Proskauer

UK Tax Round Up: October 2017

Tax Talks Blog on **October 26, 2017**

Welcome to the October 2017 edition of the Proskauer UK Tax Round Up. The past month has been a number of interesting case decisions among other developments. Please view this month's issue of the UK Tax Round Up.

UK Tax News and Developments

Government White Paper on Customs Bill

On 9 October, the Government published a White Paper setting out its approach to the introduction of a new customs and VAT regime after the UK leaves the EU. The paper repeats the suggestion of "a new and time-limited customs union between the UK and the EU customs union" and introduces a new possibility for the introduction of necessary legislation if the UK and the EU fail to agree on appropriate customs arrangements before the UK leaves the EU in March 2019.

The work will be reflected in a draft Customs Bill which is expected to be published later this year, which will set out the legislative framework to allow the Government to create the new customs and VAT regime without presupposing what it will look like.

Comments are requested on the draft bill by 3 November 2017.

Draft regulations on group relief of carried forward losses

On 16 October draft regulations (along with an explanatory statement) were published which will extend the existing simplified arrangements for group relief to the surrender of carried forward losses that will be possible (from 1 April 2017) once the Finance (No. 2) Bill 2017 has been passed.

Updated draft regulations for insurance-linked securities

On 12 October 2017 updated draft regulations (along with an explanatory statement) were published which will establish a new tax and regulatory framework for special purpose companies which will issue capital market securities the return on which will be linked to insurance risks held by the company. The tax provisions will mean that the issuing company will be exempt from corporation tax and the payments on the securities will be exempt from withholding tax.

The regulations state that they will come into force three days after they are passed by Parliament.

HMRC publishes Spotlight 41

HMRC has added a new Spotlight 41 to the list of tax avoidance arrangements of particular interest to them. The new Spotlight relates to the recent Supreme Court decision in the so-called Glasgow Rangers EBT case, which held that payment to sub-funds of an EBT which could benefit employees were “indirect” earnings and subject to tax and PAYE and national insurance contributions at the time that they were paid to the EBT.

The Spotlight states that HMRC consider that the principle discussed in the Rangers case is of application to a wide range of disguised remuneration arrangements including other EBT arrangements, remuneration routed through a employer-funded retirement benefit trust and a range of contractor loan schemes.

HMRC advise anyone who thinks they might be using or benefitting from such a scheme to try to settle their tax affairs with HMRC or they might become subject to follower notices and accelerated payment notices.

OTS publishes scope for review of capital allowances

Following its scoping document on how the capital allowances regime for tangible fixed assets might be simplified and aligned more closely to accounts depreciation. The OTS has now published a call for evidence with 16 specific questions.

This document is a continuation of the process blessed by the Government and referred to in our UK Tax Round Up last month.

The document requests views from interested parties by 30 November 2017.

Revenue & Customs Brief 3 (2017): Insurance companies and VAT on pension fund management services

On 5 October, HMRC published Revenue & Customs Brief 3 (2017) which clarifies how insurance companies should treat their provision of management services to pension funds for VAT purposes.

Historically, HMRC have accepted that those services were all exempt from VAT. However, in recent years the ECJ has distinguished between the management of defined contribution pension schemes (which is VAT exempt) and of defined benefit schemes (which is standard rated) by virtue of defined contribution pension schemes being "special investment funds" (SIFs) for VAT purposes and defined benefit schemes not being SIFs.

This Brief confirms that HMRC will now apply this treatment to insurance companies so that they will be required to charge VAT if they provide management services to defined benefit pension schemes in the UK.

PAC urges HMRC to do more to tackle VAT fraud

The Public Affairs Committee has published a report setting out measures for HMRC to adopt to ensure a more effective challenge to VAT fraud undertaken by offshore online trading platforms and highlights its concern that onshore businesses are being damaged by these offshore businesses.

UK Case Law

UT agrees appointment of receiver breaks group relief group

In *Farnborough Airport Properties Company v HMRC* the Upper Tribunal agreed with the First-tier Tribunal that the appointment of a receiver over a company's affairs severed the company (the "subsidiary") from the group relief group of its parent. This was on the basis that the powers of the receiver meant that the parent company no longer had control over its subsidiary because it couldn't secure that the affairs of the subsidiary were conducted in accordance with its wishes.

While depending to some extent on the powers given to the receiver, any proposed appointment of a receiver should be considered carefully if there is a desire to continue to surrender losses from the subsidiary to the parent or above in the group structure.

