



# Corporate tax update

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November 2019

Welcome to the latest edition of our Corporate Tax Update, written by members of RPC's tax team.

This month's update reports on the key developments from September and October 2019. No update would be complete in the current climate without a report on a recent IR35 decision (this month, we bring you two). This month's update also includes summaries as to HMRC's latest thinking on the regime for offshore receipts in respect of intangible property, as well as case summaries on the interpretation of the UK-Irish double tax treaty, cross-border loss relief and the effect of statements in HMRC's published manuals.

## HMRC updates venture capital scheme advance assurance guidance

On 28 October 2019, HMRC published updated guidance on its venture capital scheme advance assurance facility. [more>](#)

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## Upper Tribunal upholds IR35 decision in *Christa Ackroyd* case

On 25 October 2019, the Upper Tribunal (UT) upheld the decision of the First-tier Tribunal (FTT) that the BBC had sufficient control over Ms Ackroyd (a presenter) such that an employment relationship would have existed had her services been directly supplied (rather than supplied via her personal services company, or PSC). [more>](#)

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## Policy paper published in relation to reform of the off-payroll working ('IR35') rules

On 22 October 2019, HMRC published a policy paper in relation to reforms to the off-payroll working rules and the support HMRC is putting in place to assist organisations prepare ahead of April 2020. [more>](#)

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## AG opines that freedom of establishment does not entitle migrating company to loss relief in new member state in respect of losses incurred prior to migration

On 17 October 2019, the Advocate General (AG) opined that the freedom of establishment does not oblige a host member state to allow tax relief for losses incurred by a company in another (home) member state before it transferred its place of management (PoM) to the host state. [more>](#)

## HMRC publishes draft regulations to provide for real-time reporting of employer NICs on termination awards from April 2020

On 16 October 2019, draft regulations to provide for real-time reporting of the new Class 1A NIC liabilities from 6 April 2020 were published for consultation by HMRC. [more>](#)

### **New, extended scope of UK VAT grouping rules takes effect from 1 November 2019**

On 15 October 2019, HM Treasury made an order appointing 1 November 2019 as the day on which the extended scope of the VAT grouping rules take effect. [more>](#)

### **HMRC consultation response published in relation to offshore receipts in respect of intangible property**

On 14 October 2019, the government published a number of documents in response to its consultation on draft Regulations relating to offshore receipts in respect of intangible property. [more>](#)

### **EU list of 'non-cooperative' jurisdictions for tax purposes updated**

On 10 October 2019, the Economic and Financial Affairs Council updated the EU list of 'non-cooperative' jurisdictions for tax purposes. [more>](#)

### **Upper Tribunal holds that UK legislation attributing notional capital to UK PE was consistent with UK-Irish tax treaty**

On 9 October 2019, the Upper Tribunal (UT) held that UK legislation setting out how equity and loan capital should be attributed to a UK permanent establishment (PE) of a non-resident company was consistent with the UK-Ireland double tax treaty (DTT). [more>](#)

### **Court of Appeal holds that published HMRC statement could give rise to a legitimate expectation, but that taxpayer did not rely on it**

On 8 October 2019, the Court of Appeal held that a statement in HMRC's published manuals, although a statement as to HMRC's opinion of the law, was sufficiently clear, unambiguous and devoid of relevant qualification to produce a legitimate expectation. [more>](#)

### **ECJ agrees with AG opinion that VAT exemption does not extend to the provision and maintenance of cashpoint machines**

On 3 October 2019, the ECJ held that the provision and maintenance of cashpoint machines did not fall within the VAT exemption at Article 135(1)(d) of Directive 2006/112/EC for financial services transactions. [more>](#)

### **OTS publishes update on its VAT report**

On 1 October 2019, the Office of Tax Simplification (OTS) published an update on its VAT review. [more>](#)

### **Large business tax compliance – HMRC updates risk profile guidance**

On 30 September 2019, HMRC added guidance on its revised Business Risk Review (BRR) process to the Tax Compliance Risk Management manual. [more>](#)

### **First-tier Tribunal holds that BBC presenters were caught by IR35 rules**

On 17 September 2019, the First-tier Tribunal held that the so-called 'IR35' rules applied to successive contracts entered into by the BBC and personal services companies (PSCs) formed by three presenters. [more>](#)

## HMRC updates venture capital scheme advance assurance guidance

On 28 October 2019, HMRC published updated guidance on its venture capital scheme advance assurance facility.

