RPC

Tax update

March 2020

In this month's update we report on (1) updated guidance provided in HMRC's SDLT manual in relation to section 75A, Finance Act 2003; (2) a House of Commons briefing paper discussing insolvency and joint and several liability notices for directors; and (3) a Policy Paper concerning upcoming changes to the regulations for the Non-residents Landlord Scheme. We also comment on three recent cases relating to (1) capital gains losses incurred in respect of properties which were never completed; (2) a landfill "fluff" case; and (3) inheritance tax agricultural property and business property relief.

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HMRC provides updated guidance in its SDLT manual on section 75A Finance Act 2003

On 15 January 2020, HMRC updated its guidance on sections 75A to 75C, Finance Act 2003 (see SDLTM0950). more›

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Lloyd-Webber – capital gains losses allowed in relation to properties which were never completed

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Any comments or queries?

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About this update

Our Tax update is published on the first Thursday of every month, and is written by members of RPC's Tax team.

We also publish a VAT update on the final Thursday of every month, and a weekly blog, RPC's Tax Take.

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Devon Waste Management – waste firms win appeal in landfill "fluff" case

In *Devon Waste Management Ltd and Others v HMRC* [2020] UKUT 1 (TCC), the Upper Tribunal (UT) held that the disposal of certain waste materials did not attract a charge to landfill tax. more>

Charnley – inheritance tax agricultural and business property relief available in relation to farm

In *W Charnley and M Hodgkinson as executors of the estate of Thomas Gill (deceased) v HMRC* [2019] UKFTT 0650 (TC), the FTT held that inheritance tax agricultural property relief (APR) and business property relief (BPR) were available in relation to Mr Gill's estate. more>

News items

HMRC provides updated guidance in its SDLT manual on section 75A Finance Act 2003

On 15 January 2020, HMRC updated its guidance on sections 75A to 75C, Finance Act 2003 (see SDLTM0950).

Section 75A was introduced in 2006 in response to certain arrangements that sought to reduce, or eliminate, a charge to tax in a manner which was considered by HMRC to be contrary to the intention of Parliament.

Section 75A had previously been understood to be an anti-tax avoidance provision to be applied in circumstances where taxpayers had deliberately participated in transactions intended to avoid tax. However, following *Project Blue Ltd v HMRC* [2018] UKSC 30 and *Hannover Leasing v HMRC* [2019] UKFTT 262 (TC), the guidance has been updated so that, if the terms of section 75A are met, it applies regardless of motive.

Although taxpayers will be pleased that these long-awaited changes have been made, uncertainty over the application of section 75A to transactions involving multiple steps remains, especially following removal from the manual of HMRC's statement that it does not consider section 75A to apply to appropriately taxed transactions. Given the scope of section 75A, its severity and HMRC's view that no avoidance motive is required, it is likely that HMRC will seek to rely on the section more than it has done in the past.

The updated guidance can be viewed here.

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Joint and several liability notices for directors

On 5 February 2020, the House of Commons published a briefing paper on the proposal to empower HMRC to issue joint and several liability notices (JSL notices) to directors when certain conditions relating to tax avoidance and insolvency are met. This power would also extend to companies which have repeatedly been involved with insolvency or non-payment of tax.

The proposal is said to be aimed at taxpayers who deliberately abuse the insolvency regime in order to avoid, or evade, their tax liabilities through so-called phoenixism. This is the practice of repeatedly accumulating tax debts without payment by running them through a succession of corporate vehicles where each one will become insolvent and transfer its business, but not its debts, to a new entity.

As currently drafted, where a JSL notice is issued, the individual and company concerned are made jointly and severally liable for the tax debt, unless the company no longer exists, in which case the individual is wholly responsible for the debt.

The following five conditions must be met before HMRC may issue a JSL notice in cases of tax avoidance or evasion:

- the company has engaged in tax avoidance or evasion
- the company is subject to an insolvency procedure, or there is a serious risk that it will be
- the person to whom a notice is issued was responsible for, or complicit in, the avoidance or evasion, or received a benefit knowing it came from the avoidance or evasion
- that there is, or is likely to be, a tax liability arising from the avoidance or evasion, and
- there is a serious possibility that some, or all, of the tax liability will not be paid.

