Proskauer

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This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

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Welcome to September's edition of our UK Tax Round Up. This month has yet more COVID-19-related developments, including clarification of the (non) availability of certain reliefs for payments to furloughed employees, as well as a variety of items in the VAT arena.

UK COVID-19 Developments

Budget Cancelled

The Government announced on 23rd September that the Budget scheduled for November would, as a result of the ongoing Covid-19 pandemic, now not take place.

R&D tax relief and creative industry tax reliefs – HMRC guidance

HMRC has updated its guidance in relation to (a) research and development relief and research and development expenditure credit and (b) creative industry reliefs (such as film tax relief, video games tax relief, orchestra tax relief and theatre tax relief). In all cases, those reliefs are not available to the extent that the expenditure comprises payments to furloughed employees. This is perhaps an inevitable and logical result, given that the relevant employees are prohibited from working for the relevant employer during the furlough period and so cannot have been involved in the relevant qualifying activity, whether that was research and development or one of the creative industry qualifying activities.

Value added tax

Call for evidence on VAT grouping rules

HMRC has issued a call for evidence from interested parties on the current UK VAT group regime. This focuses on three questions. First, whether VAT grouping should be automatic rather than voluntary where a corporate group is established. Second, whether current restrictions on what types of business can form part of a group should be relaxed (for example how limited partnerships are treated). Finally, views are sought on the "whole establishment" provisions, which provides all branches or fixed establishments of an eligible person are treated as included provided there is at least one fixed establishment or head office in the UK.

Treatment of payments on early termination of contract

As highlighted in our Tax Blog earlier this month, in the light of the European Court of Justice's (ECJ) rulings in *Meo* and *Vodafone Portugal*, HMRC has updated its guidance stating that payments arising out of early contract termination will now be treated as consideration for a taxable supply and therefore subject to VAT. This marks a significant change from HMRC's previous

position that early termination payments described as compensation payments would ordinarily not be subject to VAT.

Newey - VAT Case on Avoidance

The case of *Newey (Newey v HMRC [2020] UKFTT 366 (TC) (14 September 2020))* has continued its tour of the court system by returning to the First Tier Tribunal ("FTT") where it started its journey over ten years ago. By way of reminder, the case concerned a scheme implemented in relation to the Ocean Finance business under which the UK loan broking business had been migrated to Jersey to avoid irrecoverable VAT on advertising costs. At the heart of the case was whether the arrangements were abusive and ineffective under European law (*Case C-255/02, Halifax Plc and others v Customs and Excise Commissioners, ECR I-1609, [2006] Ch 387, [2006] STC 919*) and UK law (*WHA Ltd v Revenue and Customs Commissioners [2007] EWCA Civ 728, [2007] STC 1695*).

The case had proceeded to the Court of Appeal in 2018, via a reference to the Court of Justice of the European Communities.

The case history is complex, but it was held that there had been an error in law made by the FTT in its initial decision concerning whether or not VAT exempt supplies had been made in the UK.

Given the above, the Court of Appeal remitted the case back to the FTT to reconsider whether they still considered that the abuse principles did not apply based on the facts that they considered in their original decision, despite that error of law. The FTT considered that the evidence still supported their previous conclusions that the arrangements put in place did reflect the economic and commercial reality and were not wholly artificial, and accordingly the FTT affirmed their original findings of fact. In particular, the Court reiterated that the arrangements with the Jersey company (Alabaster) were not "window dressing" and that company did not rubber-stamp decisions as a "brass plate" company. Alabaster carried on a commercial business, which carried on economic activities of loan broking for which it equipped itself to a limited extent with its own staff and directors in Jersey. The fact that it had a services agreement with a UK person and had relied on advice of UK tax accountants did not undermine this conclusion.

General Anti Abuse Rule

Opinion of GAAR panel published

An opinion of the General Anti Abuse Rule ("GAAR") Advisory Panel has been published. This was actually issued by the Panel back in April but has only recently been released to the public. This opinion related to certain trust and loan arrangements which, it was argued by the taxpayer, resulted in corporation tax deductions for the employing company contributing funds to the trust, but no disguised remuneration income tax charge for the employee who was lent amounts by the trust. In this case, the employee concerned was also the sole shareholder of the employing company. The company funded the trustee of a "remuneration trust" to make loans to the employee. The employee had argued that the loans were not caught by the disguised remuneration income tax rules in his hands as they related (he claimed) to his status as a shareholder rather than as an employee.

The GAAR Advisory Panel ruled that this set of arrangements was caught by the GAAR and the planning failed. They found that the entry into and carrying out of the various steps was not a reasonable course of action in the light of the relevant tax provisions.

HMRC has subsequently published *Spotlight 56,* which contains the findings of the GAAR Panel in this case.

GAAR guidance

An updated version of the GAAR guidance was issued by HMRC with effect from 11th September 2020. This update does not include any major changes but does add some procedural guidance on protective GAAR notices. These are issued when an officer of Revenue and Customs considers that a tax advantage might have arisen to a person from tax arrangements that are abusive and that, if there is a tax advantage.

Such a notice must be given within the ordinary time limits for assessing tax liabilities. Where a tax enquiry is in progress, the notice must be given before the enquiry is completed.

A protective GAAR notice must specify the tax arrangements, the tax advantage and the adjustments that the officer proposes should be made.

HMRC status as preferred creditor restored

The Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020 will come into force on 1 December 2020. This will mean that certain debts owed to HMRC will have secondary preferential status in insolvency procedures that commence on or after 1 December 2020. Debts for the following taxes will rank ahead of floating charges and unsecured creditors: PAYE income tax and primary (employee's) national insurance contributions, construction industry scheme deductions, student loan repayments and VAT. This constitutes the implementation of a measure announced in the Spring of 2020 (after an initial proposal in 2018 and consultation during 2019), but its implementation had been delayed by the Government.

This constitutes a partial return to the pre-2002 position where tax debts to the Crown had preferential status, but the new regime is much narrower, comprising broadly those taxes that are collected on behalf of another taxpayer.

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