Proskauer

UK Tax Round Up

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UK General Tax Developments

HMRC updates guidance on what constitutes "ordinary share capital"

Following the decision by the First-tier Tribunal (**FTT**) in *Warshaw V HMRC*, reported in our UK tax blog earlier this month, HMRC has updated its guidance on what constitutes "ordinary share capital" for the purposes of most tax provisions using that term.

As well as providing further guidance in relation to certain non-UK entities, the guidance has updated HMRC's view on certain categories of shares with particular rights. Following *Warshaw*, HMRC has included in its guidance reference to fixed rate preference shares where the dividend compounds over time or where a rate of interest is added if a dividend is unpaid. HMRC states that such shares would be "borderline" in respect of whether or not they are ordinary share capital. This update is in response to the *Warshaw* decision, in which the FTT held that cumulative, compounding fixed rate preference shares were ordinary share capital for the purposes of section 989 ITA 2007. This could be seen to contrast with HMRC's previous guidance that stated that cumulative fixed rate shares (with no reference to whether there was compounding on any unpaid dividend) are not ordinary shares. HMRC describes the decision in *Warshaw* as of "persuasive rather than precedent authority" in its updated guidance.

Although this update to HMRC's guidance is welcome in order to address the lack of detail in HMRC's previous guidance on the point highlighted by the decision in *Warshaw*, it is unfortunate that there is no clarity for taxpayers on the potentially significant tax consequences for them which may arise depending on the specific terms of their shares, such as for entrepreneurs' relief purposes. Taxpayers holding shares with fixed rate, cumulative, compounding dividends who expect the shares to be ordinary shares (or not) should seek advice on the possible consequences for them of this updated position from HMRC.

Anti-avoidance: two latest GAAR Advisory Panel opinions released

Two GAAR Advisory Panel opinions (Opinion 11 and Opinion 12) have been released, both agreeing with HMRC's assertion that the schemes in question were not reasonable courses of action in the circumstances and so the general anti-abuse rule (**GAAR**) applied to them.

Under both schemes, the company and the shareholder(s) acquired a bond from the scheme promoter for consideration comprising, broadly, the company assuming debt guaranteed by the shareholder. Various swaps were entered into with third parties, immediately novated to the bond manager as additional contributions to the bond (i.e., the debt) and the bond manager then entered into mirror swaps. The whole process was reversed during the respective "cooling off" periods. The effect of such transactions was that the same amount payable by the company to the shareholder(s) was created in the company loan accounts of that shareholder.

In Opinion 11, the GAAR Advisory Panel determined that the credits were equivalent to remuneration as a cash bonus. In Opinion 12, it determined that the credits were equivalent to distributions to the shareholders. The Panel stated that the steps undertaken in both situations, although not unlawful, lacked any commercial purpose and were contrived and abnormal. The Panel further commented that any correspondence relating to, or disclosure under, the disclosure of tax avoidance schemes (**DOTAS**) rules did not preclude the scheme falling within the GAAR given the different requirements applicable for such rules compared with the GAAR.

The two opinions highlight both HMRC's willingness to attack what they consider to be abusive schemes to avoid employment taxes and the GAAR Advisory Panel's willingness to agree with HMRC in these cases.

Anti-avoidance: HMRC's Spotlight 51 and Spotlight 52

HMRC has released new anti-avoidance spotlight guidance in relation to transactions using loans or fiduciary receipts (**Spotlight 51**) and using offshore trusts (**Spotlight 52**).

In Spotlight 51, HMRC confirms its awareness of tax avoidance schemes that, whilst marketed as wealth management strategies, attempt to disguise employment income and other profits as loans or fiduciary receipts. In Spotlight 52, HMRC highlights two recent FTT cases involving disclosure of schemes that utilised offshore trust structures to disguise income on which employment tax and NI contributions would otherwise be due. In both cases, the FTT agreed with HMRC that the schemes were notifiable under the DOTAS rules.

These Spotlights further highlight HMRC's willingness to challenge artificial and contrived avoidance schemes aiming to avoid employment taxes and the support that HMRC expects to get, and is getting, in doing so at tribunal level (and from the GAAR Advisory Panel as discussed above).

UK Case Law Developments

Section 75A Finance Act 2003 – Stamp duty land tax and the general anti-avoidance rule

The case of *Hannover Leasing Wachstumswerte Europa Beteiligungsgesellschaft mbH and another v HMRC* concerned arrangements for the sale of a property which were found by the FTT to fall within the scope of the stamp duty land tax (**SDLT**) anti-avoidance rule in section 75A of Finance Act 2003 (**section 75A**) even though the arrangements were not tax avoidance arrangements.

The property in question was held by an English limited partnership which itself was owned by a Guernsey unit trust in a form of tax planning generally considered acceptable. The buyer requested that the seller move the property out of the English limited partnership, due to its concerns relating to historic liabilities within the partnership, and into the Guernsey unit trust and then move the partnership itself out of the unit trust prior to completion of the sale. £55,540 of SDLT was paid in respect of the various transfers and steps giving effect to the sale.

HMRC argued that SDLT was payable on the full value of the property (approximately £140 million) as section 75A applied in respect of any reduction in tax liability, regardless of whether one of the main purposes of the transactions was avoidance of tax. The taxpayers argued that there were no scheme transactions for the purpose of section 75A and that the right amount of SDLT had been paid in respect of the transaction. The taxpayers also drew the FTT's attention to HMRC's own guidance on section 75A which states that it is an anti-avoidance provision and that HMRC will not apply it where transactions have been taxed appropriately.

