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Lexis®PSL Tax Analysis

Autumn Statement 2016 – views from the market

Tax analysis: Views from leading tax practitioners on Autumn Statement 2016.

The Lexis®PSL Tax Consulting Editorial Board (CEB) and other leading tax practitioners provide us with their views on the Autumn Statement delivered by the Chancellor on 23 November 2016.

For the Lexis®PSL Tax summary and analysis of the key business tax announcements in Autumn Statement 2016, see: Autumn Statement 2016—Lexis®PSL Tax analysis.

Overall views of the Autumn Statement 2016 on the following topics:

AUTUMN STATEMENT 2016 IN OVERVIEW

BUSINESS AND ENTERPRISE

NON-RESIDENT COMPANIES

SUBSTANTIAL SHAREHOLDING EXEMPTION

EMPLOYMENT TAXES

INSURANCE

PRIVATE EQUITY AND FUNDS

STAMP TAXES

REAL ESTATE

VAT AND INDIRECT TAXES

OIL AND GAS

TAX AVOIDANCE AND EVASION

TAX ADMINISTRATION AND COMPLIANCE

AUTUMN STATEMENT 2016 IN OVERVIEW

Gerald Montagu, NGM Tax Law and CEB member—Business, the Chancellor recognises, dislikes uncertainty and in his first (and, we were told, the last) Autumn Statement, some elements of the approach he intends to take in pursuit of greater certainty became just a little bit clearer.

A measure of caution seems to be an important element of the Chancellor's approach. The 'tax reforms' announced were relatively modest. The benefit to motorists of the fuel duty freeze (£869 million a year averaged over the parliament) will, in effect, be paid for by those bearing the burden of insurance premium tax (£812 million a year averaged over the parliament). Such a gap as remains will be more than filled by a variety of smaller measures including (from April 2017) aligning employer NICs thresholds, restricting the scope of salary sacrifice arrangements (while preserving their operation in relation to pensions), reducing the money purchase annual allowance to £4,000, the introduction of new anti-avoidance rules for the self-employed and the imposition of a 16.5% rate under the flat rate scheme to remove the fiscal incentive previously offered to businesses with nominal or non-existent VAT inputs (albeit that labelling those taking advantage of the administrative short-cut offered by the flat rate scheme 'aggressive' avoiders struck an inappropriately shrill note).

The Chancellor's caution, however, did not extend to delaying (or radically altering) the plan announced in March 2016 to introduce an interest restriction and limitations of the use of carried forward losses: both measures are to be implemented next year. The government, we are told, 'will take steps to address unintended consequences and simplify the administration of the new rules'. This sounds hopeful but what it means in practice will not be apparent until the draft legislation is published on 5 December.

If the early hints that getting the UK 'match fit' for Brexit might involve something radical, then it is now clear that the Chancellor prefers to move a few deckchairs at a time (wisely, though, without following the Foreign Secretary's lead in suggesting that those chairs might be resting on the deck of the Titanic) and otherwise to 'wait and see'. Given that there seems little that can constructively be done until the shape of Brexit becomes clearer, this may not be a bad approach.

Eloise Walker, Pinsent Masons LLP and CEB member—I laughed when I heard the changes proposed for the Budget and Spring Statement process. So, the idea is to do away with the Spring Budget but there will be a Spring Statement in reply to the OBR forecast? And at that Spring Statement 'the government will retain the option to make changes to fiscal policy..... if the economic circumstances require it'? Would it be too cynical to suppose that we will see a new pile of TAARs each Spring?

Andrew Loan, Fieldfisher—After a series of unexpected shocks this year, from the UK voting for Brexit to the Trump victory in the US presidential election, it was nice that the new Chancellor of the Exchequer did not feel the need to play to the gallery in the Autumn Statement this year. George Osborne's barnstorming theatrical performance is a thing of the past, and we must now get used to a more understated air. Or to put it another way, the speech was not very interesting: Tigger replaced by Eeyore.

The Chancellor confirmed that we will be getting a BEPS-inspired restriction on the deductibility of corporate debt costs to 30% of adjusted EBITDA, and reform of the corporate loss relief rules. Corporation tax will be falling to 17% eventually, but no sign of the 15% rate hinted at by George Osborne in July this year. Income tax personal allowances will continue to rise, taking the lowest paid out of income tax, but we keep the 45% additional rate of income tax for the time being.

This will be the last Autumn Statement followed by a Spring Budget. Instead, from late 2017, we will have an Autumn Budget, followed by a Spring Statement, with draft legislation consulted on over the Summer and a Finance Bill introduced in the Autumn so it can be enacted in good time before the start of the following tax year (unlike the last couple of years, where Finance Acts have had retrospective effect back for many months). Some will recognise this as repeating the pattern of fiscal statements adopted by Ken Clarke from 1993 to 1996. Further, it means we will have two Budgets in 2017: one in the Spring and another in the Autumn. So much for reducing the number of big fiscal policy statements! It would take a strange politician to eschew the guaranteed spotlight of publicity twice a year.

Helen McGhee and Steven Bousher, Joseph Hage Aaronson—It seems that the proverbial white rabbit was the announcement of the single annual fiscal event. After the Spring Budget next year and the consequent Summer Finance Bill, from Autumn 2017 the Budget and Finance Bill cycle will move to the Autumn. Draft clauses for the next finance bill will be published in the Summer. This should allow longer and better debate before the clauses are enacted. There will still be a Spring Statement (from Spring 2018) in response to the OBR's Spring forecast but normally the government would not use that Spring Statement to announce tax changes. The Chancellor intends that changes to the tax system should be announced in the Autumn. On balance this looks to be an improvement to the system and the CIOT and the IFS called for this change in an open letter back in September.

