Proskauer

UK Tax Round Up

November 2017

UK Tax News and Developments

The OTS publishes its report "Value added tax: routes to simplification"

On 7 November, the Office of Tax Simplification (OTS) published its first report on VAT, which included a range of proposals for simplifying the tax. Amongst the more eye-catching proposals were that:

- the Government should examine the current approach to the level and design of the VAT registration threshold, with a view to setting out a future direction of travel for the threshold, including consideration of the potential benefits of a smoothing mechanism. The OTS observed that the current VAT registration threshold of £85,000 is the highest in the EU. It also noted the distortive effects that the "cliff-edge" threshold produced, with bunching of businesses with turnover just below the threshold, and a disincentive to expand above the threshold, particularly businesses with lower levels of costs relative to supplies to consumers, such as labour-intensive businesses, and businesses operated by sole proprietors. The OTS discuss the possibilities of significant reductions and increases in the threshold, as well as the possibility of smoothing the distortive effect of the threshold;

- HM Treasury and HMRC should undertake a comprehensive review of the reduced rate, zero-rate and exemption schedules, working with the support of the OTS ; and

- the Government should consider whether capital goods scheme categories other than for land and property are needed, and review the land and property threshold.

These are interesting areas for debate and, in some cases, go beyond suggestions for simplification of the law and stray into proposing major policy shifts – particularly in the case of the registration threshold. It is also interesting to see how, if at all, the progress of these proposals fares during and after the current Brexit negotiations.

National insurance contributions

On 2 November 2017 the Government announced a one year delay to the abolition of Class 2 national insurance contributions ("NICs"). Class 2 NICs will now be abolished from 6 April 2019. The delay will allow time for the Government to engage with interested parties and Parliamentarians with concerns relating to the impact of the abolition of Class 2 NICs on self-employed individuals with low profits.

The Government has also announced that some of the proposed changes to the taxation of termination payments will nevertheless proceed as planned in April 2018.

All payments in lieu of notice will from April 2018 be treated as earnings (subject to tax and class 1 NICs). However, it appears that the proposal to extend class 1A NICs on termination payments to amounts above the income tax exempt amount of £30,000 will be postponed until April 2019.

Finance Act

The Finance (No.2) Act 2017 entered into law on 16 November 2017 with the granting of Royal Assent. Many of its provisions have effect from 6 April 2017.

Major case on restitutionary interest payable by HMRC

Littlewoods overpaid VAT to HMRC between 1973 and 2004. Between 2005 and 2008, HMRC repaid the principal sum of £205 million, together with simple interest of £268 million. Littlewoods brought proceedings against HMRC to seek additional interest, calculated on a compound basis as £1.25 billion, on the ground that such compound rather than simple interest is due under the common law of restitution, either as restitution for a mistake of law, or as restitution of tax unlawfully demanded (a "Woolwich" claim).

The Supreme Court's judgment was that (i) Littlewoods' common law claims for additional compound interest under common law were excluded by sections 78 and 80 of the Value Added Tax Act 1994 the ("1994 Act") as a matter of English law, and without reference to EU law and (ii) exclusion of the common law rights by the 1994 Act is not contrary to EU law, in light of the Court of Justice of the European Union's ("CJEU") judgment in *Case C-591/10 Littlewoods*. The Supreme Court found that the CJEU had given member state courts a discretion to provide reasonable redress in the form of interest in addition to the principal sum and that the payment of simple interest under the 1994 Act in this case cannot realistically be regarded as having deprived Littlewoods of an adequate remedy.

Littlewoods Limited and others (Respondents) v Commissioners for Her Majesty's Revenue and Customs (Appellant) Littlewoods Limited and others (Appellants) v Commissioners for Her Majesty's Revenue and Customs (Respondent) [2017] UKSC 70.

Judicial review case on diverted profits tax procedure

HMRC had concluded that profits arising from the oil trading business of Glencore Energy UK Limited ("Glencore") had been diverted to its parent company in Switzerland, Glencore International AG, so as to constitute "taxable diverted profits" and had issued a charging notice for £21.1 million (plus interest) of Diverted Profits Tax (DPT).

Glencore paid the tax demanded as required under the statute. Rather than using the statutory machinery in the DPT rules to dispute the imposition of the tax, which would have included a period of up to 12 months to await a review by a Designated Officer of HMRC, Glencore challenged the issue of the charging notice using judicial review. It alleged errors in the charging notice, including failure to consider representations made after the preliminary notice and irrationality in the calculation.

