Corporate tax update

January 2021

Welcome to the latest edition of our Corporate Tax Update, written by members of RPC's tax team. This month's update reports on some of the key developments from December 2020. Included in this update are summaries of an unexpected twist in the DAC6 saga, a call for evidence on VAT and the 'sharing economy', and the Court of Appeal decision in the *Development Securities* case. As ever we hope you, your family and friends are all staying safe.

DAC6 largely repealed in the UK...to be replaced by the OECD's MDR

On 29 December 2020, in a surprising development, regulations were made to amend the UK regulations that implement DAC6. With effect from 11pm on 31 December 2020, DAC6 hallmark categories A, B, C and E are repealed. From that point onwards, only DAC6 hallmark D remains applicable in the UK. more›

VAT treatment of movements of goods spanning 31 December 2020 – HMRC guidance

On 23 December 2020, HMRC published guidance on the VAT treatment of transactions and the movement of goods spanning the end of the Brexit transition period. In places where indicated, the guidance has the force of law. more›

Cumulative preference shares held to be "ordinary share capital" for ER purposes – UT decision in *Warshaw*

On 23 December 2020, the *Upper Tribunal* (UT) held that cumulative preference shares with rights to compound accrued (but unpaid) dividends were "ordinary share capital" for the purposes of s.989 ITA 2007 and (therefore) entrepreneurs' relief (ER). more›

Court of Appeal decision in *Development Securities* corporate residence case goes against taxpayer

On 15 December 2020, the Court of Appeal overturned the decision of the Upper Tribunal in *HMRC v Development Securities plc and others*. HMRC's appeal has therefore been allowed. more›

ABOUT THIS UPDATE

Our corporate tax update is published every month, and is written by members of RPC's Tax team.

We also publish other Tax updates on the first and last Thursday of every month, and a weekly blog, RPC's Tax Take.

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

UK asset-holding investment companies – consultation published

On 15 December 2020, HM Treasury published a consultation on proposals for changes to the UK tax regime applicable to asset-holding companies (AHCs) in alternative fund structures. more›

Upper Tribunal refers questions on intra-group transfer rules and compatibility with EU law to ECJ

On 14 December 2020, the Upper Tribunal (UT) referred to the ECJ a number of questions as to the compatibility with EU law of the UK's intra-group asset transfer rules. more›

VAT and the sharing economy – call for evidence

On 10 December 2020, HM Treasury (HMT) published a call for evidence on the so-called "sharing economy" and VAT. The move has been described as a potential tax raid on the now household-name businesses facilitating everything from taxi rides to short-term accommodation. HMT cite research suggesting that, by 2025, the total value of sharing economy transactions could reach £140bn. more›

Back to contents›

DAC6 largely repealed in the UK...to be replaced by the OECD's MDR

On 29 December 2020, in a surprising development, regulations were made to amend the UK regulations that implement DAC6. With effect from 11pm on 31 December 2020, DAC6 hallmark categories A, B, C and E are repealed. From that point onwards, only DAC6 hallmark D remains applicable in the UK.

For a previous blog on DAC6, please see here.

The practical effect of the new regulations is that, in the UK, the scope of DAC6 reporting has been significantly reduced. This applies both for 'historic' arrangement reporting (ie arrangements with steps taken since 25 June 2018, but for which the reporting window had not yet opened) and for 'new' arrangements.

There are no changes to the reporting requirements/deadlines for arrangements that fall within DAC6 hallmark D. They will still need to be considered for reporting this month and next (to include arrangements triggering this hallmark going back to June 2018) and then on an ongoing basis.

Hallmark D concerns automatic exchange of information and beneficial ownership, and (broadly) covers arrangements that involve attempts to conceal income or assets, or to obscure beneficial ownership.

A few days later, it became clear via a CIOT update that the UK intends to consult on, and implement, the OECD's mandatory disclosure rules (MDR). In other words, the UK is going to move from the EU's rules on tax transparency (under DAC6) to the OECD's international rules (MDR).

The regulations can be viewed here.

The CIOT update can be viewed here.

VAT treatment of movements of goods spanning 31 December 2020 – HMRC guidance

On 23 December 2020, HMRC published guidance on the VAT treatment of transactions and the movement of goods spanning the end of the Brexit transition period. In places where indicated, the guidance has the force of law.

