Proskauer

UK Tax Round Up

November 2023

Welcome to November's edition of the UK Tax Round Up. This month has seen the Chancellor's Autumn Statement as well as an interesting confirmation from the Court of Appeal on the scope of "arrangements" for capital gains tax rollover purposes and the Supreme Court's decision on who is a transferor for the purposes of the transfer of assets abroad rules.

Autumn Statement Announcements

On 22 November, the Chancellor delivered his Autumn Statement. The key announcements are summarised below.

1. Capital allowances "full expensing"

The government has announced that it will make "full expensing" permanent rather than letting it expire in 2027 as was proposed when it was introduced. Under the full expensing rules, businesses can write off the full cost of qualifying plant and machinery investment against their taxable profits. There is a 100% first year allowance for main rate assets and 50% first year allowance for special rate (including long life) assets.

2. Pension investment in private equity

Following consultation, the government has confirmed that guidance for the Local Government Pension Scheme will be revised to implement a 10% allocation for investments in private equity.

The government announced that it will be building on the Chancellor's Mansion House Reforms, including setting up a new Growth Fund within the British Business Bank, in order to give pension schemes access to investment in growing UK businesses as well as pension funds money being invested into UK science and technology companies via the Investment for Technology and Science initiative.

3. R&D expenditure credit

The government will merge the current R&D expenditure credit (RDEC) and small and medium enterprise (SME) tax credit schemes from April 2024 into a single scheme intended to simplify the R&D tax credit regime.

4. EIS and VCT regimes

The enterprise investment scheme (EIS) and venture capital trust (VCT) regimes, that were due to expire in April 2025, will be extended until 2035. The schemes offer tax reliefs to investors investing in early stage businesses, including 30% income tax relief on amounts invested and no capital gains tax on the sale of the investments if certain conditions are met.

5. OECD Pillar 2- introduction of the Undertaxed Profits Rules

We have discussed certain aspects of the UK implementation of the OECD Pillar 2 rules in the UK Tax Round Up of January 2022, November 2022 and July 2023. The government has confirmed that it will introduce the undertaxed profits rules (UTRP) to be effective from 31 December 2024.

6. National insurance contributions

From April 2024, the Class 2 national insurance contributions (NICs) of £3.45 per week payable by self-employed people earning more than £12,570 will be abolished. In addition, the rate at which self-employed people pay Class 4 NICs on earnings between £12,570 to £50,270 will be reduced from 9% to 8% from April 2024.

From 6 January 2024, the rate of Class 1 NICs, paid by employees, on earnings between £12,570 to £50,270 will be reduced from 12% to 10%.

7. Individual Savings Accounts (ISAs)

The government wants to improve how individuals hold ISAs. The changes proposed will expand investment opportunities available in ISAs to include long term asset funds (LTAFs) and open-ended property funds. An LTAF is designed to facilitate investment by retail investors in long-term, less liquid assets. LTAFs can invest in a range of asset classes, including private equity, private debt, venture capital, real estate and infrastructure.

8. Tax Avoidance

The government wants to introduce in the new Finance Bill a criminal offence for those who continue to promote avoidance schemes after receiving a notice requiring them to stop and to give HMRC powers to bring disqualification action against directors of companies involved in promoting tax avoidance (including those who control or exercise influence over a company).

UK Case Law Developments

Scope of “arrangements” for tax avoidance scheme

In Delinian Limited (formerly Euromoney Institutional Investor plc) v HMRC, the Court of Appeal (CA) dismissed HMRC’s appeal against the decision of the Upper Tribunal (UT) that the transaction (or “exchange”) in question was not part of a “scheme or arrangements” with a main tax avoidance purpose for the purpose of the restriction on rollover treatment in section 137 TCGA. This was a similar set of facts to those considered recently by the First-tier Tribunal (FTT) in Wilkinson and others v HMRC, reported in our September 2023 UK Tax Round Up and which referred to the UT’s decision in Delinian (referred to as Euromoney).

This case involved Delinian Limited agreeing to sell the shares in its subsidiary, Capital Data Limited, to a purchaser for about $80 million, of which $21 million was to be paid in cash and the remaining $59 million to be satisfied by the issue of ordinary shares in the purchaser. The ordinary shares comprised about 15% of the total ordinary share capital of the purchaser. Delinian was not entitled to claim the substantial shareholding exemption (SSE) under Schedule 7AC TCGA in respect of the chargeable gain realised on the sale of the Capital Data Limited shares because its shares in Capital Data did not carry any right to a dividend.

