news/events-to-help-you-get-ready-for-brexit?utm_source=724ed215-d173-4961-bb43-0d5e5c884909&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily

2. Private client

2.1 Communal areas of houses in multiple occupation still a dwelling house

The FTT has rejected a claim for capital allowances on expenditure on the communal areas of houses in multiple occupation (HMOs). The taxpayer had argued that these were not part of a dwelling house, but this was incorrect as they were facilities for everyday life.

The taxpayer let HMOs to unconnected individuals, and claimed capital allowances for expenditure on communal areas. These are not available for expenditure on dwelling houses, but the return was filed on the basis that the communal areas were not part of a 'dwelling'. HMRC considers that lobbies, stairs, and lifts in student halls of residence are not parts of a dwelling house, but other communal areas such as kitchens are. HMRC rejected the claim for the Annual Investment Allowance (AIA), as the expenditure was pre-2008, and declined to apply normal capital allowances, which are not available for expenditure on dwelling houses, as its view is that HMOs are dwelling houses.

The FTT agreed with HMRC and dismissed the appeal, holding that 'dwelling house' must take its ordinary everyday meaning. The HMOs as a whole provided the facilities for everyday domestic life, not each bedroom without kitchen and bathroom.

Tevfik v HMRC [2019] UKFTT 600 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07383.html

2.2 FTT upholds surcharge on unauthorised withdrawal from a pension scheme

The FTT has confirmed that the surcharge on unauthorised withdrawals from a pension scheme can apply even if the taxpayer was unaware that the funds derived from the pension. In this case, where the taxpayer had been targeted by scammers and was unaware that a loan derived from his pension, the discovery assessment was upheld, but the judge asked HMRC to consider the consequences of enforcement on the taxpayer, and to target its future investigations at promoters.

The taxpayer appealed against a charge for an unauthorised withdrawal from his pension, by way of a loan. He entered into this arrangement because, when he was in financial difficulty following ill health, company A cold-called him and offered a loan, which he had been seeking elsewhere. A few days later, company A rang again, asked about his pension arrangements, and recommended transferring the fund to company B, suggesting that it would grow faster. The link between pension and loan was not explained to him.

His initial appeal had been made on the grounds that there was no link, but prior to the hearing he accepted the evidence HMRC had obtained from the provider. His defence at the hearing was that he had not been aware of this link at the time the loan was made. He had now lost the pension fund to the scammers, less the 25% loan, but was required to repay this with a large amount of interest.

The FTT dismissed the appeal, as it found that the funds were derived from the pension, and the discovery assessment was valid. It accepted that the taxpayer had been unaware of the connection, and that his complaints had been upheld by the pension ombudsman, but this did not alter the fact. The judge reminded HMRC that enforcement of the assessment was at the discretion of HMRC, and expressed his hope that future investigations would target the orchestrators and promoters rather than the victims.

West v HMRC [2019] UKFTT 602 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07385.html

2.3 Permission to make a late appeal granted due to incorrect HMRC advice

Two taxpayers have been granted permission to make a late appeal against late filing penalties, as they had been advised by HMRC that no appeal could be made until the return had been filed. HMRC's note of the conversation was important in evidence.

The taxpayers, three partners in a family partnership, appealed against late filing penalties. The applications were made late, some by almost 10 months. At the hearing, HMRC cancelled the penalties for the senior partner, due to her serious illness. The remaining two argued that their late applications should be accepted, as one had called HMRC and been told that they could not appeal the penalties until the return had been filed. They had also had problems with a previous accountant, who had incorrectly told them that a return had been filed.

The FTT permitted the late appeals, as a result of HMRC having a note of the telephone conversation with a partner, telling him that appeals were only possible once the returns had been submitted. Some penalties were issued after these, but it was held to be reasonable that they had relied on this advice for all penalties. The taxpayers were granted permission to make late appeals, and HMRC accepted that they had a reasonable excuse for late filing.

Shenstone, Georgina White, Henry White v HMRC [2019] UKFTT 595 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07378.html

3. PAYE and employment

3.1 Some HMRC payslips not received for PAYE Settlement Agreements

Some employers using PAYE Settlement Agreements (PSAs) have not received the payslip reminding them of the amount due. HMRC has warned that these employers must still pay by the 22 October deadline (19 October if paying by post).

Employers using PSAs are required to pay the tax due by 22 October (19 October if paying by post). Normally, HMRC issues payslips to each employer prior to this, giving the amount due and payment methods. This year, HMRC has warned that some employers have not received these.

Whether or not an employer has received a payslip, it is still liable to pay the amount it calculates to be due by the deadlines, and may be charged interest and penalties if it does not.

<https://taxagents.blog.gov.uk/2019/10/02/important-information-about-payments-due-under-payee-settlement-agreements/>

3.2 Employer Bulletin: Brexit edition

This special edition of the Employer Bulletin focuses on how social security laws and payments will operate following the UK's withdrawal from the EU.

