RPC

Tax update

April 2020

In this month's update we report on (1) HMRC's updated guidance on certain arrangements which purport to avoid the 'managed services companies' legislation; (2) recently published draft legislation on voluntary restitution in the context of the loan charge; and (3) the Government's decision to suspend the extension of IR35 to the private sector.

We also comment on three recent cases relating to (1) whether gambling proceeds were taxable income; (2) failure by HMRC to open a valid enquiry; and (3) whether EU group relief claims displaced earlier domestic claims.

News

Managed Service Company legislation: unpaid PAYE and Class 1 NIC avoidance schemes (Spotlight 32)

On 25 February 2020, HMRC published updated guidance. more›

Loan Charge: draft legislation on voluntary restitution published

On 27 February 2020, eagerly anticipated draft legislation was published in relation to the establishment of a scheme for refunding voluntary restitution payments made under disguised remuneration loan charge settlement arrangements. more›

IR35 tax "reforms" suspended for a year

On 17 March 2020, in response to the outbreak of coronavirus, the Treasury announced that it would suspend implementation of IR35 reforms for a year. more›

Cases

McMillan – Gambling proceeds not taxable income

In *McMillan v HMRC* [2020] UKFTT 0082 (TC), the First-tier Tribunal (FTT) held that proceeds of gambling were not taxable income. more›

Credit Suisse – HMRC failed to open a valid enquiry

In *Credit Suisse Securities (Europe) Ltd and others v HMRC* [2020] UKFTT 86 (TC), the FTT allowed the taxpayers' appeals as HMRC had not issued a valid notice of enquiry. more›

Linpac – EU group relief claims did not replace earlier domestic claims to relief

In *Linpac Group Holdings Ltd v HMRC* [2020] UKFTT 60 (TC), the FTT allowed the taxpayer's appeal against HMRC's decision that its claim for group relief had been withdrawn by a subsequent claim. more›

Any comments or queries?

Adam Craggs
Partner
+44 20 3060 6421
adam.craggs@rpc.co.uk

Constantine Christofi
Associate
+44 20 3060 6583
constantine.christofi@rpc.co.uk

About this update

Our Tax update is published on the first Thursday of every month, and is written by members of RPC's Tax team.

We also publish a VAT update on the final Thursday of every month, and a weekly blog, RPC's Tax Take.

To subscribe to any of our publications, please click here.

News

Managed Service Company legislation: unpaid PAYE and Class 1 NIC avoidance schemes (Spotlight 32)

On 25 February 2020, HMRC published updated guidance. HMRC has been successful in its argument that the managed service companies (MSC) legislation (contained in Chapter 9, Part 2, Income Tax (Earnings and Pensions) Act 2003) applies to arrangements established and run by a third party.

In *Christianuyi Ltd v HMRC* [2018] UKUT 0010 (TCC), the Upper Tribunal agreed with HMRC's interpretation of the MSC legislation and confirmed HMRC's view that if a person promotes or facilities the use of a company, and that company provides the services of the individual, then the person is an MSC provider. On 5 March 2019, the Court of Appeal dismissed the taxpayer's appeal.

It is likely that HMRC will now seek to investigate and challenge similar arrangements to those implemented in *Christianuyi*, and in its guidance HMRC indicates that promotors of MSC arrangements should consider their obligations under the disclosure of tax avoidance schemes (DOTAS) regime. Failure to comply with the relevant notification requirements under the DOTAS regime may lead to substantial penalties.

HMRC's updated guidance can be viewed here.

Back to contents>

Loan Charge: draft legislation on voluntary restitution published

On 27 February 2020, eagerly anticipated draft legislation was published in relation to the establishment of a scheme for refunding voluntary restitution payments made under disguised remuneration loan charge settlement arrangements. A draft scheme document was also published.

The draft legislation is in response to Sir Amyas Morse's independent review of the loan charge which recommended substantial changes to the legislation, most of which were accepted by the Government.

Both the draft legislation and the draft scheme document sets out how the scheme will operate and how taxpayers can make claims. HMRC has updated its guidance, which advises taxpayers on the process and what evidence they will need to provide.

The scheme will take effect on royal assent to the Finance Act 2020 and any claims must be made before 1 October 2021.

HMRC's updated guidance and the draft legislation can be viewed here.

Back to contents>

IR35 tax "reforms" suspended for a year

On 17 March 2020, in response to the outbreak of coronavirus, the Treasury announced that it would suspend implementation of IR35 reforms for a year. The reforms had been due to take effect from 6 April 2020 and will now be introduced in April 2021.

The reforms, once implemented, will compel private sector companies to take responsibility for determining the IR35 status of any contractors they use. The reforms are part of a wider Government initiative to reduce the use of personal service companies which it believes leads to a significant loss of tax to the Exchequer. The reforms would have brought the private sector in line with the public sector.

The Government's announcement can be viewed here.

Back to contents>

Cases

McMillan – Gambling proceeds not taxable income

In *McMillan v HMRC* [2020] UKFTT 0082 (TC), the First-tier Tribunal (FTT) held that proceeds of gambling were not taxable income.

