Tax and the City Briefing for July

July 2017

Creating a 21st-century corporate tax system

The Office of Tax Simplification (OTS) has issued its report on simplifying the corporation tax computation. The report recommends a significant overhaul of the corporation tax computation with a move towards tax following the accounts where appropriate (including replacing capital allowances with accounting depreciation). For the largest companies, a number of simplifications are recommended for UK/UK transfer pricing and anti-avoidance legislation generally. A number of other reforms are suggested to reduce the administrative burden.

As the changes proposed are significant and many require further work before introduction, the OTS suggests the Government should set out the changes it wishes to adopt in a roadmap for corporation tax reform, perhaps over a five year period. This would enable open consultation with business prior to changes being made and will help to provide business with the required stability and certainty.

Reform of stamp duty

It is a shame that the OTS report on how to reform stamp duty does not recommend the complete abolition of stamp duty as part of its core package (the report acknowledges that a move to a fully combined stamp duty and SDRT tax would be a complex and costly legislative exercise when compared to the benefits). Instead, the report puts forward a package of changes for "paper stamp duty" which would modernise and speed up the process. And about time too: stamp duty dates back to 1694 and the method of physically impressing stamps on a document using archaic stamping machines which "close down" at 2pm every day to be cleaned, maintained, and prepared with the new date stamp for the next day, is not suited to the pace and business needs of the 21st century!

The package of recommendations set out in Chapter 2 of the report consists of the following core elements:

- digitising the stamp duty process providing taxpayers with a unique transaction reference (UTR) confirming the transaction has been notified to HMRC (a consequence of moving away from physical stamps is that there will no longer be the need to round up stamp duty to the nearest £5);
- enabling registrars to write up the company's books on sight of the UTR or evidence of payment of the stamp duty, thus permitting easy, same day registration of share transfers (so no more need for the "declaration of trust" workaround);
- making stamp duty an assessable tax for the purchaser, ending the sense it is currently "voluntary", to bring it into line with other stamp taxes and give HMRC information and enquiry powers together with the ability to impose interest and penalties if the right amount of tax is not paid within specified time limits. HMRC would then be able to refocus its resources on higher risk transactions rather than reviewing every application under the present time pressures;
- amending the scope of stamp duty as follows:
    - **Territorial scope:** aligning the territorial scope of stamp duty with SDRT so non-UK shares are not caught. This would be achieved by adopting the same definition of "chargeable securities".
    - **Grant of options:** a document under which an option is granted or released is in principle chargeable with stamp duty on

any amount paid if the option relates to stock or marketable securities. Under the current, "voluntary" system very few instruments granting options are submitted for stamping each year. The OTS recommends HMRC should consider whether, as a policy matter, if stamp duty becomes an assessable tax, it should be payable on such grants. Ideally, neither stamp duty nor SDRT should be payable on grant, tax should be only on the assignment of an option where the underlying subject matter is a chargeable security but it remains to be seen whether HMRC reach this view.

- **Partnerships:** stamp duty applies in principle to the transfer of interests in partnerships which own stock or marketable securities. Very few transfers of partnership interests are stamped each year as such transfers do not give rise to any requirement to write up company or other registers and because the transferees take the view that SDRT does not apply. Making stamp duty an assessable tax will have a significant impact on the transfer of partnership interests, to the extent the partnership assets include UK shares. This will not be a popular change.

The OTS recommends replacing compulsory adjudication of relief claims with a short form notification. Instead of submitting a full adjudication claim by post, online submission would allow taxpayers to upload a scanned document giving basic details to notify HMRC that a stamp duty relief is being claimed (such as group relief and the reconstruction reliefs). These reliefs are not currently available in SDRT which creates a trap for the unwary so the OTS also makes the welcome recommendation that they are introduced directly into SDRT, perhaps by use of a CREST flag.

The OTS suggests, in Chapter 3, additional simplifications such as:

- adopting the SDRT concept of consideration (money or money's worth);
- adopting the SDLT approach to unknown consideration to allow the stamp duty contingency principle to be retired;
- adopting the SDLT approach where debt forms part of the consideration to limit the stamp duty to the market value of the shares; and
- giving "serious consideration" to the potential for combining stamp duty with SDRT and repealing the present stamp duty legislation (this would enable the complex franking mechanism to be dispensed with).

