Corporate tax update

July 2020

Welcome to the latest edition of our Corporate Tax Update, written by members of RPC's tax team. This month's update reports on some of the key developments from June 2020. Included in this update are a summary of a decision on the correct tax treatment of bonuses paid to members of an LLP, and an AG's opinion on the VAT reverse charge position of services supplied for non-economic activity purposes. There's also an update on HMRC guidance on "exceptional" circumstances in which anticipated losses can be used to claim back overpaid corporation tax. Finally, this update also reports on Covid-19 driven extensions to DAC6 reporting deadlines and to deadlines for notifying VAT options to tax. As ever we hope you, your family and friends are all staying safe.

Bonus payments to LLP members subject to employed earner NICs

On 25 June 2020, the First-tier Tribunal held that bonus payments paid to former employees at a time when they were members of an LLP were subject to class 1 national insurance contributions (NICs).

An UnWellcome Opinion? – AG opines that reverse charge treatment applies to investment management services supplied to taxable person for purposes of non-economic activities

On 25 June 2020, Advocate General Hogan (AG) opined that the VAT place of supply of services supplied by a non-EU supplier to a UK taxable person, for the purposes of a non-economic activity, was the UK. As a result, in the AG's view section 7A of VATA 1994 was not contrary to EU law.

DAC6 reporting deadlines in UK deferred by 6 months

On 25 June 2020, HMRC confirmed that the UK will defer implementation of the initial reporting deadlines required by Directive 2018/822 (DAC6).

VAT option to tax – further temporary extension of deadline

On 23 June 2020, HMRC announced that the temporary extension of the deadline for notifying VAT options to tax would continue until 31 October 2020.

ABOUT THIS UPDATE

Our corporate tax update is published every month, and is written by members of RPC's Tax team.

We also publish other Tax updates on the first and last Thursday of every month, and a weekly blog, RPC's Tax Take.

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"Exceptional circumstances" in which anticipated losses may allow refunds of paid corporation tax – HMRC guidance

On 16 June 2020, HMRC published updated guidance on obtaining corporation tax payment refunds based on anticipated losses suffered in subsequent (but not yet ended) accounting periods. This guidance is likely to be of particular interest to companies severely impacted by the Covid-19 pandemic.

HMRC Debts: Priority on Insolvency – draft Regulations published

On 4 June 2020, a draft of The Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020 was provided to the Public Bill Committee. The Regulations are due to come into force on 1 December 2020.

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Bonus payments to LLP members subject to employed earner NICs

On 25 June 2020, the First-tier Tribunal[1] held that bonus payments paid to former employees at a time when they were members of an LLP were subject to class 1 national insurance contributions (NICs).

The decision concerned bonus payments paid to 5 members of Charles Tyrwhitt LLP. The 5 LLP members had all been employees of the LLP before becoming members and had been admitted to the Long-Term Incentive Plan (LTIP), pursuant to which the bonus payments were made, whilst they were employees. The LLP originally accounted for income tax under PAYE and for primary and secondary employed earner NICs. Subsequently, the LLP claimed repayment from HMRC of the employed earner NICs (some £1m in total) arguing that the bonus payments were fixed amounts of profits to which the 5 members were entitled as LLP members. HMRC, in refusing to make the NICs repayment, maintained that the bonuses constituted deferred remuneration in respect of the members' prior periods of employment.

The Tribunal dismissed the LLP's appeal, agreeing with HMRC's view of the nature of the bonus payments.

The Tribunal found, as a matter of fact, that the 5 individuals were members of the LLP (and not employees) at the **date of payment** of the bonuses.

However, the Tribunal agreed with HMRC that the payments satisfied the criteria of being both earnings from employment within s.62 of ITEPA 2003 and earnings in respect of an employed earner's employment within s.6 of the Social Security Contributions and Benefits Act 1992. The LTIP schemes were clearly open only to employees and the 5 members were all employees (and not members of the LLP) during the LTIP calculation periods. The 5 members would have been subject to employment tax on the bonus payments had they left the LLP as 'good' leavers.

The Tribunal was not persuaded by the LLP's argument that members could, at times when they were members (as they all were at the time of payment of the bonuses in issue here), only receive payment from the LLP by way of a share of trading profits.

The decision can be viewed here.

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An UnWellcome Opinion? – AG opines that reverse charge treatment applies to investment management services supplied to taxable person for purposes of non-economic activities

On 25 June 2020, Advocate General Hogan (AG) opined[2] that the VAT place of supply of services supplied by a non-EU supplier to a UK taxable person, for the purposes of a non-economic activity, was the UK. As a result, in the AG's view section 7A of VATA 1994 was not contrary to EU law.

The Wellcome Trust Ltd (WTL) received supplies of investment management services from suppliers (investment managers) established outside of the EU. WTL accounted for VAT on these services under the reverse charge mechanism on the basis that these supplies were made in the UK (pursuant to s.7A of the VATA 1994)

WTL wished to recover input tax incurred by it on these services. It therefore made claims under s.80 of the VATA 1994 for overpaid output tax.

