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This issue:
- UK government position papers – 'Future customs arrangements' and 'Northern Ireland and Ireland'
- Country by Country (CbC) reporting;
- Research and Development (R&D) tax relief;
- VAT on land and property
- disguised remuneration loan charge;
- Director Loan Accounts (DLAs);
- non-domiciles changes;
- new trust register;
- Individual Savings Accounts (ISA) changes; and
- the Criminal Finances Act – a new corporate offence.

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UK government position papers – 'Future customs arrangements' and 'Northern Ireland and Ireland'

The UK government recently published a number of position papers including one on future customs arrangements with the EU post-Brexit and on how to address the unique circumstances of Northern Ireland and Ireland.

The future customs arrangements paper sets out three strategic objectives that will form the basis for decision making:
- ensuring UK-EU trade is as frictionless as possible;
- avoiding a 'hard border' between Ireland and Northern Ireland; and
- establishing an independent international trade policy.

The paper on Northern Ireland and Ireland has proposals on four areas including further details on "avoiding a hard border for the movement of goods".
The UK's position in future customs arrangements can be broadly defined into two approaches.

One option is a highly streamlined customs arrangement between the UK and the EU, whereby the UK and the EU would minimise requirements on goods moving between the two areas. According to the paper, this would simplify trade requirements by continuing existing arrangements where possible, reduction and removal of barriers to trade through unilateral facilitations and implementing technology-based solutions.

Alternatively, the UK may seek to form a "new customs partnership with the EU". This would involve the UK aligning its approach to the EU customs union removing the need for a UK-EU customs border. The paper has suggested that a potential approach would involve the UK mirroring the EU's requirements for imports from the rest of the world where their final destination is the EU.

The paper on Northern Ireland and Ireland sets out these options as well as proposing some specific facilitations, including:
- negotiating a continued waiver from the requirement to submit entry and exit summary declarations for goods being moved between the UK and the EU, removing a time-sensitive administrative requirement;
- UK membership of the common transit convention to simplify border crossing for goods in transit, whereby goods do not need to complete import and export declarations each time they cross a new border;
- a cross-border trade exemption whereby small traders could continue to operate across the Northern Ireland-Ireland border in the same way they do now, with no new customs procedure requirements; and
- for larger businesses, implementing "simplified customs procedures" for "trusted traders on either side of the border".

While the papers in their current form raise many questions, they do provide further details on the UK's proposed direction of travel.

Northern Irish businesses should consider the impact of Brexit, where the free movement of goods and the cash flow benefits of current arrangements may be lost. Preparations for changes in customs duties and tax liabilities on imports and exports with other EU countries should begin as soon as possible to ensure your business is best prepared for Brexit.

Country by Country (CbC) reporting

In line with the increased scrutiny being placed on Multinational Enterprises (MNEs), the OECD Base Erosion and Profit Shifting (BEPS) project has recommended the implementation of CbC reports and the UK government is committed to implementing this.

CbC reports will require certain MNEs to provide tax authorities with detail of the territories they operate in, revenue and profits generated and the amount of tax paid.

MNEs with total consolidated group turnover of €750 million or more will be required to file CbC reports for periods starting on or after 1 January 2016.

The group is also required to notify annually by the end of their reporting period that a CbC report will be filed. A UK entity in each MNE group is required to submit an annual notification to HMRC stating which entity in the group will file the CbC report.

The ultimate parent entity has the primary obligation to file or alternatively a group company can file voluntarily.

There are circumstances in which the top UK entity of an MNE group may be required to file a CbC report for its UK subgroup. Therefore if the ultimate parent entity of an MNE group is not UK resident this should be considered further.

Research and Development (R&D) tax relief

Improving productivity and developing new products, processes and services is at the heart of most successful and growing businesses. For those companies investing in Research & Development (R&D), they are rewarded in the form of R&D tax relief.
There are benefits available to both small and large companies. Any company subject to UK corporation tax can potentially make an annual R&D claim to HMRC for qualifying activities. The reward may be in the form of a corporation tax deduction or a cash payment.

