Tax update – June 2016

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In this Month's edition of the Tax update we look at:
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1. Taxation following the BREXIT vote

I have to confess that I was mistaken in my view about the referendum. The vote to leave was a surprise to me. The volatility of the stock market as well as sterling's volatility comes as no surprise. The future looks uncertain and a great deal will depend on treaty negotiations and whether another recession is likely.

Late amendments to the Finance Bill 2016 have been introduced and I am uncertain whether the bill will receive Royal Assent before Parliament enters the summer recess. The vote to leave may even make another budget necessary, especially if a recession seems probable. If UK tax income falls, then tax rises might be a possibility. Tax is for UK government to decide. The House of Commons Library has published a briefing paper on tax and Brexit:
http://researchbriefings.files.parliament.uk/documents/CBP-7630/CBP-7630.pdf

Explanatory notes on the amendments are at:
https://www.gov.uk/government/publications/finance-bill-2016-committee-of-the-whole-house

The Public Bill Committee which will consider those parts of the Bill not dealt with in the Committee of the Whole House met for the first time on Thursday 30 June and must conclude its proceedings by 14 July.

2. Discovery assessments and developments following Pattullo case

The original intention of the self assessment legislation was to give taxpayers certainty if they had disclosed their position in their returns. The Court of Appeal decision in Langham v Veltema established a precedent and changed the spirit of the law. It was a bad decision but there has been no political will to correct the balance of rights between taxpayers and the fiscal authorities. The original intention had been to encourage disclosure so that the taxpayer had certainty when the enquiry window closed if the return contained sufficient information that an average officer of average experience and ability must have known what was being claimed.

Cynics like myself believe that HMRC has dumbed down and adopted a process now, check later approach. The avoidance scheme involved second hand insurance policies (SHIPs) and attempted to take advantage of the mismatch between income and gains. The taxation of Insurance policies is highly complex and at the time that Mr Pattullo entered the scheme (2003/04) he was unaware that the Court of Appeal would decide in 2009 in the Drummond case that such schemes did not work. The scheme arrangement involved the use of Capital Redemption Contracts (CRCs) and sought to take advantage of the wording of s 37 Taxation and Chargeable Gains Act 1992

Mr Pattullo tried a tax avoidance scheme designed to create a capital loss artificially which could then be set against a real capital gain of some £2.1 million. His argument was that he had made sufficient disclosure in his return to entitle him to certainty after the enquiry window had closed. In other words, Mr Pattullo appealed to the first tier tribunal (FTT) on the grounds that the discovery assessment was invalid. He lost.

In Charlton ([2012] UKUT 770 (TCC)) HMRC had delayed issuing a discovery assessment despite knowing that Charlton had used the SHIPs scheme. This meant that the officer had sufficient information to raise an assessment within the required timescale. His delay meant that the discovery assessment was invalid but the officer was a specialist and experienced in tackling complex avoidance cases especially after Drummond.

In Mr Pattullo's case, the hypothetical officer could not be expected to be aware fully of the complex implications of capital redemption policies (CRC) creating a capital loss for tax purposes without any economic loss. The UT held that the hypothetical officer could not be expected to have specialist knowledge of SHIPS (second hand insurance policies) or CRCs in Mr Pattullo's case. The disclosures in Mr Pattullo's return were insufficiently detailed to disapply a discovery assessment (TMA 1970 s.29(5)).

This 31 page judgement is an interesting read and confirms that the fiscal authorities have become a lot more aggressive about challenging avoidance schemes.

http://www.tribunals.gov.uk/financeandtax/Documents/decisions/Pattullo-v-HMRC.pdf

3. Group relief loss claim denied by appointment of receiver

Farnborough Airport Properties Company Ltd (FAPC) and Farnborough Properties Company Ltd (FPC) (the appellants) and and Piccadilly Hotels 2 Limited ('PH2L') are each at least 75% subsidiaries of Kelucia Limited ('KL') for the purposes of section 152 of the Corporation Tax Act 2010 ('CTA 2010'). On 27 June 2011 PH2L was placed into receivership. This was effected by the appointment of a receiver by Bank of Scotland plc over the whole of the 20 property of PH2L.

