Technical CONNECTION

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THE SPRING STATEMENT

On 5 December the Chancellor was questioned by the Treasury Select Committee. Ostensibly the topic was "The UK's economic relationship with the European Union", but Mr Hammond took the opportunity to tell the Committee that "The Spring Statement will be some time between the end of the February recess and the end of March". That probably means no earlier than 26 February, as Parliament resumes work on 25 February after its mid-winter recess.

COMMENT

An early Spring Statement could mean that the next part of the Office of Tax Simplification (OTS) report on inheritance tax simplification (which is due to cover technical tax aspects) will arrive after the Chancellor's set piece, as happened with the OTS's earlier report on administrative aspects.

AMENDMENT TO TAX RETURNS – CALL FOR EVIDENCE

The Government recently published a call for evidence – Amendment to Tax Returns. The Government intends to explore how tax returns are amended and it is keen to develop an amendments process that is simple and transparent.

While there are currently several different ways to amend tax returns which vary according to the type of tax involved, value, accounting period and turnover, this document sets out the

current amendment processes for income tax, corporation tax and VAT, including who can make amendments, the time limits for making amendments and the options for how to actually submit them.

The main purpose of this consultation is to gather evidence on the issues taxpayers and agents face when making amendments to returns, and to understand whether there is scope for alignment of amendment methods across the taxes. The closing date for comments is 6 February 2019.

SCOTLAND LAND AND BUILDINGS TRANSACTION TAX

Buried away in the December 12 Scottish Budget statement were the following announcements:

- For those purchasing additional properties it is proposed to 'increase the Additional Dwelling Supplement from 3% to 4%. Legislation will be laid before Parliament tomorrow and, if approved, the rate change will come into force on 25 January 2019.'

- The Land and Buildings Transaction Tax (LBBT) on *non-residential* property would be amended:

  - The lower rate is being cut from 3% to 1%;
  - The upper rate rising from 4.5% to 5%; and
  - The upper rate threshold will fall by £100,000 to £250,000

These changes are proposed to come into force from 25 January 2019 but will not apply if the contract for a transaction was entered into before 12 December 2018. The new table will look like this:

Purchase Price £	**LBTT Rate %**
Up to £150,000	0
£150,001 - £250,000	1
Over £250,000	5

The LBBT top rate and threshold for non-residential property now matches the SDLT rate.

HMRC GUIDANCE – THE DEEMED DOMICILE RULES AND CLEANSING MIXED FUNDS – UPDATE FROM THE CIOT

From 6 April 2017 those who are resident in the UK for 15 of the previous 20 tax years are deemed UK domiciled for the purposes of income tax, capital gains tax and inheritance tax. The effect of this deemed domicile rule is to tax long-term non-UK domiciled individuals on their worldwide income and gains as they arise, so there is no ability for them to claim the remittance basis of taxation.

Two provisions were introduced to help long-term residents move from the remittance basis to worldwide taxation, namely the ability:

- to rebase the value of certain foreign assets to 5 April 2017; and

- as an interim measure to enable all remittance basis users to cleanse mixed funds in the two-year period to 5 April 2019.

Note that whilst there is a two-year window - 6 April 2017 to 5 April 2019 - during which cleansing transfers and the associated nomination can take place, the actual remittance of cleansed funds can happen at any time (therefore it could be well outside of the two-year window).

The Chartered Institute of Taxation (CIOT) has published professional body Questions and Answers, which are intended to assist professional advisers with a number of areas of uncertainty in the tax legislation.

Given how complex this area of taxation is, individuals are advised to seek professional advice from a specialist before taking any action. However, we think these published Qs and As may be useful as an initial reference point.

HMRC's comments on the questions and suggested answers are reflected in the document. Where the document indicates that further discussion is required, it means that HMRC does not necessarily agree with the suggested answer and so it should be treated with caution until further clarification has been published. A further update will be issued when these discussions have taken place.

COMMENT

The draft suggested answers reflect the views of the committee members of the professional bodies involved in their preparation on the generic issues addressed in the questions and draft suggested answers. The questions and draft suggested answers are intended to assist professional advisers in considering the issues, do not constitute advice and are not a substitute for professional consideration of the issues by such a professional adviser in each client's specific context.

CAN IGNORANCE OF THE LAW BE AN EXCUSE IN RELATION TO TAX MATTERS?