HMRC have recently updated their guidance for a temporary extension to amend R&D claims relating to understated reimbursed expenses. They have clarified their position that reimbursed travel and subsistence expenses can fall within qualifying staff costs. This clarification will provide an opportunity for businesses to maximise previous claims.

Unfortunately, evidence suggests many UK companies are not taking full advantage of valuable R&D tax reliefs available and do not make a claim, as they do not realise they are actually performing R&D activities.

For the purpose of R&D tax reliefs, R&D takes place when a project seeks to resolve a scientific or technological uncertainty aimed at achieving an advance in science or technology. This could be if a company develops something new but may be as straightforward as overcoming technical problems, improving existing products or making a process more efficient.
There may be an element of uncertainty or business risk within R&D, but it is not necessary for work to be successful. It is much more important to focus on the journey as opposed to the finished product or process.

It is clear that the government are actively encouraging R&D so it is worthwhile to question if a company's expenditure is eligible for these relief's to ensure that R&D tax relief is not lost.

VAT on land and property

The VAT implications of land and property transactions are a topical subject for many of our clients and we have set out some key considerations below.

Option To Tax (OTT)

The OTT provisions allow for a person to charge VAT on certain supplies of land and property which would otherwise be exempt.

The OTT applies to commercial properties although certain residential and charity related supplies of land and property are specifically excluded from the OTT.

Where the OTT has been made, VAT is recoverable on associated costs, which is particularly advantageous if major works are to be undertaken. However, when deciding on the OTT, landlords should factor in the tenant base as the VAT will be an additional cost to the tenant if it cannot be recovered.

VAT is chargeable on all future rental income and the proceeds from the sale of the property, apart, from in specific circumstances, for example, if the property is sold as a VAT free Transfer Of a Going Concern (TOGC).

TOGC

In certain circumstances, the sale or acquisition of a property can be treated as outside the scope of VAT.

There are a number of conditions that must be met, including specific conditions where the seller has OTT. These include a requirement on the purchaser to exercise its OTT by a specific date.

The sale and purchase agreement should contain the relevant TOGC clauses to ensure the seller and purchaser are appropriately protected.

Failure to meet the relevant conditions can result in either VAT being charged, or not being charged in error. This could result in an absolute cost or cash flow disadvantage.

Capital Good Scheme (CGS)

The CGS relates to capital expenditure in respect of an acquisition of a property or land, or where the property has been subject to refurbishment, refits, alterations or certain extensions, where the expenditure is greater than £250,000 (net of VAT).

The owner must monitor the use of the property or land annually for 10 intervals and if the use of the property or land changes from the original, intended use, a portion of VAT originally recovered may be payable to or recoverable from HMRC. This could result in a previously unforeseen cost.

Where a property or land, subject to the provisions of the CGS, is acquired by way of a VAT free TOGC (see above), CGS responsibilities pass to the person acquiring the property.

Disguised remuneration loan charge

The Finance Bill (No2) 2017 published on 8 September 2017 includes a new tax charge for disguised remuneration loans made after 6 April 1999 and that remain outstanding to a third party by 5 April 2019. The new legislation effectively re-characterises the loan as remuneration for tax purposes. The tax will be collected through PAYE.

Typical loans include schemes whereby the employer makes a contribution to a third party, often an employee benefit trust, instead of making the payment directly to the employee. The third party would then provide the funds to the employee in the form of a loan.

The loan is usually provided on favourable terms and unlikely to be repaid in the employee's lifetime.

The new tax charge does not apply to normal employee loans that will be repaid or where the loan falls within the exclusions.

HMRC have advised that schemes in place to rename the sums received under loan agreements as something else does not mean it's not a loan and does not avoid the 2019 loan charge. The only way the new loan charge can be avoided is by making a repayment of the loan balance or settling the tax liability with HMRC in advance.

