Corporate tax update

First quarter 2018

Welcome to the latest edition of our Corporate Tax Update, written by members of RPC's tax team and published quarterly. In this first 2018 edition we highlight some of the key tax developments of interest to UK corporates from the first quarter of 2018.

Spring Statement 2018

On 13 March 2018, the Chancellor delivered the first Spring Statement (under the new approach of having a single fiscal event – or Budget – in the Autumn). more›

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UK transfer pricing rules updated to reflect latest OECD guidelines

On 1 March 2018, the Taxation (International and Other Provisions) Act 2010 Transfer Pricing Guidelines Designation Order 2018 was made. more›

Interest deductibility restriction rules – updated HMRC guidance published

On 28 February 2018, HMRC published further, updated, guidance on the interest deductibility restriction rules applicable from 1 April 2017. more›

Intangible fixed assets tax regime – consultation launched

On 19 February 2018, HMRC published a consultation document on reform of the UK's intangible fixed assets (IFA) tax regime. more›

Simplified arrangements for carried-forward losses surrendered as group relief

On 8 January 2018, regulations were made to simplify the arrangements for claiming group relief for carried forward losses. more›

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University investment activity VAT recovery – Court of Appeal refers questions to ECJ

On 27 March 2018, the Court of Appeal referred to the ECJ questions as to the ability of the University of Cambridge (University) to recover input VAT incurred in connection with the University's investment activities. more›

Any comments or queries?

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Revised HMRC guidance on VAT cost sharing exemption – bad news for insurers, banks

On 22 March 2018, HMRC published Revenue and Customs Brief 3 (2018) in light of recent ECJ decisions on the VAT cost sharing exemption (CSE). Whilst expected, given the conclusions reached in those decisions, the revised HMRC policy will be disappointing for insurers and other financial services groups. more›

VAT zero-rating treatment denied for digital versions of newspapers

On 8 March 2018, the First-tier Tribunal held that digital versions of certain newspapers did not qualify for zero-rating treatment available to the print editions of the same newspapers. more›

Upper Tribunal decision on VAT "builder's block"

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VAT grouping rules – "informal" consultation

On 1 February 2018, HMRC wrote to the Chartered Institute of Taxation (CIOT) inviting CIOT to discuss HMRC's "interim" views on possible changes to the VAT grouping rules. A response was requested by 16 March 2018. more›

First-tier Tribunal holds that UK broker did not constitute a UK fixed establishment of a non-EU insurer for VAT purposes

On 19 January 2018, the First-tier Tribunal held that the resources of a UK insurance broker did not constitute a "fixed establishment" for VAT purposes in the UK of a non-EU insurer. As a result, the UK broker was entitled to recover input tax attributable to the supplies it provided to the non-EU insurer. more›

Employment

EMI share options – lapse of EU state aid approval

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HMRC wins high-profile TV presenter IR35 case

On 10 February 2018, the First-tier Tribunal held that a former BBC presenter was, for tax purposes, to be treated as an employee. This is the first in a large number of cases being taken by HMRC against TV presenters, relying on the application of the "IR35" tax rules. more›

Government launches consultation on employment status, following publication of the Taylor Review

On 7 February 2018, the government published a consultation on employment status, following the July 2017 publication of the Taylor Review. The consultation closes on 1 June 2018 and in it the government pose 64 questions, in 7 different sections. more›

Upper Tribunal considers companies to be MSCs due to provider's involvement

On 19 January 2018, the Upper Tribunal held that five companies were "managed service companies" (MSCs) for tax purposes due to the level of involvement of the companies' provider. more›

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Welsh Land Transaction Tax – WRA guidance and HMRC SDLT guidance on "cross-border" transactions

In advance of the introduction of Welsh Land Transaction Tax (LTT), which replaced SDLT for Welsh land acquisitions from 1 April 2018, the Welsh Revenue Authority has published a number of pieces of guidance on the new rules. more›

International

BEPS – further OECD guidance on attribution of profits to (extended definition of) PEs

On 22 March 2018, the OECD published further guidance on the attribution of profits to permanent establishments (PEs), in light of the changes to the definition of a PE resulting from the OECD's Base Erosion and Profit Shifting (BEPS) project. more›

OECD Report on Tax Challenges Arising from Digitalisation

On 16 March 2018, the OECD published an "Interim Report 2018" on Tax Challenges Arising from Digitalisation. more›