David Klass, Gide Loyrette Nouel LLP—In what was a relatively quiet Autumn Statement (something which will disappoint few) the following highlights were of particular interest:

- the announcement that the traditional two Budgets per year approach is to cease, with the (welcome) aim of limiting major changes in tax policy to a single occasion in Autumn each year, Royal Assent to the Finance Bill then being given the following Spring
- welcome confirmation that the government intends to push ahead with its proposed reform of the substantial shareholding exemption (SSE). The SSE can be of real significance in group structures both domestically and internationally, but its usefulness can be hampered when it comes to implementing some of the detailed rules, in particular those around the 'investing' requirement. It appears that the government

- acknowledges this and we hope the proposed changes make the SSE of broader application, and generally more user-friendly, and
- the proposal to extend the scope of corporation tax to non-UK resident companies which receive taxable income from the UK. It's interesting to note that the government says this is based on a desire to 'deliver equal tax treatment', making particular reference to the new limitations on the deductibility of corporate interest expense, and the use of losses—and that this follows hot on the heels of the change earlier this year bringing certain non-UK companies dealing in UK land within the corporation tax charge, making it part of a noteworthy wider trend

BUSINESS AND ENTERPRISE

Natasha Kaye, Cooley LLP and CEB member—Overall, there was very little in the way of surprise. In particular, the corporation tax rate will reduce as proposed and there will be no reductions in stamp duty land tax rates, despite press speculation to the contrary. However, dismay may be expressed that certain key changes are still being introduced in line with the government's planned timetable notwithstanding the uncertain outlook for the UK economy and the challenges in dealing with the pace of tax changes. The restrictions on interest deductibility and reforms to loss relief are fundamental changes to the UK corporation tax system which businesses will have to grapple with concurrently, both to determine their impact and from a compliance perspective, in each case at very short notice given the legislation is yet to be published. The representations made to government that businesses need longer to digest and prepare have not been heeded. No doubt the legislation will still be in draft form on the date from which it takes effect (1 April 2017) and some level of uncertainty for taxpayers will therefore prevail.

As is often the case, we have been presented with a number of proposals in respect of which scant detail has been published today and some of which will not be published for some time to come. The announcement that the government is considering bringing non-resident companies with UK taxable income into the corporation tax regime had been mentioned as a possibility before. However, it would be very helpful to have some idea of the potential scope of these changes. An obvious target is non-resident companies carrying on a UK property investment business but, beyond that, it is difficult to predict the breadth of any such proposals and how they might operate in practice. Yet without further clarification it may affect investment decisions between now and (at least) Budget 2017 when the government will consult on the case and options for implementing such change.

In light of the consultation papers, I await with anticipation and trepidation the draft legislation intended to clarify and improve the taxation of partnerships and setting out the detail of the new penalty for tax avoidance enablers. The initial proposals in respect of each had far reaching implications. It is very much hoped that representations made have been taken on board such that the final proposals are not unduly disproportionate to the stated mischiefs being targeted.

Finally, to end on a positive note, the simplification of the substantial shareholding exemption and the widening of its scope is to be welcomed. Philip Hammond's announcement that this Autumn Statement was his last and that fiscal changes will only be announced once a year (in the Budget to be delivered in the Autumn) is long overdue and should be applauded.

Eloise Walker, Pinsent Masons LLP and CEB member—This is a bad Autumn Statement for big business. Despite the market's protests, and the state of the economy post Brexit vote, they are going ahead with the 30% of EBITDA interest restriction, and on the original tight April 2017 timetable. Madness. They have only just fixed the worldwide debt cap rules they messed up by rushing implementation in Finance Act 2009. And now they want to replace that with a complex 30% restriction plus a revised debt cap? We should brace ourselves for another 7 years of legislative chaos.

The new carried forward loss relief restrictions are going ahead. They too are coming in April 2017, so expect further chaos there. Is it good or bad that they will apply to banks and insurance companies? I expect bad. In theory, that means they have to go through a pointless compliance exercise each year but the rest of the group gets extra interest capacity (the bank/insurance company generally will be in a net interest profit position). In practice, I doubt it will work that way for them.

Add in the proposal to extend corporation tax to non-resident companies, and the VAT grouping consultation (not entirely HMRC's fault, but the timing is dreadful), and query whether we can really claim in grandiose fashion that 'Britain is open for business'.

On the plus side, it looks like they are going to relax the substantial shareholding rules a little, and the public benefit exemption to the new 30% of EBITDA interest restriction will be widened (a relief to the infrastructure sector), but that's a drop of good news in a sea of bad.

The proposed new registration regime for offshore structures won't make the legal industry happy, either—privilege, anyone?

Hilary Barclay, Macfarlanes LLP and CEB member—Most proposals for corporate taxpayers are unsurprising, given the Chancellor's announcement that the government will follow the business tax road map published in the Spring. There is still some good news and bad news though.

Bad news first: it is disappointing that the government has decided to plough on with the BEPS Action 4 'interest barrier' rule in 2017, well ahead of the (rest of the) EU and despite critical concepts such as the group ratio rule still being developed by the OECD.

The good news, particularly for inward investors, is the announcement that the SSE 'investing' test will be dropped. This should enable taxpayers (and HMRC) to use their compliance resources more effectively and is very welcome.

The key new announcement for companies is the consultation to bring non-resident companies which receive UK income within the charge to corporation tax. Clearly this will enable the government to bring real estate holding companies within the interest barrier proposals and loss relief changes and it may signal reform of the non-resident landlord scheme. Could this also be the beginning of the end for the UK's income tax withholding regime? I suspect that may be a step too far given the practical difficulties in collecting tax from overseas entities and the application of double tax treaties. The UK's interest withholding regime is becoming an anomaly within Europe, however, and is ripe for further reform.

Gerald Montagu, NGM Tax Law and CEB member—Also of note is the comment that 'the government will continue to consider the balance between revenue and competitiveness with regard to bank taxation, taking into account the implications of the UK leaving the EU' (time alone will tell where this leads, but this, taken together with the introduction of a favourable regime for insurance linked bonds, seems intended as a fairly clear signal to the financial sector that the government now has 'its listening ears' on).

Anne Fairpo, Temple Tax Chambers and CEB member—
The new (post-1 July 2016) patent box rules are to be updated by adding provisions to deal with cost sharing arrangements so that companies using these are not advantaged or disadvantaged when it comes to calculating the R&D fraction. This is not particularly surprising and has been on the cards for some time; cost sharing arrangements are often used to deal with transfer pricing issues, with several group companies contributing to R&D costs in order to share in the resulting intellectual property.

Review of the tax environment for R&D to build on the R&D Expenditure Credit for large companies 'to make the UK an even more competitive place to do R&D': this doesn't quite mesh with the focus on smaller and start-up businesses in the rest of the statement, but may be because the SME relief is an EU state aid and changes need to be ratified by the EU. Political sensitivities may mean that the government is reluctant to start making changes to state aid measures at the moment.

