Tax Update

A round-up of recent issues

15 October 2019

1. General

1.1 Budget date set for 6 November 2019

The Chancellor of the Exchequer has announced that the 2019 Budget will be released on Wednesday 6 November 2019.

The 2019 Budget will be Mr Javid’s first. The BBC has reported that, if there is a no-deal Brexit, the Budget is likely to be delayed, with the announcement being an economic statement.

www.bbc.co.uk/news/business-50039207

1.2 Taxation and life events – Office of Tax Simplification report

The Office of Tax Simplification (OTS) has recommended various improvements to the tax system, to assist with key events for a taxpayer. The report addresses issues including the potential to lose out on state pension by not claiming child benefit, and improvements to PAYE and pensions. A theme throughout the report is the need for better guidance and education for taxpayers.

The OTS has published a report examining how people engage with the tax system and its complexities, at key points in their lives, with recommendations for simplification. It points out that, for the majority of the population, their only experience of the tax system is PAYE, so these times might be their only significant contact with the it. The key points focussed on are as below, and advice on improving taxpayer education generally is also included.

Becoming a parent: the problems with claiming child benefit and the clawback system for those earning over £50,000. It recommends implementing a system to restore National Insurance credits to parents whose State Pension is reduced by failing to claim child benefit, and improving communications to make the consequences clear.

Starting work: the lack of public understanding of PAYE. It recommends better guidance, particularly for non-commercial employers for example, of nannies, clearer explanations of PAYE codes, and improvements to the operation of PAYE.

Starting to contribute to or draw a pension: the complexity of the system, and poorly understood differences in outcomes. It recommends a review of how allowances affect defined benefit schemes, better guidance on the different arrangements, and trying to reduce the differences in outcomes for low earners on two types of scheme.

Helping others: the complexities of acting as attorney, executor, or less formally. It recommends reviewing the process for executors handling a deceased person's affairs, and integrating and improving the various guidance sources.

www.gov.uk/government/publications/ots-life-events-review-simplifying-tax-for-individuals

1.3 Scottish Government consults on 'Tourist Tax'

The Scottish Government is considering a levy on transient visitors, and is seeking views on its impact and how best to introduce one.

The Scottish Government has opened a consultation to develop its understanding of the impact of a transient visitor levy. This is a follow-up to the National Discussion.Responses are requested by 2 December, particularly in regard to how the legislation could:

- support the continuing success of the tourism industry in Scotland;
- provide the powers that are needed for local authorities to respond to local pressures; and
- minimise the administrative and compliance burdens for those affected.

https://consult.gov.scot/local-government-and-communities/visitor-levy/

1.4 Cost of pension tax relief increases

The latest HMRC estimates of the cost of tax reliefs in 2019/20 include the prediction that the cost of individuals' pension tax relief will rise to almost £40bn.

HMRC has published its estimates of how much various tax reliefs will cost in 2019/20. Most are broadly similar to the previous year, but the cost of tax relief on pensions contributions has risen by over 5%, to £39.9bn. This represents the combined amounts of IT and NICs forgone as relief.

www.gov.uk/government/statistics/main-tax-expenditures-and-structural-reliefs *www.ftadviser.com/pensions/2019/10/10/cost-of-pension-tax-relief-rises-to-39-9bn/?utm_campaign=FTAdviser+news&utm_source=emailCampaign&utm_medium=email&utm_content=*

2. Private client

2.1 Estimated assessments upheld due to taxpayer's 'lack of action'

The FTT has refused to hear a late appeal against estimated HMRC assessments and penalties totalling over £100,000. The taxpayer claimed that the true amount was between £10,000 and £20,000, but as he had failed to provide any information or cooperate with HMRC, and the appeal was over two years late, the FTT refused permission to appeal.

After being informed that a taxpayer had not declared rental income, HMRC attempted to get information from him. He did not respond to the efforts, or provide any evidence. Estimated assessments were then raised for nine years, with penalties. He did not discuss these with HMRC, but appealed to the FTT, + over two years late.

