

The tax agenda for August

What's in practitioners' in-trays this month

Corporate taxes

FATCA

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There is a little more time to prepare for FATCA.

Readers will be familiar with the wide-ranging nature of the new US Foreign Account Tax Compliance Act (FATCA), under which financial institutions worldwide could be required to withhold US tax on payments they make to other entities – even where the entities and transactions have no nexus with the United States. FATCA's purpose – to prevent US persons holding undisclosed offshore bank accounts and other investments – is laudable, but its scope is extraordinarily wide.

A welcome development is that to allow a more orderly implementation of FATCA, the US Treasury and IRS have announced that they intend to postpone the start of FATCA by six months (see 'News', *Tax Journal*, dated 19 July 2013).

The consequences of this include:

- Withholding on US source payments will apply from 1 July 2014 (unless the withholding agent has the necessary documentation to treat the payment as exempt from withholding);
- Grandfathering for US source payments will be revised to include obligations outstanding on 1 July 2014;
- As previously announced, grandfathering in respect of non-US source passthru withholding is extended to 1 July 2014 at the earliest; withholding on non-grandfathered passthru payments is still expected to apply from 1 January 2017;
- Withholding agents will generally be required to implement new account opening procedures by 1 July 2014 (with corresponding changes to related timelines);
- The first IRS FFI list will be posted on the IRS website in June 2014; to ensure inclusion on the list FFIs will need to finalise their registration by 25 April 2014; and
- Changes will be made to ensure that institutions located in jurisdictions that have signed an IGA but not yet brought those IGAs into force are deemed FATCA-compliant.

For further guidance on FATCA, see 'Examining the US final FATCA regulations' (Reed Carey), *Tax Journal*, 14 March 2013.

Private client

Beneficial ownership

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Tax advisers whose clients hold significant holdings of UK companies via trust structures should monitor plans for a register of beneficial owners.

At the G8 meeting on 18 June 2013, the leaders of the G8 countries agreed to enhance global tax transparency and make

improvements in identifying beneficial owners of companies and legal arrangements. The UK confirmed its commitment to fully implementing the revised Financial Action Task Force standards in the UK action plan to prevent the misuse of companies and legal arrangements. As part of that commitment, the Department for Business, Innovation and Skills published a consultation paper entitled *Transparency & trust: enhancing the transparency of UK company ownership and increasing trust in UK business* (at www.lexisurl.com/DGoZx, closing date 16 September 2013).

The paper's main emphasis is on the requirement of companies to obtain and hold information about their ownership and control, and the role that Companies House would play as a central registry for information regarding beneficial ownership.

Prima facie, these measures appear to be corporate matters, however it should be noted that these arrangements concern 'legal arrangements' and, whilst there has been less attention on this point, trusts are firmly within the remit of the consultation paper. At para 2.35, the consultation paper notes that the ownership structures of some companies will include express trusts. On this basis, where an express trust has an interest of more than 25% of the shares or voting rights of a company, or otherwise exercises control over the management of the company, the authors of the consultation paper suggest that the trustee should disclose the beneficial owner of the company. It is also proposed that the beneficiary of the trust be disclosed as the beneficial owner in certain circumstances, for example if the beneficiaries have an express power to control the trust's acquisition or disposition of shares or the way in which the trust exercises the shareholder rights.

The paper is still at consultation phase, and the authors specifically request views on whether trustees of express trusts should be disclosed as beneficial owners, and whether it would be appropriate for the beneficiaries of a trust to be disclosed as beneficial owners. However, a more technical use of legal terminology and greater consideration of such issues as the distinction between a life interest and discretionary trust is required. It should also be noted that in many respects some of the initiatives set down in the action plan, such as that trustees are obliged to obtain and hold accurate and current information on the beneficiaries of the trust, are already undertaken by professional advisers.

At this stage, the proposals are unclear, but tax advisers whose clients hold significant holdings of UK companies via trust structures would be well advised to keep abreast of developments.

Employment tax

Consultations relevant to employment tax

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August will see the closing dates of three consultations affecting the taxation of employment income.

On the surface, the proposals contained in these consultations may appear to be relatively benign, but the implementation of some of the proposals could lead to issues. Readers should

consider submitting responses before the relevant consultation periods close.

Consultation: Office of Tax Simplification: Review of unapproved share schemes (at lexisurl.com/A3RH5, closing date 16 August): This consultation considers five of the OTS's recommendations. Readers may particularly wish to comment on the proposals to: (i) align the tax rules for employment-related securities more closely with the OECD recommendations on employee stock options; (ii) extend the period in which an employee may reimburse an employer before triggering a charge under ITEPA 2003 s 222; and (iii) change the valuation method of listed shares from the quarter-up method to using the closing price. More information on these proposals may be found in 'The adviser Q&A: Proposals on the taxation of unapproved share plans' (Tair Hussain) *Tax Journal*, dated 21 June 2013.

