Briefing

Private client briefing for May

Speed read

All non-dom tax changes included in the FB 2017 are on hold due to insufficient time for scrutiny prior to the general election. The UTT refuses an application to exercise its jurisdiction to suspend the effect of its decision pending an appeal. The principle of equitable mistake has been considered for the first time in Guernsey since the UK Supreme Court decision in *Pitt v Holt*. HMRC publishes new guidance on the IHT nil rate band. The FTT decided that a double tax treaty can apply where two relevant jurisdictions seek to tax different persons.

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Finance Bill 2017: all non-dom tax changes put on hold

In an unexpected move, on 25 April 2017 the government announced that many proposed changes will be dropped from the Finance Act 2017, as there would be insufficient time for proper parliamentary scrutiny of them prior to the general election. It is now clear that the changes which were dropped include all of the reforms to the taxation of foreign domiciliaries, including the new deemed domicile rules and the inheritance tax provisions regarding indirect interests in UK residential property.

Many foreign domiciliaries undertook extensive planning before 6 April in anticipation of the new rules, including restructuring existing trusts and UK residential property holding structures. The government has indicated that it will, if re-elected, reintroduce the legislation. Although there may be technical revisions following closer scrutiny, and possibly even some watering down of certain provisions, it appears that the changes are supported by both main parties and are very unlikely to be abandoned.

The main question is whether the planned changes will still take (retroactive) effect from 6 April 2017, as many commentators expect, or will be delayed until 6 April 2018 or some other future date. Extensive uncertainty is created for clients and their advisers in assessing their position, with limited information being released by the government. For example, foreign domiciliaries who have been UK tax resident for 15 years and were advised they would become deemed UK domiciled on 6 April 2017 might now only become deemed UK domiciled on 6 April 2018. They will then have to pay the £90,000 remittance basis charge for an extra year. This will be an unexpected cost to those who settled non-UK assets into overseas trusts before 6 April 2017 and believed they would not be taxed on the income of the structure as it arose. There are countless other examples where a delayed introduction of the changes will cause uncertainty, wasted planning, and accelerated or unnecessary tax charges. That said, if a delayed start date is eventually announced, this may offer a further planning opportunity for those non-doms who did no planning before April.

Why it matters

This surprise move creates considerable uncertainty and frustration for many taxpayers and their advisers, particularly where major restructuring was carried out prior to 6 April 2017 to mitigate the effects of the new regime. The changes have been planned for two years. Many observers will consider that yet another last minute tax U-turn, even if only temporary, does not reflect well on the government.

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Gresh: equitable mistake

In *Gresh v RBC Trust Company (Guernsey) Ltd and HMRC Guernsey* (judgment 6/2016), the Royal Court of Guernsey declined to set aside a pension fund trustee's decision to pay the beneficiary, Mr Gresh, £1.4m, even though it was a mistake that created a significant tax liability for the beneficiary. The principles of equitable mistake were notably considered in the 2013 pivotal decision of the UK Supreme Court in *Pitt v Holt* [2013] UKSC 26.

The case involved a member of a pension plan which was administered by a Guernsey trustee. Mr Gresh, the member, had been advised by independent tax advisers that any lump sum distribution made to him would be tax free, provided that the distribution was not remitted to him in the UK. When Mr Gresh turned 50, he requested a lump sum distribution from the trustee of his pension fund. The trustee believed the advice to be accurate and gave instructions for the requested transfer to be made. The advice was wrong in that only periodic payments would be tax free. Any capital payment, even if retained outside the UK, would be taxed. The distribution made to Mr Gresh had been assessed in the UK to a tax liability of 40%, leaving him facing a significant tax bill.

Mr Gresh's application (which came before the court in 2010) requested the setting aside of the distribution on *Hastings-Bass* principles. However, following the Supreme Court decision in *Pitt v Holt*, the application proceeded on the grounds of equitable mistake. This was because it was held in *Pitt v Holt* that a failure to take into account certain tax consequences of a decision does not amount to a breach of fiduciary duty if the trustees acted on incorrect professional advice from 'apparently competent advisers'.

Whilst HMRC was not initially a party to the application, it was joined as a result of a decision of the Guernsey Court of Appeal in 2010. HMRC opposed the application, whilst the trustee remained neutral. Mr Gresh's application was heard by the bailiff, who considered that the case of *Pitt v Holt* was highly persuasive in Guernsey (though not binding) and that under Guernsey law, the principles set out by Lord Walker in *Pitt v Holt* could be applied in Guernsey. The bailiff ruled that the Supreme Court decision in *Pitt v Holt* had not altered the test for equitable mistake. What is required is to look at all the relevant circumstances of the mistake and the consequences for the person who made the transfer in question, in order to evaluate objectively the injustice of leaving the disposition uncorrected.