FAPC submitted its corporation tax return for the period to 31 May 2012 including a claim to group relief of £5,721,318 surrendered to it by PH2L. FPC submitted its return for the period to 31 May 2012 including a claim to group relief of £4,906,391 surrendered to it by PH2L.

This 16 page judgement is worth a detailed read because it interprets "control" as is defined by CTA 2010 s 1124(2) and concludes that the receiver has control of the company.

The FTT was invited to take account of certain extracts from the proceedings before the Parliamentary Standing Committee in which the group relief provisions of the Finance Bill 1973 were discussed. These provisions, eventually enacted in the Finance Act 1973, are the immediate precursors to the provisions in issue in this case.

Pepper (Inspector of Taxes) v Hart [1993] AC 593 ruled that "reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words."

The FTT judge Dr. Christopher McNall decided that the conditions to refer to Parliamentary material were not satisfied. The clear purpose of section 154, read purposively, is simply to make group relief unavailable between companies which are not under the same control. He concluded that the receivers of PH2L, on the facts of these appeals, control it within the meaning of CTA 2010 s 1124(2). This meant that PH2L ceased to be a member of the group and the loss incurred by PH2L could not be surrendered.

Practitioners need to consider the implications of this decision which is not a precedent but might be persuasive authority. The wide powers of a receiver meant that the receiver had control and the group relationship was lost thereby denying group relief.

http://www.financeandtaxtribunals.gov.uk/judgmentfiles/j9164/TC05184.pdf

4. Termination Payments: not earnings for NIC purposes

Football seems to be dominating the headlines. In Tottenham Hotspur Ltd v R&C [2016] UKFTT 0389, the issue was whether termination payments made to players being transferred were liable to NIC. In August 2011 Tottenham agreed terms with two of its players, Peter Crouch and Wilson Palacios (the "Players") which involved the Players leaving Tottenham to join Stoke City Football Club ("Stoke") and Tottenham making payments to the Players. This appeal concerns the tax and NIC treatment of those payments.

Mr. Crouch was reluctant to leave Tottenham but the club wished to reduce its wage bill. On 31 August 2011, Tottenham and Mr Crouch signed a "Compromise Agreement" and Mr Crouch duly joined Stoke. He received a payment which was less than the wages he would have been entitled to receive until the end of his contract. Entering into the Compromise Agreement enabled Tottenham to save the ongoing cost of his wages and to secure a transfer fee from Stoke. Tottenham considered that the sum they had to pay to Mr Crouch under the Compromise Agreement was worth paying in the light of those benefits.

For Wilson Palacios Tottenham agreed to pay the following sums as a termination payment.
1) £900,000 upon the permanent transfer of his registration
2) A further £510,000 payable on 15 August 2012
The above sums were taxed at source but the first £30,000 was treated as exempt from tax.

The dispute did concern whether the exemption of the first £30,000 was available but the main issue was whether the employer's secondary NIC was due on the payments. The dispute in relation to NICs was more significant. The national insurance position is set out in SSCBA. Section 6(1) imposes a liability to Class 1 national insurance contributions on "earnings" which are defined in s3(1) of SSCBA as including:

> "any remuneration or profit derived from an employment"

The payments that Tottenham made, as part of arrangements to terminate the Players' contracts, were made in return for the surrender of the Players' rights under the contract and fall within the scope of the principle in Henley v. Murray. The payments did not derive "from" the Players' employments and consequently the income tax exemption of £30,000 each was available and the employer was not liable to the secondary NIC.

The club had not previously made 'termination' payments to players leaving employment in a situation where the club received a transfer fee. .Assuming tax and NIC are aligned by April 2018 as announced this year, such contractual payments on terminating an employment may well become liable to NIC.

http://www.financeandtaxtribunals.gov.uk/judgmentfiles/j9123/TC05143.pdf

5. New Advisory Fuel rates for company cars from 1st June

Details are at https://www.gov.uk/government/publications/advisory-fuel-rates

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There will be a general tax podcast updating AAT members on recent developments and decisions available on the website on 31 July 2016.