Corporate tax update

Third quarter 2015

Welcome to the latest edition of our Corporate Tax Update, written by members of RPC's tax team and published quarterly. In this edition we highlight some of the key tax developments of interest to UK corporates from the third quarter of 2015.

Corporation tax – general

"Fair representation" rule overrides general approach (to follow GAAP treatment) of loan relationship tax regime

On 11 August 2015, the First-tier Tribunal (in *GDF Suez Teeside Ltd v HMRC*) held that a taxable profit arose on a transfer of loan relationships from a UK parent company to its subsidiary even though it was accepted that under GAAP-compliant accounting treatment no profit was recognised. more›

Bank shareholding in R&D company held not to jeopardise SME tax relief

On 15 July 2015, in a welcome decision, the First-tier Tribunal (in *Monitor Audio Ltd v HMRC*) held that, as an "institutional" investor, the presence of a large banking group amongst the shareholders of an otherwise small or medium-sized company (SME) should not result in the company ceasing to be entitled to valuable R&D tax relief for SMEs. more›

Financial services

HMRC issues guidance on "base cost shift" for carried interest

On 20 July 2015, HMRC published guidance on the Finance (No.2) Bill 2015 provisions which end the entitlement of holders of carried interest to the so-called CGT "base cost shift". more›

VAT

Limits of insurance exemption reaffirmed by First-tier Tribunal

On 1 October 2015, the First-tier Tribunal (in *Riskstop Consulting Ltd v HMRC*) held that risk assessment and related supplies did not fall within the scope of the VAT exemption for "insurance intermediary" services. more›

Tribunal critical (again) of HMRC's refusal to allow retrospective VAT group application

On 14 August 2015, the First-tier Tribunal (in *Copthorn Holdings Ltd v HMRC*) asked HMRC to reconsider its decision to refuse a taxpayer's application for retrospective VAT group registration. This is the second time HMRC have been asked to "think again" on their decision. more›

Any comments or queries?

David Gubbay
Partner
david.gubbay@rpc.co.uk
+44 20 3060 6050

Ben Roberts
Senior Associate
ben.roberts@rpc.co.uk
+44 20 3060 6184

Input VAT recovery on retail vouchers – First-tier Tribunal finds in favour of taxpayer

On 13 August 2015, the First-tier Tribunal (in *Associated Newspapers Ltd v HMRC*) held that input tax could be recovered on the acquisition of retail vouchers that were passed on to customers participating in the taxpayer's subscription promotion. more›

Input VAT recovery on professional fees incurred on removal of minority shareholder – First-tier Tribunal finds in favour of HMRC

On 17 July 2015, the First-tier Tribunal (in *Robert Welch Designs Ltd v HMRC*) held that certain professional services were supplied to a taxpayer's majority shareholders, and not the taxpayer company itself, with the result that the taxpayer's claim to recover input tax on those services failed. more›

ECJ upholds AG's opinion in latest case on holding company VAT recovery

On 16 July 2015, the European Court of Justice (ECJ) judgment in *Larentia + Minerva and others* confirmed the earlier Advocate General's (AG's) opinion that a holding company actively managing its subsidiaries does not carry on both economic and non-economic activities for VAT purposes. more›

Transfers of business into an existing VAT group, with only intra-group supplies being made post-transfer, can be a TOGC – Upper Tribunal reverses First-tier decision

On 7 July 2015, the Upper Tribunal (in *Intelligent Managed Services Ltd v HMRC*) reversed the earlier First-tier Tribunal decision that a business transfer into an existing VAT group, where the transferee intended only to make supplies to other VAT group members, could not be a transfer of a going concern. more›

Employment taxes

HMRC publishes travel and subsistence "discussion paper"

On 23 September 2015, HMRC published a discussion paper on the taxation of travel and subsistence payments. Comments on the proposals contained therein are invited by 16 December 2015. more›

HMRC publishes guidance on PAYE special arrangement for short-term business visitors