One of the most fundamental legal principles is that ignorance of the law is not an excuse and indeed can harm you (or "Ignorantia iuris non excusat" and "Ignorantia iuris nocet" for those classically minded). It seems, however, that in certain cases relating to the filing of tax returns, the Courts have accepted that ignorance of the law can in fact be a reasonable excuse.

All the cases in question involved non-UK residents who disposed of UK properties and failed to complete the non-resident capital gains tax ("NRCGT") return within the 30-day deadline. In all cases the taxpayers claimed that they were unaware of the requirement to file the return within the new time limit and this was a reasonable excuse for failing to comply with the legislation.

The recent case of *Bradshaw v HMRC* [2018] UKFTT 0368 (TC) is a good example. Mr and Mrs Bradshaw, who emigrated to Canada in 2004, were still resident in Canada when they sold their UK property in 2015. They filed a CGT return electronically just over a year later declaring no CGT liability.

HMRC issued a late filing penalty on the grounds that the NRCGT returns were not filed within 30 days of the disposal of the UK property as required by section 12ZB Taxes Management Act 1970, which was introduced in the Finance Act 2015 in relation to disposals made on or after 6 April 2015.

The taxpayers appealed the penalty and requested an internal review which upheld the penalty. The taxpayers appealed to the First-tier Tribunal (FTT) which allowed the appeal and cancelled the penalties. Mr and Mrs Bradshaw claimed that their ignorance of the law was a reasonable excuse as HMRC had failed to publicise the introduction of the new provisions. HMRC contended that ignorance of the law is never a reasonable excuse. The Tribunal was very critical of the fact that HMRC did not publicise the new provisions sufficiently and upheld the appeal.

This was in fact not the first decision in relation to NRCGT returns. The previous ones were *McGreevy v HMRC* (2017) and *Scowcroft v HMRC* (2018) where the Tribunal also found that the taxpayer's ignorance of the law in relation to the NRCGT returns was a reasonable excuse.

It should be noted that the First-tier Tribunal decisions are not binding which means that a judge in another FTT is free to find differently. In fact there have been other cases where the judges found in favour of HMRC, for example *D & J Hesketh v HMRC* (2018) and *R Welland v HMRC* (2018) where the judge found that HMRC's failure to publicise the changes and warn taxpayers could not amount to a reasonable excuse.

In yet another case, *Raymond Hart v HMRC* (2018), the judge accepted that in certain cases ignorance of the law concerning difficult questions could be an excuse. However, he did not believe that an obligation to submit a return was particularly complex and so upheld HMRC's penalty.

In the most recent case, *J Wickenden v HMRC* (2018), Mrs Wickenden and her husband were resident in France and had been registered as non-resident landlords since 2010. In 2015, Mrs Wickenden sold a property in the UK but did not notify HMRC of the disposal until January 2017. She claimed she was not aware of requirements to file a NRCGT return within 30 days and neither was her solicitor. In this case the judge found against HMRC and allowed the appeal.

COMMENT

So, there you have it. On the one hand we have had a few cases where ignorance of the law has been accepted as an excuse, albeit in a very narrow set of specific cases, and, obviously, based on the facts of each case. On the other hand, it is also clear that it very much depends on which judge the taxpayer ends up before and none of the decisions are legal precedents.

There have apparently been over 700 appeals on late filing penalties in relation to the NRCGT return which clearly seems to support the contention that the change in the law was not publicised well enough. Given the number of cases HMRC has lost, presumably it will take greater care in publicising changes to taxation in the future. Meanwhile, it would generally not be wise to rely on this particular excuse when dealing with HMRC.

IS THERE A FUTURE FOR ONLINE WILLS?

In July 2017 the Law Commission launched a public consultation on reforming the law of Wills. The consultation period closed in November 2017 so what has been happening since then? It seems that, unfortunately, the timetable for this project has slipped back as the Government has asked the Law Commission to consider the law relating to how and where couples can be married so this new weddings project has been given priority.

As for the Wills reform, the Law Commission has yet to complete the analysis of the responses to the consultation, then has to formulate the policy and prepare a final report. Following that the Commission will instruct parliamentary counsel to draft a Bill that would give effect to its recommendations. In short, nothing much will happen anytime soon. However, it may be useful to set out the current position as far as this topic is concerned.