The draft legislation also sets out that the following three conditions must be met before HMRC may issue a JSL notice in a case of repeated insolvency:

- that during the five years prior to the notice, the person has had a pertinent connection to at least two companies which have become subject to an insolvency procedure and which had outstanding amounts due to HMRC
- that the person has a relevant connection to another, newer, company during that five-year period, which carries on a trade similar to at least two of the old companies, and
- at least one of the old companies has an amount outstanding due to HMRC when the notice is issued (and that amount is at least £10,000 and represents at least 50 per cent of the total amount due to creditors).

The briefing paper can be viewed here.

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Changes to the regulations for the Non-Resident Landlords Scheme

On 17 February 2020, HMRC published a tax information and impact note regarding the upcoming changes to the regulations for the Non-Resident Landlords Scheme (NRLS). The regulations have been made to accommodate the corporate interest deductibility restriction rules (CIR) within the NRLS.

From 6 April 2020, non-UK resident companies receiving UK property income will incur UK corporation tax, but the NRLS will still apply. Under the current NRLS, when calculating amounts to be withheld, many agents are unable to deduct financing costs as they cannot be "reasonably satisfied" that the non-resident can deduct under the CIR due to its complexity and the agent's lack of knowledge about the non-resident's affairs.

The regulations alleviate this difficulty by allowing agents to make an irrevocable election to HMRC. The new regulations allow an agent who is collecting rent for a non-resident corporate landlord to make an assumption about the allowance that may be available under the CIR, which applies to corporate taxpayers.

The regulations apply for the NRLS annual period starting on or after 1 April 2020.

The policy paper can be viewed here.

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Case reports

Lloyd-Webber – capital gains losses allowed in relation to properties which were never completed

In *Lloyd-Webber and another v HMRC* [2019] UKFTT 717 (TC), the First-tier Tribunal (FTT) held that a payment made under a contract for the acquisition of land was for the acquisition of contractual rights, rather than for the land, giving rise to an allowable loss on termination of the contract.

Background

At all material times, Lord and Lady Lloyd-Webber (the taxpayers) were UK tax resident and domiciled in England.

In 2007, the taxpayers entered into contracts to purchase two plots of land in Barbados on which two villas were to be built on or before 30 June 2009 (the 2007 contracts).

Pursuant to these contracts, the taxpayers paid a total of $11,293,117 to the vendors for the deposit and subsequent staged payments. The construction work ceased in February 2009, due to cash flow difficulties encountered by the developer.

In 2011, the taxpayers and the vendors agreed to terminate the 2007 contracts. The taxpayers obtained rights to recover some of their money in return for giving up their rights under the original contracts (the 2011 contracts). The villas were not completed.

The taxpayers did not acquire any land or recover any money and claimed capital losses of $3,124.311 for the payments made, in their 2011/12 tax returns, under section 38, Taxation of Chargeable Gains Act 1992 (TCGA).

HMRC issued closure notices disallowing the taxpayers' claims for losses. The taxpayers appealed to the FTT.

HMRC had initially denied relief on the grounds that the taxpayers had never acquired any asset; what they had acquired were contractual rights under the 2007 contracts, which were not assets for CGT purposes. However, by the time the appeals reached the FTT, HMRC's position was that the payments were for the acquisition of the land, and as the taxpayers had not disposed of land (as the land had not been acquired as the properties were never completed), the payments were not deductible under section 38, TCGA.

The issue for determination by the FTT was therefore whether the taxpayers' expenditure had been to acquire contractual rights, or the estates in land, which were the subject matter of the 2007 contracts.

If the FTT concluded that the expenditure was to acquire contractual rights, as such rights are assets, the expenditure could give rise to a loss for CGT purposes. If it concluded that the expenditure was to acquire the estates in land, as the land had never been acquired (due to non-completion of the properties), the expenditure would not give rise to a loss for CGT purposes.

FTT decision

The appeals were allowed.

In determining what the taxpayers had paid for under the 2007 contracts, the FTT said that an objective approach was required. The FTT concluded that, although the taxpayers entered into the 2007 contracts with the intention of acquiring completed villas, they acquired only the contractual rights. These rights, the only assets acquired, constituted distinct assets which were later disposed of when the 2011 contracts were entered into, and the losses generated on that disposal were allowable for CGT purposes.

