

Tax update

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1. General

1.1 GAAR panel refuses to use GAAR to widen existing legislation

The GAAR panel has ruled on a recycling of directors' loans within a group to avoid a loans to participators charge even though the transactions involved some aspects that could have been caught by the GAAR.

A director enjoyed very substantial loans from a company in which he was a participator. HMRC challenged part of the arrangements under which another company within the same group made further interest-bearing loans to the director, thus enabling him to repay the original loan and the company to avoid the loans to participator charge. The indebtedness was in fact substantially repaid later. The arrangements made were not part of a pre-packaged scheme.

The arrangements entered into clearly circumvented the 'bed and breakfasting' 30 day rule preventing recycling of loans from the same lender. The nub of the question was whether or not the omission in the legislation that should have dealt with groups was something to which the GAAR should apply.

The panel ruled that not covering group loans was a 'big and obvious matter' and that GAAR should not be used to cover the gap. Although some aspects were caught by GAAR, in all the circumstances, the course of action was reasonable. The arrangements under referral were not caught.

This is a welcome ruling as it indicates that the panel accepts the intended limitation of the legislation to abusive arrangements that cannot be said to be a reasonable course of action, rather than a wider avoidance or legislative hole-filling remit.

www.gov.uk/government/publications/gaar-advisory-panel-opinion-of-26-april-2022-repayment-of-a-participator-loan-through-transactions-involving-group-companies

2. Private client

2.1 Expenditure not allowable for CGT

The FTT has found that payments made under a consent order relating to a dispute about entitlement to the proceeds of sale of some land were damages, rather than enhancement expenditure.

A father and son sold some land that was part of another family member's estate. Other relations subsequently brought proceedings against them in relation to the proceeds and land, which were settled by a consent order. The taxpayers sought to deduct the costs of the proceedings from the chargeable gain, as well as the payments to the other relations, as these had wiped out the profits.

The FTT found that this expenditure was not deductible from the chargeable gain. The payments made under the consent order were damages, rather than part of defending title to the land, and the case was more about the will in general, and trusts, than about this particular piece of land.

Slade & Anor v HMRC [2022] UKFTT 227 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/TC08548.html

2.2 Tax avoidance scheme fails at FTT

A taxpayer who was the intermediary step in a transfer of loan notes from a company to a trust was found not to have made a loss. The main transaction was one step, and inserting transfers to him in the middle for no commercial reason was ineffective.

A taxpayer bought loan notes from a company, then transferred them into a settlement, claiming a loss on the fall in value. HMRC argued that there was no real commercial loss. He had acquired relevant discounted securities at an overvalue. The recipient settlement was for the benefit of him and his family. Essentially, he had never acquired the loan notes but simply been a conduit because he had not taken on any of the risks or rewards of ownership.

The FTT agreed that this was a pre-planned scheme, where the single composition transaction was transfer of the loan notes to the settlement. No loss had arisen. A penalty for failure to amend the return after a follower notice was issued was also upheld.

Pitt v HMRC [2022] UKFTT 222 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/TC08544.html

2.3 HMRC updates guidance on CGT on UK property returns

HMRC has confirmed that the only circumstance in which a UK property return is not required is when the self-assessment return reporting is filed within 60 days of completion.

Taxpayers who filed their self-assessment return but neglected to file an additional property return reporting the disposal will be required to go back and file the 60 day return as well. They will need to use a paper return. Penalties and interest may be charged.

www.icaew.com/insights/tax-news/2022/jul-2022/hmrc-confirms-that-cgt-property-returns-must-be-filed

3. PAYE and employment

3.1 New review of hybrid and distance working announced

The Office of Tax Simplification (OTS) has announced a call for evidence for its new review of tax implications of hybrid and distance working.

The review will look at trends, such as whether or not these types of work are likely to become more common, and how much cross-border working is involved. It is asking for submissions about what tax complexities and challenges these types of work are causing for employers, employees, and advisers.

The review will focus on IT, NICs, and CT. Only the scoping document has been published so far.

www.gov.uk/government/publications/review-of-hybrid-and-distance-working-scoping-document

3.2 Inducement to accept changes to pension scheme not earnings

The UT has overturned an FTT decision, finding that payments made to employees to compensate for future reduced pension payments were not taxable as earnings. They were simply made to put the employees in the same position, not as a change to the future conditions of employment.

A large company decided to change its pension scheme arrangements, and made payments to employees to facilitate the change. HMRC held that for 1,100 of the employees the payments derived from the employments, and should be subject to IT and NICs as earnings. The FTT agreed with HMRC, finding that that the change to pension arrangements was part of a wider renegotiation of working conditions, and could not be separated from the integrated package. Although the employees lost a right to purchase additional pension benefits, only 7% of scheme members used that right.

The UT overturned that decision, finding for the employer that the payments were compensation for the expected lower pension payments, and reduction in future employer contributions, so were non-taxable as they simply put the employees in the same position as before the change. The FTT had erred in law in finding that the payments were from employment, rather than compensation.

E.ON UK Plc v HMRC [2022] UKUT 196 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2022/196.html

4. Business tax

4.1 UT overturns decision on capital allowances tax avoidance scheme

The UT has found for two taxpayers that had been denied by the FTT a second capital allowances claim on assets on which capital allowances had already been received. The UT found that the FTT had erred in law in interpreting what constituted a cessation of ownership purposively.