The revised guidance confirms who can complete the advance assurance application. There are also checklists to assist with the process.

The updated guidance can be viewed [here](#).

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## Upper Tribunal upholds IR35 decision in *Christa Ackroyd* case

On 25 October 2019, the Upper Tribunal (UT)<sup>1</sup> upheld the decision of the First-tier Tribunal (FTT) that the BBC had sufficient control over Ms Ackroyd (a presenter) such that an employment relationship would have existed had her services been directly supplied (rather than supplied via her personal services company, or PSC).

Whether or not the FTT had erred in law in its finding on “control” was the sole ground of appeal before the UT.

The taxpayer’s argument centred upon the absence of an ultimate control clause in the actual contract between the BBC and the PSC. The view put forward on behalf of Ms Ackroyd was that the FTT had erred in law in implying such a clause into the hypothetical contract between the BBC and Ms Ackroyd.

The UT however held that although the hypothetical contract should properly be “based on” the terms of the actual contract between the BBC and the PSC, it is not correct that the hypothetical contract should merely track the actual one. The UT noted that the IR35 legislation requires that regard be given to the “circumstances” (in order to determine whether an employment relationship would exist were the services to be directly provided) and that these circumstances include the terms of the actual contractual arrangements. It was therefore open to the FTT to consider whether the hypothetical contract should include terms not in the actual contract. The UT noted in particular that the fact that the actual contract was detailed and was negotiated, and included a “whole agreement” clause, did not serve to limit the FTT’s scope in terms of the provisions that could be implied in the hypothetical contract.

The taxpayer also submitted that the FTT erred in law in reaching a view that a “framework of control” existed on the particular facts. The taxpayer argued that the BBC lacked “effective sanctions” to control Ms Ackroyd (for example, she had no line manager and was not subject to formal appraisals). A distinction was made (on behalf of the taxpayer) between control over a worker’s output, and control over input. It was (so the taxpayer’s argument went) control over input that mattered for present purposes, and the BBC did not have this. The UT rejected this argument.

1. In *Christa Ackroyd Media Ltd v HMRC* [2019] UKUT 326 (TCC).

The UT held that the FTT had been entitled, based upon the facts before it, to conclude that ultimate control of Ms Ackroyd rested with the BBC. Such facts included that the BBC could dictate the stories covered by Ms Ackroyd, the people she interviewed and the days she worked.

The decision can be viewed [here](#).

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### **Policy paper published in relation to reform of the off-payroll working ('IR35') rules**

On 22 October 2019, HMRC published a policy paper in relation to reforms to the off-payroll working rules and the support HMRC is putting in place to assist organisations prepare ahead of April 2020.

According to HMRC, 90% of workers that should be operating the off-payroll working rules are currently not doing so. HMRC state that it has "taken the decision that they will only use information resulting from these changes to open a new enquiry into earlier years if there is reason to suspect fraud or criminal behaviour". There had previously been much speculation over whether HMRC would use indications that workers were caught by the rules to open enquiries or issue tax assessments for historical periods and this reassurance will be welcomed by those affected by the off-payroll rules.

The policy paper can be viewed [here](#).

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### **AG opines that freedom of establishment does not entitle migrating company to loss relief in new member state in respect of losses incurred prior to migration**

On 17 October 2019, the Advocate General (AG) opined<sup>2</sup> that the freedom of establishment does not oblige a host member state to allow tax relief for losses incurred by a company in another (home) member state before it transferred its place of management (PoM) to the host state.

In this particular case the company incurred losses whilst resident in the Netherlands. It then transferred its PoM to the Czech Republic, and as it could no longer use the losses in the Netherlands it sought to set them against its subsequent profits arising in the Czech Republic. The claim was disallowed by the Czech tax authorities.

The AG opined that, although the freedom of establishment allowed a transfer of PoM from one state to another, the restriction of the use of losses in this case was justified on the basis of the balanced allocation of taxing powers. The denial of the relief was consistent with the principles of territoriality, autonomy and symmetry, and was proportionate.

The AG's opinion can be viewed [here](#).

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2. In AURES Holdings a.s. (C-405/18).

