Smith & Williamson

Tax Update

A round-up of recent issues

19 May 2020

1. General

1.1 Tax Update and the Spring Bank Holiday

Tax Update will be taking a break next week. The next issue will be on 2 June.

1.2 EC proposes tax reporting delays during the COVID-19 crisis

The EC has issued a proposal to delay some of the deadlines for the automatic exchange of information by three months. HMRC has not yet confirmed if this will be implemented in the UK.

The proposal applies only to the sixth version of the Directive on Administration (DAC6) and to the Common Reporting Standard (CRS). If adopted by HMRC, it would delay the commencement of DAC6 reporting by intermediaries and taxpayers to 1 October 2020 and delay the first exchange of DAC6 information by tax authorities to 31 January 2021. Exchange of CRS information by tax authorities would also be delayed by three months. The proposal does not, however, include delays to filing automatic exchange of information returns under CRS or automatic exchange of information returns under the US Foreign Account Tax Compliance Act (FATCA). There is an extension clause within the proposal to allow for another extension to these deadlines if the COVID-19 crisis continues. The EC has given Member States until 31 May 2020 to respond to the proposal.

https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-197-F1-EN-MAIN-PART-1.PDF

1.3 COVID-19: HMRC extends deadlines for appeals and clarifies reasonable excuse

Deadlines to appeal HMRC decisions have been extended by three months, where the taxpayer has been affected by COVID-19. HMRC has also confirmed that being affected by COVID-19 can count as a reasonable excuse for taxpayer delays, such as for payment or filing delays.

HMRC has announced that the deadline for appeal will be extended by three months for any tax decision or penalty dated February 2020 or later. This comes with the warning that taxpayers should submit their appeals as soon as possible.

HMRC has also confirmed that being affected by COVID-19 may be accepted as a reasonable excuse for late payments and late filing, provided that the taxpayer remedies the failure as soon as possible. The taxpayer will also need to explain how they were affected by COVID-19.

www.att.org.uk/technical/news/covid-19-%E2%80%93-reasonable-excuse-more-time-appeal

2. Private client

2.1 COVID: Updates on self-employment income support scheme

The coronavirus self-employment income support scheme (SEISS) is now open for applications, and more guidance has been released.

The SEISS announced by the Chancellor some weeks ago opened to applications last week, ahead of schedule. Prior to this, additional guidance was released on how the grant would be calculated.

For those eligible for the scheme, the taxable grant is calculated as 80% of average monthly trading profits, and will cover three months in a lump sum. Profits from the last three years are used as a benchmark, and it has been confirmed that where losses brought forward from years before this were used to reduce the taxable profit there will be no corresponding reduction in the lump sum grant. Those with tax returns currently under enquiry will receive a grant calculated on the original return. Non-residents and remittance basis users can make claims under the scheme if they confirm that their UK trading profits meet the rules, and were at least equal to their other worldwide income.

Specific guidance has been released for those subject to the loan charge, those who use averaging relief, and those who have taken parental leave.

www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme

www.gov.uk/guidance/how-hmrc-works-out-total-income-and-trading-profits-for-the-self-employment-income-support-scheme

2.2 UT overturns FTT decision on pension contributions

The UT has found that tax relief on pension contributions can only be claimed on cash contributions, and not transfers of assets such as shares. This overturns the FTT decision, which had held that the taxpayers were entitled to relief.

Four individuals, who had contracted to make contributions to a pension scheme, settled the contracts by transferring shares to the scheme. The issue considered in the case was whether or not tax relief on pension contributions included contributions other than cash. The FTT found that the share transfers were 'contributions paid' under the legislation, and thus allowed the tax relief.

The UT held that the share transfers were not eligible for tax relief based on a narrower interpretation of the legislation. It considered the meaning of 'paid' in case law, and found that it can include non-monetary payments such as shares, but that in this context 'contributions paid' solely referred to cash contributions. It could not include transfers of assets, even in satisfaction of a debt.

