Smith & Williamson

Tax update

A round-up of recent issues

21 April 2021

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1. General

1.1 New cryptocurrency manual

HMRC has published a new manual on the taxation of cryptocurrency.

The manual covers the tax treatment for both businesses and individuals, as well as HMRC's view on tax compliance in relation to cryptocurrency. The content is based on HMRC's position as set out in its past policy papers. HMRC has confirmed that in cases where there has been or may have been tax avoidance the analysis in the manual will not necessarily apply. The key questions on situs apparently remain unanswered.

www.gov.uk/hmrc-internal-manuals/cryptoassets-manual

1.2 HMRC agent update 83

HMRC has published Agent Update 83, which provides an overview of the recent issues of which tax agents should be aware, focusing on forthcoming changes.

The latest Agent Update summarises various recent issues and changes, including guidance on:

- COVID-19 support schemes and what is currently available;
- the late filing penalty extension and impacts on class 2 NICs;
- the new fully automated approach to calculating top slicing relief;
- changes to off-payroll working rules;
- the changes to capital allowances from April 2021;
- the VAT payment deferral scheme;
- SDLT rates for non-UK residents;
- the extension to the trust registration service; and
- how to participate in various surveys.

www.gov.uk/government/publications/agent-update-issue-83/agent-update-issue-83

2. Private client

2.1 UT upholds FTT finding in tax avoidance case

The taxpayer has lost his appeal in a lead case on income from a tax avoidance scheme. The UT upheld the FTT's findings that the discovery assessments were valid, and HMRC's decision to disapply a PAYE regulation such that the liability fell on the scheme user was valid.

The taxpayer had engaged in a tax avoidance scheme, under which his income was partly paid in the form of interest-free loans. The non-UK resident employers paid sums into Employee Benefit Trusts (EBTs), which were intended to be lent on to the taxpayer on the understanding that they would never be repaid. The income reported was simply the loan benefit.

One strand of the taxpayer's appeal was that, even if the loan was employment income, he should receive a tax credit for PAYE that the end user should have deducted. As it was a non-UK employer HMRC had exercised its statutory discretion to relieve the end user from the PAYE liability, and therefore charged it on the taxpayer. The taxpayer disputed the scope and legality of this use of discretion. The FTT found that HMRC had the discretion, but that it did not have jurisdiction to determine whether or not HMRC had exercised it correctly. The UT agreed. In addition, the UT agreed that the discovery assessments were valid, finding that an officer carrying out checks on returns by making calculations to identify insufficiencies was a valid discovery.

The FTT decided that it was not required to decide if the transfer of assets abroad rules (TOAA) applied, as the taxpayer had conceded regarding the employment tax liability, but noted that TOAA had no effect as the amount of income transferred offshore was nil. HMRC cross-appealed, and the UT found that the FTT had erred in finding that it did not need to deal with the TOAA issue. It was however correct that the income of the person abroad was nil, and that the taxpayer's motive was not tax avoidance.

Hoey v HMRC [2021] UKUT 82 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2021/82.html

2.2 Taxpayer appeal on quantum of discovery assessment dismissed

The FTT found that HMRC's calculation of amounts received by the taxpayer routed through various entities was correct. The taxpayer did not challenge HMRC's conclusion that the scheme was ineffective.

The taxpayer was involved in a scheme which purported to convert income into non-taxable loans that would not have been repaid. HMRC determined that the payments were taxable, as they were from self-employment. The taxpayer challenged the quantum of the discovery assessments, but not the lack of effectiveness of the scheme. He argued that he had not received payments other than those he had declared as loans, and that the HMRC office had therefore discovered no insufficiency of tax. The FTT dismissed the appeal, finding on examination of the documents that HMRC had shown that at least that amount of payments had been received by the taxpayer through the various intermediaries.

