Draft Finance Bill 2017: private client points

A few things appeared in the draft Finance Bill which may raise eyebrows.

Capital payments: It was interesting to note that capital payments to a UK resident beneficiary who becomes non-resident before the trustees of the offshore trust make a matching gain, will not be chargeable. However, capital payments to a non-resident who later becomes UK resident will be chargeable when the trust makes a gain to which the capital payment can be matched. That is really tough – and although these rules are sort of parallel, it will come as an unpleasant surprise to somebody who becomes resident here for the first time, that he can be taxed on money that he received years ago, when he was non-resident.

Two year rule: Just to make matters more difficult, the Finance Bill provides that property which is caught by the detailed provisions relating to UK residential property will not be excluded property for inheritance tax for two years following its disposal – that is the sale of the property or the repayment of the loan.

This provision is of seriously wide application. I have often suggested that when HMRC starts seeking to tax the foreign assets of foreign individuals living abroad, it will truly have gone completely mad. I think we are getting close.

Imagine the position of a foreign domiciled and resident person who has never been to the UK; he does not even speak the language and he has never had any UK assets. He has lived all his life in Ruritania. Nevertheless, he will be chargeable to inheritance tax on his death just because he lent money to a friend in Ruritania who used it to buy an investment property in the UK which he sold less than two years ago.

It is no justification to say that HMRC would probably never know, and would not pursue the foreign person in these circumstances. Why not? If there are tax obligations, they should be adhered to and all tax liabilities properly collected and paid.

Inheritance tax TAAR: The targeted anti-avoidance rule which had been proposed in earlier drafts continues and is intended to supplement the GAAR. The definition of when the TAAR will apply has been extended and will now include arrangements (whenever made) the purpose of which is 'to secure a tax advantage by avoiding or minimising the effect of [the new rules]'.

On a strict reading, this could include giving away property now while it is excluded property in the knowledge that it will cease to be excluded property on 6 April 2017. The same would apply to a third party sale for the same reason. That would seem to be an extreme view – and let us hope, too extreme. After all, it would not be avoiding the effect of the new rules because the new rules would still be of full effect and would continue to apply with full force to the taxpayer. It is just that the rules do not come into force until 6 April 2017. There would be no point in saying that the rules don't come into force until 6 April 2017 if they are going to apply anyway to transfers before that date.

It is to be hoped that some clarification is forthcoming soon. ■

Peter Vaines, Field Court Tax Chambers (pv@fieldtax.com)

The meaning of 'registrable' for VAT purposes

A recent FTT decision suggests that once voluntary registration has been validly requested, it can only be reversed (on application) from a current date (assuming the status still applies).

One of my least favourite words is 'any', and that is because it seems possible for it to mean 'all of' or 'the slightest proportion of', and one can imagine that the two could be assumed to apply in the same example.

I am not sure that 'registrable' is in that league, but I can still see the temptation to interpret it as meaning 'must be registered' as opposed to 'may be registered'.

That was the issue in *Inspired by Service Ltd* [2016] UKFTT 812 (TC). The unhappy context of this case is that it had applied for voluntary registration for VAT (on advice) but had assumed (on the same advice) that, despite registering, it would not have to pay VAT on sales until it breached the mandatory threshold.

Now, it is obvious to readers that this was a mistake, and that it should account for VAT on supplies made from the effective registration date. No returns were submitted, and HMRC raised assessments. The appellant believed that natural justice required that HMRC annul the registration entirely, on the basis that the voluntary registration was a plain error based on a misconception (and it had never exceeded the threshold). HMRC said it was not able to. The point proceeded to tribunal, where HMRC won.

The basis for the appeal was VATA 1994 Sch 1 para 13 (3). This says: 'Where the Commissioners are satisfied that on the day on which a registered person was registered he was not registrable, they may cancel his registration with effect from that day'. Note the fact that the Commissioners are only able to exercise discretion if those conditions are met. But, does the italicised part of this mean 'was not required to be registered' or 'was not entitled to be registered'? Another way of putting this is whether 'registrable' means 'capable of being registered under the rules' or 'under obligation to register under the rules'.

We can only infer this from context. The context is that registration is allowed to those who wish it, if they choose it, even if not required, but only if they qualify by making taxable (or deemed taxable) supplies. In addition to this registration is mandatory in other cases. Thus, 'registrable' cannot rationally exclude that voluntary registration scenario, and cannot solely apply where registration is mandatory. I see no doubt on that point, and neither did the tribunal. But one can understand how it was tempting to think otherwise.

This means that once voluntary registration has been validly requested, it can only be reversed (on application) from a current date (assuming the status still applies, of course), so this oversight is not rectifiable. ■

Graham Elliott, City & Cambridge Consultancy Ltd (graham@cityandcambridgeconsultancy.com)

Is the UK doing a U-turn on BEPS?

Whilst the UK has been a strong proponent of the BEPS recommendations generally, there are indications that the UK will not adopt all the measures designed to clamp down on the artificial avoidance of permanent establishment status. What does this mean for the future implementation of BEPS?

In a joint presentation [last month], HM Treasury and HMRC announced that the UK would opt out of treaty amendments that would strengthen the permanent establishment definition.

