SLAUGHTER AND MAY/

CLIENT BRIEFING

October 2021

TAX AND THE CITY REVIEW

The House of Lords reviews the proposals for notification by large businesses of uncertain tax treatment and the change to basis periods for income tax. The government postpones until 2024 the proposal to move from the current year basis of taxation to a tax year basis and to end overlap relief. *Almacantar* serves as yet another reminder of the need to comply strictly with contractual notice provisions and highlights the difficulties of relying on estoppel to make up for failure to serve notice of a claim. Draft legislation for the new economic crime levy to be paid by entities subject to the money laundering regulations favours simplicity in its design rather than being tailored to particular money laundering risk of individual sectors. In recent State aid developments, the CJEU concludes that the tax exemptions granted by the Belgian tax authority to multinational companies by way of rulings is an aid scheme; and the General Court commences its hearing in the investigation into the UK's CFC rules group financing exemption.

L Day materials update

Large business notification of uncertain tax treatment (UTT)

The House of Lords Finance Bill sub-committee is reviewing the UTT measure and has called for evidence to be given by 13 October. The committee is considering to what extent the current notification proposals take account of concerns raised in the two consultations there have been on the measure and whether sufficient support is being given to businesses to help them comply.

Change to basis periods for income tax

The Finance Bill sub-committee is also reviewing the change to basis periods for income tax but this measure has now been postponed until 2024 in response to stakeholder feedback and recognising the challenges currently faced by businesses as a result of the pandemic. This will be a relief for fund managers and other professional services firms where individuals trade through a partnership as they will have more time to prepare for the change. Making Tax Digital for Income Tax (MTD) will also be delayed until 2024 (but general partnerships will not be required to join MTD until 2025 and the date at which all other types of partnerships will be required to join will be confirmed later).

The OTS has recently published its report on the costs and benefits of adopting a tax year which is either aligned with the calendar year or with a calendar month-end. The delay to the change in basis period will also enable further consideration to be given to whether 31 March or 31 December is the preferred end of tax year for the UK. The last thing business wants is more than one date change!

Almacantar: estoppel

Almacantar (Marble Arch) SARL and another v Railway Pension Exempt Unit Trust (acting by its trustee BNY Mellon Trust & Depositary (UK) Ltd) [2021] EWHC 2385 (Comm) concerned a dispute over an SDLT indemnity. RailPen had contracted to pay half of any SDLT arising to Almacantar in respect of its purchase of various property interests but contended that the indemnity was subject to contractual time limits which were not met because Almacantar had not served a notice of claim before the expiry of the contractual limitation period.

Almacantar's primary argument was based on estoppel: that the actions of RailPen's representatives before and after the expiry of the contractual notice period lead to the conclusion they accepted that RailPen remained liable for half the SDLT payable once the process of appealing HMRC's determination concluded. RailPen had been involved every step of the way in the dispute with HMRC and copies of correspondence etc. had been shared by Almacantar with RailPen in accordance with the terms of the agreement. But this was not sufficient to make out a shared assumption that the notice periods and time limits in the agreement would not apply so the elements for estoppel were not made out on the facts.

This case can be contrasted with the recent Supreme Court case of *Tinkler* in which the taxpayer was estopped from denying that a valid enquiry had been opened. On the facts of that case, HMRC and the taxpayer's advisers appeared to have acted on the common assumption that HMRC had opened an enquiry and proceeded to correspond on the substantive merits of the case. On receipt of the closure notice in respect of this assumed enquiry, the taxpayer, however, sought to argue that the closure notice was invalid because there had never been an enquiry in respect of which it could have been issued because the notice opening the said enquiry had never been validly issued. If this argument had succeeded, the taxpayer would have escaped liability because, at that point in time, it would have been too late for HMRC to correct the initial failing. But the Supreme Court decided that, in the circumstances, the taxpayer was estopped from raising this argument and thereby denying that a valid enquiry had been opened.

Almacantar shows that the courts continue to enforce contractual notice provisions strictly and it will be very difficult to rely on estoppel to get round a failure to notify in accordance with the contract.

Economic Crime Levy: response to consultation and draft legislation

A new levy, the economic crime levy (ECL), was announced at Budget 2020 to be paid by entities subject to the money laundering regulations to help fund action to tackle money laundering and ensure delivery of certain reforms.

The government has published its response to the feedback to the public consultation on the design of the ECL which closed in October 2020 together with draft legislation which is subject to a short period of technical consultation until 15 October. The legislation will be included in the Finance Bill to be published this Autumn.

The ECL will first apply during the year 1 April 2022 to 31 March 2023 but the first set of ECL payments will not be made until 2023/24.

There will be an annual report on the operation of the levy to ensure transparency on ECL spend. The government will also undertake a review of the ECL by the end of 2027 to show how it is meeting its original policy objectives, whether it should continue, if it should remain based on just the anti-money laundering (AML) regulated sector and it if it is being calculated and collected appropriately.

Although the ECL payee base is diverse (ranging from financial services to art markets and the gambling sector), the government has opted for simplicity rather than making the levy proportionate to money laundering risk for different sectors. The ECL will be calculated on entity size based on all UK revenue defined in accordance with UK GAAP (it is difficult and cost-ineffective to isolate just AML revenue). The government will reconsider at the 3 year review whether there is appetite and scope for amending the levy to further reflect money laundering risk.