There are a number of scenarios (examples are given on page 27) where currently there would be an SDRT charge but for the charge being franked by a stamp duty exemption reliant on the narrower definition of consideration in the stamp duty rules. A change in the stamp duty definition of consideration to money or money's worth would therefore require specific exemptions to maintain the status quo and to ensure no double charge arises. The OTS recommends the policy in this area be considered.

The 1.5% season ticket charge where a UK company issues shares to a depositary receipt issuer (such as an issuer of ADRs) or a clearance system (such as DTC) is still on the UK's statute books and is only not collected by HMRC because it has been found to be contrary to EU law (the Capital Duties Directive). This season ticket charge was outside the terms of reference for the OTS review so we are no closer to knowing how the issue might be resolved as a policy matter going forward, although the European Union (Withdrawal) Bill should preserve the disapplication of the 1.5% charge on and after Brexit unless and until any post-Brexit change of law. It is hoped that, in order to maintain the UK's competitiveness, legislation will not be made to reintroduce the 1.5% charge after Brexit.

Duty of care of tax advisers

The High Court (HHJ Moulder) in *Halsall and others v Champion Consulting Limited and others* [2017]

EWHC 1079 considered whether tax advisers had been negligent in giving clients too much assurance that the tax planning schemes (a "charity shell" scheme and a film scheme) would succeed and not warning the clients about the maximum they stood to lose if the schemes failed. The decision considers what advice and warnings about risk a "reasonably competent tax adviser" would have given.

There is a distinction between the duty to provide information for the purpose of enabling someone else to decide on a course of action and the duty to advise somebody what course of action they should take. A provider of information is not generally responsible for the consequences of the course of action – only for the consequences of the information being wrong. Someone in the advice category, however, must take reasonable care to consider all the consequences of the course of action. In this case, Judge Moulder found that the tax advisers had "guided the whole decision-making process" and were in the advice category. Notionally asking the client to take the final decision as to whether to proceed did not move the advice into the "information" category. The High Court concluded that no reasonably competent tax adviser could have advised as the defendants did.

In today's climate there will be few people advising on tax avoidance schemes like the ones in this case but the distinction between giving information and advising on a course of action is one to bear in mind when advising on any kind of tax planning to make sure the client is informed of the likelihood of the tax planning being challenged and what the consequences are if the planning fails.

No judicial review of DPT notice

Recipients of DPT notices may be getting frustrated by the two-stage review and appeal procedure for challenging a DPT notice (FA 2015, sections 101 and 102) but an application for judicial review is not the answer. In the case of *Glencore Energy UK Ltd v HMRC* [2017] EWHC 1476 (Admin) the High Court held that the statutory procedure is an adequate and appropriate alternative remedy to judicial review. One of the reasons given on behalf of Glencore for the request for judicial review was that the statutory procedure is "slow, inappropriate and ineffective" and that judicial review would save time and expense. But the High Court explained that the judicial review, on the grounds as formulated, would not address the merits of the dispute – the issues would remain live and awaiting resolution. So it would not give these savings in any event.

What to look out for:

- Although the European Union (Withdrawal) Bill was published before the summer recess, we will have to wait until after the recess for the introduction of the Finance Bill. In the meantime, HMRC has published revised draft legislation where amendments have been made and has confirmed that the Finance Bill will legislate for all policies that were included in the pre-election Finance Bill, and that all policies originally announced to start from April 2017 will be effective from that date.
- A couple of consultations were promised at Budget 2017 for "the Summer" : HMRC's large business risk review and a consultation on the legislative changes necessary to ensure that the taxation of leases of plant and machinery remains the same following changes to lease accounting in IFRS 16.
- Active Scottish limited partnerships and general Scottish partnerships where all the partners are corporate bodies have to start sending details to Companies House of people with significant control within 14 days beginning 24 July 2017 or face a daily fine of £500. This is in response to media reports detailing the apparent role of such partnerships in international financial crimes because until now these vehicles have not had to reveal who controls them.
- On 26 July the Upper Tribunal will hear the case of *McQuillan v HMRC* on whether shares with no dividend rights can be fixed rate preference shares.

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