Proskauer

UK Tax Round Up

August 2018

UK Case Law Developments

VAT treatment of supplies of non-employed temps clarified

A recent Court of Appeal case – *Adecco v HMRC* – clarifies a longstanding question over seemingly contradictory case law on the VAT treatment of employment agency temps. The decision relates to non-employed temps, i.e. individuals provided by the agency to a client who are not employees of the agency but who have contracts with the agency, have no direct contract with the client for whom they work, and are paid by the agency out of a fee paid to the agency by the client.

The question for the court was whether services provided to the client in relation to the non-employed temps was a supply of staff such that the full amount of the client's fee would be subject to VAT, or a supply of introductory services such that only the element of the fee charged for the introduction would be subject to VAT and not the element that reflects the remuneration to be paid to the individual.

In line with HMRC's view set out in its VAT Notice 700/34, the Court found that it was a supply of staff so the fee was fully subject to VAT. The Court also opined that the 2011 First-tier Tax Tribunal decision in *Reed v HMRC*, in which a contrary conclusion was reached on near identical facts, must be considered wrongly decided.

The lower courts in the *Adecco* case had not commented on the *Reed* decision except to suggest broadly that it should be justified on the grounds of factual differences. HMRC had published guidance indicating that it thought the *Reed* decision should be confined to its facts. Taxpayers had therefore been left trying to assess how the contractual terms in the *Reed* and *Adecco* cases differed in order to try to establish which side of the line their arrangements stood.

Although it may be unhelpful for employment agencies and clients of employment agencies that the taxpayers in *Adecco* lost the case, it is useful to have clarification from the courts indicating that the *Reed* decision should be ignored.

International Developments

Jersey, Guernsey and the Isle of Man publish substance proposals

Jersey and Guernsey are consulting on proposals to introduce substance requirements for resident companies. The Isle of Man has joined them by announcing that it has been working with Jersey and Guernsey to develop these proposals.

The proposals are in response to concerns from the EU's Code of Conduct Group regarding minimum substance requirements for resident companies. The Code of Conduct Group reviewed tax policies of over 90 jurisdictions in 2017. While the UK Crown Dependencies of Jersey, Guernsey and the Isle of Man were considered compliant with most of the good governance criteria of the Code of Conduct Group, there were some concerns that there was no minimum substance requirement for companies resident in these jurisdictions.

The Jersey and Guernsey consultations set out the proposals. A key feature of the proposals is that companies carrying out "relevant activities", which appears to mean banking, insurance, fund management, financing and leasing, headquarters activities, shipping, or holding company activities, must demonstrate that the company is directed and managed in the relevant Crown Dependency as follows:

- There must be meetings of the Board of Directors in the relevant Crown Dependency at adequate frequencies given the level of decision making required.
- During these meetings, there must be a quorum of the Board of Directors physically present in the relevant Crown Dependency.
- Strategic decisions of the company must be set at meetings of the Board of Directors and the minutes must reflect those decisions.
- All company records and minutes must be kept in the relevant Crown Dependency.
- The Board of Directors, as a whole, must have the necessary knowledge and expertise to discharge their duties as a board.

In addition, the company will need to ensure that its "core income generating activities" are undertaken in the relevant jurisdiction. These core income generating activities are expected to be set out in legislation and will depend on the sector in which the company operates. The consultations give examples including the following for fund management and for holding company activities respectively:

- Fund Management - taking decisions on the holding and selling of investments, calculating risks and reserves, taking decisions on currency, interest fluctuations and/or hedging positions, preparing relevant regulatory and/or other reports for government authorities and investors.
- Holding Company Activities - companies which purely hold equities will need to confirm they meet all applicable corporate law and tax filing requirements, where holding companies also conduct other "relevant activities" they will additionally be subject to the requirements associated with that activity.

In the context of fund management, it remains to be seen how the core income generating activities definition will apply in situations where portfolio management is delegated to another jurisdiction and only risk management activity and supervision of the portfolio management activity remains with the fund manager in the relevant Crown Dependency.

Further, companies carrying on relevant activities will be required to demonstrate that there is:

- an adequate level of (qualified) employees in the relevant Crown Dependency, or adequate level of expenditure on outsourcing to service companies in the relevant Crown Dependency proportionate to the activities of the company;
- an adequate level of annual expenditure incurred in the relevant Crown Dependency, or adequate level of expenditure on outsourcing to service companies in Jersey, proportionate to the activities of the company; and
- adequate physical offices and/or premises in the relevant Crown Dependency, or adequate level of expenditure on outsourcing to service companies in the relevant Crown Dependency, for the activities of the company.

It is acknowledged that collective investment vehicles (which is not defined) should have reduced substance requirements which are aligned with the local regulatory framework.

The proposed substance requirements do not appear to be particularly onerous, but a key area to watch will be how rigidly the core income generating activities are defined. It is hoped that they will be sufficiently flexible to cater for differences in the commercial and regulatory models adopted by Crown Dependency companies, for example as highlighted above to enable fund managers to delegate portfolio management as appropriate.

The consultations in both Jersey and Guernsey close on 31 August 2018.

Related Professionals

- **Catherine Sear**
  Partner