On 2 November, the Court of Appeal upheld the High Court's decision to refuse permission for judicial review in a case reported as *(Glencore Energy UK Limited v HMRC)* [2017] EWCA Civ 1716.

The Court of Appeal followed the case of *Re Preston [1985] 1 AC 835* in relation to the application of judicial review in tax cases. It confirmed that there must be exceptional circumstances involving an abuse of power. In the view of the Court, that principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, so as to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. The Court found that this was not the case here and that the issues could be dealt with under the DPT statutory procedure, which was a suitable alternative remedy.

Further guidance issued by HMRC on corporation tax losses legislation

On 6 November, HMRC published a second set of draft guidance on the new regime for corporation tax loss relief, which will be introduced by Finance (No.2) Bill 2017. The new draft guidance, which is out for consultation, follows on from that released in July and is mainly centred on group relief for carried forward losses and the new, more relaxed regime for the use of carried-forward non-trade losses. Comments on the draft guidance need to be submitted by 5 January 2018.

Disguised remuneration settlement terms announced by HMRC

On 8 November, HMRC announced the terms under which a settlement with HMRC may be reached by contractors, employers and employees in respect of tax and national insurance contributions due in respect of disguised remuneration charges for prior tax years. The terms are available for disguised remuneration arrangements such as Employment Benefit Trusts (EBTs), contractor loan schemes and employer-financed retirement benefit schemes.

The terms are not lenient. Outstanding income tax, national insurance contributions and inheritance tax on all open years will need to be paid as well as voluntarily paying liabilities where HMRC is strictly out-of-time to assess. Late payment interest will be due and there may also be tax-related penalties.

Although settlement will be expensive, it will have two main benefits. First it will mean that the planned disguised remuneration loan tax charge to be introduced from 5 April 2019 would not apply. Second, it will avoid the potential issue of follower notices and accelerated payment notices by HMRC for unsettled liabilities where litigation is in prospect.

The deadline for registration of an intention to settle liabilities is 31 May 2018.

European Commission to investigate group finance exemption in UK CFC Rules as illegal state aid

Since 2013, the UK's controlled foreign company (CFC) rules include an exception for certain financing income (i.e. interest payments received from loans) of multinational groups active in the UK (the Group Financing Exemption). Under the Treaty on the Functioning of the EU, EU Member States are prohibited from granting economic support (through financial assistance or in any other form) to companies to the disadvantage of others in a way that would distort competition and trade within the EU. The Commission has stated that it "has doubts whether the [UK] Group Financing Exemption complies with EU state aid rules. In particular, the Commission has doubts whether this exemption is consistent with the overall objective of the UK CFC rules".

Autumn Budget 2017

The Chancellor will deliver the Autumn Budget on 22 November and the draft Finance Bill 2018 will be published on 1 December.

Tax News from Outside the UK

United States Tax Reform

The U.S. House of Representatives on 16 November voted to pass the "Tax Cuts and Jobs Act", the Republicans' long-anticipated tax bill. The proposed legislation would make sweeping changes to the U.S. federal tax code, including lowering the corporate tax rate to 20 percent and significant changes to U.S. international taxation, along with scores of other broad changes.

The U.S. Senate Finance Committee on 16 November also approved its own version of the Tax Cuts and Jobs Act. Although the draft legislation has not yet been released (the Senate Finance Committee traditionally debates conceptually before producing legislative text), the description of the proposal by the nonpartisan Joint Committee on Taxation staff indicates substantial differences between the House and Senate bills. The full Senate is expected to begin debate on their version of the bill in the week following the Thanksgiving recess (*i.e.*, the week of 27 November). Further modifications are likely before the bill is voted on.

Any bill that passes the Senate will have to be reconciled with the bill passed by the House of Representatives, and both houses of Congress must pass identical legislation. The final legislation must then be signed by President Trump before the Tax Cuts and Jobs Act can pass into law. While the Republicans control both the House and Senate, and thus no opposition support is needed or expected in this process, relatively small majorities (particularly in the Senate) makes further compromise amendments among Republican legislators very possible before passage.

A detailed summary of both the House and Senate versions of the Tax Cuts and Jobs Act can be found on the Proskauer Tax Talks blog, which will be updated regularly to reflect new developments.

Related Professionals

- **Catherine Sear**
  Partner
- **Robert Gaut**
  Partner
- **Stephen Pevsner**
  Partner