Background

Mr McMillan (the appellant) was an active gambler from 1998 to 2010 and was not employment or engaged in a trade during this period.

The appellant's gambling took the form of an elaborate system of betting on football results and, increasingly, higher stakes in private poker games. These dealings were all in cash and no records of any winnings or losses were maintained by the appellant.

After 2010, the appellant deposited the money he had won over the period in various bank accounts which he had opened.

On 5 February 2018, HMRC issued eight assessments, pursuant to section 29, Taxes Management Act 1970 (TMA) for the tax years 2006/07 to 2013/14, inclusive, in the total sum of £290,928.56.

On 6 February 2018, HMRC issued related failure to notify penalties in the total sum of £132,193.25.

The appellant had not filed any tax returns for the above years, nor had HMRC issued a notice to file a return under section 8, TMA.

The appellant appealed to the FTT.

FTT decision

The appeals were allowed.

The FTT noted that although the gambling methods used by the appellant were beyond the skill or sophistication of the average sports gambler, the appellant's gambling did not amount to a trade and, as such, his winnings were not taxable. Although the appellant's bank deposits were in substantial sums and this invited further investigation, on the evidence available, there was no proper inference to be drawn that the appellant was carrying on a trade.

The FTT therefore concluded that the appellant had no taxable income source for any of the periods for which the assessments under appeal were issued.

Comment

The appellant was able to provide a detailed and credible explanation of the careful research and calculation he used for his gambling system. Although certain elements of the case seemed implausible at first, they were corroborated by appropriate evidence. This decision illustrates the importance of thorough case preparation in order to establish the relevant facts relied upon at an appeal hearing.

The case is also interesting for what was revealed at para [4] of the decision:

"HMRC had inadvertently disclosed a review letter dated 11 April 2018 (not sent to the Appellant) in which the review officer had concluded that all of the assessment and penalty determinations should be cancelled because HMRC had failed to identify a taxable source. The review letter which was in fact sent, dated 16 April 2018, from the same review officer, stated that the assessments and penalties should be upheld."

It is not evident from the decision why the review officer changed his position and one is left to speculate as to why he had a change of heart. One thing is clear, the above will do little to displace the concerns of those taxpayers and practitioners who consider HMRC's review process to be little more than a 'rubber stamping' exercise.

The decision can be viewed here.

Back to contents>

Credit Suisse – HMRC failed to open a valid enquiry

In *Credit Suisse Securities (Europe) Ltd and others v HMRC* [2020] UKFTT 86 (TC), the FTT allowed the taxpayers' appeals as HMRC had not issued a valid notice of enquiry.

Background

The appellants were all companies within the Credit Suisse Group (CS).

Bank payroll tax (BPT) was a temporary tax imposed by Schedule 1, Finance Act 2010 (FA 2010), on certain forms of remuneration awarded to employees of banks between December 2009 and April 2010.

CS's appeal was concerned with the application of BPT to a deferred variable award scheme which it operated for senior employees (APPA).

There were discussions about the APPA between HMRC and CS before its BPT return was filed on 31 August 2010. Those discussions continued after that date. However, no agreement was reached in relation to whether BPT applied to the payments made during the chargeable period.

Paragraph 23, Schedule 1, FA 2010, required HMRC to give notice of its intention to open an enquiry into the taxpayer's BPT return by 31 August 2011. No written notice was issued before or after that date.

HMRC eventually concluded that the awards under the APPA were subject to BPT and purported to issue four closure notices in January 2017, amending the returns and increasing the tax payable by £83,144,379.

CS appealed to the FTT.

FTT decision
The appeal was allowed.

The FTT followed the Court of Appeal's decision in *HMRC v Raftopoulou* [2018] EWCA Civ 818. In that case the Court held that, although there was no prescribed form for an enquiry notice, it had to be clear from the notice that HMRC intended to enquire into a return.

In the present case, there was no clear indication that the post-filing discussions were more formal, or on a different basis, to those that had taken place before the filing of the returns. In the view of the FTT, notice could not be given by mere "interference or implication". Accordingly, as there was no valid enquiry notice, CS's appeals were allowed.

As the FTT had found in favour of CS in relation to the procedural issue, it was not necessary for the FTT to consider the underlying substantive issue. It did, nonetheless, consider the substantive issue and held that, had it been necessary to reach a decision on this point, it would have found in favour of HMRC.

Comment
This case clearly demonstrates the importance of HMRC ensuring that it has opened a valid enquiry if it wishes to amend a taxpayer's return.

As the FTT noted, an informal enquiry does not have the statutory consequences that result from the issuing of a formal enquiry notice. HMRC therefore needs to consider the position carefully as, subject to any further appeal, HMRC's failure to follow its usual practice of issuing notices has, in this instance, resulted in a potential loss to the Exchequer of £83m.

As the amount of tax in issue in this case is substantial, it would not be surprising if HMRC was to seek to appeal to the Upper Tribunal.

The decision can be viewed here.