On 16 September 2015, HMRC published guidance on the PAYE special arrangement for short-term business visitors, together with a word version of the contractual agreement to be entered into between HMRC and any employer wishing to adopt the special arrangement. more›

Other developments

HMRC treatment of US LLCs unchanged following Anson decision

On 25 September 2015, HMRC published Revenue and Customs Brief 15 (2015) following the Supreme Court decision in *Anson v HMRC*. more›

HMRC consultation on large business tax compliance

On 22 July 2015, HMRC published a consultation document on improving large business tax compliance. Comments were sought by 14 October 2015. Under the proposals, a "large" business would be one with a turnover in excess of £200m and/or a balance sheet total of more than £2bn for the prior financial year. more›

International

Automatic exchange of information – HMRC launches "informal" consultation on guidance

On 17 September 2015, HMRC published draft guidance on the various automatic exchange of information regimes (namely FATCA, the OECD's Common Reporting Standard, and the Crown Dependencies and Overseas Territories (CDOT) reporting regimes). more›

Multinational information sharing – OECD guidance and model protocol published

On 7 August 2015, the Organisation for Economic Co-operation and Development published documents to help member jurisdictions and financial institutions implement the OECD's standard for automatic exchange of financial account information. more›

Corporation tax – general

"Fair representation" rule overrides general approach (to follow GAAP treatment) of loan relationship tax regime

On 11 August 2015, the First-tier Tribunal (in *GDF Suez Teeside Ltd v HMRC*[1]) held that a taxable profit arose on a transfer of loan relationships from a UK parent company to its subsidiary even though it was accepted that under GAAP-compliant accounting treatment no profit was recognised.

The consideration for the loan relationships transfer was the issue of shares in the Jersey incorporated and tax resident subsidiary. The fair value of the consideration shares was equal to the aggregate fair value of the loan relationships.

Although the Tribunal accepted that the UK taxpayer's accounts were GAAP compliant, the "general rule" under the UK's loan relationship tax regime (that amounts brought within the charge to tax are those recognised in accordance with GAAP) can be overridden where the absence of an accounting profit does not "fairly represent" a taxpayer's profit for tax purposes.

This was perhaps not a surprising conclusion, not least because (in the words of the Tribunal) what was being considered was a "tax planning scheme" and a "structured transaction in which accounting rules have been used in order to both defer tax and potentially remove profits from the UK tax net".

The Tribunal also remarked that it had, in essence, used the "fair representation" override as an anti-avoidance rule, and that this was in line with the loan relationship regime as it will apply once the Finance Bill 2015 changes take effect (removing the "fair representation" stipulation with effect from 1 January 2016) and replacing it with a new anti-avoidance rule.

The decision can be found here.

Back to contents>

Bank shareholding in R&D company held not to jeopardise SME tax relief

On 15 July 2015, in a welcome decision, the First-tier Tribunal (in *Monitor Audio Ltd v HMRC*[2]) held that, as an "institutional" investor, the presence of a large banking group amongst the shareholders of an otherwise small or medium-sized company (SME) should not result in the company ceasing to be entitled to valuable R&D tax relief for SMEs.

The appellant company encountered financial difficulties after purchasing a business with funding provided by Royal Bank of Scotland (RBS). The company and RBS agreed a debt-for-equity swap pursuant to arrangements whereby, ultimately, an RBS subsidiary acquired 43% of the company's shares (and 26% of the voting rights). The RBS subsidiary could appoint a non-executive director, whose consent was required for material changes to the company's business, acquisitions and disposals over certain thresholds, and other key matters. In practice however, the director did not always exercise his rights and was not involved in the day-to-day management of the company.

1. [2015] UKFTT 0413 (TC).
2. [2015] UKFTT 0357 (TC).

The Tribunal held that the RBS subsidiary was an "institutional" investor for the purposes of Commission Recommendation 2003/361/EC, which contains a definition of SME adopted for the purposes of the UK's R&D tax relief rules. An institutional investor's balance sheet does not need to be factored into the financial tests required to determine whether companies held more than 25% by others still fall within the SME definition.