## HMRC publishes draft regulations to provide for real-time reporting of employer NICs on termination awards from April 2020

On 16 October 2019, draft regulations to provide for real-time reporting of the new Class 1A NIC liabilities from 6 April 2020 were published for consultation by HMRC. Under the National Insurance Contributions (Termination Awards and Sporting Testimonials) Act 2019, termination payments made from 6 April 2020 that exceed £30,000 and are taxable under ITEPA 2003 will give rise to an employer NIC charge.

The draft regulations provide that such NICs liabilities on cash or cash-equivalent payments should be paid and reported to HMRC as they arise (rather than under form P11D(b)). Termination awards that are benefits-in-kind should be paid and reported after the tax year end via form P11D(b).

The draft regulations can be viewed [here](#).

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## New, extended scope of UK VAT grouping rules takes effect from 1 November 2019

On 15 October 2019, HM Treasury made an order appointing 1 November 2019 as the day on which the extended scope of the VAT grouping rules take effect.

Finance Act 2019 included provisions enabling certain individuals and partnerships to be eligible for inclusion in a VAT group. These changes follow the ECJ decision in *Larentia + Minerva*<sup>3</sup>. In particular, under these extended VAT grouping rules:

- an individual carrying on a business via a UK establishment and one or more UK bodies corporate are eligible to be treated as members of a VAT group if the individual controls the UK body(ies) corporate; and
- two or more relevant persons (individuals, bodies corporate or Scottish partnerships) carrying on a business in partnership via a UK establishment and one or more UK bodies corporate are eligible to be treated as members of a VAT group if the partnership controls the UK body(ies) corporate

The order can be viewed [here](#).

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## HMRC consultation response published in relation to offshore receipts in respect of intangible property

On 14 October 2019, the government published a number of documents in response to its consultation on draft Regulations relating to offshore receipts in respect of intangible property.

The Offshore Receipts in respect of Intangible Property (ORIP) rules were introduced by section 15 of, and Schedule 3 to, Finance Act 2019. A tax information and impact note for the ORIP rules was published on 29 October 2018, which provides further details on the background to the regime.

As a result of consultation with affected businesses, advisory firms and representative bodies, certain technical amendments to the legislation have been identified that are necessary for the regime to work as intended.

3. C-108/14.

The definition of UK sales has been clarified to make the rules more proportionate and improve their targeting and there are new rules to minimise double taxation, and better targeting of the jurisdictions in scope. HMRC has published the updated statutory instrument, explanatory memorandum and tax information and impact note.

The documents can be viewed [here](#).

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### EU list of 'non-cooperative' jurisdictions for tax purposes updated

On 10 October 2019, the Economic and Financial Affairs Council updated the EU list of 'non-cooperative' jurisdictions for tax purposes. The list, first adopted in December 2017, is regularly updated.

The 'list' actually has 2 parts. Annex I contains those jurisdictions deemed to be non-cooperative for tax purposes. Annex II contains a 'watch-list' for inclusion in Annex I.

Notably in this most recent update, the UAE has been removed from Annex I. Switzerland and other jurisdictions have been removed from Annex II. Nine jurisdictions now remain on Annex I: American Samoa, Belize, Fiji, Guam, Oman, Samoa, Trinidad and Tobago, the US Virgin Islands and Vanuatu.

The list is particularly relevant to the EU's cross-border tax planning arrangements disclosure regime (Council Directive (EU) 2018/822, or "DAC6"). Whether or not a jurisdiction is included in the EU list of non-cooperative jurisdictions determines the application or otherwise of DAC6 'category C' hallmark arrangements.

To view the updated EU list, see [here](#).

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### Upper Tribunal holds that UK legislation attributing notional capital to UK PE was consistent with UK-Irish tax treaty

On 9 October 2019, the Upper Tribunal (UT) held<sup>4</sup> that UK legislation<sup>5</sup> setting out how equity and loan capital should be attributed to a UK permanent establishment (PE) of a non-resident company was consistent with the UK-Ireland double tax treaty (DTT).

Two Irish companies (Irish Bank and Irish Nationwide) traded in the UK through PEs here. Each PE filed UK tax returns and claimed interest deductions on amounts borrowed from the relevant Irish company<sup>6</sup>.