Prior to completion of the sale of the Capital Data shares, the tax director of one of Delinian's main shareholders suggested that Delinian might receive preference shares in the purchaser rather than the $21 million cash so that the entire gain on the sale of the Capital Data shares could be deferred by rollover into the purchaser ordinary and preference shares under section 135 TCGA and the preference shares could be redeemed in 12 months' time with the gain that had been rolled into them benefiting from the SSE so that no tax would arise. So, the receipt of the purchaser preference shares rather than cash would, effectively, defer and avoid corporation tax on chargeable gains (CGT) on the 26.25% of the deal value that Delinian would otherwise have received as cash on completion.

HMRC argued that the exchange of the 26.25% of the Capital Data shares for purchaser preference shares did not qualify for rollover relief under section 135 TCGA because the restriction in section 137 TCGA applied to it as an exchange that was "part of a scheme or arrangements" that had a main purpose of avoiding corporation tax.

The FTT and UT, and now the CA, had to consider the scope of the "exchange" relevant for the purposes of section 137 and the scope of the "scheme or arrangements" that the exchange was part of. It was generally accepted that the exchange was the exchange by Delinian of entirety of the Capital Data Limited shares for the purchaser ordinary and preference shares and that the question was really whether that exchange formed part of a scheme or arrangements with a main purpose of avoiding tax. HMRC argued that the relevant "scheme or arrangements" that had a main purpose of tax avoidance was the exchange of the Capital Data shares for the purchaser preference shares.

The CA disagreed with this interpretation and said that the clear purpose of the language in section 137 was to disallow rollover treatment where it could be said that the exchange was part of a scheme or arrangements with a main purpose of tax avoidance and that required identifying the entirety of the scheme or arrangements of which the exchange formed part and applying the purpose to that whole scheme or arrangements. It did not allow what was a single, coherent scheme or arrangement to be broken down into constituent parts to try to identify a particular element that might be said to have a main purpose of tax avoidance. So, while it might have been the case that the exchange of 26.25% of the Capital Data shares for purchaser preference shares, rather than cash, did have a tax avoidance purpose, the scheme or arrangements in question was the entirety of the sale of Capital Data Limited, and the FTT had found, on the facts, that the proposal to replace the cash element of the sale with preference shares was not central to the transaction, Delinian would have sold for cash had the purchaser rejected the proposal to issue preference shares and, while Delinian made a rollover clearance application to HMRC (which was rejected), it did not wait for the response before the transaction was completed. Accordingly, once the relevant scheme or arrangements had been identified, applying the natural meaning of the words, as the exchange of the Capital Data shares for purchaser ordinary and preference shares, the CA agreed that the exchange of the Capital Data shares as part of that scheme or arrangement did not have a main purpose of tax avoidance.

The case provides more welcome clarity on the approach to be taken in identifying the scheme or arrangements for the purposes of rollover relief where there is some element of tax avoidance and that HMRC cannot simply carveout a small element of a larger transaction unless it can show that the small element is, in some way, driving the larger transaction.

Transfer of assets by a company is not a transfer by its shareholders or directors

In HMRC v Fisher and another, the Supreme Court (SC) unanimously held that UK resident individuals with significant shareholdings in and control over a non-UK resident company were not subject to tax under the transfer of assets abroad (TOAA) rules now contained in Chapter 2 Part 13 ITA 2007 in respect of income of the non-UK resident company that arose from a business which had been transferred to it by a UK company also owned and effectively controlled by the UK individuals because the UK individuals were not “transferors” for the purposes of the rules.

The Fisher family, Stephen, Anne and their children, Peter and Diane, operated a betting business within the UK which, from 1988, was carried on by a UK company, Stan James (Abingdon) Limited (SJA). The family owned the shares in, and were directors of, SJA. In order to avail themselves of reduced betting duty in Gibraltar, SJA established a Gibraltar branch through which most of the telephone betting business was carried out. In March 2000, substantially all of the business of SJA (apart from 12 shops located in the UK) was transferred to Stan James Gibraltar Limited (SJG), a company incorporated and tax resident in Gibraltar that was also wholly owned by the Fisher family at the time of the transfer (although in different proportions to SJA).