The Bulletin confirms that the Government is aiming to establish reciprocal arrangements with other Member States regarding social security. The important implication is that these do not yet exist if there is a no-deal Brexit. If successfully negotiated, the arrangements would allow the UK to maintain existing social security coordination until 31 December 2020. Some individuals would therefore be protected from having to pay social security in more than one jurisdiction. The Bulletin summarises how employers should prepare for a no-deal Brexit if they have employees working in the EU, EEA, Switzerland or Ireland.

It also provides details of grants for customs declarations and further sources of information on Brexit.

www.gov.uk/government/publications/employer-bulletin-brexit-edition

4. Business tax

4.1 CA upholds UT decision on withholding tax on manufactured overseas dividends

The CA has found for the taxpayer, upholding the UT decision that the manufactured overseas dividend (MOD) regime constituted a restriction on the free movement of capital. The trustees of a pension scheme were therefore entitled to recover withholding tax on historic MODs.

The taxpayer, a pension fund, suffered £8.8m of withholding tax arising from stock lending arrangements carried out between 2002 and 2008. If the fund had been taxable on its dividend income, it would have been able to obtain credit for the withholding tax suffered. As a pension fund, it was not taxable on such income, so the withholding tax suffered was an actual cost.

The trustees argued that the MOD regime imposed a restriction on the movement of capital under EU law. The FTT dismissed this appeal, but the UT overturned this decision. It found that the correct approach to this issue was to compare the UK tax treatment of UK manufactured dividends and MODs. The FTT had compared the receipt of a MOD with the receipt of the foreign dividend itself. The UK law in these circumstances provided for withholding tax on a MOD, but not on a UK manufactured dividend. The MOD regime did therefore infringe upon the right to free movement of capital.

The CA upheld this decision, noting that the MOD regime limited the returns available to investors from stock lending of overseas shares. It therefore discouraged investors from buying or retaining such shares. This restriction on free movement was found not to be justified or proportional. The CA also agreed with the remedy put forward by the UT: a recipient of a MOD who has no liability to income tax should be repaid the withheld tax.

Although withholding tax on MODs was abolished in 2014, this was a test case that will have a significant impact on other taxpayers. HMRC estimated that £905 million of tax and interest is at stake.

HMRC v Coal Staff Superannuation Scheme Trustees Limited [2019] EWCA Civ 1610

www.bailii.org/ew/cases/EWCA/Civ/2019/1610.html

4.2 FTT clarifies when ignorance of the law is a reasonable excuse

The FTT has ruled against a taxpayer that appealed against late filing penalties for ATED. It confirmed that ignorance of the law may be a reasonable excuse that is sufficient to overturn penalties, particularly where the taxpayer is resident outside the UK. As a member of the Institute of Taxation and a UK-qualified barrister, however, the company director should not have been ignorant of major tax changes.

The taxpayer had not been aware that it was subject to ATED and incurred several late filing penalties. It argued that the sole director, who lived outside the UK, should not be expected to know when the UK introduces new tax laws. The FTT considered two similar cases that arose in respect of non-resident CGT. It agreed with those cases; ignorance of the law can be a reasonable excuse in some limited circumstances. The director in this case, however, was a member of the Institute of Taxation and had qualified as a barrister in the UK. The FTT held that he should have been well aware that tax rules change frequently and should have checked the local tax position of the property from time to time. Ignorance of the law was, in his case, not a reasonable excuse.

Tysim Holdings Limited v HMRC [2019] UKFTT 606 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2019/TC07389.html

5. Tax publications and webinars

5.1 Webinars

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

- 9 October 2019: S&W Sessions: IR35: Preparing you for changes to off-payroll working.

<https://smithandwilliamson.com/en/events/>

6. And finally

6.1 Historical sacrilege

With a Prime Minister keen on the Classics, and many things nostalgic, we were surprised last week to learn that his Chancellor had an eye to abolition. Abolition, namely, of IHT. There is indeed a fine history of tax abolition - window, hearth, and playing card taxes, to name just a few, and a substantial backlash against increased probate fees - but can this justify historical sacrilege?

IHT was only introduced in 1986, but its ancestors have a rich history. The probate duty of 1694 was really a stamp tax, but modern forms arrived 200 years later with estate duty. Through swings, roundabouts, and less-than-successful attempts at simplification, the UK has stuck faithfully to the utopian dream of combining death and taxes in some way that not more than half the population complains about. Is now really the time to give up?

Naturally, some might say that tax advisers have a personal interest in keeping tax complex, but we are not too worried. After all, there is still a good market for advice on estate duty, abolished 1975 (RIP).

https://en.wikipedia.org/wiki/History_of_inheritance_taxes_in_the_United_Kingdom

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		

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