Although the taxpayer submitted that he was unaware of the time limit to appeal and had a medical condition that affected his ability to deal with paperwork, the FTT refused to accept the late appeal. He had taken almost no action to deal with the situation, and HMRC should be allowed to finalise matters. The FTT accepted that if his argument that he owed £10,000 to £20,000, rather than the HMRC calculation of over £100,000, were correct then he would be significantly prejudiced by this, but it could not make a conclusion as to the potential merits of his claim as he had supplied no evidence of this or his asserted financial hardship.

Modi v HMRC [2019] UKFTT 0610 (TC)

http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j11353/TC07393.pdf

3. Trusts, estates and IHT

3.1 Probate fee increase cancelled

The Government has cancelled the planned increase to probate fees. It will instead review them in its wider review of court fees. Small adjustments to cover costs will be considered.

The Justice Secretary, Rt Hon Robert Buckland QC MP, has confirmed that the Government will not proceed with the proposed increase in probate fees. These were due to be changed from a flat fee to a banded system based on the size of the estate. This would have increased the fee significantly for estates worth over £50,000. The increase was due to take effect in April 2019, but was delayed by pressure on Parliamentary time.

Probate fees will instead be looked at as part of a wider review by the Ministry of Justice to ensure all fees are 'fair and proportionate'. This review will consider small adjustments to cover costs. The cancellation follows significant pressure on the Government from groups including the Law Society. The planned increase would have been funded the courts service more widely, as more income would have been raised than is necessary to fund the Probate Office.

www.ftadviser.com/pensions/2019/10/14/govt-u-turns-on-probate-fee-hike/?utm_campaign=FTAdviser+news&utm_source=emailCampaign&utm_medium=email&utm_content=

4. PAYE and employment

4.1 GAAR Panel advises on Employee Shareholder Shares Scheme

The GAAR panel has advised on a scheme manipulating the rules concerning employee shareholder shares (ESS). ESS were introduced in 2013 but abolished from December 2016, so the decision is of historic application only. It does nevertheless contain some insights on the GAAR Panel's approach

to tax abuse generally. The scheme, which effectively transferred value into ESS from shares already held by the employees, was held to be abusive.

The scheme involved a company wholly owned by a taxpayer through a partnership who became an employee. The company obtained an HMRC valuation of proposed growth shares from HMRC that included net asset value hurdles. The effect of the share rights was that value could pass out of existing shares into the new ESS shares. The taxpayer gave up his material interest in the company. The company duly reorganised its share capital and the taxpayer entered the ESS agreement and obtained the shares. Within 90 days the hurdle was met, the taxpayer resigned and the company repurchased the (now valuable) ESS, CGT- and income tax-free.

The upshot is that the scheme delivered tax free proceeds in the hands of the taxpayer. It was hardly surprising that this was considered abusive, but the Panel's analysis was instructive. Looking at whether or not steps were contrived or abnormal, the Panel thought that the giving up of the partnership interest was not contrived, nor was the issue of the special ESS. The hurdle within the ESS was contrived, however, because it had the effect of moving all the value from existing shares into the new shares. Hurdles were not inherently a problem, as they could be used in ordinary incentive arrangements, but this one was.

www.gov.uk/government/publications/gaar-advisory-panel-opinion-of-7-august-2019-extraction-of-value-from-a-company-by-its-directors-and-shareholders?utm_source=7a6b4f2c-37f6-422d-9a4a-aa16c13227a7&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily

5. Business tax

5.1 UT rules on the attribution of profits to permanent establishments

The UT has determined that UK law correctly implements the permanent establishment (PE) provisions of the UK/Ireland Double Taxation Agreement (DTA). The starting point is the actual position of the PE, but this should be adjusted to reflect the position that would have arisen if the PE had been a separate and independent entity.