In the Tribunal's eyes, the key question was whether RBS (via its subsidiary's shareholding and non-executive director) was putting the company in a stronger market position than other SMEs. This was not the case, according to the Tribunal, as the director had little or no involvement in day-to-day management.

The decision can be found here.

Back to contents>

Financial services

HMRC issues guidance on "base cost shift" for carried interest

On 20 July 2015, HMRC published guidance on the Finance (No.2) Bill 2015 provisions which end the entitlement of holders of carried interest to the so-called CGT "base cost shift".

The guidance does not expand greatly on the new legislation. However it does include examples of how the new rules will operate.

The guidance can be viewed here.

Back to contents>

VAT

Limits of insurance exemption reaffirmed by First-tier Tribunal

On 1 October 2015, the First-tier Tribunal (in *Riskstop Consulting Ltd v HMRC*[3]) held that risk assessment and related supplies did not fall within the scope of the VAT exemption for "insurance intermediary" services.

The Tribunal held that *Riskstop* was not an "insurance agent" and therefore did not make (VAT exempt) insurance-related supplies under the UK rules applicable to insurance intermediaries.

Riskstop was involved in the process of (i) evaluating for insurers the level of risk of a potential insured, and (ii) helping the potential insured to improve its risk profile.

Applying the test formulated in the recent decision in *Westinsure* (see here for an earlier blog on that decision) the Tribunal crucially found that *Riskstop* was not involved in bringing together the insurer and insured for the purpose of concluding insurance contracts. It did not introduce potential prospects to insurers, nor did it put insurers in touch with prospects. *Riskstop* could not therefore be an "insurance agent" under the VAT exemption legislation. As it was accepted that *Riskstop* was not an insurance broker, that finding was fatal to *Riskstop's* claim for exemption.

It is worth noting in particular:

- HMRC's submissions that the scope of the insurance intermediary exemption should be interpreted restrictively, and that *Riskstop's* position was "pushing the envelope" of the VAT exemption
- HMRC had on more than one occasion confirmed to *Riskstop* that its services were VAT exempt. However, HMRC had subsequently re-examined the services with "fresh eyes", leading to a change of treatment (but not, it was claimed, of policy).

The effect is that *Riskstop's* services, and therefore other insurance-related services that are not provided by an "insurance agent" (or an insurance broker) will not qualify for VAT exemption and will therefore be standard-rated.

The Tribunal noted that the decision in *Westinsure* is to be taken to the Court of Appeal. Until such time the *Westinsure* and *Riskstop* decisions highlight that the VAT exemption must be narrowly interpreted. Even service providers who are a "fundamental part of the insurance process" (as claimed by *Riskstop*) may not be able to rely on the VAT exemption, unless they are part of the chain that brings insured and insurer together.

The decision can be viewed here.

Back to contents>

3. [2015] UKFTT 469 (TC).

Tribunal critical (again) of HMRC's refusal to allow retrospective VAT group application

On 14 August 2015, the First-tier Tribunal (in *Copthorn Holdings Ltd v HMRC*[4]) asked HMRC to reconsider its decision to refuse a taxpayer's application for retrospective VAT group registration. This is the second time HMRC have been asked to "think again" on their decision.

The taxpayer group is in the housebuilding business. Generally-speaking any VAT incurred by the group on land purchases was fully recoverable, as the group made zero-rated supplies of newly-constructed houses.

However, on certain historic purchases of VAT-opted land a VAT cost had arisen as the group SPV acquiring the relevant property (by way of a sub-sale from the immediate taxpayer purchaser) had not been added to the taxpayer VAT group. As the immediate purchaser had not validly opted to tax the property, a VAT exempt supply had taken place, precluding VAT recovery. Had the relevant SPV been added to the VAT group, such exempt supply would have been disregarded.