The OECD concluded last year that the current definitions were open to widespread abuse and a significant cause of base erosion.

This surprising move by the UK comes against a backdrop of a continuing commitment to BEPS implementation by the government, confirmed as recently as the Autumn Statement on 23 November 2016. The UK has gone it alone before, though, departing from BEPS recommendations two years ago when it introduced the diverted profits tax (DPT, or what became known as the 'Google tax'). This unilateral move was seen by many as an unnecessary and a pre-emptive strike, whilst the government defended it as being complementary to the overall objectives of the BEPS reforms.

The reasons behind the UK's position on the PE changes are not completely clear, although it could be that HMT and HMRC are trying to take a pragmatic view. It is possible they believe the changes are unnecessary as DPT will prevent the worst offences. HMT and HMRC should remember that to be successful, BEPS must ultimately deliver a coherent global approach to international tax. Whether or not the UK government believes it needs to implement a specific measure must be considered in the context of impact on other territories and the companies trying to operate across borders.

Businesses understand that there needs to be a 'new normal' for tax, where the right tax is paid in the right place, but BEPS is fundamentally about coherence so the days of unilateral measures should be over. ■

Rebecca Reading, RSM UK (RSM's Weekly Tax Brief)

State aid developments: *Santander* and *Apple*

The CJEU has issued its decision in *Santander*, and the EC has published the full non-confidential version of its decision in the *Apple* case. They suggest an uphill struggle for Ireland and Apple in their attempt to overturn the EC's decision.

In the week before Christmas when the thoughts of many may have been more attuned to mince pies and office Christmas parties, there were two developments in the application of state aid principles to tax matters. First, the European Commission published the full non-confidential version of its decision in the *Apple* case (previously all we had to go on was the Commission's summary of its decision). Then, in an unwelcome development for Apple and other multinationals trying to challenge the Commission's application of state aid principles to tax matters, the CJEU published its decision in the joined cases of *Santander* and *World Duty Free* (Cases C-20/15 P and C-21/15 P).

The Commission has been using EU state aid rules to challenge tax rulings given by some states to multinationals (such as Starbucks, Fiat, Amazon, Apple and McDonald's) and tax reliefs in some jurisdictions. A key issue in cases where member states and affected companies are appealing the decisions of the Commission is whether the tax rulings in question constitute a 'selective advantage'.

The *Santander* case considered this issue. It concerned a Spanish tax provision which gave a Spanish company acquiring a shareholding of at least 5% in a non-Spanish company a tax deduction for amortisation of goodwill. No such tax relief was available for a Spanish company acquiring a shareholding in another Spanish company.

The Commission decided that the tax relief constituted state aid and directed Spain to recover the benefit of the aid. In 2014, World Duty Free Group (formerly Autogrill España), Banco Santander and Santusa Holding succeeded in getting the General Court of the EU to annul the decision on the basis that the Commission had not established the selectivity of the scheme. The General Court decided that the tax relief was not selective because it did not apply only to any particular category of business or the production of any particular category of goods, but was potentially available to all Spanish companies that wanted to acquire shareholdings of at least 5% in foreign companies. It said that for there to be state aid, the Commission had to identify a particular category of businesses with specific characteristics which were exclusively favoured by the relief.

The CJEU has now overturned the decisions of the General Court and referred the cases back to that court, saying it had erred in law in finding that the Commission had not applied the selectivity test correctly. The CJEU said that a tax measure was selective if it favoured some businesses over other businesses in a comparable factual and legal situation. It said that this was the case even if the measure was in principle open to all companies. The fact that a very large number of businesses could claim a tax relief or that those undertakings belonged to different economic sectors was not sufficient to call into question the selective nature of that measure. The cases have therefore been referred back to the General Court for a further examination of the detailed facts and arguments.

The *Apple* decision relates to tax rulings concerning the method of allocation of profit to the Irish branches of two Apple companies, which were incorporated in Ireland but, under Irish tax law at the time, regarded as not resident in Ireland, even though they were not tax resident anywhere else. This resulted in a large percentage of the profits being attributed to a US head office, but not being taxed anywhere. In the decision the Commission is bold in looking beyond Ireland and questioning whether the US head office has any substance. The decision also reveals that no profit allocation or transfer pricing report prepared by Apple was available to Irish Revenue when examining the ruling requests. Ireland is contesting the decision. It has published a summary of its arguments (see www.bit.ly/2h2Ixs3): in essence, that the Commission has misunderstood Irish law, exceeded its powers and interfered with national tax sovereignty. However, the apparently lax Irish ruling procedure, as described in the Commission's decision, and the *Santander* decision, suggest an uphill struggle for Ireland and Apple in their fight to overturn the decision. ■

Caroline Ramsay & Heather Self, Pinsent Masons

Most read on taxjournal.com

1. **2016: that was the year that was** (15.12.16)
2. **Cases of the year: 2016** (14.12.16)
3. **VAT in 2016: or Brexit, pursued by a bear** (Michael Conlon QC, 14.12.16)
4. **Tax and the City in 2016** (Mark Middleditch, 14.12.16)
5. **The ever-growing challenge of managing tax disputes and risks** (Richard Jeens, 14.12.16)