The taxpayers were two Irish banks that operated in the UK through PEs. Under the UK/Ireland DTA, PEs should be taxed as if they are distinct and separate enterprises that operate in their own right. This creates a tax fiction of a standalone company, which is in line with the OECD Model Taxation Convention.

The PEs had been denied tax deductions in the UK for interest paid to the Irish headquarters by way of Capital Attribution Tax Adjustments. HMRC contended that the amount of equity in each PE had been understated, so the loan capital and interest had been overstated. The PEs argued that the DTA precluded HMRC from applying the UK provisions that gave rise to the disallowance. It claimed, therefore, that the actual capital position should be accepted.

The FTT had found for HMRC, and the UT upheld this ruling. The correct starting point is the actual capital attributed to the PE. This position should, however, be adjusted if it does not reflect what the position would have been if the PE was in fact a separate and independent entity. The UK provisions relied on by HMRC are not the only way to implement this approach, but they are consistent with the DTA. The appeal was dismissed.

To come to this decision, the UT determined that only the OECD publications pre-dating the DTA should be considered. It did accept that the versions of the OECD Commentary up to 2008 could be consulted because the OECD position was largely unchanged until then. The UT refused to consult the most recent Commentary, which is substantially updated. This case may not, therefore, be entirely authoritative in respect of more recent transactions.

Irish Bank Resolution Corporation Limited (in special liquidation) and another v HMRC [2019] UKUT 0277 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2019/277.html

5.2 CA judgment on reliance on HMRC manuals

The CA has upheld a HC judicial review decision on whether or not a statement in HMRC's Manuals gives rise to a legitimate expectation. It agreed that the statement did amount to a representation on which a taxpayer could rely. In this case, however, a 'high degree' of unfairness did not result from HMRC applying the correct law instead of holding to its representation. The appeal was therefore dismissed.

The taxpayer, a UK investment company, had suffered 30% withholding tax (WHT) on interest payments received from a US subsidiary. The taxpayer was denied unilateral credit relief (UCR) by HMRC; instead, the taxpayer was allowed to deduct the WHT from the gross interest payable. The taxpayer made two appeals: first, that HMRC's treatment was incorrect, and second, a judicial review claim that HMRC's Manuals gave rise to a legitimate expectation of UCR. The first appeal is pending; the second is the subject of this case.

UCR is restricted by UK law where there is an express provision in a double taxation agreement (DTA) denying credit relief. The wording of HMRC's International Tax Manual at the time indicated that UCR would not be restricted in the taxpayer's circumstances. The HC had ruled that the Manual did amount to a representation on which it was reasonable for taxpayer to rely, but that the taxpayer had not relied on it when structuring the loan arrangements. Furthermore, the HC found that it was not conspicuously unjust for HMRC to resile from the representation in the circumstances of the case.

The CA agreed that the Manual contained a clear and unambiguous representation on which taxpayers were entitled to rely. There must, however, be a high degree of unfairness arising for HMRC to be prevented from resiling from that incorrect view of the law. It agreed with the HC that this threshold was not met, but for different reasons. The taxpayer's reliance on the Manual was weak in two respects: the statement in the Manual was only a representation of HMRC's opinion of the law, and the taxpayer had obtained specialist advice such that it was not at any great disadvantage compared to HMRC when interpreting the law. HMRC's refusal to apply its representation, then, did not amount to an abuse of power and the taxpayer did not show it suffered serious detriment as a result. It is notable that the CA's analysis differentiated between an 'ordinarily sophisticated taxpayer' and a taxpayer that obtained expert advice. It explicitly stated that reliance on a tax adviser is not fatal to a claim for legitimate expectation, though the CA treated it as a factor that mitigated the unfairness of the outcome in this case.

