RPC

Corporate tax update

October 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 September 2020. Included in this update are summaries of the Chancellor's tax announcements as part of the Winter Economy Plan and the EC's decision to appeal the decision of the European General Court in the *Apple* state aid case. There are also updates on new HMRC guidance on off-payroll working for private businesses and the VAT treatment of payments for early termination of contracts. As ever we hope you, your family and friends are all staying safe.

Business Asset Disposal (BAD) Relief – CGT manual updated

Towards the end of September, HMRC updated its published Capital Gains Manual following the changes to Entrepreneurs' Relief (ER) announced earlier this year. By way of reminder, at the Spring Budget in March an immediate reduction in the ER lifetime limit from £10m to £1m was announced. So-called 'anti-forestalling' rules were also announced to prevent pre-Budget tax planning from allowing sellers to retain the £10m limit. At the same time, the name of the relief was changed from ER to Business Asset Disposal Relief.

European Commission to appeal General Court's judgment in *Apple* state aid case

On 25 September 2020, the European Commission (EC) published a statement by Margrethe Vestager (Executive Vice-President) (MV) on the EC's decision to appeal the General Court's judgment on the *Apple* state aid case.

Winter Economy Plan – VAT and self-assessment taxpayer announcements

On 24 September 2020, the Chancellor announced the Government's Winter Economy Plan. He had already announced the cancellation of the planned Autumn 2020 Budget. The Plan is designed to protect the UK economy as the country enters into a winter dominated by the COVID-19 pandemic.

UK and Austria enter into agreement for relief from Austrian dividend withholding tax

On 18 September 2020, HMRC published a "competent authority agreement" between the UK and Austria. This agreement sets out the process to be followed in order to claim relief at source from Austrian withholding taxes on dividends paid to a UK parent company.

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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Off-payroll working rules from April 2021 – updates to HMRC manual

On 17th September 2020, HMRC updated its Employment Status Manual. The updates address the extended 'off-payroll working' rules for medium and large private sector businesses (with effect from 6 April 2021).

HMRC Debts (priority on insolvency) – Regulations made

On 11 September 2020, the Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020 were made. The Regulations will come into force on 1 December 2020.

OTS extends deadline for CGT call for evidence

On 8 September 2020, the Office of Tax Simplification (OTS) announced an extension of the deadline for providing detailed comments on its call for evidence on capital gains tax (CGT, published on 14 July 2020). Detailed comments are now sought by 9 November 2020.

HMRC issue new guidance on VAT treatment of early termination fees and compensation

On 2 September 2020, HMRC published Revenue & Customs Brief 12 (2020). At the same time it updated the VAT Supply and Consideration Manual. The Brief and updated guidance sets out HMRC's view that fees and compensation paid for early termination of a contract will, typically, be consideration for a supply (subject to VAT).

Business Asset Disposal (BAD) Relief – CGT manual updated

Towards the end of September, HMRC updated its published Capital Gains Manual following the changes to Entrepreneurs' Relief (ER) announced earlier this year. By way of reminder, at the Spring Budget in March an immediate reduction in the ER lifetime limit from £10m to £1m was announced. So-called 'anti-forestalling' rules were also announced to prevent pre-Budget tax planning from allowing sellers to retain the £10m limit. At the same time, the name of the relief was changed from ER to Business Asset Disposal Relief.

The Manual updates cover, in particular, HMRC's approach to the anti-forestalling rules and unconditional contracts, share exchanges and reorganisations.

The updated manual pages can be viewed here.

European Commission to appeal General Court's judgment in *Apple* state aid case

On 25 September 2020, the European Commission (EC) published a statement by Margrethe Vestager (Executive Vice-President) (MV) on the EC's decision to appeal the General Court's judgment on the *Apple* state aid case.

This long-running case began in August 2016, when the EC announced its decision that Ireland had provided illegal state aid to Apple amounting to EUR 13bn plus interest. The EC, in the case of *Ireland and Apple*, found that the tax rulings gave Apple an unfair advantage (amounting to illegal state aid) as the rulings approved an artificial allocation of profits within two Irish incorporated Apple subsidiaries. The two Irish companies held the rights to use the intellectual property of the Apple group to sell and manufacture Apple products outside of the Americas. Apple's European sales operations were set up so that all sales (and therefore significant profits) were recorded in Ireland through these two companies. The Irish tax authority rulings agreed to an internal allocation of these profits so that the majority of the profits were allocation to a "head office" not located in Ireland (or indeed any other jurisdiction) and that had no premises or employees. Only a small proportion of these profits was allocated to the Irish branch of these Irish companies (and therefore subjected to Irish tax).

Both Apple and the Irish government quickly announced that they intended to appeal the EC's 2016 decision. Apple argued that most of its profits are taxed in the US, where the group's value is created. The EC's 2016 decision gave rise to an unusual situation whereby a taxpayer has been told to pay historic overdue taxes to a national government that asserts such tax is not due.