Mandatory disclosure by intermediaries of cross-border tax planning arrangements

On 13 March 2018, the EU Council agreed to a measure to require the mandatory disclosure by intermediaries to their local tax authorities of certain cross-border tax planning arrangements. more›

Taxing the digital economy – draft EC directives published

On 21 March 2018, the European Commission published two draft Directives relevant to the taxation of the digital economy. more›

Luxembourg appeals against the European Commission's ruling in respect of Amazon

On 26 February 2018, the European Commission (EC) published the text of its October 2017 decision against Luxembourg (which found that Luxembourg had, in the EC's view, granted illegal state aid to Amazon). more›

Miscellaneous

"Loyalty bonuses" paid to investors not subject to withholding tax as "annual payments"

On 8 March 2018, the First-tier Tribunal held that so-called "loyalty bonuses" paid to investors by an investment platform service provider (Hargreaves Lansdown) were not "annual payments" subject to withholding of basic rate income tax. more›

Spring Statement 2018

On 13 March 2018, the Chancellor delivered the first Spring Statement (under the new approach of having a single fiscal event – or Budget – in the Autumn).

As expected, the Chancellor's statement included no substantive tax measures. However, a number of consultations were announced and other tax-related documents were published, including:

- A paper setting out the government's views on the challenges for the corporate tax system posed by the digital economy (together with potential solutions). See here.
- A "call for evidence" on the VAT registration threshold (ie whether the current £85k threshold for compulsory registration disincentivises growth for small businesses). See here.
- A consultation on allowing claims for entrepreneurs' relief in respect of gains made before a shareholding is diluted below the 5% threshold. As proposed, this would only be possible where the dilution occurs as a result of the raising of new capital for use in the business. It is proposed that this change would take effect for qualifying dilutions from 6 April 2019. See here.

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Corporation tax – general

UK transfer pricing rules updated to reflect latest OECD guidelines

On 1 March 2018, the Taxation (International and Other Provisions) Act 2010 Transfer Pricing Guidelines Designation Order 2018 was made. The effect of the Order is that, with effect from April 2018, the relevant provision of TIOPA 2010[1] is updated to refer to the July 2017 version of the OECD's Transfer Pricing Guidelines.

The Order can be viewed here.

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Interest deductibility restriction rules – updated HMRC guidance published

On 28 February 2018, HMRC published further, updated, guidance on the interest deductibility restriction rules applicable from 1 April 2017. As well as reflecting certain recent changes made to the rules, the guidance gives further clarity on a number of technical issues. Given the complexity of the rules, this more detailed guidance is to be welcomed.

The revised guidance can be viewed here.

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Intangible fixed assets tax regime – consultation launched

On 19 February 2018, HMRC published a consultation document on reform of the UK's intangible fixed assets (IFA) tax regime.

Amongst other things, the consultation considers (i) whether pre-2002 assets should be brought within the scope of the IFA regime, (ii) whether the IFA de-grouping charge could be made less onerous, and (iii) the restriction denying relief for goodwill and other "customer-related" assets.

Comments are invited by 11 May 2018.

The consultation document can be viewed here.

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Simplified arrangements for carried-forward losses surrendered as group relief

On 8 January 2018, regulations were made to simplify the arrangements for claiming group relief for carried forward losses.

The rules for relief for carried-forward losses changed from 1 April 2017. Losses arising after that date and carried forward can now be surrendered as group relief. The legislation that allows companies to enter into simplified arrangements for group relief has been amended so that simplified arrangements can now be used for group relief claims for carried-forward losses.

The regulations can be viewed here.

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1. Section 164 of the Taxation (International and Other Provisions) Act 2010.

VAT

University investment activity VAT recovery – Court of Appeal refers questions to ECJ

On 27 March 2018, the Court of Appeal[2] referred to the ECJ questions as to the ability of the University of Cambridge (University) to recover input VAT incurred in connection with the University's investment activities.

At issue is the correct tax treatment of VAT which the University has paid in respect of the professional management of the Cambridge University Endowment Fund (Fund). The Fund invests donations and endowments which produces an income of over £40m per year, used by the University to support all of its activities.