The judge noted that, while HMRC's manuals may have suggested that tax relief could have been claimed in this scenario, the manuals are merely HMRC's interpretation of the law and do not have the force of the law.

HMRC v Sippchoice Ltd [2020] UKUT 149 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2020/149.html

2.3 Taxpayer found to have acquired UK domicile of choice

The FTT found that a taxpayer had acquired a domicile of choice in the UK. The FTT considered that it did have jurisdiction to determine a person's domicile in the course of his application for closure notices and his appeal against an information notice.

The taxpayer, a UK resident in his seventies with a non-UK domicile of origin, contended that he intended to leave the UK for his second home in Spain on retirement, or on the death of his wife. He was married to a British wife, and their children and grandchildren were UK resident.

HMRC enquired into his domicile status in two tax years. An information notice was issued to obtain details of his worldwide income and gains in those years, to allow HMRC to issue closure notices in due course. The taxpayer appealed the information notice and also made an application for HMRC to issue closure notices.

The FTT first considered whether or not it had the power to determine the taxpayer's domicile. The FTT found that it did have the power and that it was appropriate to exercise it, as the information requested in the notice was reasonably required, and the question of domicile was key to the enquiry.

The FTT then considered the question of domicile of choice. It noted that the taxpayer's declarations of intention needed to be examined critically, since it was clearly in his interests to say that his intentions were not to remain in the UK indefinitely. It noted that he had been UK resident for over 40 years and that he had no firm plans for retiring or leaving the UK, his wife being reluctant to emigrate. There was also uncertainty as to whether his domicile of origin was Venezuela or the Netherlands, and he had not retained meaningful links to either of these countries. The FTT found that his chief residence was in the UK and that he had also formed the intention to remain in the UK indefinitely, and he had therefore acquired a domicile of choice in the UK.

The appeal against the information notice was dismissed and HMRC was found to have reasonable grounds for not issuing closure notices.

Henkes v HMRC [2020] UKFTT 159 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2020/TC07645.html

3. Trusts, estates and IHT

3.1 GAAR panel considers use of Employee Benefit Trusts (EBTs) for family companies

The GAAR Panel has found that the use of an EBT to avoid IHT on death was caught by the GAAR legislation. The Panel also gave some helpful guidance as to the boundaries of the GAAR and the acceptability of planning in this area for small family companies.

The scheme on which the Panel was asked to give its opinion was one broadly set out in the GAAR examples. The example was the creation of an EBT for family succession purposes, rather than for the benefit of employees. Mrs A, who was terminally ill, created and funded an artificial company and settled the majority of the company shares into an EBT, taking advantage of IHT relief for such gifts to an EBT. She died shortly afterwards. The other likely beneficiary was her son, Mr B, who was the only other person involved with the company. The planning effectively created a family investment company for him, rather than a trust for the incentivisation of any employee.

Unsurprisingly, the Panel found that this was caught. The Panel did however confirm that the creation of an investment company was not itself contrived or abnormal. It was both contrived and abnormal though where a trust was created for the benefit of employees that the company did not need or have.

Usefully, it also pointed out that it might be possible to make a qualifying gift, even just before death, where the only or main beneficiaries were employee family members. This was on the basis that there was an ongoing substantive and active business, with employees just happening to be family members.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883571/Case_16_Opinion_-_Anonymised_FINAL.pdf

4. PAYE and employment

4.1 HC holds payments to be remuneration not dividends and therefore not void

Although not strictly a tax case, this case was a lead case in deciding the legal nature of payments under a DOTAS-registered employment tax avoidance scheme. The taxpayers sought to unravel the scheme, by having the court declare the payments unlawful dividends and therefore void under company law. This attempt was unsuccessful.