In England and Wales, the formalities for making a valid Will are governed by section 9 of the Wills Act 1837. It is well known that for a Will to be valid it must be in writing, signed by the testator in the presence of two witnesses and signed by the witnesses themselves. In the consultation document the Law Commission clearly stated that it does not propose fundamental change in this area.

It is very clear from the legislation that a Will would ordinarily need to be a paper document. However, as mentioned above, the Law Commission has specifically considered how the ability to make a Will electronically could make the process easier and indeed promote making Wills by individuals. There is no doubt that if someone was simply able to make a “quick Will online" the process would be significantly simplified and obviously much cheaper. On the other hand, of course, as with all things electronic, there is the potential risk of fraud and exploitation.

While electronic signatures are fully legal in the UK and becoming more accepted in commercial transactions, by definition in such transactions, given that two parties (ie. the testator and witnesses) are involved, each party would be interested in ensuring the authenticity of the other party’s signature. The "ensuring of the authenticity of the signature" is in fact the key issue in this e-Wills dilemma. As the Law Commission has pointed out, in order to make electronic Wills a reality, it will first have to be determined what constitutes a secure form of electronic signature and there will have to be a suitable infrastructure to ensure that a durable record of an electronic Will remains available many years after the Will has been executed.

In order to strike a balance between enthusiasm for electronic Wills on the one hand and the need to work out the detail of how they could be securely introduced on the other, the Law Commission provisionally proposed the creation of a statutory power enabling the introduction of electronic Wills that provide sufficient protection for testators against the risk of fraud and undue influence.

Until the law is clarified in this area (which will require a separate piece of legislation) the Law Commission has confirmed that electronic signatures will not satisfy the current formalities for a valid Will.

COMMENT

Given the delay to the above project, if any individuals have been waiting to make a Will electronically, once this becomes a legally valid method of making a testamentary disposition, the recommendation must be to not wait any longer and make a Will in accordance with the current requirements.

If any clients have in fact purported to make a sort of electronic Will, perhaps having heard that such Wills have been found acceptable in other jurisdictions, it is an adviser's duty to clarify the position, namely that for the time being UK domiciled individuals or individuals with UK situs property, are still subject to the 1837 legislation.

According to a new research recently published by Royal London more than half (54%) of the adult population do not have a Will.

TAX ON CRYPTOASSETS

HMRC has published a new policy paper on cryptoassets (like crypto currency and bitcoin).

Over more recent years we have seen the popularity of cryptoassets grow. However, very rarely do we come across queries in relation to how such assets are taxed – although this could well change in the years to come or even sooner!

Previous HMRC guidance suggested that highly speculative transactions in cryptoassets might be considered gambling, which is effectively outside the scope of the charge to tax. However, in a change of position, HMRC's latest guidance confirms that it no longer considers that the buying and selling of cryptoassets will be the same as gambling.

The new policy paper sets out HMRC's view - based on the law as it stands at the date of publication – about how individuals who have cryptoassets are taxed. The paper does not consider the tax treatment of cryptoassets held for the purposes of a business carried on by an individual. However, HMRC will produce more information on this at a later date.

Cryptoassets (or 'cryptocurrency' as they are also known) are cryptographically secured digital representations of value or contractual rights that can be:

- Transferred;
- Stored; or
- Traded electronically.

HMRC does not consider cryptoassets to be currency or money. This reflects the position previously set out in the Cryptoasset Taskforce (CATF) report. The CATF have identified three types of cryptoassets: exchange tokens; utility tokens; and security tokens.

HMRC's paper considers the taxation of exchange tokens (like bitcoins) and does not specifically consider utility or security tokens.

In its guidance, HMRC confirms that:

- Most individuals hold cryptoassets as a personal investment and, as such, will be subject to capital gains tax (CGT) on gains and losses.

- Section 104 pooling applies (put simply assets of the same class are pooled to give an average acquisition cost), subject to the 30-day rule for 'bed and breakfasting'.

- A capital loss may be claimed in the event that a cryptoasset becomes of negligible value – although evidence of any loss will need to be proved if the loss of the asset arises as a result of the accidental destruction of a private encryption key or fraud.

- It will be rare for an investment in cryptoassets to be regarded as trading, although 'mining' or 'airdrops' (see below) are likely to indicate a trading activity and, as such, income tax will take priority over capital gains tax and will apply to profits (or losses).

