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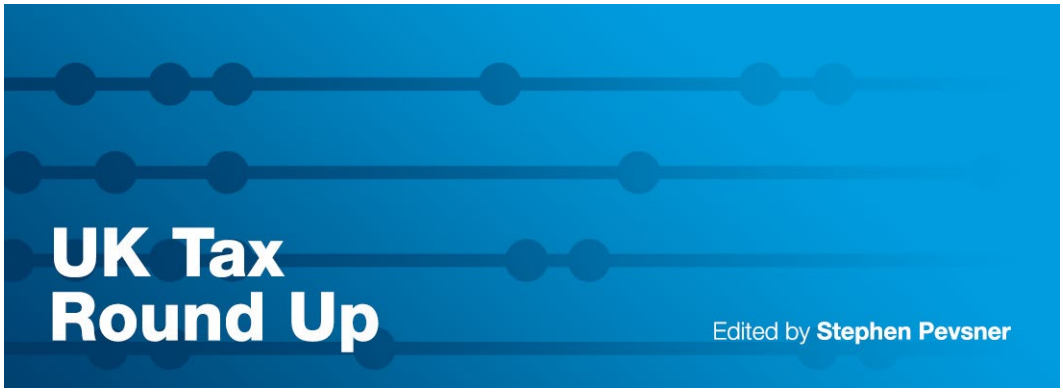

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Welcome to April's edition of our UK Tax Round Up. While this month has been quiet on the case law front, there have been a number of HMRC announcements and updates to prior published guidance along with published responses to consultations covering aspects of the salaried member rules, globally mobile employees, stamp taxes on shares and the permanent establishment, transfer pricing and diverted profits tax rules.

HMRC Announcements

HMRC publishes long-awaited revised guidance on "capital contribution" condition in the salaried member rules

On 9 April, HMRC published revised guidance on the application of the capital contribution condition (Condition C) of the LLP salaried member rules officially reverting to their pre-February 2024 position.

As mentioned in our February UK Tax Round Up, there has been a high level of uncertainty ever since HMRC (without warning) amended its guidance in February 2024 regarding the types of LLP capital contribution arrangements that HMRC considers can be disregarded for the purpose of applying the target anti avoidance rule (TAAR) to Condition C, in particular with respect to so called "top up" contributions upon which many LLP members rely.

As a reminder, under section 863A ITTOIA 2005 members of UK LLPs who are treated as "salaried members" are subject to tax on their remuneration as if they were employees. Under the rules, the default position is that all members of an LLP are salaried members unless they "fail" one of the three tests in sections 863B, 863C and 863D ITTOIA (so called Conditions A, B and C). Condition C focuses on the relevant member's capital contribution to the LLP. In order to fail the Condition C test for the relevant tax year, the member's capital contribution must be at least 25% of the individual's expected "disguised salary" (being the amount of their total expected remuneration which is not "variable").

The guidance that was published in February 2024 described an arrangement under which an LLP member whose disguised salary was expected to increase so that their capital was less than 25% of that amount would contribute a further £10,000 of capital to meet the 25% requirement and stated that "*this arrangement will trigger the TAAR and no regard can be given to the £10,000 when considering whether X meets Condition C. As such X will meet Condition C as their contributed capital remains at only £15,000*".

The latest revised guidance states that HMRC accepts that a "genuine contribution made by the individual to the LLP, intending to be ensuring and giving rise to real risk" will not fall within the TAAR. The changes to the guidance make clear that all the facts and circumstances of the payment should be taken into account to determine whether the contribution is genuine, intended to be enduring and at real risk (taking those words at their ordinary meaning). HMRC will also take into account how the contribution is used by the LLP in determining whether it is genuine and giving rise to real risk and that, if "the LLP does not intend to, or does not in fact, make commercial use of the contribution, that may indicate that it is not a genuine capital contribution or at real risk". The guidance goes on to note however that HMRC would not consider that "a contribution was not genuine or at real risk if the LLP did not require additional capital before it was made (for example if it was already well capitalised)", noting that HMRC recognises that LLPs may put contributions to a variety of commercial uses, including satisfying regulatory capital requirements.