The taxpayers were companies that had incurred expenditure on assets that qualified for capital allowances. They then entered into long-funding lease arrangements involving options with the intention of making a second claim for capital allowances on those same assets. The scheme was designed to create a second opportunity to claim capital allowances without any real economic consequences. The argument put forward by HMRC was that the taxpayers did not cease to own the assets for capital allowances purposes and therefore the taxpayers tax analysis did not apply.

The FTT applied a purposive approach to interpreting the capital allowances legislation. It viewed the arrangement as a composite whole and concluded that a disposal for capital allowances purposes had not occurred because the taxpayers did not in reality cease to own the assets and then reacquire them. The UT disagreed with the FTT's conclusions, which had focused on 'real' disposal values and the composite nature of subsequent transactions rather than whether or not the taxpayers lost legal and beneficial ownership of the assets at a particular point. The UT therefore remade the decision to

award the capital allowances. It did however point out that it had only considered the *Ramsay* argument that HMRC had advanced, and that if it had advanced its argument in other ways, the conclusion reached might have been different. The FTT had erred in law in not rejecting the *Ramsay* argument that HMRC put forward.

Altrad Services Limited (1) Robert Wiseman and Sons LTD (2) v HMRC [2022] UKUT 185 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2022/185.html

4.2 HMRC wins appeal in \$4bn interest expense case

The UT has overturned an FTT decision, ruling that interest incurred on the acquisition of an investment business was not tax-deductible. Obtaining a tax advantage was the main purpose of the loan; so, despite additional commercial motivation it was unallowable. It also found that the loan arrangement required a transfer pricing adjustment as it would not have been made between independent enterprises.

The taxpayer was a US company that was tax resident in the UK. It had been incorporated to facilitate the acquisition of part of Barclay's investment business. It had incurred interest expenses of approximately \$4bn. The FTT found that an independent enterprise would have made a comparable loan to the taxpayer if particular covenants had been given, so no adjustment was required for transfer pricing purposes. It also held that although obtaining a tax advantage was integral to the arrangement and a main purpose of the arrangement, the loan had a commercial purpose and would have been entered into in the absence of the tax advantage. The entire interest expense was therefore apportioned to the commercial purpose of the loan and fully deductible.

The UT overturned the decision on both points. The FTT had erred in law by taking into account third party covenants absent from the actual transaction in considering whether or not an independent lender would have made such loans. It set aside the FTT decision and confirmed that HMRC's amendments to the returns should be upheld. This conclusion rendered the unallowable purpose issue immaterial to the appeal, as the transfer pricing adjustment took priority, but it went on to consider the second point as full arguments had been made.

It agreed with the FTT that the loans had both a commercial purpose and an unallowable tax advantage, but in the apportionment, it found that the FTT had erred in focussing only on the subjective beliefs of a board member and on the period just before the transaction completed. This is an objective test. The UT found that, but for the tax advantage purpose, there would have been no commercial purpose to the loans, and all relevant facts and circumstances led to the conclusion that the interest should be wholly attributed to the unallowable purposes and disallowed.

HMRC v Blackrock Holdco 5 LLC (Tax) [2022] UKUT 199 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2022/199.html

5. Tax publications and webinars

5.1 Tax publications

The following Tax publications have been published.

[AHDB levies to fall outside the scope of VAT](#)

6. And finally

6.1 Well that's a first

2 AUGUST 2022

As the GAAR panel comes of age with its 21st advisory opinion (article 1.1), something entirely unprecedented has occurred. Yes, it has finally agreed with a taxpayer.

This is not to suggest any bias: far from it. The GAAR panel has only been running since 2017, and has faced the more interesting end of inventive arrangements. Still, it is nice for taxpayers to see that success is possible, if unlikely. In an atmosphere of sensibly ever-tightening legislation, we are glad to see that the panel is unwilling to extend its scope.

www.gov.uk/government/publications/gaar-advisory-panel-opinion-of-26-april-2022-repayment-of-a-participator-loan-through-transactions-involving-group-companies

www.gov.uk/government/collections/tax-avoidance-general-anti-abuse-rule-gaar

| Glossary | | | | |
|----------------------------------------|---------------------------------------------------------------------|-----------------------------------------------|-------------------------------------------|---------------------------------------|
| Organisations | | Courts | Taxes etc | |
| ATT – Association of Tax Technicians | ICAEW - The Institute of Chartered Accountants in England and Wales | CA – Court of Appeal | ATED – Annual Tax on Enveloped Dwellings | NIC – National Insurance Contribution |
| CIOT – Chartered Institute of Taxation | ICAS - The Institute of Chartered Accountants of Scotland | CJEU – Court of Justice of the European Union | CGT – Capital Gains Tax | PAYE – Pay As You Earn |
| EU – European Union | OECD - Organisation for Economic Co-operation and Development | FTT – First-tier Tribunal | CT – Corporation Tax | R&D – Research & Development |
| EC – European Commission | OTS – Office of Tax Simplification | HC – High Court | IHT – Inheritance Tax | SDLT – Stamp Duty Land Tax |
| HMRC – HM Revenue & Customs | RS – Revenue Scotland | SC – Supreme Court | IT – Income Tax | VAT – Value Added Tax |
| HMT – HM Treasury | | UT – Upper Tribunal | LBTT – Land and Buildings Transaction Tax | |

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