Back to contents>

Linpac – EU group relief claims did not replace earlier domestic claims to relief

In *Linpac Group Holdings Ltd v HMRC* [2020] UKFTT 60 (TC), the FTT allowed the taxpayer's appeal against HMRC's decision that its claim for group relief had been withdrawn by a subsequent claim.

Background
LINPAC Group Holdings Ltd (Holdings), a global plastics supplier, was a UK resident company which formed part of an international group which comprised UK companies and EU subsidiaries.

Holdings submitted domestic claims for corporation tax group relief under Chapter IV, Part X, Income and Corporation Taxes Act 1988 (ICTA 1988) (now Part 5, Corporation Tax Act 2010), in respect of losses surrendered by another of the UK group companies (the UK claims).

Holdings subsequently made further group relief claims in respect of losses made by UK and EU group companies (the EU claims). The EU claims were made in respect of the same profits as the UK claims. The EU claims were based on the decision of the European Court of Justice in *Marks & Spencer plc v Halsey (Inspector of Taxes)* [2006] (C-466/03) (*M&S*).

When made, the efficacy of the EU claims was unclear, and Holdings subsequently accepted the EU claims were not valid. Holdings, therefore, sought to rely on the UK claims but, despite having indicated that it was prepared to accept their reinstatement, HMRC maintained that the UK claims were no longer open because the making of the EU claims involved the withdrawal of the UK claims (because it is not possible to have two group relief claims extant at the same time) and it was too late to resubmit them.

Holdings appealed.

FTT decision
The appeal was allowed.

The FTT was of the view that the circumstances of the case were different to those in *M&S*. In *M&S*, only overseas losses were in issue and the successive claims were in respect of the same losses. Following the *M&S* decision it was not necessary for a later claim to be preceded by the withdrawal of an earlier claim. Rather, a later claim can be valid despite the non-withdrawal of an earlier claim, and earlier and later group relief claims can co-exist.

The FTT concluded that although Holdings had not expressly kept the UK claims open or replaced them, there was no implicit withdrawal. This was particularly so in light of the fact that it was unclear at the time when the EU claims were made whether they would be valid. Overall, the FTT found that the EU claims had been made in the alternative to the UK claims and that Holdings had withdrawn the EU claims, leaving the UK claims extant.

Comment
This decision provides useful guidance on the effect of making both domestic and cross-border group relief claims in respect of the same profits. It is clear that EU group relief claims do not replace earlier domestic claims to relief, and that such claims can co-exist, leaving the domestic claims valid.

A requirement to withdraw the valid domestic claims before making the still speculative cross-border claims would have made it excessively difficult, if not practically impossible, to advance the cross-border claims. The result would have been that the putative EU right to cross-border group relief would have been impossible in practice to exercise.

This decision will be of interest to corporate groups where there is an international dimension to their group relief claims.

The decision can be viewed here.

Back to contents>

About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 78 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol. We put our clients and our people at the heart of what we do.

"... the client-centred modern City legal services business."

We have won and been shortlisted for a number of industry awards, including:

- Best Legal Adviser every year since 2009 – Legal Week
- Best Legal Employer every year since 2009 – Legal Week
- Shortlisted – Banking Litigation Team of the Year – Legal Week Awards 2019
- Shortlisted – Commercial Litigation Team of the Year – Legal Business Awards 2019
- Shortlisted – Best Copyright Team – Managing IP Awards 2019
- Shortlisted – Insurance Team of the Year – Legal Business Awards 2018
- Winner – Best Employer – Bristol Pride Gala Awards 2018
- Winner – Client Service Innovation Award – The Lawyer Awards 2017
- Shortlisted – Corporate Team of the Year – The Lawyer Awards 2017
- Winner – Adviser of the Year – Insurance Day (London Market Awards) 2017
- Winner – Best Tax Team in a Law Firm – Taxation Awards 2017
- Winner – Claims Legal Services Provider of the Year – Claims Club Asia Awards 2016

Areas of experience

- Advertising & Marketing
- Alternative Dispute Resolution
- Commercial Contracts
- Commercial Litigation
- Competition
- Corporate Crime & Investigations
- Corporate
- Data & Technology
- Employment & Pensions
- Financial Markets Litigation
- Health, Safety & Environmental
- Insurance & Reinsurance
- Intellectual Property
- International Arbitration
- Private Equity & Finance
- Product Liability & Regulation
- Real Estate
- Regulatory
- Restructuring & Insolvency
- Tax
- Trusts, Wealth & Private Client

THE LAWYER European Awards 2018 WINNER Global network of the year

LegalWeek Best Legal Adviser 2017-2018

THE LAWYER Awards 2017 TRAVELERS BEST CLIENT SERVICE INNOVATION WINNER

Finalist of Tolley's TAXATION Awards 2019

Winner Adviser of the Year insuranceday London Market Awards

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

38/F One Taikoo Place
979 King's Road
Quarry Bay, Hong Kong
T +852 2216 7000

12 Marina Boulevard
38/F MBFC Tower 3
Singapore 018982
T +65 6422 3000

RPC