The taxpayer company was an owner-managed business owned by a husband and wife who subsequently divorced. The company's accountant had been consulted over tax efficient payment out of profits and among other courses of action had introduced the company to the provider of a tax scheme using 'E' shares in a DOTAS-registered scheme. The scheme involved the issue of shares to the two owner directors but on terms that were, it was asserted, tax free for the directors while being tax deductible by the company as remuneration. The scheme was repeated more than once.

In this case, which directly affected other cases where the scheme had been used, the company sought to have the transactions of the scheme set aside. This was on the basis that the transactions should be properly characterised as unlawful distributions rather than as remuneration. In effect, the company was inviting HMRC to agree their true substance rather than their form.

It was agreed that the transactions had to be characterised by their substance, but the dispute between the parties was the extent to which the parties' subjective intentions could be taken into account.

The court held that it would not generally interfere with the commercial decision taken by the directors who would have a wide 'margin of appreciation'. In this instance, the commercial decision was held to be the award of remuneration and accordingly the transactions could not be unwound. The tax effect of the scheme has not yet been resolved.

Chalcot Training Ltd v Ralph & Anor [2020] EWHC 1054

www.bailii.org/ew/cases/EWHC/Ch/2020/1054.html

4.2 HMRC loses an appeal on the taxation of football referees

The UT has dismissed an appeal by HMRC against a decision that football referees were self-employed. The judgment clarifies how the mutuality of obligation test should be applied and how to approach the issue of control where the worker is highly skilled and needs little oversight.

The taxpayer engaged referees to officiate football matches, and had succeeded in its appeal to the FTT that those engagements were self-employments. The FTT found that there was insufficient mutuality of obligation and that the taxpayer exercised an insufficient degree of control for the referees to be employed. HMRC appealed to the UT on both these points. HMRC argued that mutuality of obligation is only a relevant factor when determining if a contract exists, if it is work-related, and if personal service is required. Mutuality of obligation was not, in HMRC's view, relevant when determining if a contract is one of employment or self-employment. The UT disagreed; mutuality of obligation is essential when categorising a contract as one of employment. It further clarified this obligation: the employee must be obliged to perform at least some work personally, and the employer must be obliged to provide work, a retainer or consideration in the absence of work. The appeal was therefore dismissed. The UT went on find that the FTT had erred when it decided the contracts lacked sufficient control to be contracts of employment. The FTT had focused too narrowly on the matches, when the taxpayer could not interfere to control the referee's actions. The UT held that the FTT should have considered the entire duration of the contract, not only the matches. Over the duration of the contracts, the taxpayer did have sufficient control over the referee's actions for there to be an employment contract. This did not, however, change the outcome of the case because the mutuality of obligation test had not been met.

HMRC v Professional Game Match Officials Limited [2020] UKUT 0147 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2020/147.html

4.3 Temporary tax relief on home office equipment

An exemption from IT and NICs will be introduced for employee purchases of home office equipment that are reimbursed by the employer. It will only be available where the employee is required to work at home because of the breakout of COVID-19.

The Financial Secretary to the Treasury has announced that a temporary tax exemption will be introduced to support home working during the COVID-19 breakout. It will apply to individuals who purchase home office equipment and are reimbursed by their employer. The relief will apply if the provision of that equipment would have been exempt from IT if it had been provided directly to the employee by or on behalf of the employer. The reimbursements will not be subject to IT or NICs if these conditions are met.

Secondary legislation will be introduced to implement this relief, which will apply from the day after the regulations come into force until 5 April 2021. The announcement confirms that HMRC will exercise its collection and management discretion such that no tax will be collected on reimbursements that would qualify except that they were paid between 16 March 2020 and the date the regulations take effect.

www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-05-13/HCWS237/

4.4 FTT disallows foreign service relief

The FTT has denied foreign service relief to an employee who received a termination payment, on the grounds that he was ordinarily resident in the UK throughout the employment. The Tribunal considered documentary evidence of his whereabouts to determine his ordinary residence position, primarily credit card records.