Jonathan Cooklin, Davis Polk & Wardwell LLP—Philip Hammond delivered a steady as she goes Autumn Statement, at least from a tax perspective. (Theresa May had kept the best tax lines for herself at her speech to the CBI earlier in the week.) The tax road map remains in place and the Chancellor confirmed his commitment to a 17% corporation tax rate by 2020. Less welcome, although hardly unexpected, is the government's commitment to reforming the rules on corporation tax losses and limiting interest deductibility, both of those measures being significant money raisers. Increasingly thin pickings from employee tax planning, but some notable measures nonetheless: abolition of employee shareholder shares relief (not a total surprise), tightening of salary sacrifice benefits (other than for eco-friendly parents) and further tweaks to the disguised remuneration code. How long before carried interest is in the cross wires?

Ben Jones, Eversheds LLP—Some comfort can be taken from the renewed commitment to the corporation tax rate reductions and the business tax road map generally. It is hoped that the low corporate tax rates will support the attractiveness of the UK in spite of Brexit and that some measure of stability around UK tax policy will be of comfort to businesses operating or planning to invest in the UK. A degree of certainty in this uncertain post-Brexit/Trump world is not to be underestimated.

NON-RESIDENT COMPANIES

Mark Simpson, Squire Patton Boggs—The government has announced it is considering bringing non-resident companies' UK income into the corporation tax regime. We will apparently get a consultation following the 2017 Budget (I assume this means the March one rather than the Autumn one). This will be relevant to the real estate sector as non-resident companies currently pay UK income tax on all rent and UK CGT on capital gains on residential (but not commercial) property.

A few initial thoughts:

- this will bring non-resident companies into the rules restricting the tax deduction for interest costs which the government has confirmed will come into effect in April 2017 (the previous consultation merely noted that they were thinking how to do this), as well as the rules restricting the use of carried forward losses. Highly geared investors may find themselves paying UK tax on rent even though they have not made an accounting profit (a problem now faced by UK individual buy-to-let landlords)
- we will have to see whether the government uses this opportunity to tax non-resident companies on gains on non-residential property—this would be consistent with the aim to 'deliver equal tax treatment' and would arguably simply bring the UK into line with other major countries. The real estate sector will be concerned at the impact on capital values as investors adjust to potentially lower after-tax returns on their investments
- on the plus side, non-resident companies will presumably benefit from the reductions in corporation tax rates up to 2020. Income tax on rent is currently taxed at 20% but the corporation tax rate will reduce to 19% next April and is due to go down to 17% in 2020 (unless the government has to make further cuts to meet the Prime Minister's commitment to ensure the UK has the lowest rate of corporate tax in the G7, raising the prospect of having to match president-elect Trump's plan to reduce the US rate from 35% to 15%)

Gerald Montagu, NGM Tax Law and CEB member—There will be a consultation in March 2017 on bringing the income profits of non-resident companies within the charge to corporation tax, with a view to ensuring that the interest restriction and loss relief restrictions operate on a 'level playing field'. This takes forward an idea floated by HMRC during a consultation earlier this year and would, if introduced, represent a significant change to the rules of the game at least for offshore landlords and those trading in the UK otherwise than through a permanent establishment (whether investment income would be affected too seems unclear). Presumably, a 3% tax cut, representing the difference between the rates of corporation tax and income tax forecast for the end of this Parliament, could sweeten the pill (but this, too, will have to wait until next year).

Robert Langston, Saffery Champness—The government will consult on bringing non-UK resident companies within the scope of corporation tax, rather than income tax as they are currently. This will mainly affect companies that have UK rental income, and are taxed under the non-resident landlord scheme. It will also affect the small number of companies trading in the UK, but not through a permanent establishment: for example, where the 'transactions in land' rules apply.

I suspect the reason behind this proposal is to ensure that non-UK resident companies are subject to corporation tax anti-avoidance rules, and in particular the new 30% interest restriction. This was hinted at in the latest consultation document on the interest restriction when the government was 'considering whether and how the interest restriction rules should apply to companies with a liability to UK income tax.'

However, there may also be some benefits for such companies being subject to corporation tax:

- the lower rate of corporation tax (19% from 1 April 2017, then falling to 17%) will apply rather than the income tax rate (20%)
- there may be greater scope for companies to claim a tax deduction for certain financing expenses, such as discounts on deeply discounted bonds (DDBs)
- the 'transfer of assets abroad' anti-avoidance rules may not apply as the charge to corporation tax arguably precludes a charge to income tax. Under current rules, rental income in structures beneficially owned by UK residents are often taxed at 45%: ie 20% for the company, and then a further 25% for the individual (being 45% income tax less credit for the 20% paid by the company)

John Meehan, Stephenson Harwood LLP—The Autumn Statement did not contain too many surprises for businesses, with many of the measures having already been announced and consulted on. Of particular note is the proposal to bring offshore companies with UK 'taxable income' into corporation tax. Offshore property investment companies in particular will be following this one closely. On the one hand there may be benefits from the steadily decreasing headline rate of corporation tax and (possibly) access to group relief, but with that would come the new rules restricting corporate interest expense and use of losses. It will be interesting to see the detail and timeline for implementation, assuming it goes ahead. It is to be hoped that the stated aim of delivering 'equal tax treatment' for onshore and offshore companies does not morph into a proposal to also tax gains of non-resident investment companies.

Andrew Loan, Fieldfisher—Another low-key but potentially far-reaching announcement was the suggestion that non-resident companies could be made subject to UK corporation tax on any income with a UK source, perhaps from April 2018. This might apply to income that is already subject to withholding of 20% UK income tax, such as UK interest or property rentals. It remains to be seen how this proposal will interact with the UK's double tax treaties, which usually allocate taxing rights to the jurisdiction of residence, and may eliminate the need for the diverted profits tax.

SUBSTANTIAL SHAREHOLDING EXEMPTION

Gerald Montagu, NGM Tax Law and CEB member—
The substantial shareholding exemption is to be improved, simplifying the rules, removing the investing requirement within the SSE and providing a more comprehensive exemption for companies owned by qualifying institutional investors. These are all measures which can only be helpful in seeking to make the UK an attractive destination for international head quarter companies in the run up to Brexit.

John Meehan, Stephenson Harwood LLP—The removal of the investing company requirements is a very welcome simplifying measure. The promise of a 'more comprehensive exemption' for companies owned by qualifying institutional investors can also only be good news but there is no detail yet as to what this may look like. The consultation on SSE reform highlighted funds investing through UK holding companies as a potential area for change and it may be that for these types of investors we will see a relaxation of the trading requirement in relation to the company disposed of.