It was held that:

- the finance administration function of the taxpayer, at the relevant time, was in a state of "some chaos". The failure to add the relevant SPVs to the VAT group was not deliberate, but was a genuine error. All subsequent transactions took place on the basis of a (mistaken) assumption that the SPV were part of the VAT group
- the modified HMRC policy on retrospective VAT group applications makes a distinction between taxpayer error (which can seemingly never meet the required "exceptional" circumstance criteria) and HMRC error (which seemingly are "exceptional")
- HMRC were being far too restrictive in applying the "general" discretion available under section 43B of the Value Added Tax Act 1994. The change to HMRC's published policy, introduced after an earlier Tribunal decision in the same case that HMRC should reconsider its decision, was a "somewhat cynical endeavour to leave the policy substantially unchanged"
- continued refusal to allow retrospective VAT group registration in this case was not justified on the basis that HMRC had, on four separate occasions, listed for the taxpayer those group companies that were part of the VAT group.

It remains to be seen whether HMRC will now amend its published policy so that retrospective VAT group registration could be possible where the failure arises due to genuine taxpayer error and the effect (of not registering as part of a VAT group) leads to a material net VAT cost for the taxpayer.

The decision can be viewed here.

Back to contents>

Input VAT recovery on retail vouchers - First-tier Tribunal finds in favour of taxpayer

On 13 August 2015, the First-tier Tribunal (in *Associated Newspapers Ltd v HMRC*[5]) held that input tax could be recovered on the acquisition of retail vouchers that were passed on to customers participating in the taxpayer's subscription promotion.

4. [2015] UKFTT 0405 (TC).
5. [2015] UKFTT 0409 (TC).

The Tribunal's interpretation of Schedule 10A (Face-Value Vouchers) to the Value Added Tax Act 1994 was that, for VAT purposes, it effectively merges the retailer's supply of the voucher with the ultimate supply on redemption (to the voucher-holding customer). For the retailer, there is on this interpretation one single taxable supply, treated as made when the customer redeems his or her voucher. The true effect, in the Tribunal's eyes, of the critical provision in the legislation is to relieve the retailer of the obligation to account for output VAT at the time of supply of the voucher. The legislation does not, on this view, prevent input VAT from arising for the original recipient of the retail voucher (ie the taxpayer who then, for no consideration, passes it on to its participating customer). Such input VAT was held to be recoverable.

In a separate, but related, appeal heard last year the Tribunal held that no output VAT was due on supply of the vouchers by the taxpayer to its customer. HMRC has appealed against that earlier decision (due to be heard in October 2015).

The decision can be viewed here.

Back to contents>

Input VAT recovery on professional fees incurred on removal of minority shareholder – First-tier Tribunal finds in favour of HMRC

On 17 July 2015, the First-tier Tribunal (in *Robert Welch Designs Ltd v HMRC*[6]) held that certain professional services were supplied to a taxpayer's majority shareholders, and not the taxpayer company itself, with the result that the taxpayer's claim to recover input tax on those services failed.

The professional services fees in question were predominantly legal fees in connection with a legal dispute between the majority shareholders and minority shareholder in a family company. The company sought to claim input tax recovery on those fees however, the Tribunal agreed with HMRC that such recovery should not be allowed as:

- the lawyers' invoices were in each case addressed to the majority shareholders (and not the company). Applying the Court of Appeal's guidance in the *Airtours*[7] case (for a discussion on which, see here), this "contractual" position is the starting point when looking at to whom services are supplied for VAT purposes
- the lawyers refused to re-issue their invoices to the company (the inference being that the lawyers did not consider the company to be their client)
- the "economic reality" was, in the Tribunal's view, not inconsistent with the contractual position; the interest of the company and the majority shareholders were intertwined and the legal proceedings had been brought in the name of the shareholders
- the required "direct and immediate" link between the professional services and the company's business was not present. Although it was recognised that the removal of the minority shareholder allowed the majority shareholders (and directors) to focus more fully on the company's business, this was too far removed to allow input tax recovery.

The decision can be viewed here.