The FTT, agreeing with HMRC, held that section 75A did apply and that SDLT was chargeable on the full cost of the property despite the lack of a tax avoidance motive. The FTT considered HMRC's guidance on section 75A either wrong or irrelevant. Interestingly, the FTT indicated that if the sale had proceeded with the partnership as the seller of the property, or if the steps had been undertaken in a different order, section 75A would not have applied. The taxpayer is expected to appeal.

Following this decision, there is more uncertainty on the application of section 75A to property transactions with corporate holding structures, especially where there is no tax avoidance motive. Those undertaking, and advising on, such property transactions should carefully consider the structures involved and whether they could be caught be the seemingly ever-widening scope of section 75A.

Redemption of QCBs crystallised a gain rolled over from earlier conversation of non-QCBs

In *Hancock and another v HMRC*, the Supreme Court dismissed the taxpayers' appeal and held that the redemption of qualifying corporate bonds (**QCBs**) crystallised a gain previously rolled into the QCBs by the prior conversion of non-QCBs (and other QCBs).

The Supreme Court dismissed the taxpayers' argument that because the previous conversion "included" QCBs as well as non-QCBs the crystallisation of a held over gain did not occur as the QCBs were outside of the scope of section 116 of the Taxation of Chargeable Gains Act 1992. The Supreme Court acknowledged that the taxpayers had a strong argument on a literal reading of the relevant provision but concluded that such interpretation would be contrary to the policy behind the legislation and create opportunities for abuse. The Supreme Court did not, however, follow the Court of Appeal and apply what might be considered to be a "strained" interpretation of the provisions. Instead, it placed weight on the fact that the relevant provisions had to be applied on their terms with "necessary adaptations" in respect of conversions of securities as part of a reorganisation. Accordingly, the Supreme Court felt able to rely on the wording of the legislation to determine that the prior conversion of the loan notes was two separate conversions, one of the QCBs and the other of the non-QCBs.

Given the focus on the wording of the legislation in the Supreme Court's decision, it did not provide much further detail for taxpayers and their advisers on the approach the courts may take in situations where apparent clear statutory language could be set aside in favour of an approach requiring a strained interpretation of the relevant statutory language. The Court simply commented that the instances where such an approach can be applied must be limited.

Single composite supply for VAT purposes where two separate items acquired in one package

The case of *HMRC v The Ice Rink Company* concerned whether the supply of access to an ice rink and the hire of ice skates were together one composite supply or two separate supplies for VAT purposes.

The taxpayer offered various ice skating packages to customers, including access to an ice skating rink with or without skate hire as well as skate hire without access to the ice rink. If the supplies were separate supplies, the hiring of children's ice skates was zero-rated whilst the access to the ice rink was standard-rated. If the ice skates were part of the access to the ice rink, the whole supply was standard-rated.

The Upper Tribunal (**UT**), overturning the decision of the FTT, held that there was one composite standard-rated supply as, considering only those customers purchasing the combined access to ice rink and skate hire package, the two aspects were acquired as a single supply.

The UT stated that the FTT had been wrong to consider not only the customers who purchased the combined package but also those customers who purchased other products and that the FTT should not have considered supplies made to persons other than the "typical customer" of the combined package as being relevant to the nature of the supply to a typical customer. Taking that approach, the UT held that it was not possible to extract the skate hire as a separate zero-rated supply and so the whole composite supply was standard-rated.

This case highlights that the nature of the supply for the actual customers involved is important in determining the nature of such supply for VAT purposes and that, where there is a supply comprising multiple elements, a particular element of the supply could not be extracted simply because it could be acquired on its own.

Overpayment of car parking charges was consideration for VAT purposes

In *National Car Parks Ltd v HMRC*, the Court of Appeal held that "overpayment" by customers in respect of car parking charges as result of not having the correct change to put in the machine was consideration for VAT purposes.

In reaching its decision, the Court stated that the meaning of "consideration" was autonomous across the EU and could differ from a domestic contract law interpretation. The VAT meaning was a subjective, not objective, value based on the amounts actually paid for the service. Therefore, it was the actual price paid for the services, including any overpayment, which was the relevant consideration for VAT purposes. Looked at another way, the customers had made their entire payment for the parking services notwithstanding that they could have paid less had they had the correct change.

The case illustrates that the key consideration in ascertaining consideration for VAT purposes is whether there is a direct link between the service provided and the payment made in respect of that service. In this instance, the fact that the payment made exceeded the market value and the original contractual offer price did not prevent this higher payment being the consideration.

International Developments

Guidance on new substance requirements in the Isle of Man, Guernsey and Jersey

Guidance has been released by the Crown Dependency (**CD**) governments of Guernsey, Jersey and the Isle of Man in relation to legislation outlining economic substance requirements.

Under pressure from the EU of being blacklisted as "uncooperative tax jurisdictions", the governments have collaborated on the guidance following the introduction of new legislation at the end of 2018 by all three jurisdictions. The guidance confirms that companies that fall within the scope of the new legislation must perform their core income-generating activities in any relevant sector within the relevant jurisdiction. To fall within the scope of the legislation, companies must perform real commercial activities such as the sale or exchange of goods or provision of services for profit.

The guidance confirms that pure equity-holding companies that passively hold equity investments, broadly, will not be considered as carrying on an economic activity and so will not fall within the scope of the new substance requirements.

CD resident corporate managers (such as corporate general partners to fund partnerships) will fall within the scope of the new legislation and so whether the manager performs "core income generating-activity" within the relevant CD will be key in determining whether it meets the substance requirements. It will also be a requirement that the manager is directed and managed in the CD and the guidance provides a list of what is expected to satisfy this.

The guidance does not provide details as to the process that tax officials will use to determine if an entity has met the substance requirements and further guidance is expected in relation to particular sectors, as well as outlining the reduced requirements for pure equity-holding companies.

Funds and companies operating in any of the CD jurisdictions should consider their existing activities and substance status in response to the new legislative requirements.

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