Ben Jones, Eversheds LLP—With the pressures that the uncertainty of Brexit has placed on the UK as a corporate HQ jurisdiction or a base for European operations, the proposed changes to the substantial shareholding exemption are welcome. Our SSE regime is currently more complex and harder to satisfy than equivalent participation exemptions in competitor European holding company jurisdictions, making the UK less attractive in the context of the wider Brexit issues. The planned changes, particularly removing the investor conditions, should help balance the scales.

Andrew Loan, Fieldfisher—As usual, there was more buried away in the detail of the documents on the gov.uk website, including the announcement that the substantial shareholding exemption (SSE, not to be confused with ESS) will be made easier to obtain by removing the investing company condition (which requires the shareholder company, holding 10% or more of the share in a trading company, to itself be a trading company). This should allow many investment companies to qualify for the SSE, and also end the need for clever footwork to secure the SSE for parent companies selling the last active company in a group.

EMPLOYMENT TAXES

Graham Muir, Nabarro LLP and CEB member—There was relatively little of interest announced in the Autumn Statement 2016 from an employment tax perspective.

The only significant surprise was the abolition of the tax benefits applying to employee shareholder shares with almost immediate effect. The first point to note is that this does NOT impact on ESS shares already owned. The effective date for the changes is 1 December 2016; the tax exemptions will not apply to any shares acquired on or after that date. (There is one exception to this, which is where the independent advice which has to be given to recipients of employee shareholder shares was given on 23 November (ie the day of the Autumn Statement) but before 1.30 pm on that day: there is a one day period of grace for those arrangements, so that shares acquired on 1 December 2016 will still qualify for the exemptions.) The surprise here is not so much that the tax benefits of ESS have been withdrawn—that always seemed likely at some point given that the regime had so clearly missed its target—but the timing of the withdrawal, coming only eight months after the emasculation of the tax benefits by the imposition of the lifetime limit on capital gains which could be exempted under the regime to £100,000, as announced in the Budget in March this year.

The Autumn Statement confirmed that the tax regime for termination payments will be overhauled with effect from April 2017 (following a period of technical consultation on draft legislation published in August this year). In particular, it was confirmed that termination payments of over £30,000 will be subject to employer's NIC from that time. It appears (although very little information is available until the revised draft legislation is published on 5 December) that the government has responded to criticisms relating to the new rules on payments in lieu of notice (PILONs), by applying tax only on such part of a termination payment as represents the unworked portion of an employee's notice period (calculated at the rate of their basic salary). The draft legislation published previously required an assessment to be made of the amount of other payments (such as bonus) which could reasonably be expected to have been received during the notice period, and applied tax also to such amounts. Assuming that this simplification is reflected in the new draft legislation when it is published, this change is much to be welcomed.

As previously announced, from April 2017, new benefits in kind provided as part of salary sacrifice arrangements will be subject to income tax and NICs as if they were paid as salary, thus removing the tax and NICs benefits of many salary sacrifice arrangements. A number of arrangements will not be caught, however, and arrangements already in place will be protected from the new rules for a limited period (one year, in the case of any arrangement in place before April 2017 and four years in the case of such arrangements which relate to cars, accommodation and educational arrangements). The benefits which are exempt from the new rules are pension arrangements, pensions advice, cycle to work schemes and (an extra item added following consultation) ultra-low emission cars, which can continue to be provided under arrangements where tax and NIC savings are available. However, the very common salary sacrifice arrangements for car parking and mobile phones (and all other benefits) will no longer be effective from a tax perspective after April 2017 and so such benefits may as well then be provided out of after-tax salary.

Employee and employer NICs thresholds are to be aligned from April 2017, which will simplify the administrative burden of NIC borne by employers and is therefore to be welcomed (notwithstanding that this will involve a small extra cost to employers).

Patrick Ford, Squire Patton Boggs—Clearly an area he felt able to concentrate on, the Chancellor announced (or, more commonly, confirmed) a number of employment tax related changes in the Autumn Statement:

- as announced in the last Budget, the Chancellor has confirmed that from April 2018 termination payments over £30,000, which are subject to income tax, will also be subject to employer's NICs. However, although as previously announced all PILONs will be fully taxable (and NICable) from April 2018, irrespective of whether there is a PILON clause in the contract, the government has adjusted its proposals in this regard following consultation. Rather than the taxable PILON amount including all compensation for any benefits and bonus that would have been received during the unworked notice period, tax will only be applied to the equivalent of the employee's basic pay for the unworked notice period
- in one of the day's more significant changes, the tax and NIC advantages of salary sacrifice schemes will be removed from April 2017 (ie the sacrificed pay will be subject to tax and NICs). The arrangements relating to pensions (including advice), childcare, cycle to work and ultra-low emission cars are all excepted from the change. All arrangements in place before April 2017 will be protected until April 2018, while any arrangements that were in place before April 2017 for cars, accommodation and school fees will be protected until April 2021
- employee shareholder status was introduced in 2013 and gives employees income tax and capital gains tax reliefs in respect of shares acquired by reason of their employment where they give up certain employment rights. The Chancellor announced that ESS will no longer be available for arrangements entered into on or after 1 December 2016. The tax reliefs applying to ESS shares that have already been issued will be unaffected.

Gerald Montagu, NGM Tax Law and CEB member—For anyone thinking of giving up employment rights on or after 1 December 2016 in exchange for the tax advantages offered by the employee shareholder scheme, the news was not good. You will be too late: that boat has sailed (although those safely on board will still be able to enjoy their voyage as booked). The scheme was ill conceived and its (hardly surprising) demise was, presumably, a quick 'win' made possible by the departure from 11 Downing Street of the Chancellor's predecessor whose brain child it was.

Andrew Loan, Fieldfisher—Some well-advised employees (and others who could get employee status) jumped at the chance to sign away some employment rights to acquire employee shareholder shares, with their very attractive uncapped capital gains exemption, when ESS was introduced in 2013. This peculiarly generous exemption never seemed well targeted and was ripe for abuse. So much so that a £100,000 cap on gains qualifying for the exemption was imposed on ESS last year. It seems that even this restriction is not enough, and the Treasury has lost patience. ESS is abolished for shares acquired from 1 December 2016, little more than 3 years after the relief was introduced. For those who have not yet received independent legal advice, the seven day waiting period means it is already too late. Few will mourn its passing.