HMRC refused to allow such interest deductions, on the basis that the tax returns filed by the PEs understated the amount of equity capital of the PE (therefore overstating the PE's loan capital, and therefore the interest charges). What was at dispute in this case was whether (as contended by Irish Bank and Irish Nationwide) the terms of the DTT took precedence over the UK legislation. In other words, whether (or not) the terms of the DTT precluded the application of the relevant UK legislation.

4. In *Irish Bank Resolution Corporation Ltd and another v HMRC* [2019] UKUT 277 (TCC).
5. As in force at the relevant time.
6. The UT explicitly recognised the legal 'fiction' in referring to a PE "paying" an amount of interest to the non-resident company, but used such terminology as the best shorthand way of describing such dealings.

The UK legislation in question was section 11AA(3)(b) of ICTA 1988<sup>7</sup>. It provides that it shall be assumed, in attributing profits to the PE, that the PE has such equity and loan capital as it could reasonably be expected to have on the basis that the PE was a distinct and separate enterprise, dealing wholly independently with the non-resident company.

HMRC argued that section 11AA(3)(b) was one of the approaches in calculating a PE's profits that was permitted by the DTT. The DTT neither obliged this approach, nor precluded it, meaning (in HMRC's view) that the domestic law approach was permissible.

In construing the DTT, the UT held that prior HMRC practice as to the taxation of a UK PE should not be taken into account. The UT did, however, consider OECD publications and foreign case law as to similar DTTs in construing the DTT. The UT considered a number of OECD publications, published both before and after the DTT entered into force<sup>8</sup>. The UT concluded that the relevant terms of the DTT, when considered alongside the OECD publications (in particular the 2008 commentary), can be "complied with in a variety of ways".

Therefore, despite the fact that the DTT did not contain wording equivalent to section 11AA(3)(b), this did not (in the UT's view) preclude that UK provision from being relied upon by HMRC. The non-residents' appeal was accordingly dismissed.

The decision can be viewed [here](#).

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### **Court of Appeal holds that published HMRC statement could give rise to a legitimate expectation, but that taxpayer did not rely on it**

On 8 October 2019, the Court of Appeal<sup>9</sup> held that a statement in HMRC's published manuals, although a statement as to HMRC's opinion of the law, was sufficiently clear, unambiguous and devoid of relevant qualification to produce a legitimate expectation.

The Court considered whether, on the facts, a change in HMRC's stated opinion would be so unfair as to constitute an abuse of power. The Court held to be relevant the fact that the taxpayer in question had engaged a professional tax adviser. In the Court's view, this affected the taxpayer's ability to claim to have relied on HMRC's published opinion.

In view of the fact that the taxpayer had engaged a professional advisor, and that the published HMRC statement was merely an opinion, the Court held that there was insufficient unfairness to constitute an abuse of power in this case.

The decision can be viewed [here](#).

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7. Now superseded by section 21(2)(b) of the Corporation Tax Act 2009.

8. The UT noted that the further removed from the date of the DTT, the less helpful such OECD publications were likely to be.

9. In *R (Aozora GMAC Investment Ltd) v HMRC* [2019] ECWA Civ 1643.

## ECJ agrees with AG opinion that VAT exemption does not extend to the provision and maintenance of cashpoint machines

On 3 October 2019, the ECJ<sup>10</sup> held that the provision and maintenance of cashpoint machines did not fall within the VAT exemption at Article 135(1)(d) of Directive 2006/112/EC for financial services transactions.

Article 135(1)(d) refers to “transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring”.

In this case the services provided to banks by the taxpayer comprised the supply and maintenance of cashpoint machines. The taxpayer verified bank card data, requested bank authorisation and dispensed the cash. The ECJ took the view that these were merely ‘functional’ services, rather than the approval of transactions. The ECJ held that, in order to constitute a “payment transaction” for the purposes of the VAT exemption, the services had to have the effect of transferring funds, and effecting legal and financial change.

The decision (French version) can be viewed [here](#).

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## OTS publishes update on its VAT report

On 1 October 2019, the Office of Tax Simplification (OTS) published an update on its VAT review. The update outlines and evaluates responses by the government, HM Treasury and HMRC to the report it published in November 2017.