Contractor v HMRC [2021] UKFTT 54 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2021/TC08040.html

2.3 Permission granted for 1 of 32 late appeals against information notices

For 32 pension scheme administrators whose bulk appeals against information notices were submitted late by their agent, only the one who contacted HMRC directly has been allowed to make a late appeal.

HMRC issued 70 pension scheme administrators with information notices requiring details of their respective schemes. They all appointed the same agent to liaise with HMRC on their behalf, some choosing to appeal the notice, some to wind up their scheme. The appeals of 32 of those who chose to wind up the schemes were submitted over a year late, and the FTT considered the applications for late appeals together.

All argued that if allowed to appeal their cases could be added to similar proceedings, allowed efficient conduct of the appeals. They also argued that they had relied on the agent, and that the appeals had merit. In 31 of the appeals, the application for late appeal was rejected, given that reliance on an agent is not generally an excuse, and the taxpayers had received various items of correspondence, such as penalty notices, that should have prompted them to check on the progress of their cases. The 32nd taxpayer's appeal was allowed, as he had contacted HMRC directly to ask for more information, and there had been delays to the officer's response.

Cummine v HMRC [2021] UKFTT 67 (TC)

Adair & Ors v HMRC [2021] UKFTT 66 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2021/TC08052.html

www.bailii.org/uk/cases/UKFTT/TC/2021/TC08051.html

2.4 HMRC loses case as discovery 'stale'

Discovery assessments were held by the FTT to be invalid, as they were issued four years after the beginning of an investigation, three years after the taxpayer had formally admitted to inaccuracies.

The taxpayer kept a small shop. In 2013, HMRC visited to check his VAT and income tax records. The investigation progressed to examining more records and making test purchases. He was invited to enter a contractual disclosure facility in 2014 under suspicion of fraud, and made a statement that he had understated taxable profits. HMRC ultimately issued discovery assessments and penalties in 2017.

HMRC submitted that the discovery had been made following the investigations and correspondence. This covered a considerable period of time, and HMRC had not specified the discovering officer. The FTT held that the discovery assessments were invalid, as the discovery had been made long enough before their issue to become stale. It was clear from 2014 that there was an insufficiency of tax, and a delay of three years was overly long, without adequate reasons.

Mehrban v HMRC [2021] UKFTT 53 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2021/TC08039.html

2.5 Late application for enhanced protection accepted

A taxpayer has been allowed to claim an enhanced lifetime allowance for his pension despite applying years late, due to his reasonable reliance on advice.

The taxpayer had financial advisers to assist with his pensions and investments, but they did not bring the existence of enhanced protection to his notice until 2013, when he applied for the 2014 lifetime allowance. After changing advisers in 2015, he was informed of the 2009 and 2012 opportunities, and submitted a claim in 2016. HMRC accepted that he had a reasonable excuse for the delay until 2015, but not for the 14 month gap before the application. The FTT permitted the late application, finding that problems with his professional advisers, including following their complaints procedure, constituted a reasonable excuse for that period.

Gammell v HMRC [2021] UKFTT 49 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2021/TC08035.html

3. Business tax

3.1 FTT upholds the taxpayer's appeal on reconstruction relief

Tax avoidance was found to be a purpose but not a main purpose of arrangements for the sale of shares. The FTT found that the evidence showed the deal would have progressed, regardless of the tax outcome.

The taxpayer was a company that sold shares in two subsidiaries in exchange for ordinary and preference shares in a third company. Initially, it agreed to receive ordinary shares and cash. At a late stage in the deal, the cash was substituted by preference shares. Cash would have generated an immediate taxable gain, but preference shares were expected to be eligible for the substantial shareholding exemption (SSE) and therefore exempt from CT if sold after being held for a year. Advance clearance from HMRC had been sought, but the deal completed before a response has been received. The taxpayer treated the transaction as exempt from tax under reconstruction relief. When it sold the preference shares, it treated the disposal as exempt under SSE.