Both the First-tier and Upper Tribunals, allowing VAT recovery, held that although the University's investment activities did not of themselves amount to an "economic activity", the professional fees incurred on such activities formed part of the University's general overheads as those (out-of-scope) activities benefitted other (taxable, and non-taxable) activities. Accordingly, the earlier decisions had ruled that the VAT should be regarded as residual input tax and recoverable in accordance with the University's partial exemption method. Two decisions of the ECJ[3] were relied upon by the University in these earlier decisions.

HMRC, on the other hand, argued that the input tax relates solely to the investments held in the Fund and cannot be regarded as falling within the category of general overheads referable to other (taxable) parts of its activities.

The Court concluded that the correct approach on these facts was not sufficiently clear to preclude an ECJ reference. Specifically the Court proposed referring to the ECJ the questions:

- whether, where fees are incurred solely in relation to a non-taxable investment activity, it is possible to make the necessary link between those costs and the economic activities which are subsidised with the investment income which is so produced
- confirmation that the Court's reading of the decision is *Sveda* is correct and accordingly that no distinction is to be made between exempt and non-taxable transactions for the purpose of deciding whether input tax is deductible.

A key issue for the ECJ to give a view on, is whether in this context income raised by investment should be treated as equivalent to the raising of capital.

The decision can be viewed here.

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Revised HMRC guidance on VAT cost sharing exemption – bad news for insurers, banks

On 22 March 2018, HMRC published Revenue and Customs Brief 3 (2018)[4] in light of recent ECJ decisions[5] on the VAT cost sharing exemption (CSE). Whilst expected, given the conclusions reached in those decisions, the revised HMRC policy will be disappointing for insurers and other financial services groups.

2. In *HMRC v University of Cambridge* [2018] EWCA Civ 568.
3. C-465/03 *Kretztechnik AG v Finanzamt Linz*; C-437/06 *Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG v Finanzamt Göttingen*.
4. "Changes to the VAT exemption for cost sharing groups".
5. *Minister Finansów v Aviva Towarzystwo Ubezpieczeÿ na ÿycie S.A. w Warszawie* (Case C-605/15) and *DNB Banka AS v Valsts ieÿÿmumu dienests* (Case C-326/15), and *European Commission v Federal Republic of Germany* (Case C-616/15).

The CSE, broadly, provides an exemption for VAT on services provided within groups whose members make exempt (or non-business) supplies provided:

- the intra-group supplies are "directly necessary" to enable the group members to make such exempt (or non-business) supplies
- only each member's exact share of the cost of the intra-group supplies are recovered, and
- exempting the intra-group supply would not lead to distortion of competition.

From 22 March 2018 (but subject to a transitional period), the CSE will only be available to groups engaged in a limited number of "public interest" activities. These will include education, health and welfare and charitable fundraising but will exclude from the scope of the CSE banks, insurance and other financial services.

Additionally, the CSE will only be open to members located in the UK.

Groups that have applied HMRC's previously published guidance will be able to continue to do so until 31 May 2018 unless tax avoidance is involved or there is likely to be a distortion of completion.

The Brief can be viewed here.

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VAT zero-rating treatment denied for digital versions of newspapers

On 8 March 2018, the First-tier Tribunal held[6] that digital versions of certain newspapers did not qualify for zero-rating treatment available to the print editions of the same newspapers.

"Newspapers" are zero-rated for VAT purposes. The question at issue before the First-tier Tribunal was whether the digital versions of the same newspaper, which whilst not identical were broadly similar to the 'hard-copy' print edition, could also benefit from zero-rating.

The taxpayer's view was that, even if not strictly "newspapers", the principle of fiscal neutrality (so that VAT should be imposed consistently so as not to distort competition as between similar supplies) meant that digital and print editions should be subject to the same VAT treatment.

The Tribunal agreed with HMRC that "newspapers" could not encompass digital editions as these amounted to a supply of services. "Newspapers", for the purposes of VAT zero-rating treatment, were (physical) goods. Indeed the Tribunal's view was that the whole of the group of zero-rated items of which newspapers were just one type ("Books etc") was confined to supplies of goods. The taxpayer did not succeed with an argument that the UK VAT legislation[7] should be construed purposively, so as to extend to new forms of the provision of news following technological advances.

The decision can be viewed here.

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6. In *News Corp UK & Ireland Limited v HMRC* [2018] UKFTT 0129.
7. Item 2 of Group 3 of Schedule 8 to the VATA 1994.

