Proskauer

UK Tax Round Up

October 2021

UK Budget

The Chancellor presented the Budget on 27 October. Although it contained a wide range of general spending and tax-related announcements, there was nothing of significance for the private funds industry that had not been previously announced. In particular, there was nothing about changes to the capital gains tax rules or rates.

The main piece of legislation that will be of interest to the funds industry is the new UK asset holding company (AHC) regime. The new law for AHCs will be published in the draft Finance Bill on 4 November. These rules have been the subject of considerable consultation between HMRC and representative bodies over the past couple of months and it is hoped that this will result in a clear and simple regime which will make the UK an attractive jurisdiction for establishing AHCs.

UK Case Law Developments

More clarity on the scope of the transfer of assets abroad rules

In *Fisher and Others v HMRC*, the Court of Appeal (CA) allowed part of HMRC's appeal and decided (by two to one majority) that two of the three taxpayers involved were "transferors" for the purposes of the transfer of assets abroad (ToAA) rules. The decision overturned the Upper Tribunal (UT) decision (reported in our March 2020 edition) which itself had overturned the previous First-tier Tribunal (FTT) decision.

As discussed in our previous report, the case related to three members of the Fisher family who owned and ran the Stan James betting business through a UK company. The UK company entered into various arrangements to move its online betting business to a new Gibraltarian company to avoid UK betting duty. The three taxpayers were Stephen Fisher (who had set up the business and was a shareholder in the UK company), his wife Anne (who was a shareholder but not involved in the management of the business) and their son Peter (who was also a shareholder and involved in the management of the business).

The main question to be decided was whether the Fishers should be considered to be "transferors" (or "quasi-transferors" as referred to) of the UK business for the purposes of the ToAA rules (which would allow income of the new company to be attributed to the Fishers) by virtue of having control over the decisions of the UK company or, in the terms discussed in the case, being in a position to procure the transfer. The UT had said that they should not be considered to be transferors. The CA (by majority) disagreed with this in respect of Stephen and Peter but agreed in respect of Anne, since she was not involved in the decision making process. The CA referred to the ToAA rules as having been "long recognised [as] a "penal" provision with a deterrent function and so a broad spectrum anti-avoidance provision which should not be narrowly or technically construed". Applying this approach, the CA stated that it was not within the power of the UT to overturn the FTT's conclusion that Stephen and Peter had each (or together) procured the transfer of the business from the UK to Gibraltar and so were each "quasi-transferors" of the business. The CA agreed with the UT that Anne should not be considered to be a quasi-transferor because she was not involved in the management of the business.

The second point discussed was whether the Fishers could rely on the "motive defence" under the ToAA, that the transfer of the business was a bona fide commercial transaction and was not designed with the purpose of avoiding tax (on the basis that betting duty was a tax). The UT had accepted that the motive defence was available had it been wrong on the quasi-transferor question because the purpose of the transaction was to save the business and it was not designed to avoid tax (notwithstanding that the elimination of the betting duty was required to save the business). This was a somewhat surprising conclusion given the longstanding approach of the courts to other (albeit differently worded) "main purpose" tax avoidance provisions. On the point, the CA also said that the UT was not entitled to overturn the FTT's conclusion that the transfer of the business to Gibraltar was designed with the purpose of avoiding betting duty, notwithstanding that this was the way in which the real purpose of saving the business could be achieved.

In his dissenting judgement, Phillips LJ said that he did not agree that Stephen and Peter should be treated as quasi-transferors. Neither of them had an individual controlling shareholding in the UK company but Newey LJ, in the leading judgment, had said that they acted together in procuring the transfer of the business. Phillips LJ said that, while he could see that a single controlling shareholder could be considered to be able to procure the acts of a company and so be a quasi-transferor, he did not consider that the concept of procuring should be extended to two (or more) shareholders, each acting independently, voting in a way that means that the relevant company takes the relevant action.

The decision, in reinstating the FTT's original decision, shows that the ToAA rules should, indeed, be considered to be a "penal provision with a deterrent function and so a broad spectrum anti-avoidance provision which should not be narrowly or technically construed" and that taxpayers should be wary of its application when being involved in transactions that might come within its scope.

Difficulty of obtaining deduction for individual expenses of an employee

In *Kunjur v HMRC*, the FTT has allowed in part the taxpayer's appeal that he was entitled to a deduction against his employment income for the cost of additional accommodation that he rented to be close to his workplace. While this has been reported as a decision favourable to Mr Kunjur, given the extremity of its facts it really illustrates just how difficult it is for an employee to satisfy the "wholly, exclusively and necessarily" for the purposes of the employment test for personal expenses (and the equivalent "wholly and exclusively" test for the self-employed).

Mr Kunjur was a dentist who decided to retrain as a maxillofacial surgeon. His dental practice was in Southampton, where he and his family lived and his wife worked. He was training at St George's Hospital in South London. For the first week of his work at St George's he commuted from Southampton by car. This took three hours if there were no incidents and required leaving Southampton at 5.30am and returning home at 11pm. Mr Kunjur decided that this was not sustainable as it would leave him too exhausted to carry out his work safely and prejudice his principal obligation as a doctor to look after his patients as set out in the principles of the General Medical Council (GMC). He decided that he would need accommodation closer to the hospital, particularly given the generally accepted requirement to be available and within 30 minutes of the hospital while he was on call (required two nights a week and one weekend in six).