HMRC denied the reconstruction relief, arguing that anti-avoidance provisions applied. Reconstruction relief is not available if the main or one of the main purposes of the arrangements is tax avoidance. The FTT found that the arrangements must be taken as a whole and not limited to the arrangements that concern only the acquisition of preference shares. Avoiding a liability to tax was held to be a purpose of those arrangements, but it was not a main purpose. The email and verbal evidence showed that the taxpayer would not have substituted preference shares for cash if that change had endangered the deal. The tax at stake was not significant compared with the overall transaction value, and the taxpayer did not invest much effort in exploring the tax outcomes. The anti-avoidance rules therefore did not deny reconstruction relief, and the appeal was upheld.

Euromoney Institutional Investor plc v HMRC [2021] UKFTT 0061 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2021/TC08046.html

3.2 Clarification on the substantial shareholding exemption and groups

The FTT has ruled on the interpretation of the substantial shareholding exemption (SSE) deeming provisions for groups. The provisions only extend the period of ownership of a subsidiary during such a time as the subsidiary's trading assets were used by another company within the same group.

The taxpayer was a company that owned shares in a subsidiary for less than 12 months prior to disposal. The disposal triggered a gain of approximately £53.2 million. It claimed SSE, relying on the deeming provisions for groups to extend its ownership of the shares to the requisite 12 months. In this case, the taxpayer, a standalone company, transferred trade and assets to a new subsidiary incorporated in June 2015, and then sold the subsidiary to a third party in May 2016. The question before the FTT was whether

or not SSE was available when a company sells a subsidiary that has been owned for less than 12 months and there has not been a group of companies in existence for the 12 months prior to the share sale.

The FTT agreed with HMRC that the deeming provisions only apply insofar as the taxpayer is part of the group. A group must therefore exist for the 12 months prior to the disposal i for SSE to be available. The judge noted, however, that the law was not clear on this point. The outcome is '*odd and arbitrary*', but it is not unjust or absurd.

M Group Holdings Limited v HMRC [2021] UKFTT 69 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2021/TC08054.html

3.3 Taxation of litigation settlement payments

The FTT has found that a payment to settle actions against an auditor and an accountant were revenue in nature. The payment was compensation for lost profits, rather than compensation for lost cash or consideration for giving up the right to pursue the claims.

The taxpayer was a company from which an employee embezzled funds and was later imprisoned. The taxpayer later pursued breach of contract and negligence claims against its accountant and auditors, which were settled out of court. A payment was made to the taxpayer, which it treated it as a capital receipt. HMRC argued that the payment should have been a trading receipt.

The FTT ruled in favour of HMRC. It found that the settlement was not a payment in exchange for relinquishing the right to litigate. It was a commercial decision on the optimal recovery with the least risk and cost. The payment was therefore compensation for the losses sustained by the taxpayer due to the failures of the accountant and the auditor. The fact that the payment was accounted for as a capital receipt was not determinative. Instead, the FTT found the payment to be revenue in nature. The payments compensated for a loss of profit, not a loss of cash. The stolen sums had never been taxed and had actually received CT deductions. The appeal was dismissed.

Charlton Chauffeur Driver Limited v HMRC [2021] UKFTT 56 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2021/TC08042.html

3.4 UT clarifies penalties for non-compliance with follower notices

The UT has overturned an FTT ruling that non-compliance with a follower notice was reasonable. Although actions taken after the deadline can inform the decision of whether or not non-compliance is reasonable, in this case the non-compliance it was not reasonable for the company to take no corrective action.

The company had entered into a scheme to avoid SDLT. It received a follower notice and an advanced payment notice (APN), neither of which were acted upon before the deadlines. The company later agreed a payment plan with HMRC, believing that this plan discharged all its responsibilities under the follower notice and the APN. In fact, a 50% penalty for failing to take corrective action was also due.

The FTT held that the non-compliance with the corrective notice was, unusually, reasonable because the correspondence from HMRC was so confused and ambiguous.