In July 2020, the European General Court (EGC) ruled in favour of Apple and the Irish Government in this case. The EGC's decision noted that "the commission did not prove that the contested tax rulings were the result of discretion exercised by the Irish tax authorities." The EGC decision, which effectively ruled in favour of the Irish Government and Apple on all points, was somewhat surprising. Few expected that Apple would ultimately be forced to pay the full €13bn, but many observers would have expected the Court to come to a decision that Apple had underpaid some tax.

In her statement, MV says that the EC considers that important legal issues are raised by the EGC's judgment in the context of tax planning and state aid. She also says that the EGC made a number of errors of law in its judgment.

The final ruling on this case could have far-reaching implications for EU-US relations.

The statement can be viewed here.

Winter Economy Plan – VAT and self-assessment taxpayer announcements

On 24 September 2020, the Chancellor announced the Government's Winter Economy Plan. He had already announced the cancellation of the planned Autumn 2020 Budget. The Plan is designed to protect the UK economy as the country enters into a winter dominated by the COVID-19 pandemic. The main tax announcements were:

- The extension of the reduced (5%) rate of VAT for the hospitality and tourism sectors. This reduced rate will stretch to 31 March 2021 (previously due to end on 12 January 2021). See here for our blog on this when first announced in July.
- A new payment scheme for VAT payments that were deferred earlier in the year. Those businesses (over half a million, according to the Government) that took advantage of the March-June 2020 VAT deferral will be able to spread their VAT payments over the financial year 2021-22, in 11 equal instalments (rather than paying in full in March 2021). Businesses will have to 'opt-in' to choose this payment option.
- More time for the self-employed and other taxpayers to pay taxes due in January 2021. Taxpayers with up to £30,000 of self-assessment tax liabilities due will be able to use HMRC's 'time to pay' facility. This will enable payment over an additional 12 months.

The Winter Economy Plan can be viewed here.

UK and Austria enter into agreement for relief from Austrian dividend withholding tax

On 18 September 2020, HMRC published a "competent authority agreement" between the UK and Austria. This agreement sets out the process to be followed in order to claim relief at source from Austrian withholding taxes on dividends paid to a UK parent company.

Such relief is provided for under the UK-Austrian double tax treaty. The agreement provides for relief to be claimed using the applicable form in Austria, which includes a space for HMRC to confirm the UK residence of the parent company.

From the end of the Brexit transition period (due to end at 11pm on 31 December 2020), UK parent companies will no longer be able to rely on the EU Parent-Subsidiary Directive. That these sort of agreements are being discussed/concluded is welcome, albeit carrying extra administrative formalities.

The agreement can be viewed here.

Off-payroll working rules from April 2021 – updates to HMRC manual

On 17th September 2020, HMRC updated its Employment Status Manual. The updates address the extended 'off-payroll working' rules for medium and large private sector businesses (with effect from 6 April 2021).

Of particular interest are the new pages dealing with "medium/large" businesses (which are subject to the new rules from April 2021) vs "small" businesses (which will continue to be subject to the existing 'IR35' rules). The new guidance addresses some practical issues in applying these tests and includes some examples.

The updated guidance also gives further detail (and, again, examples) of the obligations an in-scope private sector business will have in respect of "status determination statements".

The updated guidance can be viewed here.

HMRC Debts (priority on insolvency) – Regulations made

On 11 September 2020, the Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020 were made. The Regulations will come into force on 1 December 2020.

The 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 Regulations.

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

The Regulations can be viewed here.

OTS extends deadline for CGT call for evidence

On 8 September 2020, the Office of Tax Simplification (OTS) announced an extension of the deadline for providing detailed comments on its call for evidence on capital gains tax (CGT, published on 14 July 2020). Detailed comments are now sought by 9 November 2020.

The OTS call for evidence follows a request from the Chancellor and seeks comments on CGT principles, technical detail and practical operation. In all, 43 questions are set out in the call for evidence with specific areas mentioned including CGT rates, reliefs and exemptions, interactions with income tax, boundary between income tax and CGT in relation to employees, deferred consideration, earn-outs, QCBs and non-QCBs, EIS/SEIS/VCT disposal relief and valuations.

The call for evidence can be viewed here.

HMRC issue new guidance on VAT treatment of early termination fees and compensation

On 2 September 2020, HMRC published Revenue & Customs Brief 12 (2020). At the same time it updated the VAT Supply and Consideration Manual. The Brief and updated guidance sets out HMRC's view that fees and compensation paid for early termination of a contract will, typically, be consideration for a supply (subject to VAT).

Previously, HMRC had typically regarded payments described as compensation as being outside the scope of VAT. However recent ECJ case law[1] has shown this to not always be the case. In order to fall outside the scope of VAT, there must be no direct link between the payment and a supply of goods or services.

HMRC's view now is that payments for early termination will amount to consideration for a supply (regardless of whether or not the contract in question allows for early termination).

Revenue & Customs Brief 12 (2020) can be viewed here.

ANY COMMENTS OR QUERIES

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ENDNOTES

1. *Meo* (C-295/17) and *Vodafone Portugal* (C-43/19).