Proskauer

UK Tax Round Up

July 2019

Finance Bill 2019-2020

The FB19-20 was published on 11 July. The majority of the matters included have been announced previously with no surprise measures. The draft legislation is now open for consultation. We have summarised some of the key measures included here.

Stamp duty and stamp duty reserve tax

A new rule was introduced last year imposing market value consideration for stamp duty and stamp duty reserve tax purposes where listed shares or securities are transferred to a connected company. In the FB19-20, and following consultation on the proposal, a similar provision has been included for unlisted shares and securities, imposing a market value consideration where a transfer is made to a connected company and part or all of the consideration for the transfer is the issue of shares. HMRC has stated that these rules will not cover capital contributions or distributions in specie. While not entirely clear, this provision might be seeking to negate the benefit of so-called stamp duty "swamping schemes" where a company with substantial share capital issues a very low number of new shares in consideration for the transfer of shares to it to reduce the stamp duty liability on that transfer.

It is equally interesting to note that the government has indicated that there is no current intention to progress any of the other stamp duty measures it has consulted on recently, including provisions to align the meaning of "consideration" for stamp duty and SDRT purposes. HMRC states that any such changes will be delayed until consideration of a wider reform and modernisation of stamp duty is undertaken.

Digital services tax

Draft legislation and guidance has been published in respect of the proposed new digital services tax (DST). The draft legislation largely accords with the proposals put forward in the consultation, particularly in relation to the rate and thresholds, although some changes have been made to address administrative and compliance issues raised in the consultation.

In very general terms, the DST would apply to groups with worldwide revenues from certain digital services of £500 million or more. Such groups will be subject to a DST of 2% on revenues derived from UK customers (or users) above £25 million. It will apply to revenues earned from 1 April 2020.

The proposals reinforce the government's commitment to introducing the DST prior to an international consensus being reached in this area, and it is interesting that other countries, most notably France, have also announced plans recently to introduce similar measures. These measures have raised the ire of the US in particular who view them as an unfair tax burden on US-based businesses doing business with non-US customers and have threatened retaliatory tariffs on France.

Carried forward capital losses

From 1 April 2017, a restriction was introduced in respect of corporate carried forward income losses, meaning such losses could only be set off against 50% of a UK group's income total profits above an annual allowance of £5 million.

The FB19-20 extends this restriction to capital losses carried forward, applicable from 1 April 2020. The restriction will mean that only 50% of chargeable gains will be able to be sheltered by carried forward losses, with the current £5 million group allowance being spread between a UK corporate group's income and capital profits.

Off payroll working in the private sector

The FB19-20 also includes legislation that will extend the off payroll working rules that currently apply to workers contracted through personal service companies (or other intermediaries) by the public sector to the private sector from 6 April 2020.

These rules change the provisions under IR35 so that any employment tax obligations (PAYE and NICs) relating to a worker are shifted from the worker's personal service company (or other relevant intermediary entity) to the business to which the worker provides his or her services.

Both the CIOT and ICAEW have published responses to the proposals, urging, in particular, that tools and guidance to be improved to assist businesses in concluding on a worker's status. HMRC has confirmed that further guidance will be published on this later in the year with the aim of helping businesses prepare for the introduction of these rules.

The problems that businesses are likely to encounter are highlighted by this month's court decisions on IR35 matters discussed below from which it is clear that it can be very difficult to distinguish between someone who should be treated as an employee from someone properly treated as an independent consultant.

UK Case Law Developments

Two further cases considering the application of IR35

This month there have been two new employment status cases considering the application of the IR35 rules.

In *George Mantides Ltd v HMRC*, the First-tier Tribunal (FTT) considered an appeal by Mr Mantides, who was a urologist supplying services to two hospitals via his personal service company. HMRC claimed that he would have been an employee in both cases had he contracted with the hospitals directly. The FTT considered the contracts between the personal service company and each hospital separately and allowed the taxpayer's appeal in relation to services supplied to one hospital but not the other.

In relation to the hospital where the appeal was allowed, the personal service company and the hospital had entered into a written contract that permitted the services to be supplied by an appropriately qualified substitute and which could be terminated with one day's notice. The FTT found that this was sufficient to indicate an independent consultancy. There was no written contract between the other hospital and the personal service company, only a letter confirming the arrangement of the services from a locum agency which did not contain any right to send a substitute and was silent on termination. This, along with some other relevant factors, was enough for the FTT to determine that if Mr Mantides had contracted directly with the hospital he would have been an employee. Of particular relevance was the FTT's finding that such contract would have been for Mr Mantides' personal services with no right to provide a substitute. The different conclusions in this case show that the important distinction between employment and self-employment can be a fine one and that it is critical that the arrangements between the worker's personal service company and the client are documented to reflect (credibly) those terms that would be expected in a contract between the client and an independent contractor.