The guidance mainly addresses movements of goods between the EU and Great Britain (the position for Northern Ireland being dealt with under the Northern Ireland Protocol, whereby pre-Brexit rules for movements between the UK and the EU will continue in relation to movements between Northern Ireland and the EU).

The guidance can be viewed here.

Back to contents>

Cumulative preference shares held to be "ordinary share capital" for ER purposes – UT decision in *Warshaw*

On 23 December 2020, the Upper Tribunal (UT) held[1] that cumulative preference shares with rights to compound accrued (but unpaid) dividends were "ordinary share capital" for the purposes of s.989 ITA 2007 and (therefore) entrepreneurs' relief (ER)[2].

The taxpayer held shares carrying a right to a fixed, 10%, cumulative dividend. Where there were insufficient reserves to pay dividends in a particular year, payment would be deferred to a subsequent year. The question was whether the shares constituted "ordinary share capital" (OSC) for the purposes of section 989. Under section 989, OSC means all of a company's issued share capital other than fixed rate shares.

HMRC's view was that, because the rate of the dividend remained fixed, the shares could not be OSC. The UT agreed with the First-tier Tribunal that, because the company's articles provided for compounding, dividends could accrue other than at a fixed rate. In other words, for a dividend to make shares fall outside the definition of OSC, both (1) the percentage rate and (2) the amount to which the rate was applied, must be fixed.

The UT in *Warshaw* referred to the decision of the UT in *McQuillan*[3] , in particular the view expressed that the objective of section 989 was to provide a straightforward "bright dividing line" between OSC and other types of shares.

The decision can be viewed here.

Court of Appeal decision in *Development Securities* corporate residence case goes against taxpayer

On 15 December 2020, the Court of Appeal overturned the decision of the Upper Tribunal in *HMRC v Development Securities plc and others*[4]. HMRC's appeal has therefore been allowed.

In June 2019, the UT had held that a number of Jersey-incorporated companies were, in fact, resident for tax purposes in Jersey. This UT decision overturned the 2017 decision of the First-tier Tribunal (FTT), which held that the companies were UK tax resident as a result of the central management and control (CMC) of the companies being exercised in the UK (through the companies' parent). In essence, the FTT's decision was based on the finding of fact that the directors in Jersey had agreed to implement transactions on the parent company's instructions. The UT took the view that the FTT had incorrectly concluded that the Jersey company directors had abdicated their decision-making responsibility.

The facts of the case were that a group headed by a UK resident parent undertook a tax-planning proposal designed, and carefully implemented, by its accountants. The aim of the proposal was to allow the group to access latent capital losses on certain assets (including UK real estate) on the basis that the crystallised losses would include indexation. Very broadly, the proposal involved newly-established wholly-owned Jersey companies purchasing the assets at an artificially high price and selling them shortly

Back to contents>

afterwards at a loss. Critical to the success of the proposal was that the Jersey companies would be treated as non-UK resident prior to sale of the assets.

The FTT, in a lengthy judgment, had agreed with HMRC that the tax planning scheme did not work as the Jersey companies were UK tax resident throughout.

At the Court of Appeal it was held that the UT had not been justified in setting aside the FTT's original decision, for the reasons given by the UT. The FTT's original decision has therefore been affirmed, but the judges as the Court of Appeal appeared to disagree as to the issues considered by the FTT. The wider implications of this decision for corporate residence issues is therefore questionable – perhaps the decision simply serves to demonstrate the difficulties that can arise in this area and the importance of offshore directors making, and documenting, substantive decisions in order to secure offshore residence.

The decision can be viewed here.

UK asset-holding investment companies – consultation published

On 15 December 2020, HM Treasury published a consultation on proposals for changes to the UK tax regime applicable to asset-holding companies (AHCs) in alternative fund structures.

This is actually the second consultation on this topic and is part of the Government's stated intention to make the UK an attractive and competitive jurisdiction for investment funds.