HMRC raised discovery assessments for Stephen, Anne and Peter (Diane was non-UK resident) in respect of a number of years between 2000/2001 and 2007/2008 totaling unpaid tax in excess of £5 million pursuant to section 739 ICTA 1988 (now section 720 ITA 2007, the main charging provision of the TOAA rules) and sought to treat profits of SJG as income of the Fishers, having regard to their relative shareholdings in SJG.

Broadly, the TOAA rules can impose a tax charge for a UK tax resident individual where there is a transfer of assets abroad and the individual is either the transferor or, if not the transferor, actually receives a benefit as a result of the transfer. HMRC’s position was that, while not actually making the transfer of the business to SJG, the individuals were “quasi-transferors” through their collective ability to control SJG and, as such, should be regarded as transferors for the purposes of the TOAA rules.

The assessments were appealed to the FTT. The FTT agreed with HMRC on the general point that the individuals could be treated as transferors for the purpose of the rules (but allowed Anne's appeal on the basis that she was not actually involved in the management of the business at all and allowed the appeals of Peter and Stephen in respect of some of the years of assessment on other grounds which are not relevant to the SC's decision).

On appeal, the UT dismissed the assessments on the basis that the transfer was made by SJA and not the Fishers and that there was no basis for treating any of them as the "real" transferor or that SJA was merely an instrument through which they effected the transfer of the assets to SJG. SJA was a longstanding company and none of the individuals could, on their own, control its activities. Accordingly, the TOAA code was not applicable to the transfer of the business to SJG and SJG's subsequent income.

The CA, by majority, then allowed HMRC's appeal in respect in respect of Peter and Stephen but dismissed it in respect of Anne. The CA held that Stephen and Peter were subject to the TOAA charge as transferors. It agreed with the conclusion of the FTT in respect of Anne that she should not be treated as a "quasi-transferor" as she had not been involved in running the business and had played no active part in the decision making. Phillips LJ dissented and would have dismissed HMRC's appeal in respect of all three taxpayers, noting that none of the Fishers had procured the transfer of assets by SJA simply by voting in favour of the transfer.

Peter and Stephen Fisher appealed that decision to the SC. After considering the relevant body of case law, the SC concluded that there was no basis of support for a construction of the TOAA rules that a shareholder of a company should be deemed to be a transferor of the company's assets simply by owning all or a majority of the shares in the company. The SC noted that section 739 ITA is a punitive provision, which strongly suggested that there should be limit on the scope the tax charge to the actual transferor and noted that this was supported by other, more lenient, charging provisions within the TOAA code, such as the provision which applies to a non-transferor only to the extent that they receive a benefit (now contained in section 732 ITA 2007) and a provision that extends the definition of transferor to a transferor's spouse. As such, the most natural interpretation of the legislation is that section 739 was limited to charging the individual who makes the transfer of assets abroad or, in certain circumstances not explored, to "associated operations".

Accordingly, the SC concluded that the Fishers were not, either singly or collectively, the transferors of the business, that they were not within section 739 and that the transfer of the assets was made by SJA as the legal owner of the assets. In these circumstances, the company's actions could not be attributed to the shareholders.

Somewhat concerningly, counsel for HMRC sought to argue that a degree of uncertainty about who might be taxed as a transferor was a positive attribute of the TOAA rules as an anti-avoidance provision designed to discourage people from transferring assets abroad with a tax avoidance purpose and that the provision works better to achieve this aim if taxpayers are unable to know whether they would be caught or not. HMRC could then assess them to tax on the income of the overseas person, leaving the taxpayer to try to convince HMRC that they were not subject to the rules. The SC gave this short shrift and agreed with counsel for the Fishers that the law cannot be left in some unclear state "just to scare people".

As a side issue, there is a motive defence to the TOAA rules which applies, broadly, where the avoidance of tax liability is not the purpose or one of the purposes of the relevant transaction. The CA noted that this could not be relied on in the circumstances due to the objective of avoiding betting duty with the transfer. The SC did not consider this point further given its conclusion on the main point.

The case gives useful guidance on the scope of the TOAA rules in this context of transfers by persons other than the UK individual in question given the uncertainty that has existed for years as to quite how widely the rules could be applied.

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