Upper Tribunal decision on VAT "builder's block"

On 26 February 2018, the Upper Tribunal[8] allowed, in part, the taxpayer's appeal in relation to its ability to recover input VAT incurred on the provision of certain white goods, kitchen appliances and carpets installed in newly built properties.

This was a referral back to the Tribunal in respect of certain issues remaining to be determined from a previous appeal. For our earlier commentary on the original Upper Tribunal decision, see here.

The taxpayer had submitted claims to HMRC for recovery of historic input tax amounting to over £51m, in relation to the installation of various items in newly-built properties (including ovens, surface hobs, extractor hoods, washing machines, microwaves, dishwashers, refrigerators, freezers and carpets).

The VAT so-called "builder's block" prevents house builders from claiming input VAT recovery on certain specified goods supplied as part of a (zero-rated) dwelling. For the builder's block to apply, the goods must be "incorporated" in the dwelling. However this does not include items "ordinarily" installed by builders as fixtures. The taxpayer had sought to recover input VAT on various items based on the following (alternative) arguments:

- the UK builder's block was incompatible with EU law, or
- the items in question were not "incorporated" into the dwelling, or
- if incorporated, they were of a kind "ordinarily" installed by builders.

HMRC denied the taxpayer's claims on the basis the items fell within the scope of the so-called "builder's block", so that any input tax incurred on these items was not recoverable.

The Upper Tribunal in 2017 held that the builder's block was not unlawful under EU law but adjourned the hearing to allow the parties to agree the extent of the claim that related to goods that were not fixtures.

The parties were not able to reach agreement, however, so the Tribunal was required to apply its own test to various kitchen appliances. In particular, it had to decide whether certain items, which were not fixtures, were nonetheless fittings and incorporated. The Tribunal found that all items under consideration were either fixtures or installed fittings, and were therefore incorporated into the buildings for the purpose of the builder's block. Only extractor hoods installed between 1 January 1982 and 1 June 1984, were "ordinarily installed" as fixtures and, therefore, fell within an exclusion from the application of the builder's block.

The Tribunal confirmed that incorporation does not require an item to be integrated. Items may be freestanding but nonetheless be installed fittings because they can reasonably be expected not to be moved on a regular basis.

The decision can be viewed here.

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8. In *Taylor Wimpey Plc v HMRC* [2018] UKUT 55.

VAT grouping rules – "informal" consultation

On 1 February 2018, HMRC wrote to the Chartered Institute of Taxation (CIOT) inviting CIOT to discuss HMRC's "interim" views on possible changes to the VAT grouping rules. A response was requested by 16 March 2018.

This "informal" consultation will consider three options for widening the scope of the VAT grouping rules, by allowing "non-corporate" entities to join a VAT group:

- a non corporate entity (for example partnership or individual) to join a VAT group with its body corporate subsidiaries if it controls all of the members of the VAT group
- a partnership to join a VAT group where all of the partners in the partnership are bodies corporate and all of the bodies corporate are already in a VAT group
- a limited partnership to join a VAT group where the sole general partner is a body corporate and manages the limited partnership.

HMRC's letter to CIOT can be viewed here.

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First-tier Tribunal holds that UK broker did not constitute a UK fixed establishment of a non-EU insurer for VAT purposes

On 19 January 2018, the First-tier Tribunal held[9] that the resources of a UK insurance broker did not constitute a "fixed establishment" for VAT purposes in the UK of a non-EU insurer. As a result, the UK broker was entitled to recover input tax attributable to the supplies it provided to the non-EU insurer.

The UK broker (Broker), a company incorporated in England and Wales, provided broking, underwriting and claims handling services to a Gibraltar-incorporated insurance company (Insurer). The Insurer made supplies of insurance, via the Broker, to UK customers. The Broker received a commission from the Insurer and, crucially:

- the Broker set the gross premium payable by UK customers (the Broker's commission being the difference between this gross premium and the net premium payable to (and set by) the Insurer)
- the contracts between the Broker and Insurer were on arm's length terms
- the Insurer decided which risks to insure
- the Broker could reject, settle and pay claims up to a maximum amount per claim
- the Broker acted for other insurers, had autonomy to decide on its staffing numbers, and owned its website, call centres, computer and software systems and customer databases.

The Broker, relying on the rule that input tax can be recovered if attributable to insurance services supplied to non-EU[10] customers, sought to recover input tax attributable to its supplies to the Insurer on the basis that the supplies were made outside of the EU. HMRC's view was that the Broker's supplies were made to a UK fixed establishment of the Insurer, by virtue of the fact that the Broker's human and technical resources constituted such an establishment, with the result that the input tax was not recoverable.