Comment

The taxpayers in this case clearly suffered a loss following significant expenditure on properties which were not completed and by allowing relief for this loss, the FTT's decision is arguably consistent with the CGT regime which, according to Lord Wilberforce in *Aberdeen Construction Group Ltd v HMRC* [1978] AC 885, is to tax capital gains and make allowances for capital losses.

The FTT also, importantly, confirmed that the subjective intention of the parties was irrelevant when determining what was actually acquired. That called for an objective analysis of the facts. Although the taxpayers entered into the 2007 contracts with the intention of ultimately acquiring completed villas, the payments made by them were only for the acquisition of contractual rights.

Interestingly, the FTT revealed that HMRC had accepted that the Upper Tribunal's (UT) decision in *Hardy v HMRC* [2016] UKUT 332 (TCC), which was initially relied on by HMRC, had been wrongly decided, because the earlier decision of the Court of Appeal in *Underwood v HMRC* [2009] STC 239, had not properly been cited to the UT in that case. As a result, it was not disputed that the taxpayers acquired assets (ie the rights under the 2007 contracts), which were later disposed of.

Given the wider implications of this decision to other taxpayers, it would not be surprising if HMRC was to seek to appeal this decision to the UT.

The decision can be viewed here.

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Devon Waste Management – waste firms win appeal in landfill "fluff" case

In *Devon Waste Management Ltd and Others v HMRC* [2020] UKUT 1 (TCC), the UT held that the disposal of certain waste materials did not attract a charge to landfill tax.

Background

The appellants operate in the field of waste management and disposal. In so far as they dispose of materials as waste by way of landfill at landfill sites, they are liable to pay landfill tax.

Landfill tax was introduced by Finance Act 1996. Changes were made to the landfill tax regime in 2009, as a result of the decision of the Court of Appeal in *HMRC v Waste Recycling 35 Group Ltd* [2008] EWCA Civ 849 (*WRG*). The 2009 changes were made by Finance Act 2009, with effect from 1 September 2009. The result of these changes was that certain activities were treated as taxable disposals under section 40, Finance Act 1996, whereas they had not been so under the pre-2009 regime.

Section 40, Finance Act 1996, as it was in force at the relevant time, provided as follows:

"(1) Tax shall be charged on a taxable disposal.
(2) A disposal is a taxable disposal if –
(a) it is a disposal of material as waste,
(b) it is made by way of landfill,
(c) it is made at a landfill site, and
(d) it is made on or after 1st October 1996."

In relation to section 40(2)(a), section 64, Finance Act 1996, provides that a disposal of material is a disposal of it as waste: "if the person making the disposal does so with the intention of discarding the material".

The appellants and HMRC were in dispute as to whether certain waste material used in landfill sites to provide a protective layer against leakage, was indistinguishable from other waste material disposed of by way of landfill and was therefore subject to landfill tax pursuant to section 40, Finance Act 1996.

The appellants appealed to the FTT.

There were two appeals before the FTT. The issue considered in the first appeal was whether certain waste material from households, shops and offices was subject to landfill tax. Some of this waste material (known as 'fluff') was selected to be used as a layer to protect against leakage of polluting liquids and gases. When used in this way, the fluff performed a function in the landfill rather than simply being waste that had been disposed of.

The second appeal related to a material known as 'EVP', which was similar to fluff and carried out a similar function.

The appellants argued that fluff and EVP was not a taxable disposable under FA 1996, on the basis that WRG was authority for the principle that making use of the material for the site operator's purposes in connection with regulatory compliance was inconsistent with an intention to discard, even though the materials had been disposed of at landfill sites, because some use was made of it in connection with the design and operation of the landfill sites.

FTT decisions
The appeals were dismissed.

The FTT found that the use made of the material disposed of was only an indicator of whether there was an intention to discard the material, and that use was not conclusive in determining whether it was discarded. In the view of the FTT, the use of such material as a protective layer was not sufficient to negate an intention to discard it as it was destined for landfill in any event and because there was no physical difference between that material and the other general waste disposed of at the landfill sites. The FTT therefore held that the disposal of the waste was a taxable disposal by way of landfill, for the purposes of section 40(2)(b), Finance Act 1996.