Darren Oswick, Simmons & Simmons LLP—Intriguingly, following much recent debate over the gig economy, the Autumn Statement confirmed that the government remains concerned at the way that the tax system treats different forms of remuneration inconsistently. As a result, the government will now consider how the tax system could be made fairer between workers carrying out the same work under different arrangements. Whether this will lead to anything significant, other than perhaps more targeted anti-avoidance, is open for debate. Indeed, it remains unclear how wide the review might be, but a root and branch consideration of the interaction of the way the tax system treats employment, self-employment and incorporated business is perhaps overdue. More specifically, the government has confirmed that it will take forward proposals to remove the advantages of salary sacrifice schemes from April 2017. The exclusion of certain tax-advantaged arrangements introduced for policy reasons, such as those for childcare and cycle to work, is welcome, as is the decision to exclude pension arrangements.

INSURANCE

Hui-Ling McCarthy, 11 New Square and CEB member—A small but significant development for future affected life insurance policyholders is the government's confirmation as to how it intends to legislate in Finance Bill 2017 to address the disproportionate tax charges that can arise in certain circumstances from policy part-surrenders and part-assignments.

The current tax code charges to income tax the full value of policy rights surrendered on a part surrender (subject to a 5% annual deduction), not just the economic profit or gains made on the policy (if any). This has resulted in policyholders unintentionally triggering disproportionate income tax charges that far exceed the economic growth of the policy when they partly withdraw substantial sums in the early life of the policy.

This issue was brought to a head in the much publicised case of *Lobler* [2015] UKUT 152 (TCC), in which the policyholder faced an effective tax rate of more than 700%. There has subsequently been a formal consultation concerning options for reforming the law in this area.

The proposed new legislation announced in a supplementary paper to the Autumn Statement will allow policyholders who inadvertently trigger a disproportionately high income tax charge to apply to HMRC to have the charge recalculated on a just and reasonable basis. This should lead to fairer outcomes for policyholders, provided that there is proper judicial oversight of the application and recalculation process and comprehensive, widely-published guidance. The changes will take effect from 6 April 2017.

David Wilson, Davis Polk & Wardwell LLP—In an Autumn Statement which was short on new content, a couple of insurance-related changes caught my eye. As it becomes increasingly common for large-scale M&A transactions to be backed by warranty and indemnity (W&I) insurance, the UK's rate of IPT (which it has been announced will be increased again in June 2017, from 10% to 12%) is becoming one of the factors which needs to be taken into account when determining the location of an acquisition vehicle. Better news for insurers is confirmation that the government is taking forward its work on developing a framework for insurance linked securities, with the introduction of corporation and withholding tax exemptions for qualifying 'insurance risk transformation' vehicles, which pass insurance risk to the capital markets.

Next year also holds in store the geeky treat of a consultation on bringing UK source income of non-resident companies within the charge to corporation tax, rather than income tax, which promises to raise some interesting technical issues.

Mark Sheiham, Simmons & Simmons LLP—The confirmation that the UK will take forward measures to introduce a tax friendly regime for insurance linked securities SPVs (ISPVs) was very welcome. The decision to exempt UK ISPVs authorised by the PRA and FCA from UK corporation tax on their risk transformation activities and from withholding taxes on their payments to debt or equity investors is sensible and pragmatic, given that other ISPV jurisdictions, such as Bermuda, apply similar exemptions. It should be noted, however, that the corporation tax exemption will not apply to any activities of an ISPV beyond risk transformation: for example administrative or management activities.

Of course, it is not surprising that the UK government proposes to ensure that UK ISPVs cannot be used for tax avoidance purposes. However, some of the suggested anti-avoidance measures give cause for concern, particularly since many of them trigger permanent loss of the tax exemptions even if the failure is later rectified. Most notably, the draft tax regulations would disqualify ISPVs from UK tax exemption in the event of corporation tax compliance failures such as delays or errors in filing tax returns.

This seems disproportionate and we can only hope that this measure will be dropped or at least watered down following the consultation.

PRIVATE EQUITY AND FUNDS

Catherine Sear, Proskauer Rose LLP and CEB member—Overall from a tax perspective it was a remarkably uneventful Autumn Statement. For the private investment funds community, this was perhaps more noticeable owing to the series of legislative changes announced in Autumn Statements and Budgets over the past couple of years.

Points relevant to private investment funds included the announcement that the recent partnership consultation would be taken forward. With very little information at this stage, we will need to wait for the draft legislation for consultation to discover which proposals will be adopted and in what form. A key question will be how, and the extent to which, the differences between trading and investment partnerships will be recognised.

Other points of interest for the private equity industry included the announcement that the corporate interest deductibility changes are still on track to come in from April 2017. Those who had hoped for more time to plan will be disappointed. The future abolition of employee shareholder status is also of note for management teams.

Finally, the intention behind the move to an Autumn Budget, as a single fiscal major event with Royal Assent of the Finance Act prior to the start of the relevant tax year, is laudable. But for all the promises of more certainty and more time for consultation, we must wait to see how this works in practice.

Bradley Phillips, Asset Management Tax Group, PwC and CEB member—Focusing on the asset management sector, although at first glance the various tax announcements look relatively benign, there are actually a number of changes which may have a real impact on funds and their investors.

The proposal to modernise the rules on the taxation of dividend distributions to corporate investors in an authorised fund in a way which allows exempt investors, such as pension funds, to obtain credit for tax paid by the fund is welcomed, as are the changes to the rules in relation to co-ownership authorised contractual schemes to clarify the rules on capital allowances and chargeable gains. However, the proposal to legislate to ensure that performance fees incurred by offshore funds are not deductible in calculating reportable income under the offshore fund tax regime could alter both the timing of tax on a number of alternative investment funds returns and the overall effective tax rate for investors, although the reporting fund regime may still offer benefits to UK investors.

The proposed reforms to the substantial shareholding exemption to ensure wider availability of the exemption may benefit investors in funds which would not previously have qualified for SSE, enhancing the UK's position as a holding company location for private equity investments in trading businesses.

The reform of the taxation of UK partnerships may impact on alternative investment funds in addition to fund managers structured as partnerships. It is not clear yet whether this could be adverse or not.

Finally, if the government does bring non-resident companies in receipt of taxable UK income within the scope of UK corporation tax, this could have a major impact, in particular, on real estate funds investing in UK real estate as the new interest deductibility rules would then apply. This may make the UK REIT a potentially more attractive fund structure.