The UT overturned this decision. It confirmed that it may be possible for events occurring after the deadline for taking corrective action to have some bearing on whether or not the non-compliance was reasonable. In this case, the overall non-compliance was not 'reasonable in all the circumstances'. Although the penalty for non-compliance stood, the UT reduced it from 50% to 30% in light of the cooperation of the company after the deadline had passed. The judgment includes a useful discussion on what actions amount to 'counteraction' in relation to follower notices and tax avoidance schemes.

HMRC v Comtek Network Systems (UK) Limited [2021] UKUT 81 (TC)

www.bailii.org/uk/cases/UKUT/TCC/2021/81.html

3.5 CA rules HMRC cannot take General Electric to trial over tax fraud

It has been reported that the CA has overturned the HC's decision to allow HMRC to pursue tax fraud claims against the General Electric group (GE). Approximately $1 billion of tax is said to be at stake.

In 2005, GE made a settlement agreement with HMRC regarding the UK anti-arbitrage rules that were in force at the time. HMRC sought to annul the agreement in 2018 on the basis that GE had not disclosed key information. There is a six-year limit on such claims, but HMRC argued that that time limit should not apply because GE had engaged in fraudulent misrepresentation. The HC ruled in favour of HMRC and agreed that the prospect of fraudulent misrepresentation was not 'merely fanciful'.

It has been reported that the CA has overturned that decision. It found that fraudulent misrepresentation is subject to the usual six-year limitation. The issue is one of contract law, not tax law. HMRC cannot therefore pursue the fraud claim against GE, and has been ordered to pay legal costs to GE.

www.ft.com/content/bd6d92b2-e19d-48ed-9ddb-b82613dbdc62

4. VAT

4.1 SC finds that a sale and leaseback is not a disposal of an entire interest

The SC overturned a ruling by the Court of Session, finding that a sale and leaseback of a building does not amount to a disposal of the entire interest in that property. A self-supply charge therefore did not arise on the sale and leaseback of a care home, the construction of which was zero-rated.

The taxpayer was a company that had constructed a care home, which qualified for zero-rating. The development was financed by a sale and leaseback agreement, raising the issue of whether or not a self-supply charge applied to claw back the relief on the construction. Such a charge is triggered if the taxpayer disposes of its entire interest in the property within ten years of the completion of the building. The Court of Session had ruled that the sale of the property within the wider sale and leaseback arrangement amounted to a disposal of the entire interest in the property. It therefore found that the self-supply charge applied.

The SC overturned this decision. It held that the sale and leaseback arrangement should not be separated into a standalone sale followed by a leaseback. It was one single arrangement that did not result in the taxpayer disposing of its entire interest in the care home. The self-supply charge was therefore not triggered, and the appeal was allowed.

Balhousie Holdings Ltd v HMRC [2021] UKSC 11

www.bailii.org/uk/cases/UKSC/2021/11.html

5. Tax publications and webinars

5.1 Tax publications

The following Tax publications have been published.

- *Technology and Transformation: Will RPA change the future of outsourcing?*
- *Why transfer pricing planning is increasingly important*
- *Inheritance tax planning with property portfolio values*
- *Common complex financial instruments in the technology industry*

5.2 Webinars

The following client webinars are coming up over the next month.

- 29 April: MTD Phase 2 - Are you ready?
- 6 May: Professional Practices Spring Webinar Series
- 12 May: S&W Sessions: Transfer Pricing

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

6. And finally

6.1 Framing the narrative

Spare a thought this week for the Chairman of Sark's Policy and Finance Committee, who finds himself in the unfortunate position of possibly introducing income tax on his island. Raising taxes is rarely a popular move, but introducing income tax for the first time? Gird your loins!

Then again, he could convince his fellow island residents that the new income tax is only a temporary measure. We can assure him that after 179 years, people tend to stop expecting temporary income taxes to be abolished.

www.bbc.co.uk/news/world-europe-guernsey-56758396

www.parliament.uk/about/living-heritage/transformingsociety/private-lives/taxation/overview/incometaxbolished/

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		