As well as summarising responses to the first consultation, this second consultation seeks views on a number of proposals for reform of the UK tax treatment of AHCs. The Government's preference is for a bespoke tax regime to apply to AHCs. The proposals for AHCs include:

- an exemption from tax on capital gains realised by an AHC on disposal of investment assets (save for UK land, or any "property-rich" assets)
- a possible exemption from UK withholding tax on payments of interest from an AHC to investors
- a possible stamp duty (and SDRT) exemption on a repurchase of shares by an AHC to return capital to investors, and a potential broader exemption for share / loan capital transfers
- changes to the application to AHCs of the UK's hybrid mismatch rules and group relief regime
- eligibility criteria for the AHC regime and administrative provisions such as entry into, and exit from, any new AHC tax regime

The consultation also proposes changes to the UK real estate investment trust (REIT) regime. For example, making the REIT regime more accessible by relaxing some of the statutory tests (to include the REIT maximum shareholding rule, and "balance of business" test).

Comments are invited by 23 February 2021.

The consultation document can be viewed here.

Back to contents>

Upper Tribunal refers questions on intra-group transfer rules and compatibility with EU law to ECJ

On 14 December 2020, the Upper Tribunal (UT)[5] referred to the ECJ a number of questions as to the compatibility with EU law of the UK's intra-group asset transfer rules.

The facts of the case are that a UK company transferred certain assets (1) in 2011, to a Swiss 'sister' company (a Swiss subsidiary of its Dutch parent), and (2) in 2014, to the Dutch parent itself.

The First-tier Tribunal (FTT) held that the UK's intra-group transfer rules were only incompatible with EU law in respect of the 2014 asset transfer. The denial of relief under section 171 of the TCGA 1992 was held by the FTT to amount to a restriction on Dutch parent's right to freedom of establishment. The FTT therefore disapplied section 171(1A)(b) (the condition for relief that the transferee is UK tax resident or within the scope of UK corporation tax in respect of the asset(s) transferred).

The parties agreed before the UT that the FTT's approach in disapplying section 171(1A)(b) was incorrect. The UT has therefore referred to the ECJ questions regarding whether the UK's intra-group transfer rules contravened the right to freedom of establishment or free movement of capital, and (if so) whether it was acceptable to defer the payment of tax or have tax paid in instalments.

The decision can be viewed here.

VAT and the sharing economy – call for evidence

On 10 December 2020, HM Treasury (HMT) published a call for evidence on the so-called "sharing economy"[6] and VAT. The move has been described as a potential tax raid on the now household-name businesses facilitating everything from taxi rides to short-term accommodation. HMT cite research suggesting that, by 2025, the total value of sharing economy transactions could reach £140bn.

The document looks, in particular, at digital platforms acting as agent, facilitating the supply of services between unconnected parties. With a nod to the types of businesses that are in scope, it talks of services that take the form of individuals hiring out their labour, and / or renting out their assets, in return for consideration. A key question posed by HMT in their call for evidence is whether current VAT rules applicable to an agent-principal arrangement are fit for purpose in the context of these types of digital platforms. One proposal for comment is that such digital platforms should be required to themselves account for VAT on supplies made by the underlying service providers to consumers.

The primary concern identified centres on service-providers who are not VAT-registered (whether due to falling below the current VAT registration threshold or not being "in business"). HMT express the view that over time these types of service-providers will provide an even greater proportion of total services than they do currently. This allows customers to receive services without suffering the usual extra VAT charge due on the supply. In the government's words, this does not currently provide for fair competition and a level playing field between business in the sharing economy on the one hand, and more 'traditional' businesses on the other.

Back to contents>

The document also addresses digital platforms based outside the UK, and the potential for lost VAT revenue under existing VAT place of supply rules (again, due to the fact that many underlying service providers are not VAT-registered and are therefore not required to apply the reverse charge VAT treatment on services supplied from outside of the UK).

Responses must be sent to HMT by 3 March 2021.

The call for evidence can be viewed here.

ANY COMMENTS OR QUERIES

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

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

Robert Waterson
Partner
+44 20 3060 6245
robert.waterson@rpc.co.uk

Michelle Sloane
Partner
+44 20 3060 6255
michelle.sloane@rpc.co.uk

ENDNOTES

1. In *HMRC v Warshaw* [2020] UKUT 0366 (TCC).
2. As it then was – note that there have been significant changes to ER since the time in question, not least the regime's re-naming as Business Asset Disposal Relief.
3. [2017] UKUT 344 (TCC).
4. [2020] EWCA Civ 1705.
5. In *Gallaher Ltd v HMRC* [2020] UKUT 354 (TCC).
6. The definition adopted for the purposes of HMT's document is that used by the OECD.