Gerald Montagu, NGM Tax Law and CEB member—The fund world has, this time, been left relatively alone. The means by which exempt investors obtain credit for tax paid by authorised investment funds is to be modernised (although it remains to be seen whether HMRC will take the opportunity to alter the 'streaming' rules as it has been mooting for some time) and performance fees calculated by reference to any increase in an offshore fund's value are to be used to reduce any tax payable on disposal gains (rather than being deductible against income), bringing the position more in line with onshore funds. It may come as something of a relief for those involved in this sector that this time at least, their place in the limelight as the bogeyman of the moment was taken by letting agents charging fees to tenants.

Ceinwen Rees, Debevoise & Plimpton LLP—This was a muted Autumn Statement for the tax world and many in the private equity industry will breathe a sigh of relief and return to working out the practical application of the many and varied changes to fund-related taxation that have been brought in over the past two years. Non-doms are still holding their breath awaiting the detail of the new deemed domicile regime and future management teams will certainly regret the loss of employee shareholder status.

Stephen Pevsner, King & Wood Mallesons LLP—As expected, the Autumn Statement was a relative non-event for tax practitioners. The main announcements were the imminent publication of the new BEPS-related, EBITDA-linked interest cap rules, which promise to be long and detailed and will require careful scrutiny of the details, but the government announced that they would operate from April next year which is disappointing. There will also be the promised carry forward loss restriction and group relief modernisation rules to consider, all of which will lead to some careful tax modelling for leveraged businesses. From the private fund industry's perspective, the other interesting development will be the response to the current consultation on partnership tax reform, with the hope that HMRC will properly distinguish between trading and investment partnerships and that any changes coming out of the review do not place excessive and unworkable compliance and reporting obligations on investment partnerships.

Peter Morley, Squire Patton Boggs—In an Autumn Statement focused on the new industrial strategy and the launch of a new national productivity investment fund, there were a few announcements which are directly relevant for those involved in private equity:

- employee shareholder status has been abolished. The change applies to shares issued on or after 1 December 2016. Since there has to be a minimum 7 clear days' notice between the individual employee being advised on the implications of ESS and the issue of the shares, this effectively means that unless employees have already received that advice, no further issues of ESS shares will be possible from Autumn Statement day. Shares which have already been issued will be grandfathered and continue to benefit from either the full CGT exemption or the capped £100,000 CGT exemption depending on whether they were issued on or before 16 March 2016
- the government has confirmed that it is going to push ahead with the planned restriction on the amount of tax deduction that can be claimed by large groups for their interest expense. It had been widely hoped that the government might delay the changes which will come into effect in April 2017 to give businesses more time to plan. However, Mr Hammond announced that the measure will come into effect. The rules will limit the deduction which companies can claim for corporation tax purposes where the group has interest expenses of more than £2million per year, net interest expenses exceed 30% of UK taxable earnings and the group's net interest to earnings ratio in the UK exceeds that of the worldwide group. This is inevitably going to involve some reflection on how transactions are structured to ensure traditional debt based structures are still appropriate in the new world
- the government also confirmed that it will limit the amount of profit that can be offset by carried forward losses. This was previously announced in Budget 2016. From April 2017, there will be a restriction to 50% of profit, with each standalone company or group benefiting from a £5million allowance
- a consultation will be launched to consider options to streamline and prioritise the advance assurance service for VCTs and EIS. This will be welcome given the backlogs which can sometimes occur. In addition, Finance Bill 2017 will include some changes to the VCT, EIS and SEIS rules to:
  - clarify the EIS and SEIS rules for share conversions
  - provide additional flexibility for follow on investments made by VCT funds in companies with certain group structures, and
  - introduce a power to enable VCT regulations to be made in relation to certain share for share exchanges

And finally, this was Philip Hammond's first and last Autumn Statement. We will have two Budgets to look forward to next year: one in Spring 2017 and one in Autumn 2017. From 2018 onwards, the main fiscal Budget will be in the Autumn. There will be a statement in the Spring which will usually not contain any major fiscal changes, although Mr Hammond has reserved the right to make urgent changes when necessary. The purposes of the change in dates is to allow for a more rigorous Parliamentary scrutiny of changes before they come into effect in a new tax year. We will see.

STAMP TAXES

Michael Quinlan, Temple Tax Chambers and CEB member—The Autumn Statement mentions that stamp duty on share transactions is to be reviewed by the Office of Tax Simplification. The curious and cumbersome relationship between what is left of the 300 year old stamp duty regime on physical documents that applies to stock transfer forms and stamp duty reserve tax (SDRT), the more modern charge on agreements to transfer securities, including shares, that had its 30th anniversary this year, has been the subject of pleas for reform for as long as I can remember.

It was on the agenda when I joined the stamp duty sub committee of the Law Society in the mid 1990s and surfaced with more zeal with the advent of stamp duty land tax (SDLT) in 2003, when land transactions were subject to the new tax (bumping tax receipts up by £10 billion a year over time) and stamp duty was confined to instruments transferring stock and marketable securities (and partnerships holding property of this kind). The excuse for not consolidating stamp duty into SDRT has historically been a lack of ministerial time coupled, perhaps, with a residual fear by HMRC that revenue would somehow slip through the net. The reality is that stamp duty belongs to a bygone era and, with appropriate amendments to the SDRT legislation to ensure that exclusions and exemptions are preserved, should be abolished.

It's not just the accessibility issues associated with interacting but separate taxes. SDRT is sensibly confined to securities issued or registered in the UK. Stamp duty theoretically applies to stock issued anywhere in the world if the paper transfer is signed in the UK or otherwise relates to something in this country. This gives rise to absurdities such as having to advise clients that an instrument transferring shares issued in a foreign country signed in the UK, or pursuant to a contract signed, say, in London, will be chargeable to stamp duty, but that the duty doesn't have to be paid unless the buyer needs it for civil purposes here.

Unfortunately, I understand that the review is solely about simplifying stamp duty rather than abolition, although its interaction with SDRT and SDLT will be covered. Let us hope that limiting the territorial scope of stamp duty to something like that of SDRT will be one of the simplifications recommended. The OTS is expected to publish its report next Summer.

Siobhan Mossop, EY LLP—On the stamp taxes front, this year's Autumn Statement is likely to be somewhat of a disappointment, not least to those who were hoping for an abolition of the SDLT supplement on acquisitions of additional residential properties. HMRC seems not to have been convinced by the rhetoric around market distortions and unfairness associated with this supplement. Although perhaps some can take comfort from the fact there is no suggestion of an increase in the supplement rate.