Back to contents>

6. [2015] UKFTT 0431 (TC).
7. [2015] STC 61.

ECJ upholds AG's opinion in latest case on holding company VAT recovery

On 16 July 2015, the European Court of Justice (ECJ) judgment in *Larentia + Minerva and others*[8] confirmed the earlier Advocate General's (AG's) opinion that a holding company actively managing its subsidiaries does not carry on both economic and non-economic activities for VAT purposes.

To view our earlier commentary on the AG's opinion, click here.

As a result of the ECJ's judgment, it should be expected that a holding company actively managing all its subsidiaries should be entitled to full input VAT recovery on its acquisition costs. It will be interesting to see whether HMRC updates its most recent guidance in light of this judgment.

In addition, the ECJ upheld the AG's opinion as to whether a member state may restrict VAT group membership to persons having legal personality (it cannot). It will also, therefore, be interesting to see if HMRC addresses this aspect of the judgment, as in the UK such membership is currently limited to bodies corporate.

The decision can be found here.

Back to contents>

Transfers of business into an existing VAT group, with only intra-group supplies being made post-transfer, can be a TOGC – Upper Tribunal reverses First-tier decision

On 7 July 2015, the Upper Tribunal (in *Intelligent Managed Services Ltd v HMRC*[9]) reversed the earlier First-tier Tribunal decision that a business transfer into an existing VAT group, where the transferee intended only to make supplies to other VAT group members, could not be a transfer of a going concern.

For commentary on the First-tier decision, see here for our earlier update.

The transferor provided electronic payment services to banking businesses. It agreed to transfer its business to a member (but not the representative member) of a VAT group. Although the transferee group as a whole made banking supplies to third parties (which supplies incorporated the transferred business), the actual transferee under the sale and purchaser agreement made supplies only to another VAT group member.

Following the recent European Court of Justice (ECJ) decision in the *Skandia* case, the Upper Tribunal held that supplies to VAT groups are treated as made to the group itself. In other words, the transferee of the business in this case was the VAT group and not the individual member. The VAT group's business was made up of the individual activities of all its group members. The VAT group was, therefore, carrying on the "same kind of business" as the transferor, for TOGC purposes. Simply because the UK's VAT grouping rules deemed all such individual activities as carried on by the representative member did not change the character of those activities.

The decision can be found here.

Back to contents>

8. Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham (C 108/14) and Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG (C 109/14).
9. [2015] UKUT 0341 (TCC).

Employment taxes

HMRC publishes travel and subsistence "discussion paper"

On 23 September 2015, HMRC published a discussion paper on the taxation of travel and subsistence payments. Comments on the proposals contained therein are invited by 16 December 2015.

The proposals, which would appear to be broadly tax-neutral (and possibly even taxpayer-favourable in some cases) are based on the principle that, as under the current rules, tax relief should be given for business travel but not ordinary commuting. The proposals seek to clarify the rules and apply objective tests.

Journeys in the course of an employee's performance of duties would continue to qualify for relief. Relief would also be available for journeys to any location other than an employee's "main base" (to be nominated by the employee).

The discussion paper can be found here.

Back to contents>

HMRC publishes guidance on PAYE special arrangement for short-term business visitors

On 16 September 2015, HMRC published guidance on the PAYE special arrangement for short-term business visitors, together with a word version of the contractual agreement to be entered into between HMRC and any employer wishing to adopt the special arrangement.

The special arrangement, available pursuant to regulations that allow departure from the strict application of PAYE where such application would be "impracticable", applies to non-resident employees from non-treaty jurisdictions who work in the UK for no more than 30 days in the tax year. It does not apply to directors, nor does it apply for national insurance purposes.

The guidance (and arrangement) can be found here.

Back to contents>

Other developments

HMRC treatment of US LLCs unchanged following Anson decision

On 25 September 2015, HMRC published Revenue and Customs Brief 15 (2015) following the Supreme Court decision in *Anson v HMRC*[10].

