UPCOMING EVENTS & LIKELY DATES

September 2017
NEWSLETTER

2017

OCTOBER	Littlewoods (compound interest on repaid VAT)	Supreme Court Judgment
NOVEMBER	CFC & Dividend GLO (portfolio investments)	High Court: further Hearing
LATE NOVEMBER	Expected date of next Finance Act	
Q3	FII (dividends from controlled interests)	Supreme Court Permission to Appeal

2018

FEBRUARY	Prudential (Portfolio Dividends)	Supreme Court Hearing

Partial Closure Notices

Tom O'Reilly

The draft Finance Bill (No.2) contains provisions to allow HMRC to issue "Partial Closure Notices". Partial Closure Notices will operate substantially the same way for individuals and trusts, partnerships and companies. HMRC will be able to issue closure notices for individual aspects ("matters" as they are referred to in legislation) of an enquiry before they have to close the entire enquiry. The effect on the individual matter closed will be the same as if a closure notice had been issued under the current system, including all the usual knock-on effects of time limits for amendments, appeals etc. relating to that individual matter. This power will supposedly allow HMRC to resolve simpler issues quickly without them dragging along behind more complicated and long-running arguments.

Taxpayers remain able to apply to the tribunal for a full closure notice, but will also be able to apply for a partial closure notice.

First ever GAAR Advisory Panel Opinion

Tom O'Reilly

A company, which operated an EBT, bought gold from a third party and gave it to two directors who were 49% and 51% shareholders. The directors immediately sold the gold and settled the company's liability to pay for the gold in exchange for a director's loan account credit. At the same time a long term obligation was created which required the directors to pay an amount at least equal to the price of the gold to the EBT at some point in the future.

The scheme attempted to avoid s.62 of ITEPA 2003 (which defines "earnings" for employment) and Part 7A of ITEPA 2003 (designed to catch "disguised remuneration") but still entitle the company to a CT deduction.

The GAAR Panel decided that the scheme involved "contrived or abnormal steps" (FA 2013 s.207(2)(b)) as it is abnormal for an employer to reward employees with gold and for parties who choose to introduce an asset into arrangements to sell the asset immediately. In addition if cash and not gold had been used either the directors or company would have been in a substantially different economic or commercial position.

The Panel also considered that the transaction was not consistent with the principles of the relevant legislation. The most likely comparable transaction was the funding by the company of the EBT which would have given rise to a charge to income tax under Part 7A and NICs and would have resulted in a deferment of the CT deduction. The reason that the taxpayer was claiming different treatment was that a subsection relied upon (ITEPA 2003 s.554Z8(5)) did not contain an express "no connections with tax avoidance" provision, unlike other subsections (ss.(1)). The Panel did not see an obvious reason why these should be treated materially differently and that the legislation contained a shortcoming which the arrangements tried to exploit.

The Panel considered that the steps taken were not a reasonable course of action.

Eqiom & Enka v Ministre des Finances C-6/16: Beneficial Ownership Limitations must target only artificial arrangements

Peter Stewart

France introduced legislation which provided that the withholding tax exemption in the Parent Subsidiary Directive ("PSD") does not apply where the distributed dividends are received by a legal person controlled directly or indirectly by a resident outside the EU unless the purpose of the chain of interests is not to take advantage of the exemption. France therefore subjected dividends from Eqiom to withholding tax on the basis that Eqiom was directly or indirectly controlled by a Swiss company.

France attempted to justify the legislation under the fraud and abuse exception in the PSD. However, the CJEU held that the fraud and abuse exception had to be interpreted strictly. The specific objective of legislation must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the purpose of which is unduly to obtain a tax advantage. The mere fact that a company residing in the EU is directly or indirectly controlled by residents of third States does not, in itself, indicate the existence of a purely artificial arrangement which does not reflect economic reality.

Further the French law was a restriction on freedom of establishment because the condition on the exemption to withholding tax only applied to non-resident parents. The Court considered that this difference in treatment is likely to dissuade a non-resident parent company from exercising an activity in France through a subsidiary and is therefore an impediment to freedom of establishment. This restriction could not be justified by the objective of combating fraud and tax evasion because this justification has the same scope as the fraud and abuse exception in the PSD.

The Trustees of the BT Pension Scheme C-628/15: Tax Credits for Exempt Taxpayers

Tom O'Reilly

Until 1997 exempt taxpayers such as pension funds received a tax credit refundable in cash with the receipt of a dividend from a UK company which amounted to franked investment income (FII). However dividends received from a UK company which were from foreign sources of profits (and paid under the foreign income dividend or FID regime) did not carry any such credit. The CJEU, following the opinion of the Advocate General, has concluded that exempt shareholders should have received equivalent tax credits with FIDs. Being exempt taxpayers there was however no tax to repay. The Court has concluded that under EU law charges include any deducted amount which needs to be refunded to restore equal treatment, which for shareholders who received FIDs gives rise to an entitlement to the tax credit. It is for the UK courts to determine the procedural rules determining protection of EU rights, and those rights must not be less favourable than for similar domestic actions.

The court attached no significance to the fact that the shareholders were not subject to income tax on dividends, whether or not the breach of EU rights was significant enough to give rise to non-contractual liability on the UK, nor to the fact that the companies distributing FIDs may have increased their dividends to cover any "shortfall" caused by being unable to claim a tax credit. This did not give rise to "double recovery" on behalf of the shareholders.

Trustees of the P Panayi Accumulation & Maintenance Settlements C-646/15: Exit Charge on Trust Migration

Cristiana Bulbuc

This case deals with s.80 TCGA 1992 which provides that the migration of a trust resulting from trustees ceasing to be UK resident is a deemed disposal for capital gains tax purposes of the trust fund at market value. The FTT referred the case to CJEU for a preliminary ruling on whether the exit charge on trust migration is compatible with the freedom of establishment, freedom to provide services and free movement of capital.

The ECJ found a difference in treatment between trusts which retain their place of management in the UK and trusts whose place of management is transferred to another Member State. The ECJ held that the legislation discourages the trustees, who manage the trust, from transferring the place of management of the trust to another Member State and deters the settlor from appointing new non-resident trustees. This difference constitutes, according to the Court, a restriction on freedom of establishment.

Moreover, as the legislation at issue provides only for the immediate payment of the tax concerned, it goes beyond what is necessary to achieve the objective of preserving the allocation of powers of taxation between Member States and constitutes, therefore, an unjustified restriction on the freedom of establishment.

Cussens & Others C-251/16: Abuse of Rights

Cristiana Bulbuc

In this case the Advocate General considered the application of the *Halifax* principle to property transactions. Mr Cussens, together with associates, built holiday homes in Ireland granting initially a long lease of the properties to a related undertaking and then cancelled the lease shortly thereafter. The properties were subsequently sold to third parties. As a result of this arrangement, no VAT was payable on sale. The question was whether these transactions were abusive.

The AG reiterated that the abuse of rights principle required there to be a transaction resulting in a tax advantage that was contrary to the purpose of the relevant provisions and that the essential aim of the transactions was to obtain that tax advantage. In the AG's view, the transactions in this case, which were designed to artificially create a first taxable supply of the properties, so that more valuable subsequent supplies to third party purchasers were exempt from VAT, did not meet the purpose of the relevant provisions of the Sixth Directive.

The AG also opined that the subjective test, which asks whether the essential aim was to obtain a tax advantage, must be applied restrictively and that the net should not be cast too widely. The test would not be fulfilled if the transactions are found to have some economic justification other than a tax advantage.

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