The table below, taken from the response document, shows the four size bands and the corresponding suggested fixed fee ranges. The final fixed fee amounts will be confirmed in the Finance Bill legislation.

ENTITY SIZE	SMALL	MEDIUM	LARGE	VERY LARGE
UK revenue threshold	**Under £10.2m**	**£10.2m-£36m**	**£36m-£1bn**	**Over £1bn**
Fixed fee ranges	**Exempt**	**£5,000-£15,000**	**£30,000-£50,000**	**£150,000-£250,000**

Small entities will be exempt from paying the levy. The medium, large and very large regulated entities will pay the ECL at a rate proportionate to their size. It is not intended for entities to pay more than 0.1% of their UK revenue in ECL liability.

The fixed fee sizes will be updated periodically after the 3 year review. But (reminiscent of the bank levy!) they could be updated sooner if the ECL does not yield the desired £100m per year, or to reflect new data or in response to macroeconomic changes (such as inflation).

The levy will be calculated and reported at the entity level and will be collected by the three statutory AML supervisors: HMRC, the FCA and the Gambling Commission. Partnerships will be treated as entities in their own right with partners being jointly and severally liable for payment of the ECL by the partnership.

State aid

September was an eventful month for State aid cases.

Belgian excess profits

In the Belgian excess profits case C-337/19P, the CJEU annulled the General Court's decision and concluded that the tax exemptions granted by the Belgian tax authority to multinational companies by way of rulings is an aid scheme, as found by the Commission.

In 2016 the Commission gave a ruling that the Belgian excess profits tax regime is unlawful State aid and ordered Belgium to recover around EUR 700m in unpaid taxes from the multinationals that benefited from the scheme. In February 2019, the General Court held that the Commission had erroneously considered that the Belgian excess profit system at issue constituted an aid scheme and annulled the Commission's decision.

The Commission appealed to the Court of Justice which followed AG Kokott's recommendation that the decision of the General Court should be annulled. The CJEU worked through the three cumulative conditions that have to be satisfied in order for a state measure to be classified as an aid scheme and concluded that the General Court had made errors of law in interpreting the first two conditions which then vitiated its assessment of the beneficiaries of the excess profit exemption.

The CJEU concluded that the Belgian tax authorities had systematically granted the excess profit exemption when the conditions were satisfied and this is an "act" for which no "further implementing measures" are required.

Having concluded it is an aid scheme, the CJEU referred the case back to the General Court to rule on other aspects of the case, such as the pleas alleging the absence of any advantage or selectivity and alleging infringement of the principles of legality and protection of legitimate expectations. So this case will not be finally resolved for a while yet but the Commission will be pleased with the CJEU's decision on the aid scheme point.

UK CFC rules: group financing exemption

The hearing before the General Court began on 20 September in the appeal against the 2019 decision by the European Commission that the UK's group financing exemption in its controlled foreign company (CFC) rules gave an unfair tax advantage to certain multinational companies, constituting illegal State aid. The exemption was removed from the legislation in 2019 but this case is important to the many multinationals from whom HMRC has been obliged to seek recovery of the alleged unlawful State aid.

The European Commission determined in 2019 that the CFC rules for exempting non-trading finance profits constituted State aid to the extent that the relevant significant people function (SPF) for those profits was located in the UK. From the summary of the appeal lodged in September 2019, we can see that the UK Government is running a number of arguments. These include challenging the Commission's interpretation of the finance company exemption as a derogation from the general rule for identifying artificially diverted non-trading finance profits. At the time the exemption applied, the majority of EU member states did not have CFC legislation and so profits were not taxable in any circumstances so there is a lack of any profit diversion. The UK also argues that the Commission failed to focus on the underlying objectives of the CFC rules. The key objectives of the UK when drafting the CFC regime were that it focus on higher risk situations and be workable for tax authorities and companies. If the Government is wrong and the provisions are found to be selective, it is argued that the administrative grounds that apply to justify the exemption insofar as they relate to the origin of capital apply equally to the location of SPFs.

It is understood that the hearing was suspended part way through, due to one of the judges being unable to continue and that the General Court will re-list the hearing for completion in due course. So we will have to wait a while for the next instalment.

What to look out for:

- The Finance Bill sub-committee call for evidence on UTT and basis period reform closes on 13 October.
- The technical consultation on the economic crime levy draft legislation closes on 15 October.

- 15 October is also the closing date for comments on the draft legislation for residential property developer tax. The final design of the tax (including tax rate) will be announced at the Autumn 2021 Budget on 27 October.

- On 18 October the Upper Tribunal is scheduled to begin hearing the appeal in *Trustees of the P Panayi Accumulation and Maintenance Trusts Nos 1 – 4 v HMRC* on the compatibility of the section 80 TCGA 1992 exit charge with EU law.

- On 27 October at the Autumn Budget we may find out the rate of tax that will apply to banks, when the corporation tax rate increases to 25%.

- **The OECD G20/Inclusive Framework aims to reach agreement on the design of international tax reform by the end of October 2021. A detailed implementation plan is expected to be published.**

This article was first published in the 8 October 2021 edition of Tax Journal.

CONTACT

Mike Lane
PARTNER
T: +44 (0)20 7090 5358
E: mike.lane@slaughterandmay.com

Zoe Andrews
PSL COUNSEL & HEAD OF TAX KNOWLEDGE
T: +44 (0)20 7090 5017
E: zoe.andrews@slaughterandmay.com