# Tax and the City Briefing for November

November 2017

## *Farnborough Airport Properties*- arrangements and control

Group relief surrenders are prevented at a time when there are arrangements in place whereby the relevant group relationship could be broken (CTA 2010, s154+). In *Farnborough Airport Properties Company – HMRC [2017] UKUT 394*, the Upper Tribunal ruled that the appointment of a receiver in respect of a company had the effect that the shareholders of that company ceased to control it, with the result that the company could not surrender losses from that time. When considering the timing of the arrangements, the Upper Tribunal helpfully commented that neither the entering into of a security document nor the right to appoint a receiver, in and of themselves, constitute a disqualifying arrangement. On this basis, a genuine third party contingency will prevent an arrangement from coming into existence until such time as the contingency occurs.

Less helpful is the Upper Tribunal's narrow construction of the definition of "control" (CTA 2010, s1124). This definition refers to a company's articles "or other document regulating" the company. The Upper Tribunal's view is that the debenture in question is not an "other document regulating" the company because "other document" in this context means a *constitutional* document, akin to articles of association, which is binding on members by virtue of its status as such and does not include a document to which accession requires a separate agreement.

This narrow construction is potentially unhelpful in the context of other provisions using similar language. One such example is in the context of consortium relief in a joint venture. It is generally considered that a similar reference in the consortium relief rules, providing that a suspension of voting rights falls within a safe harbour, is apt to include a suspension set out in a shareholders' agreement. (The suspension of voting rights in a joint venture is often included in the relevant shareholders' agreement rather than in the articles to avoid details of the commercial arrangements being filed at Companies House.)

At the time of writing it is not known if the *Farnborough* decision will be appealed. As it stands, it could impact on a considerable number of joint venture projects if the suspension of voting rights has to be relocated to the articles in order to fall within the safe harbour provisions.

## Draft guidance on penalties for enablers of defeated tax avoidance

The much-awaited guidance, published on 20 October for consultation until 30 November, gives some comfort to those advisers who stay the "right side" of the line that they will not be "enablers" under the legislation to be enacted in what will become Finance (No. 2) Act 2017. HMRC will publish final guidance once that Act receives Royal Assent.

The enablers legislation applies to a person if they enable abusive tax arrangements that are entered into on or after the date of Royal Assent. The enabling activity must also have been undertaken on or after this date. The tax arrangements must be subsequently defeated for the penalty to be imposed. The penalty for an enabler is equal to the amount of consideration received or receivable by them for enabling those arrangements. No penalty can be charged unless HMRC has obtained an opinion of the GAAR Advisory Panel in relation

to the tax arrangements or equivalent arrangements.

Some aspects of the draft guidance of interest to tax professionals are set out below:

- Where a partnership carries on the business during the course of which the enabler activities are performed, it is the partnership, not the partner or employee performing the activities, that will be the enabler for the purposes of the legislation (paragraph 5.1.6).

- The designer category of enabler is subject to a knowledge carve-out. Example 7 illustrates what a corporate lawyer needs to do to rely on this carve-out. In this example, a corporate lawyer is approached by a person who, unbeknown to that lawyer, is designing abusive tax arrangements. The lawyer is asked to advise on the company law aspects of the proposed transaction only and the legal advice is reflected in the final design of the tax arrangements. So long as the lawyer takes the normal necessary care and attention in accordance with their professional requirements (e.g. taking relevant action if money laundering or fraud is suspected), there is no expectation that the lawyer should insert additional checks or ask further questions to establish whether or not there is a tax advantage and to ensure they are not providing advice in relation to abusive tax arrangements (paragraph 5.2.7).

- Helpful examples are given of tasks that an adviser might carry out which will not lead them to be a manager of arrangements. Performing a statutory service such as preparing board minutes, completing/filing returns, making Companies House filings or Land Registry filings or auditing statutory accounts will not be "managing or organising" those arrangements provided that is all that has been done (paragraph 5.3.1.5).

- The marketer category of enabler is very broad. There is no knowledge condition because, according to the draft guidance, "anyone marketing abusive tax arrangements should be well aware that that is what they are doing". One of the ways a person can be a marketer is by communicating information about a proposal for those arrangements to a user of the arrangements or to another person. The draft guidance helpfully makes it clear that this communication has to be made "with a view to the user entering into those arrangements or transactions forming part of those arrangements". If the arrangements a person actually enters into are, as a matter of fact, different to those proposed to them, the person who communicated the proposal will not be a marketing enabler (see paragraph 5.4.1.6).