The taxpayer claimed that, for three years of his employment, he had not been ordinarily resident in the UK under the regime that predated the statutory residence test. He therefore claimed foreign service relief on the majority of his termination payment. HMRC issued a closure notice on the grounds that he had been ordinarily resident in that period, so was not entitled to the relief, and the taxpayer appealed.

The taxpayer noted that he became UK resident in 2007 when he returned to the UK after an absence of 6 years. He claimed that he only became ordinarily resident three years later once he had become settled in the UK. The FTT considered many pieces of evidence, including the terms of his employment contracts, where his personal belongings were and what clubs he had joined. The taxpayer asserted that he had spent 70% of the period outside the UK, but his credit card records demonstrated that he was in the UK in 34 out of 40 months. The FTT found that his move to the UK had a settled purpose from the outset and that he was ordinarily resident in the period in question.

Da Silva v HMRC [2020] UKFTT 163 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2020/TC07649.html

5. Business tax

5.1 Capital allowances tax avoidance scheme struck down by the FTT

Two taxpayers have been denied a second capital allowances claim on assets on which capital allowances had already been received. The FTT ruled that the capital allowances provisions in question should be purposively interpreted by considering the avoidance scheme as a whole, not as separate steps.

The taxpayers were companies that had incurred expenditure on assets that qualified for capital allowances. They then entered into leasing arrangements involving options with the intention of allowing them to make a second claim for capital allowances on those same assets. The scheme was designed to create a second opportunity to claim capital allowances without any real economic consequences. The primary issue before the FTT was how the purposive approach to interpreting the capital allowances legislation should be applied. If the arrangement was viewed as a composite whole, a disposal for capital allowances purposes had not occurred because the taxpayers did not in reality cease to own the assets and then reacquire them. The taxpayers argued, however, that the individual steps in the arrangement should be viewed separately. The FTT found that the correct approach was to consider the entirety of the arrangement. It emphasised the point that a composite view is not always the correct application of the purposive approach; it depends on the particular legislative provisions. In this case, there was no disposal event so HMRC was correct to deny the second claims for capital allowances.

Cape Industrial Services Limited and another v HMRC [2020] UKFTT 00162

www.bailii.org/uk/cases/UKFTT/TC/2020/TC07648.html

5.2 CA clarifies profit calculations for corporate partners

The CA has ruled on the tax treatment of income and expenses incurred by companies that operate their own trades in addition to being corporate partners in partnerships. It also clarified HMRC's right to put forward arguments on appeal that result in a greater adjustment to tax than what was stipulated in a closure notice.

The taxpayers had acquired interests in seven leasing partnerships and made significant capital contributions to two of them. The taxpayers then quickly generated large profits by having the partnerships dispose of their leases. It was common ground that the taxpayers operated their own trades (the 'solo trades') in addition to being partners in the leasing partnerships.

The first issue was the tax deductibility in relation to the sole trades of the capital contributions. The UT had found that these payments were revenue expenses in nature; not, as HMRC argued, capital payments. The UT held, however, that these payments were not tax deductible from the income of the solo trades because they were not incurred wholly and exclusively for the purposes of those trades. The CA agreed. The partnerships used the funds for the purposes of the partnership trades; the funds were not used for the solo trades.

The second issue was HMRC's right to argue on appeal for a different adjustment than the amount stipulated in the original closure notice. The CA held that, provided the arguments addressed the matters

identified in the closure notice, HMRC could make an argument that would result in a greater liability than the original adjustment.

The third and main substantive issue concerned the calculation of taxable profits. Under the accounting standards used by the taxpayers, some of the income of the solo trades comprised profits of two of the partnerships. The precise accounting treatment and context of this scenario had not been clearly delineated by the lower courts and was very complex. The key issue was that some profits were included in the tax computations of both the taxpayers and the partnerships. The taxpayers argued that this outcome violated the no double taxation principle. The CA agreed with the UT that double taxation should be prevented by excluding the profits of the partnerships from the taxable profits of the taxpayer's solo trades.