R (on application of Aozora GMAC Investment Limited) v HMRC [2019] EWCA Civ 1643

www.bailii.org/ew/cases/EWCA/Civ/2019/1643.html

6. VAT

6.1 UT overturns FTT ruling on charities and VAT law

The UT has ruled that a Community Amateur Sports Club (CASC) cannot be a charity for the purposes of VAT law. The definition of 'charity' in charity law should be read as informing the definition in VAT law. Consequently, a CASC cannot benefit from provisions that allow zero-rating of some types of construction costs incurred by charities.

Eynsham Cricket Club (the Club) had constructed a pavilion for use by its members and the local community. It included a licensed bar and was hired out to the public for events. The FTT had ruled that the construction costs were subject to the standard rate of VAT, rather than zero-rated as the Club had argued. The Club was not established for charitable purposes only and thus was not a charity for the purposes of VAT. The FTT had ruled in the Clubs favour on other points, but the issue of charitable purposes was sufficient for the appeal to fail. The Club was granted permission to appeal, and HMRC conceded that the FTT's ruling on charitable purposes was wrong in law. At a subsequent case management hearing, the UT determined that the Club was established for charitable purposes only. Effectively, the Club had succeeded in its appeal. HMRC, however, challenged three other points of the FTT's decision, so the case progressed to the UT.

The primary issue was the FTT's determination that a CASC could qualify as a charity for VAT purposes. Under charity law, a CASC is specifically excluded from being a charity. This exception is not present in the VAT provisions. The UT examined the interaction of charity law and tax law, and overturned the FTT's decision. It found that the definition of 'charity' in the *Charities Act 2011* informed the definition of 'charity' for VAT purposes. A CASC could not therefore qualify as a charity for VAT purposes. The Club, therefore, did not qualify as a charity, so the supplies were standard-rated. The outcome of the case was the same as that ruled by the FTT, but on different grounds.

Eynsham Cricket Club v HMRC [2019] UKUT 0286 (TC)

www.bailii.org/uk/cases/UKUT/TCC/2019/286.html

6.2 The Law Society issues new guidance on disbursements

New guidance on the VAT treatment of disbursements has been published by the Law Society. This follows recent case law, in which the concept of disbursements was interpreted narrowly, casting doubt on client invoicing practices.

The Law Society has confirmed that it is aware of the difficulties the *Brabners* case has caused firms and it regrets the lack of clarity resulting from that and other decisions. Its new guidance is not intended to set standards for the profession, but rather sets the context for the decisions that firms need to take on the treatment of disbursements for VAT purposes. The Law Society expressly does not accept any legal liability for the contents of the guidance.

Brabners LLP v HMRC [2017] UKFTT 0666: *www.bailii.org/uk/cases/UKFTT/TC/2017/TC06093.html*

www.lawsociety.org.uk/support-services/advice/articles/vat-treatment-of-disbursements-and-expenses/

7. And finally

7.1 The next state pension scandal: ETA 2050ish

Following the court case of the 'WASPI' women, one could be forgiven for thinking that the Government would be keen to avoid more people getting a nasty shock when they retire. However, there is another pension scandal brewing (see article 1.2).

It is not well known that failing to claim child benefit reduces state pension entitlement for those out of the workforce. The Government expects those whose partner's income is over the threshold to claim child benefit but 'elect not to receive'. Surprisingly, not every new parent manages this absurdity. It cannot be corrected 30 years later when they retire, and also means that the child will not automatically receive a National Insurance number.

Forget the teddy bear, and give a new parent this tip instead: claim child benefit. Feel free to elect not to receive it, but filling out this form for a new baby will save the 16 year old an administrative headache, and potentially mean thousands of pounds extra in retirement for the proud parents. Alternatively, the only hope is that the Government, which may have other priorities, will sort this issue out.

www.ftadviser.com/pensions/2019/10/11/ots-tells-govt-to-sort-out-state-pension-credit-for-parents/?utm_campaign=FTAdviser+news&utm_source=emailCampaign&utm_medium=email&utm_content=

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		