There is an announcement that the government has asked the Office of Tax Simplification to carry out reviews on stamp duty on share transactions, coupled with a suggestion that we may be about to lose the long-standing act of HMRC physically stamping the documents of transfer. Time will tell whether this review by the OTS becomes more of a substantial overhaul of the stamp duty system; perhaps we are headed towards a modernised self-assessment stamp tax.

Stamp tax practitioners will watch with interest the announced clarificatory changes to the rules on capital allowances, chargeable gains and investments by co-ownership authorised contractual schemes (CoACS) in offshore funds, should there be implications for the associated stamp duty land tax provisions. We await such clarification on the land and buildings transaction tax (LBTT) treatment of CoACS.

As regards the Annual Tax on Enveloped Dwellings (ATED), we have the expected rise in rates, in line with inflation, for 2017–18. An inflationary rise may not, of itself, prove costly, but taxpayers are reminded that the ATED rules demand a property revaluation in 2017. We may find valuations next year pushing properties into a higher ATED band and therefore higher cost.

REAL ESTATE

Graham Chase, Olswang LLP—I was hoping that the Chancellor would take the opportunity to reduce SDLT rates, which have reached levels few would have thought possible a few years ago. Leaving aside the economic arguments for lower rates, high rates tend to result in an increasingly complex system as exclusions and reliefs are introduced to selectively mitigate the effect. High value residential property acquisitions in particular need special care, with potential for multiple dwellings (such as a self-contained flat or annex) or mixed use. Indeed, an industry seems to have developed whereby advisers trawl through the Land Registry so as to identify potential over-payments. These can be corrected, usually in return for a handsome and contingent fee! Not a positive development I think.

As expected, interest relief is proposed to be restricted from April 2017 by reference to EBITDA. This is one of the biggest changes on the horizon for impacted businesses, which will typically include real estate investment. Again, details are awaited but key issues will include (i) the group/external funding exclusion and specifically, how groups are identified, (ii) the operation of the £2m de-minimis and (iii) the identification and allocation of financing costs to different accounting periods.

Andrew Goldstone, Mishcon de Reya LLP—It is disappointing that the government has offered no concessions to property buyers who are being inadvertently caught by the additional 3% SDLT. For example, it catches those extending the lease on their main home who also happen to own a buy to let property. Similarly, it affects those currently renting who want to buy their first home but who happen to own a buy to let as they are not classed as 'replacing their main home'. It's clear the 3% SDLT surcharge was never meant to apply in these cases and yet the government seems incapable of admitting that errors were made in the drafting of the legislation.

It is also disappointing that the government did not listen to representations by individual landlords, many of whom will now make a loss due to the restrictions on deducting mortgage interest going forward. The obvious risk is that some landlords will leave the market and rents will rise, thereby exacerbating the housing crisis for many younger people and lower income families. Restrictions on letting agents' fees may have the same effect. If landlords pay the fees instead, rents will inevitably rise.

VAT AND INDIRECT TAXES

Andrew Rimmer, BVC Associates Ltd—With regards to VAT and indirect taxes, the government has continued with its targeted campaign to counter avoidance, also enlisting business' assistance in such areas as fulfilment houses that deliver goods to UK customers on behalf of overseas suppliers. The proposed new penalty regime for anyone participating in a VAT fraud or who should have known that a VAT fraud was being perpetrated merely extends the principles already present with countering Missing Trader Intra-Community Fraud, excise fraud for alcoholic goods and the Disclosure of VAT Avoidance schemes generally. The appeal system will ensure that taxpayers and advisers can at least be heard, but like the extant avoidance areas, there is some disquiet by taxpayers on the efficacy of conducting an appeal. Quite naturally the government is putting the onus on taxpayers and advisers to report suspicious activity and to refrain from any transactions where VAT fraud is suspected. The new penalty regime is designed to 'shut the door before the horse has bolted'. These measures are aimed at reducing the VAT Gap which estimates 'lost VAT' of approximately £13 billion and 10% of revenue for the 2015–2016 fiscal year.

The main 'routine' VAT measure as a means to securing increased revenue is the introduction of a new rate for labour-only businesses that use the Flat Rate Scheme (FRS). HMRC has been running a successful targeted campaign on FRS businesses and their attention to such taxpayers is likely to intensify as HMRC seeks to migrate relevant businesses to the new FRS rate. Contractors forced to migrate to the new 16.5% rate are likely to pay much more VAT as the differential between the standard-rate of VAT and the new rate will make 'savings' immaterial. For example, currently an IT contractor with a £100,000 turnover can obtain a flat rate saving of £3,800 per annum compared to normal VAT accounting, which will be reduced to about £200. The change may result in some contractors switching to the standard VAT rules despite the increased administrative burden.

A number of consultations are to be held by HMRC, most notably regarding VAT group treatment following the recent upheaval in cross-border supplies of services within VAT groups, as ruled by the CJEU in *Skandia* (Case C-7/13). There is still substantial debate on what a VAT group actually is and how it is to be treated for VAT accounting purposes, which has raged since the *Kingfisher* VAT grouping case [1994] STC 63.

All of these measures fall within the HMRC Assurance Strategy encapsulated as part of HMRC's 'Single Departmental Plan 2015–2020'. HMRC has a lot to do to achieve these objectives and it is safe to say that the increased targeting of businesses that HMRC considers are 'ripe' for visiting will continue apace for the foreseeable future.

Keith Gordon, Temple Tax Chambers and CEB member—Governments often like to be seen as forward-thinking and it is possible that the current fad of 'post-truth-ism' has in fact been employed in Budget announcements for as long as any of us can remember. However, headlines that might grab the attention of the popular press can actually be counter-productive if used in a technical release aimed only at the tax professional. There will no doubt be many tax advisers who saw an announcement about VAT changes designed to prevent 'aggressive abuse' and decided that it was not for them, without looking at the detail.

In fact, the perpetrators of the 'aggressive abuse' being targeted will in most cases be those very businesses who (in any ordinary sense of the words) would do nothing aggressive, let alone abusive. The target of the new measures will simply be some of those businesses who accepted HMRC's invitation to adopt a simpler VAT accounting method, known as the flat-rate scheme. Those businesses whose purchase of goods in any VAT period is below 2% of turnover will now be required to pay a flat-rate of 16.5%. Goodbye simplicity. Goodbye certainty. Indeed, it will no longer be possible to identify the VAT payable on any receipt until after the end of the relevant quarter.