The provisions also extend to the self-employed and partnerships from 6 April 2017 and will create an income tax charge on trading profits disguised as other non-taxable receipts to create a tax advantage. This includes loans provided through third parties after 6 April 1999 but before 5 April 2017 and remain outstanding at end of 5 April 2019.

HMRC's recent success in the Supreme Court with an employee benefit trust case is a useful reminder HMRC will not tolerate contrived or abusive tax avoidance schemes and are prepared to tackle existing and prevent future use of disguised remuneration avoidance schemes.

Director Loan Accounts (DLA)

Many directors of owner managed companies use a DLA to regularly draw down funds. This works well when dividends are credited to a DLA that isn't overdrawn and the director withdraws from his/her dividend balance.

However, failure to monitor and manage these accounts can result in a myriad of corporate, employment and personal tax issues and a quagmire of questionable paperwork.

S455 of the Corporation Tax Act 2010 levies an anti-avoidance corporation tax charge at a rate of 32.5%, where close company DLA's remain overdrawn nine months after the accounting year end. Although repayable once the loan is cleared, HMRC will retain the tax for nine months after the year end in which the loan was cleared, subject to anti-avoidance bread and breakfasting rules.

Interest free overdrawn DLA's constitute a beneficial loan and a benefit in kind employment tax charge arises. This will result in a National Insurance contribution charge on the employer and an income tax charge on the employee. The benefit will have to be disclosed annually on a Form P11D.

Where an overdraft exists and is left to increase by continued director drawings, larger dividends are often required to clear it. This may result in substantial income tax charges which in turn put additional pressures on future DLA balances.

Dividends will require sufficient reserves and the proper Companies Act formalities should be followed with board minutes and dividend paperwork being prepared. The dividend will be treated as paid when the right to draw the dividend exists, ie when they are credited to the DLA.

Allowing DLA overdrawn balances to increase is more than poor practice, it could potentially fall foul of company and tax law and in HMRC's view, could constitute earnings under PAYE.

Non-domiciles changes

On 13 July 2017, the government confirmed that all of the provisions for the taxation of non-domiciles (non-doms), which were dropped at short notice from the Finance Bill 2017 due to the impending general election, will be introduced with retrospective effect from 6 April 2017. Whilst the legislation still requires royal assent, this provides much needed certainty which has been lacking since the general election was announced.

From 6 April 2017, individuals who have been resident in the UK in 15 out of the previous 20 years will be deemed to be UK domiciled (deemed-dom) for income tax, capital gains tax and inheritance tax purposes.

Non-dom individuals with less than £2,000 of unremitted income and gains will continue to be automatically entitled to the remittance basis of taxation even once they are 'deemed-dom'.

CGT rebasing will be available to individuals becoming 'deemed-dom' from 6 April 2017 and who have paid the remittance basis charge at least once in an earlier year (a qualifying individual). The asset being rebased must have been owned by the individual on 5 April 2017 and must not have been situated in the UK during the period from 16 March 2016 to 5 April 2017. There appears to be no requirement that the individual owned the asset (a qualifying asset) throughout this period.

The rebasing will apply automatically to qualifying assets sold by a qualifying individual on or after 6 April 2017, although an election may be made to disapply the rebasing where, for example, the asset had depreciated in value.

Individuals who were born in the UK with a UK domicile of origin but who later become non-resident and acquire a domicile of choice, will be treated as domiciled in the UK as soon as they become resident on any return to the UK (returning non-doms). Trusts created by a 'returning non-dom' will be treated as if created by a UK domiciled person.

Those who may be affected by these rules should take advice immediately as their tax position may change significantly and they will not benefit from some of the reliefs available for those becoming deemed domiciled under the long-term non-dom rules.

New trust register

From June 2017 it has become necessary for trustees of UK trusts and non-UK trusts with UK tax liabilities to maintain accurate and up-to-date records of all the beneficial owners of the trusts they act as trustee for. They will also be required to report beneficial ownership information annually to HMRC to be kept on a UK register of trusts.