The appellants appealed.

UT decision
The appeals were allowed.

HMRC argued that there was a "taxable disposal" because the material in question was discarded by the site operators and so was disposed of “as waste”.

The appellants argued that there was no taxable disposal because, although disposed of, the material was not discarded because some use was made of it in connection with the design and operation of the landfill sites.

In the view of the UT, the FTT had misinterpreted the ratio of *WRG*. That case decided that if a site operator disposed of material at a landfill site with the intention and effect of making use of its properties for its own purposes, including regulatory compliance, the disposal was not made with the intention of discarding the material. The disposals were therefore not taxable disposals.

The UT exercised the power conferred on it by section 12, the Tribunals, Courts and Enforcement Act 2007, to re-make the FTT’s decision.

Comment
The FTT fell into the “once waste, always waste” trap warned against in *WRG* and *Parkwood Landfill Ltd v HMRC* [2002] EWCA Civ 1707. It is not the character of the material that is determinative of whether it is deposited as waste, but rather the intention with which it is deposited.

In the instant case, the appellants, when disposing of fluff and EVP at their landfill sites, intended to and did make use of the material’s properties for their own purposes. This was sufficient to prevent the disposal of the material from being subject to landfill tax.

The decision can be viewed here.

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Charnley – inheritance tax agricultural and business property relief available in relation to farm

In *W Charnley and M Hodgkinson as executors of the estate of Thomas Gill (deceased) v HMRC* [2019] UKFTT 0650 (TC), the FTT held that inheritance tax agricultural property relief (APR) and business property relief (BPR) were available in relation to Mr Gill’s estate.

Background
Mr Gill died on 20 November 2013. Mr Charnely and Mr Hodgkinson (the appellants) were executors of Mr Gill’s estate.

Mr Gill owned Woodlands Farm (the farm), which consisted of:

- a house in which he lived
- a yard, brick barn and outbuildings
- 21. 19 acres of agricultural land (permanent pasture), and
- a range of buildings let for storage of commercial grass and cutting equipment.

Although Mr Gill did not own any livestock, he did allow farmers, who held an annual grazing licence, to graze their animals on his agricultural land. He had day to day involvement checking the livestock. He also grew vegetables on an acre of the land and sold and/or exchanged them at a local shop.

Upon Mr Gill's death, the appellants claimed APR and BPR, in relation to the farm.

HMRC refused the APR, except in relation to the agricultural land. This was on the basis that the house was not a "farmhouse" and did not constitute "agricultural property", within the meaning of section 115(2), Inheritance Tax Act 1984 (IHTA) and the other buildings were not occupied by Mr Gill for the purpose of agriculture such that section 117(b), IHTA, was satisfied.

HMRC also refused the BPR claim, on the basis that the farm was an investment in land, rather than land used for farming.

The appellants appealed to the FTT.

FTT decision
The appeal was allowed.

The FTT concluded that the farmhouse and other buildings were occupied for the purpose of agriculture and the business was that of farming and not wholly, or mainly, the holding of investments.

In the view of the FTT, the scope of the phrase "for the purposes of agriculture", in section 117, IHTA, was wide, and accordingly a restrictive approach should not be taken.

The FTT found that Mr Gill carried out the duty of a farmer, even though he did not technically own livestock on his farm. His activities were not carried out in order to let the land or prepare the land to let, which would be more akin to the activities of an investor rather than a farmer. The FTT disagreed with HMRC's contention that the land upon which vegetables had been grown was merely a 'vegetable patch', commenting that this argument failed to consider the history and intended use of the land and the evidence that crops had been grown on the land in the past.

Comment
This decision provides helpful guidance to those claiming APR and BPR. In making its decision, HMRC focused on each constituent part of the farm in isolation rather than looking at the property as a whole. It had failed to examine the history of the agricultural land. The detailed evidence of the agricultural use to which the property was put, which was relied upon by the appellants in support of their case, was critical to the success of their appeal.

The decision can be viewed here.

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