In *Kickabout Productions Ltd v HMRC*, a well known radio presenter (Mr Hawksbee) provided services to a radio station through his personal service company. The presenter had presented his show for 18 years and it was a cornerstone of the radio station's schedule.

For the period in question, Mr Hawksbee provided his services under contracts that lasted for 2 years, required him to present 222 shows a year and under which he was paid a fixed fee for each show. He had significant freedom on content and guests for the shows presented (subject to certain basic rules and regulations) although the radio station controlled the location and times of the shows. The individual was not required to participate in other activities for the radio station apart from presenting the shows and was not invited to staff meetings or events, did not have a line manager and was not subject to appraisals. He was subject to restrictions on providing radio shows to other broadcasters but was otherwise free to do other work which did not impact on the radio shows. During the period being considered, about 90% of Mr Hawksbee's income was generated through these shows.

While the FTT allowed Mr Hawksbee's appeal and held that the relationship was akin to self-employment, the decision was only reached by the casting vote of the tribunal chairman (on a two judge panel). The main reasons for the decision were that the radio station was not required to provide work to Mr Hawskbee and that it had insufficient control over how Mr Hawksbee presented his shows. These, along with other less important factors, were sufficient to indicate that Mr Hawksbee would have been treated as an independent contractor had he contracted with the radio station directly. It is significant, however, that the second judge, who disagreed with this conclusion, felt it desirable to include an appendix to the decision setting out the reasons for what would have been his decision that Mr Hawksbee should have been treated as an employee. The second judge took a less detailed approach to assessing the evidence and stated the importance in these cases of "standing back from the detailed picture and evaluating the overall effect of the individual details to appreciate the whole picture".

These cases, as well as a number of other recent cases on IR35, demonstrate that categorising a relationship as analogous to employment or self-employment can be difficult, particularly where the indicative factors are finely balanced and the nature of the work means that it is not necessarily helpful to try to apply the historic test of control by employer over employee to the arrangements.

It will be interesting to see whether, given the difficulty of the question, the end customers start to take a more conservative approach to this question and factor employment costs into their analysis when contracting with workers when, from next April, the employment tax obligations will fall on them rather than on the worker's intermediary.

VAT on "free" supplies

In *Marks and Spencer plc v HMRC*, the question for the Upper Tribunal (UT) was how consideration should be treated for VAT purposes in respect of a promotion under which customers received a free bottle of wine when they purchased three food items for £10. Marks and Spencer did not account for VAT on the transactions under the promotion on the basis that the £10 was paid for the food items which are zero-rated for VAT purposes (whereas the wine was standard rated). The UT dismissed Marks and Spencer's appeal and held that the £10 consideration was consideration for all four items and, as such, part of the consideration must be attributed to the wine on which VAT was chargeable. The tribunal stated that the commercial reality was that customers purchased the four items for £10 and the fact that the "free" item was supplied at the same time and in the same transaction as the food items was key (as opposed to a different arrangement under which a voucher to claim a free item at a later date might have been offered).

This case shows that it is important to focus on the commercial reality of a transaction for VAT purposes, rather than how it may be marketed to customers. It is very much hoped that this case does not affect the availability of Mark and Spencer's "free" wine offer in the future though.

EU Case Law Developments

VAT on investment management fees not recoverable

In *HMRC v The Chancellor, Masters and Scholars of the University of Cambridge*, the CJEU have ruled that Cambridge University was not acting as a taxable person when raising donations and endowments and, consequently, it could not deduct input VAT on the investment management fees relating to the management of those funds as part of its general overheads.

The university acts as a charity and its main activity is the supply of education which is exempt from VAT. The university also carries on other activities which are subject to VAT, such as selling merchandise. Both the FTT and the UT found that the investment management fees formed part of the university's overheads and therefore that the VAT on the fees was recoverable. HMRC then appealed to the Court of Appeal, which referred the issue to the CJEU.

The CJEU found that the donations to the university were not consideration for an economic activity and that the university was not acting as a taxable person when raising and such donations. The CJEU then decided that the investment and management of the amounts raised was a continuation of that non-economic activity and, therefore, should be treated in the same way for VAT purposes. In addition, the CJEU considered whether the investment management costs could be considered to comprise a cost component of all of the university's activities (exempt and VATable) and decided that they could not because the returns from the university's investments were intended to support all of its activities and so resulted, if anything, in a reduction of the price of anything offered by the university rather than increasing those prices.

The case is a further illustration of the complex facts and questions that might need to be assessed by businesses that carry on a mix of VATable and non-VATable activities when determining how much of their input VAT they can recover.

Related Professionals

- **Catherine Sear**
  Partner