Investec Asset Finance plc and another v HMRC [2020] EWCA Civ 579

www.bailii.org/ew/cases/EWCA/Civ/2020/579.html

6. VAT

6.1 Input tax on opera production costs cannot be attributed to venue catering supplies

The UT has ruled that there was no direct and immediate link between opera production costs and taxable supplies of catering made in the opera venue. Input tax incurred on the production costs could not therefore be attributed to the taxable supplies for VAT recovery purposes.

The taxpayer operated an opera theatre and made VAT exempt supplies of theatre ticket sales, as well as making other supplies within the venue. These included the sale of ice creams and drinks at the venue's bars. The taxpayer had sought to recover a proportion of input tax on its opera production costs on the basis that the cost could be attributed in part to the taxable supplies of catering in the venue. The FTT had previously ruled that the production costs could be attributed to these taxable supplies, so some of the input VAT could be recovered. HMRC appealed, arguing that the production costs could only be indirectly linked to the taxable catering supplies. As such, the input VAT should not be recoverable under the application of the standard method override.

The UT ruled in favour of HMRC. As the production costs did not represent a cost component of the supplies of ice cream and drinks in the venue, there is no direct and immediate link between the production costs and the taxable catering supplies. It was not sufficient that the catering supplies would not have been made in the absence of the opera production; this was found to be an indirect link only. HMRC was therefore correct to deny the input tax deduction in respect of the production costs.

HMRC v Royal Opera House Covent Garden Foundation [2020] UKUT 132 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2020/132.html

6.2 VAT disallowance of input tax on debts over six months old

The FTT has allowed a claim for input tax where the invoice did not include a payment due date and the consideration remained outstanding after six months. It found that an informal credit agreement existed with the supplier, under which payment was not yet due.

HMRC had disallowed an input tax claim relating to supplies from a group company because the consideration remained unpaid after six months. Generally, input tax cannot be claimed if payment remains outstanding six months from the later of the date of the invoice or the date payment was due. The invoices in this case did not include a payment due date. The central issue, therefore, was how long the debt had been outstanding for.

The taxpayer claimed it had an informal agreement with the supplier company that provided for credit terms of up to ten years from the date the taxpayer commenced trading. On these grounds, the six month limit had not been breached. HMRC argued that, due to the lack of contemporaneous evidence, the actual payment due date should be the date of supply. On this basis, payment had not been made within the six month limit. The FTT found that the correct payment due date was ten years from the date the taxpayer

commenced trading, in line with the credit arrangement. The six month limit had therefore not been exceeded. The appeal was therefore allowed.

The Premspec Group Ltd v Revenue & Customs [2020] UKFTT 167 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2020/TC07653.html

7. Tax publications and webinars

7.1 Tax publications

The following Tax publications have been published

- *Digital Services Tax*
- *Withdrawal of 'representative occupier' ESC*
- *PAYE Settlement Agreements May 2020*
- *Taxation of gains on disposals of UK property by non-residents*

7.2 COVID-19 hub

Our Coronavirus hub is designed to answer your key questions and will be updated regularly over the next few months. It contains a number of detailed articles on the measures introduced to help with the financial impact of COVID-19.

https://smithandwilliamson.com/covid-19-hub/

8. And finally

8.1 We're still here!

And finally sympathises this week with the FTT, who would like to make it known that they are still working. Deprived of traditional accoutrements such as desks and courtrooms, it can be a struggle to remember who is on holiday, or on secondment, but few of us have to contend with scurrilous media reports that we aren't coping.

Naturally, the correct approach is to write a cross letter to the press, tabloid or otherwise. We believe you FTT.

www.tax.org.uk/sites/default/files/200511%20COVID-19%20FTT%20Tax%20Chamber%20Response%20to%20reports.pdf

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		