Accordingly, Mr Kunjur rented "modest" accommodation in Colliers Wood in south London where he would stay from Sunday night until Friday evening and when on call at the weekends. He used the accommodation while on call and also when researching and writing articles required as part of his training. While convenient for work, Mr Kunjur did not consider Colliers Wood to be an attractive place to live (indeed, he was mugged in his first week returning from work). Given his wife's work and family roots in Southampton, he did not consider moving his family to London. As a mature adult with a settled family life, the FTT agreed that it would be unreasonable to expect him to use hospital accommodation generally used by students or to use a hotel room for those nights that he was in London.

In order to be able to claim a deduction against employment income for an expense under section 336 ITEPA 2003, the expense must be incurred "wholly and exclusively and necessarily in the performance of the duties of employment". There is plenty of case law considering the equivalent "wholly and exclusively" test for expenses incurred by the self-employed that show, generally, that a deduction will be denied if there is a dual purpose in incurring the relevant expense which means that the taxpayer gains some personal benefit. HMRC's position in this case was that the expense had to be incurred as an obligation of his employment contract in order to be deductible and so Mr Kunjur was not entitled to a deduction because the accommodation was not required on that basis and it served the dual purpose of providing a place to live while he was not at work.

The FTT placed a great deal of weight on the professional requirements placed on Mr Kunjur by the GMC and his obligation to place the interests of his patients before his own interests, and held that this obligation should be considered an obligation of his employment. The FTT also agreed that this obligation meant that Mr Kunjur had to have accommodation available in London. On that basis, he satisfied the “necessary in the performance of his duties” part of the test.

In considering the “wholly and exclusively” part of the test, the FTT said that Mr Kunjur met the test while he was in the accommodation on actual calls providing advice and that he gained no personal benefit from the accommodation over the weekends when he was not on call. It held that it was not clear that the time spent on research and writing articles did satisfy the test since he could have done this anywhere.

However, having decided that, in principle, Mr Kunjur could satisfy the “wholly and exclusively and necessarily in the performance of the duties of employment” test by reason of the particular obligations imposed on him by the GMC, the FTT went on to say that the accommodation costs would have to be apportioned between times that he satisfied the test and times that he didn’t, and that the time that qualified was limited to that during which he was providing advice from the accommodation while formally or informally on call. Time that he was on call but not giving advice was not time during which he was using the accommodation to perform his duties.

So, even on these extreme facts, while succeeding in part, it looks from the judgement that Mr Kunjur might actually be able to claim only a relatively small proportion of his accommodation costs as incurred “wholly and exclusively and necessarily in the performance of the duties of employment”, showing just how hard it is for employees to satisfy the test on personally incurred expenditure.

Other UK Tax Developments

Health and Social Care Levy Bill receives Royal Assent

On 20 October, the Health and Social Care Levy Bill received Royal Assent, so that the new rules imposing an additional 1.25% on employee and employer national insurance contributions and increasing each band of the dividend tax rates by 1.25% will come into force from 6 April 2022.

The increase to national insurance rates will be reversed from 6 April 2023, at which time the new health and social care levy at the same rates will be introduced (applied to employee and employer and applying to earnings of people above state pension age).

International Tax Developments

Consensus on international approach to taxing the digital economy

This month has seen two significant developments in the ongoing OECD-driven attempts to tax the digital economy more fairly under the BEPS 2.0 initiative, described in more details in our Tax Talks blog post.

On 8 October, the OECD made a breakthrough in its attempt under BEPS 2.0 to obtain international consensus on how the global tax system could be changed to share the tax on profits from large multinationals (principally in the digital economy) more fairly. The BEPS 2.0 proposals contain two limbs (so called Pillar 1 and Pillar 2).

Under Pillar 1, a certain amount of profit from the activities of the largest multinationals would be shifted into the countries in which the business's customers and users reside.

Under Pillar 2, there would be an agreed minimum headline tax rate for all jurisdictions.

The agreement this month has seen 136 of the 140 OECD nations signing up to the proposals. This has included certain EU countries, including Ireland, which were previously opposed. The breakthrough has come partly because the US (not an OECD country) has agreed to the general proposal for a global minimum tax and sharing of profits and partly because the minimum tax has been set at 15% rather than the previous "at least" 15%.

The hope is now that the relevant rules for all countries to implement Pillar 1 and Pillar 2 will be agreed during 2022 and implemented in 2023.

As a result of frustration with the pace of agreeing international rules in this area, certain countries, including the UK, have implemented unilateral digital services tax (DST) rules.

On 21 October, the US agreed with the UK and certain other European countries that those countries would be able to retain their domestic DST rules (that the US has previously opposed) until the OECD proposals are implemented and that the US would withdraw its threat to impose sanctions in response to the unilateral DSTs. The agreement further says that the UK and other relevant countries will give a notional credit against the tax imposed under the new rules when implemented based on the excess amount taxed under the unilateral DSTs from 1 January 2022 until implementation of the new rules.

These are significant developments in the attempt to impose an international regime around large multinational businesses and the digital economy that will make it more difficult for those businesses to avoid at least 15% tax on their profits and will allow the countries in which customers are located to generate more tax from the relevant transactions, although there will still be considerable legislative hurdles to overcome before the rules are in place, not least in the US.

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- **Catherine Sear**
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- **Richard Miller**
  Partner