However, the ECJ had already held[3] that the investment activities of WTL, for which these investment management services are obtained, amount to non-economic activities for VAT purposes. It was accepted by the parties that:

- WTL did not use the investment management services for taxable supplies within the meaning of Article 2(1)(c) of the VAT Directive, and
- WTL is not a "taxable person acting as such" for the purposes of Article 2(1)(c) when it engages in investment activities[4].

WTL's argument was therefore that, although WTL is a taxable person under Article 2 of the VAT Directive, it is not a taxable person "acting as such" for the purposes of Article 44 of the VAT Directive and in respect of those investment activities already held by the ECJ to amount to non-economic activities.

The question referred to the ECJ by the Upper Tribunal was essentially whether the use of the words "a taxable person acting as such" in Article 44 of the VAT Directive had the effect of excluding WTL from the scope of Article 44 in relation to the investment management services supplied to it by non-EU managers. WTL's argument was that:

- Article 44 applied to a taxable person in respect of supplies to it for the purposes of its taxable supplies, but
- Article 44 does not apply to a taxable person in respect of supplies to it for the purposes of its non-economic activities.

The AG however concluded that although the use of the words "acting as such" in Article 44 was "clumsy", the effect of the deeming provision in Article 43 of the VAT Directive is that Article 44 applies to all services supplied to a taxable person (such as WTL) unless received for personal use. These words do not – in the AG's view – exclude from Article 44 services that are supplied to taxable persons for non-economic activity purposes. Unless the ECJ disagrees with the AG, taxable persons will need to reverse charge VAT in these scenarios but will be unable to recover input tax if the supplies are used for the purposes of non-economic activities.

The AG's opinion can be viewed here.

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DAC6 reporting deadlines in UK deferred by 6 months

On 25 June 2020, HMRC confirmed that the UK will defer implementation of the initial reporting deadlines required by Directive 2018/822 (DAC6). The reporting deadlines will be delayed by 6 months so that:

- 28 February 2021 is the deadline for reporting of cross-border reportable arrangements with an implementation first step between 25 June 2018 and 30 June 2020
- 31 January 2021 is the deadline for reporting of cross-border arrangements with an implementation first step, or advised on etc. by an intermediary between 1 July 2020 and 31 December 2020.

This deferral is in response to the Covid-19 pandemic and the UK is taking the same approach as most (though not all) EU member states. This announcement does not alter any other aspect of DAC6, which took effect in the UK on 1 July 2020.

HMRC's guidance on this deferral can be viewed here.

VAT option to tax – further temporary extension of deadline

On 23 June 2020, HMRC announced that the temporary extension of the deadline for notifying VAT options to tax would continue until 31 October 2020.

Under normal circumstances, HMRC must be notified of an option to tax within 30 days.

As a result of social distancing measures imposed in response to the Covid-19 pandemic, HMRC have temporarily relaxed these requirements. The new deadline is 90 days from the date the decision to opt to tax was taken.

This extended[5] deadline for notifying HMRC of an option to tax applies to decisions to opt to tax made between 15 February and 31 October 2020.

The announcement can be viewed here.

"Exceptional circumstances" in which anticipated losses may allow refunds of paid corporation tax – HMRC guidance

On 16 June 2020, HMRC published updated guidance on obtaining corporation tax payment refunds based on anticipated losses suffered in subsequent (but not yet ended) accounting periods. This guidance is likely to be of particular interest to companies severely impacted by the Covid-19 pandemic.

Corporation tax paid before the 'normal' due date (being 9 months and 1 day after the end of the accounting period) is repayable up until that due date without pre-conditions.

Where a taxpayer company seeks repayment of corporation tax after this normal due date, the newly-updated guidance confirms that claims for repayment based on losses in the subsequent accounting period (but where such period has not ended – so-called anticipated losses) may be considered in "exceptional" circumstances.

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The guidance gives, as an example, the scenario where the anticipated losses in the subsequent period will be so great that they are likely to comfortably exceed any relevant income in that period and the amount of taxable profits in the prior period that relate to the repayment claim. The guidance extends to the position for "large" companies that pay corporation tax in quarterly instalments.

The updated HMRC guidance can be viewed here and here.

HMRC Debts: Priority on Insolvency – draft Regulations published

On 4 June 2020, a draft of The Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020 was provided to the Public Bill Committee. The Regulations are due to come into force on 1 December 2020.

The draft Regulations set out the debts due to HMRC that will have 'secondary' preferential status in insolvencies from 1 December 2020. They are debts in respect of PAYE income tax, employee NICs, construction industry scheme deductions and student loan repayments. VAT debts are to be treated in the same way, though are not covered by these draft Regulations.

HMRC would remain an unsecured creditor for direct taxes such as corporation tax and employer NICs.

The draft Regulations can be viewed here.

ANY COMMENTS OR QUERIES

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ENDNOTES

1. In *Charles Tyrwhitt LLP v HMRC* [2020] UKFTT 272 (TC).
2. In *HMRC v Wellcome Trust Ltd* (Case C-459/19).
3. In *Wellcome Trust Ltd v CCE* (Case C-155/94).
4. As well as managing a large endowment portfolio, WTL also has a number of comparatively minor activities (such as sales, catering and property rental) in respect of which it is VAT-registered.
5. Following earlier announcements covering decisions to opt made up to 31 May, and then up to 30 June.