As reported in the last Corporate tax update in *Anson* the Supreme Court held that Mr Anson was entitled to a share of the LLC's profits as they arose. He was therefore entitled to double tax treaty relief for US tax against his UK tax liabilities.

Despite this, and after "careful consideration" HMRC's published policy on US LLCs has not changed, as it considers the *Anson* decision to be fact-specific. A US LLC will, therefore, continue to be treated by HMRC for UK tax purposes as a taxable entity (and not fiscally transparent).

The Brief does, however, state that claims for double tax treaty relief in circumstances similar ro those in *Anson* will be considered on a case-by-case basis.

The Brief can be found here.

Back to contents>

HMRC consultation on large business tax compliance

On 22 July 2015, HMRC published a consultation document on improving large business tax compliance. Comments were sought by 14 October 2015. Under the proposals, a "large" business would be one with a turnover in excess of £200m and/or a balance sheet total of more than £2bn for the prior financial year.

This latest development should be seen against the continuing backdrop of the Government being seen to tackle 'unacceptable' tax avoidance/planning. From reading the document what is very clear is that the Government is increasingly looking at behaviour that goes against the "spirit" of tax legislation.

Amongst the proposals:

- large businesses would be compelled to publish their tax strategies (ie their attitude to tax risk and approach to their relationship with HMRC)
- a "voluntary" code of tax practice would be introduced for large businesses (possibly similar to that already in place in the banking industry)
- "special measures" would be introduced for those large businesses that persistently undertake aggressive tax planning, or refuse to adequately engage with HMRC.

The consultation document can be found here.

Back to contents>

10. (2015) UKSC 44.

International

Automatic exchange of information – HMRC launches "informal" consultation on guidance

On 17 September 2015, HMRC published draft guidance on the various automatic exchange of information regimes (namely FATCA, the OECD's Common Reporting Standard, and the Crown Dependencies and Overseas Territories (CDOT) reporting regimes).

At the same time, revised FATCA and CDOT guidance (dated 14 September 2015) has been published.

The guidance can be viewed here.

Back to contents>

Multinational information sharing – OECD guidance and model protocol published

On 7 August 2015, the Organisation for Economic Co-operation and Development published documents to help member jurisdictions and financial institutions implement the OECD's standard for automatic exchange of financial account information.

Among the published documents were:

- the Common Reporting Standard (CRS) "handbook". This guidance will be of limited use in the UK, as the UK has already implemented CRS
- a model protocol for use by jurisdictions with tax information exchange agreements.

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.

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

At RPC we put our clients and our people at the heart of what we do:

- **Best Legal Adviser status every year since 2009**
- **Best Legal Employer status every year since 2009**
- **Shortlisted for Law Firm of the Year for two consecutive years**
- **Top 30 Most Innovative Law Firms in Europe**

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

- **Winner – Law Firm of the Year – The Lawyer Awards 2014**
- **Winner – Law Firm of the Year – Halsbury Legal Awards 2014**
- **Winner – Commercial Team of the Year – The British Legal Awards 2014**
- **Winner – Competition Team of the Year – Legal Business Awards 2014**
- **Winner – Best Corporate Social Responsibility Initiative – British Insurance Awards 2014**
- **Highly commended – Law Firm of the Year at The Legal Business Awards 2013**
- **Highly commended – Law firm of the Year at the Lawyer Awards 2013**
- **Highly commended – Real Estate Team of the Year at the Legal Business Awards 2013**

Areas of expertise

- Banking
- Commercial
- Commercial Litigation
- Competition
- Construction
- Corporate
- Employment
- Insurance
- Intellectual Property
- Media
- Outsourcing
- Pensions
- Private Equity
- Real Estate
- Regulatory
- Reinsurance
- Tax
- Technology

15412

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

11/F Three Exchange Square
8 Connaught Place
Central Hong Kong
T +852 2216 7000

8 Marina View #34-02A
Asia Square Tower 1
Singapore 018960
T +65 6818 5695