The draft guidance explains how the penalties for enablers regime interacts with the Code of Practice on Taxation for Banks (the "Code"). Banks that adopt the Code are required to comply with the spirit, as well as the letter, of the law. Although there is nothing in the enablers regime to prevent a bank from being an enabler under any of the five categories, the draft guidance explains that the enablers legislation does not require banks to introduce additional governance so long as their existing Code governance is robust and the conditions set out in paragraph 5.8.7 are satisfied.

### HMRC's annual report on Code

In its third annual report on the operation of the Code, HMRC continues to be pleased with the positive impact on banks' behaviour. In the reporting period 1 April 2016 - 31 March 2017, banks made 19 pre-transaction Code approaches (compared with 16 in the previous reporting period). Only two of these were considered by HMRC to lead to a tax result contrary to the intentions of Parliament and the banks concerned did not proceed. The average turnaround time for HMRC dealing with pre-transaction Code

approaches is now 20 days (twice as long as for the previous reporting period).

There are a small number of banks whose behaviour in relation to governance, tax planning or the bank's relationship with HMRC continues to cause concern for HMRC. A subset of these continue to push the boundaries of acceptable tax planning.

As part of the cross-government Panama Papers Taskforce, HMRC has been reviewing the evidence relating to banks' links to Panama and other offshore jurisdictions to assess whether such links are consistent with commitments under the Code.

## VAT on management services provided by insurers to defined benefit pension schemes

HMRC has long taken the view that, with one exception, the management of defined benefit ("DB") schemes is taxable. That exception is when the management is performed by a regulated insurer. This exception arises because "insurance transactions" are an exempt activity for VAT purposes but as this term has no statutory definition, HMRC interprets this as including all of the activities of an insurer regulated under the Financial Services and Markets Act 2000 (Notice 701/36/13).

EU VAT law, on the other hand, allows only pure insurance activity, i.e. the underwriting of specified risks, to be an exempt supply. Until now, HMRC appears to have been happy to allow this discrepancy to continue; but as announced in *Revenue and Customs Business Brief 3/2017*, (2017), the management of a DB scheme by an insurer will become taxable, in like manner to the management of a DB scheme by anyone else. Although the brief announced a commencement date of 1 January 2018 for this change, it is understood that HMRC has agreed with industry representatives to postpone commencement until later in 2018 or in the first half of 2019. The revised commencement date is expected to be published by HMRC shortly.

It looks as if this change has been prompted (at least in part) by the ongoing *United Biscuits* litigation. At the High Court hearing in early October, the trustee of the United Biscuits' DB scheme was set to argue that there was a breach of fiscal neutrality given that regulated insurers benefit from an exemption not afforded to others. The trustee claimed a refund of forty years' VAT paid on DB management fees which it argued should have been exempt.

HMRC emphasised that the management of defined contribution schemes will, following the decision in *ATP Pension Services* (Case C-464/12), continue to be exempt, whether they are managed by an insurer or by anyone else. HMRC stated that very few DB schemes are managed by insurers, so that the withdrawal of exemption for the management of DB schemes by insurers will, they expect, have limited practical effect. This is of little consolation, however, for those insurers which do manage DB schemes and which now need to get themselves ready to account for VAT. The impact on the DB funds themselves of the loss of the exemption could also be significant and may affect their profitability. This is not what insurers need right now on top of their Brexit planning, so the postponement of the commencement date will be welcomed.

## What to look out for:

- Revised hybrids guidance is expected soon (HMRC deferred planned publication from end of September to reflect comments in the guidance).
- On 13 November, the consultation closes on the draft regulations amending the rules on simplified arrangements for group relief claims to include carried-forward losses. These amendments are required in light of the legislation in the second Finance Bill 2017 which permits group relief of carried-forward losses from April 2017.
- The first Autumn Budget takes place on 22 November. From 2018 there will, thankfully, be only one fiscal event a year.
- The Court of Appeal is scheduled to hear the taxpayer's appeal in *Trigg* (interpretation of s117(2) TCGA: qualifying corporate bonds) on 22 November.
- On 30 November, the OTS review on depreciation and capital allowances closes.
- On 6 December, the consultation on the Business Risk Review closes.

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