The revised guidance also clarifies that when considering whether there is "real risk" this means considering whether the individual is "personally at actual risk of losing the contribution (whether funded out of their own money or a loan) in the event that the LLP makes a loss or becomes insolvent", rather than looking at whether the LLP itself is really at risk of making a loss, and "the fact that an LLP is well capitalised, such that practical risk of insolvency is very low, would not mean that the contribution is not at real risk".

The clarificatory updates to the guidance are welcome and should provide LLP members with comfort that the pre-February 2024 position, particularly with respect to the validity of top-up contributions, has been restored. However, care still needs to be taken when considering the practical application of the TAAR. LLP members should ensure that any capital contributions they make meet the partnership's needs and represent genuine contributions which would be at risk should the LLP fail and consider carefully whether or not it can be said that the main purpose of making the contribution is to avoid the member from being a salaried member as there is still some uncertainty as to what HMRC's approach to the question of whether a contribution is "genuine" might be.

HMRC statement for LLPs with open compliance checks for the salaried member rules pending BlueCrest decision

The Chartered Institute of Taxation (CIOT) has reported that HMRC has written to LLPs with open compliance checks relating to the application of the salaried member rules to set out their approach pending the outcome of the application to appeal the latest BlueCrest decision to the Supreme Court (SC). As a reminder, the BlueCrest case focused on Condition B of the salaried member rules (in section 863C ITTOIA) which requires that the mutual rights and duties of the members and the LLP give the individual member significant influence over the affairs of the LLP. The Court of Appeal (CA) decided that the "significant influence over the affairs of the partnership" contemplated by Condition B must derive from, and have its source in, the mutual rights and duties of the members (between themselves and between the members and the LLP) as conferred by the statutory and contractual framework which governs the operation of the LLP. For a more detailed overview of that decision please refer to our Tax Blog available here.

The CIOT has indicated that HMRC confirmed it will continue to carry out compliance activity in relation to Condition B and the salaried member rules more generally, but that HMRC "does not anticipate a material change to the current and planned compliance approach as a direct consequence of the CA's finding that mutual rights and duties must derive from, and have its source in, the statutory and contractual framework that governs the operation of the LLP." In an effort to save costs, HMRC has said it will consider, on a case-by-case basis, agreeing not to seek the LLP's views as to whether any significant influence derives from legally enforceable mutual rights and duties until at least the SC decides whether permission to

appeal should be granted (and HMRC will consider this again after the SC decides whether to grant permission). While HMRC will continue to issue determinations and assessments of under paid tax where they consider appropriate, it has indicated, again, on a case-by-case basis, that it is open to agreeing not to start the formal litigation process with respect to determinations of under-paid tax in situations where the outcome of BlueCrest may be materially relevant to the case in question (again to be reconsidered once the SC decides whether to grant permission to appeal the decision).

The letter from HMRC also advises LLPs to discuss any concerns they have regarding the potential impact of the CA decision with their customer compliance manager.

HMRC statement for LLPs with open compliance checks for the salaried member rules pending BlueCrest decision

HMRC has published guidance on the application of PAYE to globally mobile employees (i.e. employees who come to, or travel outside, the UK to work) (GMEs) from 6 April 2025 following changes made as part of the Autumn Budget 2024.

Among the changes introduced is a new process for obtaining a direction under section 690 ITEPA. The purpose of the direction, formerly known as a "section 690" direction, now referred to as a "GME PAYE" direction, is to provide relief from the strict operation of PAYE on employment income paid to certain GMEs including (i) UK tax resident individuals who qualify for overseas workday relief, (ii) UK tax resident individuals who are eligible for split year treatment who have overseas earnings in the overseas part of their split year and (iii) non UK tax resident individuals who spend some time working in the UK. By default, HMRC expects UK employers to apply tax via the PAYE system on the entirety of an employee's income. But, where the direction applies, employers are authorised to limit the application of PAYE to the estimated proportion of the employee's employment income that is attributable to their work in the UK.