9. In *Hastings Insurance Services Ltd v HMRC* [2018] UKFTT 27 (TC).
10. Footnote.

In a lengthy decision, the Tribunal held that the Insurer did not have a UK fixed establishment and that, even if it did, the Broker's supplies should nevertheless correctly be viewed as being supplied to the Insurer's business establishment outside of the EU (in Gibraltar). The Broker was therefore, in the Tribunal's view, entitled to recover its input tax attributable to its supplies to the Insurer.

In reaching its decision that there was no UK fixed establishment of the Insurer on the facts, the Tribunal noted that each of the Broker and the Insurer operated separate businesses, each with their own commercial aims (so that the Broker acted independently, albeit within commercially agreed limits).

The case can be viewed here.

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Employment

EMI share options – lapse of EU state aid approval

On 4 April 2018, HMRC issued an announcement[11] confirming that EU state aid approval for EMI options would expire on 6 April 2018.

In the Bulletin, HMRC state that an application has been made for renewal of the approval but that there is a possibility that EMI options granted after 6 April 2018, but before any such renewal is approved, may not receive the usual tax-advantaged EMI treatment.

HMRC has, however, confirmed that EMI options granted up to 6 April 2018 should not be affected.

The HMRC Bulletin can be viewed here.

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HMRC wins high-profile TV presenter IR35 case

On 10 February 2018, the First-tier Tribunal[12] held that a former BBC presenter was, for tax purposes, to be treated as an employee. This is the first in a large number of cases being taken by HMRC against TV presenters, relying on the application of the "IR35" tax rules.

Broadly, the IR35 tax legislation currently[13] requires that, where an individual is engaged via an intermediary (eg their own personal service company), and the individual would be an "employee" of the end client if engaged directly, the intermediary must treat the fees received as employment income of the individual and account for tax and national insurance contributions accordingly.

Although the *Ackroyd* case is not a lead case, its outcome had been hotly anticipated and there is some degree of debate as to the Tribunal's decision in the case.

It is clear from the decision that each case needs to be considered on its own facts but the Tribunal's view as to whether the TV presenter was "controlled" by the BBC (it held that she was) will be of concern to many taxpayers who have provided their services under similar arrangements.

The decision can be viewed here.

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Government launches consultation on employment status, following publication of the Taylor Review

On 7 February 2018, the government published a consultation on employment status, following the July 2017 publication of the Taylor Review[14]. The consultation closes on 1 June 2018 and in it the government pose 64 questions, in 7 different sections.

Whilst accepting the Taylor Review's conclusions that (i) there is a lack of clarity and certainty with regards to the current tests for employment status, (ii) the current 3-tier approach to employment status as far as employment **rights** are concerned, should be retained, and (iii) an online tool

11. In "Employment related securities bulletin No.27" (April 2018).
12. In *Christa Ackroyd Media Ltd v HMRC* [2018] UKFTT 69 (TC).
13. Assuming the end client is not a public authority, in which case the burden of the IR35 regime switches from the intermediary to the end client.
14. "Good Work – The Taylor Review of Modern Working Practices (July 2017).

for determining employment status would be helpful, the consultation does not itself present proposals as to how, for example, to introduce greater clarity and certainty in this area.

The consultation specifically seeks views as to whether, as recommended by the Taylor Review, the definitions of "employed" and "self-employed" in tax law and employment rights law should be aligned . Notably, the consultation makes no recommendation either way.[15]

At the same time, the consultation seeks views as to whether individuals who are deemed employees for tax purposes (eg as "salaried members" of LLPs, or under the IR35 legislation), should also be given employment rights as "deemed" employees.

For our earlier commentary on the Taylor Review, see here.

The consultation can be viewed here.

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Upper Tribunal considers companies to be MSCs due to provider's involvement

On 19 January 2018, the Upper Tribunal[16] held that five companies were "managed service companies" (MSCs) for tax purposes due to the level of involvement of the companies' provider.

Under the MSC tax rules, an MSC is required to account for tax and national insurance contributions on amounts paid to the "worker" pursuant to the engagement between the MSC and the end-client, howsoever the payment is described (ie, the amounts received by the worker are treated as earnings from an employment). To be caught by the MSC rules, amongst other requirements the "provider" of the services (ie the use of the company to provide the services of individuals) must be "involved" with the company.