SPA terms do not mean implied duty to co-operate

In *Takeda Pharmaceutical Co v Fougera Sweden Holding 2 AB*, the High Court held that the seller was not under an express or implied duty to provide the buyer with information relevant to settling a tax dispute involving the target company. The tax liability in question was indemnified by the seller but had a time limit for resolving the issue of six years from completion. The buyer said that it could resolve the dispute if it was provided the information by the seller and also that the "further assurance" provision in the SPA meant that the seller was obliged, expressly or implicitly to provide the information.

The High Court disagreed saying that there was no express obligation on the seller to provide the information and so there was nothing for the further assurance clause to apply to.

This is another example of the courts taking a strict approach to interpreting provisions in SPAs and tax covenants negotiated between informed parties and highlights the importance of including clear drafting to deal with points that either of the parties thinks might be pertinent in enforcing rights and obligations.

FTT decides tax avoidance scheme notifiable under DoTAS

In *Root2Tax and Root3Tax Limited*, the First-tier Tribunal decided that a particular tax scheme was notifiable under the disclosure of tax avoidance schemes (DoTAS) regime by virtue of considering the purpose of the arrangements as a whole and not by looking at each element of it in isolation.

To date there have not been many reported decisions on the scope of the DoTAS regime, but given that the requirement to notify is now one of the reasons that HMRC can issue accelerated payment notices, this might change in the future.

Attribution of notional capital to UK permanent establishment

In *Irish Bank Resolution Corporation Limited v HMRC*, the FTT agreed with HMRC that the profits of the UK permanent establishment (PE) of an Irish bank should be calculated for the purposes of the UK/Ireland double tax treaty by applying an amount of notional capital to the PE.

In this case, the UK PE was funded with loans from Ireland. It sought to deduct all of its interest expense in calculating its UK taxable profits. The decision meant that it could not deduct the interest associated with its notional capital.

HMRC wins another film scheme case

The FTT found conclusively for HMRC in its latest challenge to a film finance based tax avoidance scheme in *Hardy and Moxon v HMRC* (the Vanguard case). This particular scheme was intended to generate a capital loss for the participants significantly in excess over the money that they put at risk in the scheme. The taxpayers argued that the scheme was effective on a number of technical bases, all but one of which was squarely rejected by HMRC.

Of particular interest in the context of the sort of “shrink-wrapped” arrangement in question, involving a relatively low level of investment at risk in shares and a relatively large level of investment in the shares funded by way of a non-recourse loan the proceeds of which were effectively simply retained in the structure, was (i) the share subscription price funded by the loan was not really an investment and did not give base cost to the shareholder, (ii) the fact that the scheme participant and the company were not connected did not mean that the share purchase was “on arm’s length” terms and (iii) when determining the investor’s base cost in the share the market value was relevant which was low in the circumstances when the share issuing company had no real intention to make a profit.

News from Outside the UK

EC rules against Amazon

The EC has concluded that Amazon received illegal State Aid from Luxembourg worth about €250 million between 2006 and 2014 as a result of its agreement with the Luxembourg tax authority that allowed Amazon to significantly reduce its Luxembourg tax liability on its European sales by its Luxembourg operating company (to which all of its European sales were booked) paying a large licence fee to its Luxembourg IP holding company (which was not subject to tax in Luxembourg). The EC decided that Amazon was given an advantage not available to other companies and that the tax ruling given by the Luxembourg tax authority had no valid economic jurisdiction.

The EU have also announced that the EC is going to refer Ireland to the ECJ for failing to recover the €13 billion that the EC decided Apple owes under a similar State Aid decision from August 2016.

OECD body focused on BEPS delivery

The OECD's Forum on Tax of Administration held its plenary meeting in Oslo at the end of September, bringing together Tax Commissioners from 50 administrations. At the meeting they discussed the priorities for the next year, ensuring effective implementation of the BEPS project and the Common Reporting Standard and continuing to improve tax compliance through the effective use of data, increasing information sharing and minimising identity fraud.

Guernsey Court sets aside transfer of business assets into trusts

In *Whittaker v Concept Fiduciaries Ltd*, the Guernsey Royal Court allowed a taxpayer to set aside a transaction under which she transferred shares in her business to a Guernsey trust relying on "fundamentally flawed" tax advice on the basis of a mistake.

The relevant law of mistake was UK law. The transaction was intended to save tax but not only was it ineffective but would have cost tax. There has been some discussion recently as to whether a tax motivation would preclude rectifying by reason of mistake. The Court decided not but noted that rectification might be refused in "artificial tax avoidance arrangements".

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