Historically, once an application for a section 690 direction was made employers had to await until receipt of HMRC approval before they could rely on its effect. The new guidance confirms that employers can now operate PAYE on the basis of the apportionment once the online application for the GME PAYE direction has been acknowledged. New applications must be submitted if there are any changes to the individual's circumstances (e.g. if the proportion specified is no longer correct or if there is a change in their tax residency status).

There are a number of other changes introduced, including a change to the duration of the validity of the direction. Prior to 5 April 2025, section 690 directions could apply for up to a three year period. Under the new GME PAYE direction regime, employers are required to submit a new application annually on behalf of each qualifying employee. Employers should also be aware that any section 690 directions previously issued are invalid from 6 April and so new applications must be submitted for the 2025/26 tax year.

Employers should review the existing position of any GMEs who may have a section 690 direction in place and submit any new required online GME PAYE direction applications to HMRC as soon as possible.

Consultation on stamp duty on shares

HMRC has published a summary of responses to its consultation on proposals for the modernisation of stamp duty on shares that was published in April 2023. A link to the responses is available here.

The broad thrust of the summary is that the government intends to replace the existing stamp duty and stamp duty reserve tax (SDRT) system with a single, self assessed tax on shares that is similar to the SDRT and stamp duty land tax (SDLT) regime. This will provide for an online reporting and payment system and HMRC plans to consult with stakeholders about the operational details with a view to introducing the new system in 2027.

The new system is expected to include many aspects of the existing rules (such as intragroup transfer relief and reconstruction relief) and make some changes (such as introducing a new unascertainable consideration payment regime that is based on the SDLT rules).

One point of interest is that HMRC expects that most transfers of partnership interests will no longer be subject to stamp duty subject to the inclusion of an anti avoidance rule to prevent partnerships being used as a method of transferring share ownership in order to avoid the new tax.

The government also plans to consult on the 1.5% "season ticket" charge that applies to the transfer of certain shares to depositary receipt issuers and clearance services. This charge has been considerably narrowed over recent years, and there appears to be no intention to broaden it.

Changes to definition of permanent establishment and the investment manager exemption

HMRC has published a consultation document, along with proposed draft legislation, which would make changes to the definition of permanent establishment (PE) and the investment manager exemption (IME) which, broadly, excludes UK investment managers from being PEs of their non UK resident clients where certain conditions are met. This consultation is the next step in the consultation commenced in summer 2023. A link to the consultation is available here.

The new document states that the proposed changes to the definition and operation of the PE rules are to bring the UK's rules into line with the latest international consensus on the definition of PE and the attribution of profits to them.

The main change to the definition of what can be a PE in section 1141(1)(b) CTA 2010 extends it to include "*a person acting on behalf of the [non-UK] company habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the [non-UK] company and the contracts are (i) for the transfer of the ownership of, or for the granting of the right to use, property owned by the [non-UK] company or that the company has the right to use or (ii) for the provision of services by the [non-UK] company*". The explanatory notes to the draft legislation state that this extension to the definition is to replace the previous "authority to do business" with a definition which is targeted at contract conclusion which is the focus of the standard double taxation agreement provision on dependent agent permanent establishment and that the revised definition dispenses with having "an authority" to act on behalf of the non resident and focuses solely on whether the contract conclusion or negotiation activity is habitually undertaken in the UK.

This revised scope of permanent establishment, if enacted in this form, might have to be considered by UK investment advisers who provide advice to non UK investment managers and/or fund vehicles where the investment adviser is heavily involved in negotiating contracts for the purchase and sale of assets.

The other major change of interest to investment funds will be the removal of the so called "20% test" from the investment manager exemption, which will make it clearer that UK based investment managers (and advisers) should be treated as agents of independent status, and

so not as permanent establishments, of the non-UK funds (and their investors) that they provide services to.

There are a number of other associated amendments proposed and the consultation also covers proposed changes to the UK's transfer pricing and diverted profits tax rules, also with a view to simplifying and updating the UK's international tax rules to more closely align them with the UK's treaty obligations.

The consultation is running until 7 July.