The new service, known as the Trusts Registration Service (TRS), replaces the previous requirement to file a paper form notifying HMRC of the creation of a trust.

Trustees are required to provide information about the identities of the settlors, other trustees, beneficiaries, all other natural or legal persons exercising effective control over the trust and all other persons identified in a document or instrument relating to the trust, including a letter of wishes.

Trustees will also need to provide HMRC with general information regarding the trust such as name, date of creation, details of trust assets, tax residence and administration address.

If the trustees fail to maintain an up-to-date record of beneficial owners, or provide HMRC with the required information, HMRC can impose a penalty and publish a statement about the failure. The trustees will also be guilty of a criminal offence, punishable by imprisonment for up to two years or a fine or both.

Individual Savings Accounts (ISA) changes

Since 6 April 2017, each adult resident in the UK can invest up to £20,000 in ISA products per annum, generating returns which are free from income tax and Capital Gains Tax (CGT). Any interest earned doesn't count towards your personal savings allowance, so if you earn a lot of interest, you can protect more of it in an ISA.

The following ISAs are currently available on the market and the £20,000 limit can be invested in a single product or a mixture of all of them, so long as the limit is not exceeded:

- cash ISA;
- stocks and shares ISA;
- Lifetime ISA (LISA); and
- Help to Buy ISA.

The LISA was launched on 6 April 2017 and allows you to save £4,000 a year with a 25% bonus on top, before interest and growth.

It can be opened by anyone aged between 18 and 40 and contributions can be made until the age of 50.
In order to protect the 25% bonus, the funds can only be used for two specific purposes. The first purpose is for first time buyers to use towards a deposit for a residential property and the second is for retirement savings once you reach 60. There are penalties for withdrawing the funds for a non-qualifying purpose, which can result in losing the 25% bonus in addition to an administration charge.

Unlike the LISA, the Help to Buy ISA is available to those aged 16 and over and can be opened anytime until December 2019. You can save £1,200 in the first month of opening, with a further £200 a month thereafter. It is only available to first time buyers and must be used to purchase a residential property, at which point all the money contributed to the ISA will have 25% added to it, up to a maximum bonus of £3,000.

Those making use of the LISA or the Help to Buy ISA can use the remaining allowance to top up another ISA to the £20,000 limit. For example, you can only put £4,000 in to the LISA every year, which means you could put the remaining £16,000 into any of the other options.

The Criminal Finances Act – a new corporate offence

A new corporate offence now exists that holds firms criminally liable for failing to prevent employees and associated persons, from facilitating tax evasion in the UK or abroad.

Previously it had to be shown that senior board members were involved and aware of the activity. Ignorance by management of the activity is now no longer a defence and instead firms must show that they have reasonable controls and preventative procedures in place to mitigate the risk of tax evasion.

There is a three stage process, there must be criminal tax evasion by the tax payer and conviction is not a prerequisite. Relevant bodies (broadly all companies and partnerships including foreign companies with a UK business) could still be prosecuted where there has been a voluntary disclosure by the tax-payer.

Secondly the associated person (employee or person providing services to or for the relevant body) must have deliberately and knowingly assisted with the tax evasion.

If the first two stage offences are committed then the relevant body will have committed the criminal offence, unless it can show that it had reasonable preventative measures in place to help prevent it.

The government expects a rapid implementation with risk area's identified and prioritised. HMRC expects regular reviews and updates as new risks are identified.

HMRC will investigate the UK tax offence with prosecutions being brought by the Criminal Prosecution Service. Financial Penalties are limitless and convictions may have to be disclosed to the relevant regulators, preventing the award of future public contracts.

All relevant bodies should have top level commitment to implement proportional procedures to identify risk exposure, followed by due diligence to mitigate identified risks. Evidence of training and ongoing monitoring and review will also be vital. Draft guidance can be found on www.hmrc.gov.uk

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