The bailiff found that it would not be an appropriate exercise of the court's jurisdiction to set aside the disposition. The material issue was that when considering the issue of unconscionability (or unfairness or injustice) it was necessary to look at the consequences of setting aside, or not setting aside, the disposition. The only person affected here was Mr Gresh, who would have a tax liability if the mistake was not corrected (and HMRC who would not be able to levy the tax if the disposition was set aside). By contrast, in other cases where the court had been persuaded to set aside dispositions, there had been other parties whose interests were affected. The unconscionableness (or injustice or unfairness) of leaving the mistake uncorrected had to be viewed objectively. In all the circumstances, the court did not consider that it would be an appropriate exercise of the court's jurisdiction to set aside the distribution.

> Not every mistake as to tax consequences based on incorrect or negligent professional advice will be corrected by the courts

Why it matters

It is notable that the Royal Court has decided that not every mistake as to tax consequences based on incorrect or negligent professional advice will be corrected by the courts. Whilst the court was not in a position to form a view as to whether Mr Gresh may have an action against his tax advisers, this was a reminder that there are occasions when the courts will consider it more appropriate to seek a remedy from professional indemnity insurers, rather than the courts.

Tager: should UT suspend effect of its own decision pending appeal?

The Upper Tribunal has refused an application that it should exercise its jurisdiction under rule 5(3)(l) of the Tribunal Procedure (Upper Tribunal) Rules, SI 2008/2698, which permits the tribunal to suspend the effect of its own decision pending an appeal.

In *HMRC v Tager* [2017] UKUT 161 (TCC), the applicant, a well known barrister, was seeking suspension of the effect of the tribunal's decision to impose tax-related penalties for failure to comply with information notices.

The tribunal held that it was well established that suspending the effect of a decision pending an appeal should be an exceptional course of action for a tribunal (or court) to take. In the context of tax appeals, the taxpayer had to show that material prejudice would result if they were compelled to pay; and that this would outweigh the prejudice caused to HMRC if the tribunal's decision was suspended.

The tribunal held that the taxpayer had failed to show an inability to pay (indeed, the taxpayer had indicated ample means to pay) and there was no reason to believe that HMRC would be unable to repay any excess penalty. As such, the tribunal declined to exercise its discretion because the taxpayer did not show that material prejudice would result if he were compelled to pay.

Why it matters

It is notable that the tribunal declined to exercise its discretion, despite the tribunal's awareness that the income tax element of the tax due had been agreed at a lesser sum than the amount that the tribunal had assumed when determining the amount of the penalty. Clearly, the healthy financial position of the taxpayer in this case was key.

New HMRC guidance on RNRB

HMRC has added new detailed guidance concerning the inheritance tax residence nil rate band (RNRB) to its *Inheritance Tax Manual*. The new guidance provides more technical detail than the generic guidance HMRC previously published for use by taxpayers. The new guidance is found in the manual at IHTM46000 onwards.

Lee & Bunter: DTT applies where jurisdictions tax different persons

A double tax treaty (DTT) can apply where the two relevant jurisdictions seek to tax different persons, the First-tier Tribunal has decided (in *Lee & Bunter v HMRC* [2017] UKFTT 0279 (TC)). This case considered a 'round the world' scheme that exploited the UK/Mauritius double tax treaty to avoid capital gains tax on gains realised by UK trustees. As the UK/Mauritius treaty, and the OECD Model Convention on which it was based, operated with reference to categories of income or gains rather than categories of persons liable to tax, it was still possible to benefit from treaty relief where the two jurisdictions sought to tax different persons.

Why it matters

This type of scheme has since been closed down by HMRC, but the tribunal's clarification of the application of a double tax treaty where the jurisdictions tax different persons is welcome.

What to look out for

- The government is exploring the case and options for bringing within the scope of corporation tax, certain non-resident companies with existing UK taxable income and/or gains from the disposal of certain UK residential property interests. Those targeted include non-resident companies that are chargeable to income tax and/or non-resident CGT, particularly those receiving rental income from UK property. The consultation closes on 9 June 2017.
- As a part of its efforts to make tax digital, the government has launched its consultation on the sanctions for late submission and late payment of tax. The consultation sets out three possible models for late submission penalties and provides an update on late payment of penalty interest. The consultation closes on 11 June 2017. ■

For related reading visit www.taxjournal.com

- What now for non-doms? (11.5.17)
- *Futter & Pitt*: the *Hastings-Bass* principle (Simon McKie, 31.5.13)
- Lessons from *Lobler* on rectification and mistake (Tim Jarvis, 14.6.15)
- Cases: *R Lee and N Bunter v HMRC* (9.5.17)
- Corporation tax and non-resident companies: a consultation (Philip Spencer & Robin Hutton, (27.4.17)