The OTS notes in its update that there has been substantial progress on guidance and communication, partial exemption and the capital goods scheme, and penalties, alongside wide ongoing consideration of the approach to the VAT threshold. The OTS will continue to monitor future developments and may provide a further review on progress at a later date.

The update can be viewed [here](#).

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## Large business tax compliance – HMRC updates risk profile guidance

On 30 September 2019, HMRC added guidance on its revised Business Risk Review (BRR) process to the Tax Compliance Risk Management manual. The BRR is generally applicable to businesses with a turnover of over £200m, or business that are particularly complex, and is the process by which HMRC evaluates, and categorises, the tax compliance risk profile of large businesses

The revised process, referred to as BRR+, will provide for four risk categories (compared to the original two), namely; low, moderate, moderate-high and high.

The BRR takes place at least annually for customers who are not “low risk” (for low risk taxpayers, the BRR is generally carried out every 3 years).

10. In *Finanzamt Trier v Cardpoint GmbH*, successor in law to Moneybox Deutschland GmbH (Case C-42/18).



Under the BRR+, a business will be assessed against three specific behaviour areas:

- systems and delivery
- internal governance; and
- approach to tax compliance

For each area, HMRC has provided a number of “low risk” indicators – a business will be categorised under BRR+ by reference to the number of such indicators that it fails to meet.

The revised guidance can be viewed [here](#).

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### First-tier Tribunal holds that BBC presenters were caught by IR35 rules

On 17 September 2019, the First-tier Tribunal<sup>11</sup> held<sup>12</sup> that the so-called ‘IR35’ rules applied to successive contracts entered into by the BBC and personal services companies (PSCs) formed by three presenters.

Each presenter was at all relevant times the sole shareholder and a director of the PSC that he or she set up. The contracts that were the subject of the dispute spanned periods from 2006/7 to 2013/4<sup>13</sup>.

The Tribunal held that the actual contractual terms between the relevant PSC and the BBC provided the best evidence as to what a direct, notional contract between the BBC and the relevant presenter would have looked like. For the purposes of the IR35 analysis, the Tribunal therefore focused on the terms of the actual (PSC-BBC) contracts as though they were the terms of the notional (presenter-BBC) contract.

The issue under consideration was, essentially, whether these notional contracts met the minimum requirements for there to be an employment relationship for IR35 purposes. In a lengthy judgment, the Tribunal looked at the contracts between the BBC and each of the 3 PSCs, in light of the tests of (i) mutuality of obligation and (ii) control.

The Tribunal held that the fact that the actual contracts provided that (i) the presenters were obliged to be available on a ‘first-call basis’, and (ii) the BBC was obligated to provide to the presenters and to pay them, for a minimum number of days’ work, meant that there was a mutuality of obligation.

As for the control test, the Tribunal placed weight on the facts that (i) the BBC required the presenters to attend meetings, training and appraisals, (ii) the presenters were contractually obliged to adhere to the BBC’s editorial guidelines, (iii) ultimate editorial control remained with the BBC, and (iv) the presenters were restricted from working for other organisations.

It was also considered by the Tribunal that the contracts contained no meaningful right of substitution.

The decision can be viewed [here](#).

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11. In *Paya Limited and others v HMRC* [2019] UKFTT 0583 (TC).

12. By a casting vote.

13. With small variances for each PSC.

## About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 78 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol. We put our clients and our people at the heart of what we do.

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

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

- Best Legal Adviser every year since 2009 – Legal Week
- Best Legal Employer every year since 2009 – Legal Week
- Shortlisted – Banking Litigation Team of the Year – Legal Week Awards 2019
- Shortlisted – Commercial Litigation Team of the Year – Legal Business Awards 2019
- Shortlisted – Best Copyright Team – Managing IP Awards 2019
- Shortlisted – Insurance Team of the Year – Legal Business Awards 2018
- Winner – Best Employer – Bristol Pride Gala Awards 2018
- Winner – Client Service Innovation Award – The Lawyer Awards 2017
- Shortlisted – Corporate Team of the Year – The Lawyer Awards 2017
- Winner – Adviser of the Year – Insurance Day (London Market Awards) 2017
- Winner – Best Tax Team in a Law Firm – Taxation Awards 2017
- Winner – Claims Legal Services Provider of the Year – Claims Club Asia Awards 2016

### Areas of experience

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