The five companies were personal service companies, and each had a single individual shareholder whose services were provided to end clients. The companies were provided as a "package" by a services provider. The provider gave the individual shareholders a choice as to how frequently they received salary payments from the company, and whether they received a minimum wage or other, specified, amount. The provider provided a number of services to the companies.

The Upper Tribunal found that the companies were MSCs within the meaning of the tax legislation[17]. The Tribunal held that the services provider in this case was (i) an "MSC provider", as required under the applicable legislation, and (ii) "involved" with the five companies. On the question of "involvement", it was found that:

- the services provider benefitted financially "on an ongoing basis from the provision of the services of the individuals", and
- the services provider influenced the way in which payments were made to the individuals, and influenced the companies' finances and activities.

The decision can be viewed here.

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15. The current 3-tier approach for employment rights, which includes the concept of "workers", means that in order to achieve full alignment, either this category would need to be removed (a move which the government, in keeping with the Taylor Review recommendation, seems to have rejected) or, in the alternative, added to tax law.
16. In *Christianuyi Ltd and others v HMRC* [2018] UKUT10 (TCC).
17. Section 61B of ITEPA 2003.

Stamp taxes

Welsh Land Transaction Tax – WRA guidance and HMRC SDLT guidance on "cross-border" transactions

In advance of the introduction of Welsh Land Transaction Tax (LTT), which replaced SDLT for Welsh land acquisitions from 1 April 2018, the Welsh Revenue Authority has published a number of pieces of guidance on the new rules. These include:

- general LTT guidance available here, here and here
- guidance on LTT returns and enquiries, available here
- LTT guidance on leases and trusts, available here and here.

Also, on 21 March 2018, HMRC published SDLT guidance on "cross-border" transactions (for example transactions where a single property spans the English-Welsh, or English-Scottish, border). The guidance can be viewed here.

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International

BEPS – further OECD guidance on attribution of profits to (extended definition of) PEs

On 22 March 2018, the OECD published further guidance on the attribution of profits to permanent establishments (PEs), in light of the changes to the definition of a PE resulting from the OECD's Base Erosion and Profit Shifting (BEPS) project.

The BEPS changes to the definition of a PE aim to reduce the potential for companies to claim they do not have a PE in a country in which they do business. The changes address, in particular, "commissionaire" and similar strategies. These, and other, changes have been "introduced" via a multilateral instrument (MLI). The MLI, published on 24 November 2016, enables countries to amend their existing double tax treaties all at once[18]. Although 67 countries (including the UK) had signed the MLI by 7 June 2017, the UK has reserved its right not to apply the MLI insofar as it deems there to be a PE where a person acts on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise.

The OECD guidance can be viewed here.

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OECD Report on Tax Challenges Arising from Digitalisation

On 16 March 2018, the OECD published an "Interim Report 2018" on Tax Challenges Arising from Digitalisation.

The Report gives an update as to implementation of certain BEPS measures in this area, and describes unilateral actions taken in some jurisdictions (for example the Diverted Profits Tax, or DPT, in the UK).

A final report on this area is not expected until 2020.

The OECD report and press release can be viewed here and here.

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Mandatory disclosure by intermediaries of cross-border tax planning arrangements

On 13 March 2018, the EU Council agreed to a measure to require the mandatory disclosure by intermediaries to their local tax authorities of certain cross-border tax planning arrangements.

An "intermediary" for these purposes is anyone with an EU taxable presence (or EU professional services registration) who designs, markets, organises or makes available for implementation or manages the implementation of a "reportable" cross-border arrangement. Taxpayers may also be caught by the new rules as the term extends to anyone who knows, or could reasonably be expected to know, that they have undertaken to provide (directly or indirectly) aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.

The new rules are similar to the UK's existing "DOTAS"[19] regime as, for the cross-border arrangement to be "reportable", a specified "hallmark" must exist.

18. In respect of which, see our earlier commentary here.
19. Disclosure of Tax Avoidance Schemes.

The new rules must be implemented by member states by 31 December 2019, to be applied from 1 July 2020. The uncertainty surrounding Brexit casts doubt as to whether the UK will impose these new rules, although the UK has been a vocal supporter of the OECD work in this area.

The Council announcement can be viewed here.