HMRC frequently stated that the flat-rate scheme had winners and losers: it was not there to cut tax bills but to cut red tape. Now it seems that some 'winners' are to be excluded, and red tape is to be added.

OIL AND GAS

Phil Greatrex, CW Energy LLP—On the simplification of the petroleum revenue tax (PRT) election process, it has been possible to opt out of the PRT regime, and the field to become a non-taxable field, for a number of years, but only if it could be demonstrated that there was no reasonable expectation of PRT profits on the field. The reduction in the rate of PRT to 0% from the beginning of the year did not of itself extend the number of fields which could take benefit of the election under the current law. Going forward there are to be no conditions attached to the making of an election, other than that the election must be in writing and will be irrevocable.

We presume that any fields where there is a possibility of recovering PRT which has been paid in the past, or where there is a possibility that an unrelievable field loss (UFL) might arise in respect of the field for any partner, will not make the election. It is possible that partners in a field may have different positions which may frustrate the election being made. Indeed, it is important that companies who are contacted by the responsible person in a field should critically assess whether there are circumstances where a UFL could be created even where it appears that losses generated by decommissioning will not exceed historic field profits.

There are a whole raft of other issues which industry has raised with government as being important in achieving MER (maximise economic recovery), such as the extension of the investment allowance regime for infrastructure tariffs, transferability of corporation tax capacity, and a number of technical PRT issues mainly around decommissioning. It is disappointing that none of these issues have been addressed at this time. The press releases do not even give an indication that any of these other matters are still under consideration, but it is hoped that progress can be made over the next year on a number of these issues with some much needed changes hopefully being introduced in Finance Act 2018.

TAX AVOIDANCE AND EVASION

Gerald Montagu, NGM Tax Law and CEB member—The Chancellor has reaffirmed that the government intends to introduce a measure imposing a penalty for 'enabling' another person or business to use a tax avoidance arrangement that is later defeated by HMRC. It is, though, welcome that although the government will remove the defence of having relied on non-independent advice as taking 'reasonable care' when considering penalties, the taking of 'independent' advice will remain relevant in accessing liability for penalties. However, Ministers' doors clearly remain very much open to HMRC if it feels additional powers could help it protect the exchequer, and the government is considering or intends to:

- make access to licences or services for businesses conditional on registration for tax
- introduce an additional reporting requirement for those operating 'complex' offshore structures, and
- bring money-service businesses with the scope of HMRC's data-gathering powers.

Gideon Sanitt, Macfarlanes LLP—HMRC has committed to challenging the role of advisers in perpetuating negative tax behaviour. Indeed, more than just advisers, HMRC refers to the so-called supply chain of advice and intermediation between those who develop tax avoidance arrangements and those who use them. This focus on advisers is not new, but the Autumn Statement indicates a more concerted approach: rules will be introduced penalising those who have enabled defeated avoidance arrangements, preventing taxpayers from defending penalties as a result of relying on advice that was not independent and requiring intermediaries to notify HMRC where they have arranged complex structures for clients to hold money offshore. Whilst these rules have specific targets, they also fit into a wider narrative of HMRC encouraging responsible tax behaviour. HMRC has increasingly taken on the role of a regulator over the years and, like any good regulator, HMRC is concerning itself with raising the standards of the industry. Whilst few would disagree with HMRC challenging certain sectors of the market, HMRC will need to be wary of over-zealous rules having a chilling effect on the provision of legitimate advice.

Graham Chase, Olswang LLP—We await details of new sanctions for enablers of tax avoidance. But if the August consultation is a guide then these are potentially extreme measures, not simply relevant to marketed schemes of the egregious variety. Lawyers, accountants and IFAs are most obviously targeted by the new rules. But in a typical M&A, reorganisation, joint venture or financing transaction the breadth of the term 'enablers' may be such as to include banks, insurers, brokers, trustees and so on. One of the key issues is whether the rules are triggered where a targeted avoidance-related rule or unallowable purpose test applies. If so, then difficult questions may regularly arise. Limitation of the rule to circumstances where the GAAR applies would be a better outcome for taxpayers and advisers.

Helen McGhee and Steven Bousher, Joseph Hage Aaronson—Whilst there was continued focus on tax avoidance and closing the tax gap, it was mentioned that in fact the UK has one of the lowest tax gaps in the world so maybe we can halt the vast swathe of new powers being introduced to counter avoidance that HMRC simply never uses? Doubtful! We shall see what emerges but on the penalties for enablers legislation there was some hint that the feedback received as part of the consultation process has been taken on board in introducing these measures: good news.

TAX ADMINISTRATION AND COMPLIANCE

Gerald Montagu, NGM Tax Law and CEB member—Presumably in response to the small tsunami of litigation in recent years, legislation will be introduced to provide 'HMRC and customers earlier certainty on individual matters in large, high risk and complex tax enquiries' (whether this will improve the situation, and how it will tilt the table between HMRC and its customers, remains for now entirely opaque).

Keith Gordon, Temple Tax Chambers and CEB member—On a potentially positive note, the government has announced a continuation of its plans to introduce partial closure notices for self assessment enquiries. This should allow HMRC and taxpayers to obtain certainty on aspects of an enquiry whilst investigations continue in relation to other areas. I initially welcomed the proposals when first announced, but was horrified at the subsequent revelation that the rules were to be introduced solely for HMRC's benefit and convenience. In the past six months, I have been involved in discussions with HMRC designed to achieve a fairer balance. I am not yet privy to the final proposals, but yesterday's announcement, I hope, is an indication that progress is being made for the benefit of all.

Gideon Sanitt, Macfarlanes LLP—With HMRC having faced cuts for many years, the Autumn Statement has committed to employing up to 200 additional full-time staff each year from 2018–19 until 2021–22. The focus of those staff on further accelerating litigation and the provision of follower notices, as well as expanding litigation settlement activity reflects a commitment to the approach that HMRC has vigorously and, from its perspective, successfully pursued over the last few years. What is also noteworthy is that HMRC's additional resources will also be looking to increase the number of cases challenged under the general anti-abuse rule (GAAR). That should not be difficult given the relatively limited use of the GAAR so far, but this may be an indication that HMRC is intending to turn its attention much more seriously to the GAAR, particularly as it has been bolstered by penalties under Finance Act 2016.

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