- If an employer transfers cryptoassets to an employee, these are taxable as employment benefits. If they fall within the description of readily convertible assets they are subject to PAYE.

- As mentioned above, HMRC does not consider cryptoassets to be currency or money so they cannot be used to make a tax relievable contribution to a registered pension scheme.

- Cryptoassets will be property for the purposes of inheritance tax.

'Mining' is where an individual uses a computer(s) to carry out computational tasks as part of the underlying digital ledger and can receive cryptoassets as payment. Where the individual is not trading, such fees are treated as miscellaneous income. 'Airdrops' are allocations of cryptoassets where the individual may or may not have to perform a service to receive the allocation. If the individual does not have to perform a service, and is not trading, then the receipt can be tax free.

Otherwise, the receipt will be considered miscellaneous income.

HMRC has also produced guidance for individuals to check if they need to pay income tax or National Insurance contributions when they receive cryptoassets or if they need to pay CGT when they sell cryptoassets.

HMRC TRUSTS & ESTATES NEWSLETTER

The December 2018 edition of HM Revenue & Customs' Trusts and Estates Newsletter is now available and includes a few important articles relating to trusts and estates.

1. Agent toolkits

HMRC has compiled a number of toolkits to help and support agents who may not necessarily complete a large number of trust and estate returns. These include a trusts and estates toolkit, a capital gains tax for trusts and estates supplementary toolkit and an inheritance tax toolkit to assist with completing form IHT400. The inheritance tax (IHT) toolkit may also be helpful when completing the excepted estate form IHT205, or C5 for Scotland, as many of the considerations, such as valuation, also apply to these.

2. Trust Registration Service

HMRC is implementing the Trust Registration Service in a number of phases. Currently, it is not possible for lead trustees and their agents to update their registered information or to declare that there have not been any changes. The project to allow trustees and agents to update their details online is now underway.

In addition, as part of HMRC's commitment to continuously improving trusts and estates services, it is holding multiple research sessions with agents to understand their requirements. HMRC would like to hear from agents interested in participating in the following research:

- experiences of trusts and estates online registrations, focusing on common issues;
- prototype testing of potential changes to features and design of the service.

For anyone interested in taking part in any of the above sessions or if you have any questions you can email HMRC.

The Trust Registration Service was created following the adoption of the Fourth Anti-Money Laundering Directive (4MLD) and required any express trusts that paid tax to register. The Fifth

Anti-Money Laundering Directive (5MLD) will expand the register to all express trusts regardless of whether they pay tax. HM Treasury will publish a consultation this winter asking for views on how the UK interprets and implements this requirement.

3. Taxation of Trusts Consultation

The Chancellor of the Exchequer announced in his Autumn Budget 2017 that the Government would publish a consultation in 2018 on the taxation of trusts.

The consultation document is now available. In summary the consultation invites views on the principles that Government believes should underpin the taxation of trusts: transparency, fairness and simplicity.

4. Inheritance Tax Manual - Speciality Debts

Following consultation with stakeholders, HMRC has published updated guidance on the IHT treatment of specialty debts.

5. IHT - Application for Confirmation in Scotland

Earlier this year minor amendments were made to Form C1, used to apply for Confirmation in Scotland. HMRC was initially informed, by the Scottish Courts and Tribunals Service, that only the new version of the form should be accepted. However, it has been agreed that the earlier version will continue be accepted.

6. IHT Reference for a Taxpaying Lifetime Event

For those who need to pay IHT on:

- a transfer into a trust,
- a ten-year anniversary on a trust,
- assets that have stopped being held in a trust or being relevant property,

they must apply for a reference, using form IHT122, before they send the account to HMRC. This process needs to be followed for each separate event. Applying for a reference will mean HMRC can match the payment to the account when it receives it.

Form IHT122 should only be used when someone needs a reference for one of the lifetime events listed above. For anyone sending HMRC a form IHT400, and tax is due, they should apply for a reference online or use form IHT422 – Application for an Inheritance Tax reference.

INCOME WITHDRAWAL RATE FOR JANUARY 2019

The appropriate gilt yield, used to determine the 'relevant annuity rate' from HMRC's tables for an adult member commencing income withdrawals (or reaching an income withdrawal review date), in January 2019 is 1.5%.