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Taxing the digital economy – draft EC directives published

On 21 March 2018, the European Commission published two draft Directives relevant to the taxation of the digital economy.

- The first will impose a "temporary" digital services tax (DST). Levied by each member state, DST will apply at the rate of 3% on revenue from certain digital activities and only to entities with (i) worldwide revenues exceeding EUR 750m, and (ii) taxable EU revenue exceeding EUR 50m. The stated intention is that DST will no longer be charged once more permanent measures are put in place (see below).
- The second draft Directive would allow any member state to extend the definition of a "permanent establishment" to include the existence of a "significant digital presence" in the member state. This threshold would be met if certain digital services are supplied to users in the member state through a digital interface and either:
  - total annual revenue exceeds EUR 7m, or
  - number of users exceeds 100,000, or
  - business contracts for supply of such services exceeds 3,000.

The draft Directives can be viewed here.

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Luxembourg appeals against the European Commission's ruling in respect of Amazon

On 26 February 2018, the European Commission (EC) published the text of its October 2017 decision against Luxembourg (which found that Luxembourg had, in the EC's view, granted illegal state aid to Amazon).

On the same day it was revealed that Luxembourg had (in December 2017) challenged the EC's original decision. Luxembourg's arguments, in broad summary, include that:

- the EC had failed to establish the existence of an advantage in favour of Amazon EU S.à r.l. (OpCo). In particular the EC erred in finding that the royalty fee actually paid by OpCo differs from the arm's-length price
- the EC had failed to establish that the Luxembourg tax ruling is selective in nature
- the EC had undertaken covert fiscal harmonisation by imposing its own interpretation of the "right" transfer pricing to apply in this case, infringing the exclusive competence of the member states in the area of direct taxation.

The EC's October 2017 decision can be viewed here.

Luxembourg's challenge can be viewed here.

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Miscellaneous

"Loyalty bonuses" paid to investors not subject to withholding tax as "annual payments"

On 8 March 2018, the First-tier Tribunal[20] held that so-called "loyalty bonuses" paid to investors by an investment platform service provider (Hargreaves Lansdown) were not "annual payments" subject to withholding of basic rate income tax.

Crucially, the Tribunal took the view that the loyalty bonuses did not represent "pure income profit" in the investor's hands. This is a key requirement in determining whether any payment is an "annual payment" subject to withholding. As the so-called loyalty bonus was, in fact, the passing on to investors of their share of the annual management charge rebated to Hargreaves Lansdown, it could not amount to "profit". It was not the case that the investor received the payment without having to "do" anything. Rather, in the Tribunal's view, as the investor had to pay the management charge in the first place the effect of the payment of the rebate to the investor by way of a 'loyalty bonus' was to reduce their net cost.

This goes directly against HMRC's publically stated[21] view of "trail commission", and it therefore remains to be seen whether HMRC will appeal this decision.

The decision can be viewed here.

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20. In *Hargreaves Lansdown Asset Management Limited v HMRC* [2018] UKFTT 127.
21. See here.

About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 83 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol.

"... the client-centred modern City legal services business."

At RPC we put our clients and our people at the heart of what we do:

- **Best Legal Adviser status every year since 2009**
- **Best Legal Employer status every year since 2009**
- **Shortlisted for Law Firm of the Year for two consecutive years**
- **Top 30 Most Innovative Law Firms in Europe**

We have also been shortlisted and won a number of industry awards, including:

- **Winner – Overall Best Legal Adviser – Legal Week Best Legal Adviser 2016-17**
- **Winner – Law Firm of the Year – The British Legal Awards 2015**
- **Winner – Competition and Regulatory Team of the Year – The British Legal Awards 2015**
- **Winner – Law Firm of the Year – The Lawyer Awards 2014**
- **Winner – Law Firm of the Year – Halsbury Legal Awards 2014**
- **Winner – Commercial Team of the Year – The British Legal Awards 2014**
- **Winner – Competition Team of the Year – Legal Business Awards 2014**

Areas of expertise

- Competition
- Construction & Engineering
- Corporate/M&A/ECM/ PE/Funds
- Corporate Insurance
- Dispute Resolution
- Employment
- Finance
- Insurance & Reinsurance
- IP
- Media
- Pensions
- Professional Negligence
- Projects & Outsourcing
- Real Estate
- Regulatory
- Restructuring & Insolvency
- Tax
- Technology

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