Partnerships: A review of two aspects of the tax rules (at www.lexisurl.com/wgKvG, closing date 9 August): The proposed changes would: (i) introduce a new test for determining the employment status of members of an LLP which is inconsistent with the treatment of partners in general law partnerships; and (ii) tax 'hybrid' structures using a complex series of reapportionment rules which, among other issues, lack an appropriate mechanism for dealing with the legitimate use of LLPs within large corporate groups. Readers may refer to 'The adviser Q&A: New tax rules pressurise partnerships' (Chris Hutley-Hurst), *Tax Journal*, dated 31 May 2013, for further information on the proposed changes.

Offshore employment intermediaries (at www.lexisurl.com/VXTsq, closing date 8 August): The proposed changes would introduce a requirement for offshore employers of UK workers to account for PAYE and NIC, with the liability being shifted to end-users in certain circumstances. In their current form, the proposals could conceivably lead to UK businesses being required to account for PAYE and NIC in respect of commercial arrangements with no tax avoidance purpose. For example, it might be possible for a UK business to be caught as a result of receiving consultancy services from an offshore provider (ignorant of its UK tax obligations) whose staff carry out extensive work at the premises of the UK business. Further details of this consultation may be found at 'The adviser Q&A: Changes for offshore employment intermediaries' (Punam Birly), *Tax Journal*, dated 14 June 2013.

Readers are encouraged to engage with HMRC in respect of any of the consultations relevant to their practice, and to provide alternative suggestions, as well as examples of genuine commercial arrangements, which may be adversely affected by the current proposals.

SMEs

NIC on self-employed entertainers

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The consultation on NIC for self-employed entertainers closes this month.

The consultation on the NIC treatment of self-employed entertainers (available via www.lexisurl.com/R2X81) closes on 6 August. The recent Court of Appeal decision in *ITV Services Ltd v HMRC* [2013] EWCA Civ 867 (see page 6) highlighted the muddle which the law has got into in this area, one judge commenting on 'this most unhappily drafted legislation'. It is telling that the consultation document takes 46 pages to explain that the preferred solution is simply to abolish the special rules altogether from 6 April next year. (See also 'Comment: HMRC's consultation on NIC for self-employed entertainers' (Andrew Gotch), *Tax Journal*, dated 7 June 2013.)

There are two other consultations relevant for those advising SMEs, and these have already been mentioned by Dan Pipe (above). The first of these is the consultation on five of the recommendations made by the OTS in its review of unapproved share schemes. The most significant of the areas for review is probably the proposed extension of the period within which an employee must 'make good' amounts paid by an employer in respect of tax on employment-related securities from 90 days to 6 July following the end of the tax year. The inflexibility of the existing period (or at least HMRC's inflexible enforcement of it) was heavily criticised by Sir Stephen Oliver earlier this year in *Benedict Manning v HMRC* [2013] UKFTT 252 (TC), describing the provision as 'penal'. It is to be regretted that HMRC rejected outright the main OTS recommendation in this area, namely that ITEPA 2003 s 222 should not apply at all in relation to employment-related securities (ERS), and that amounts not made good by the employee should be treated as an employment-related loan where appropriate.

The other consultation also mentioned above which affects SMEs concerns the controversial changes to aspects of partnership taxation, which closes with indecent haste on 9 August. This covers a range of proposals from removing the presumption of self-

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employment from members of LLPs through countering aggressive partnership structures to outlawing relatively benign arrangements whereby professional partnerships have funded working capital by introducing corporate 'money box' members to the LLP. If the changes go through as currently proposed, many firms may need to rethink their structures from April next year.

VAT

Manufacturer-funded refunds

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Manufacturers who pay rebates to consumers of their goods purchased through retailers should respond to the VAT consultation.

It was announced in the 2013 Budget that the VAT law will be changed in 2014 to allow manufacturers to reclaim VAT when they make refunds directly to consumers. A consultation 'to gain a better understanding of industry practices to support the design of the legislation' was promised. That consultation began on 31 May, with the publication of the consultation document *VAT treatment of refunds made by manufacturers* (available via www.legisurl.com/RBGh9). The consultation period ends on 31 August.

Since 1996, when the European Court of Justice (as it was then) decided the case of *Elida Gibbs Ltd* (Case C-317/94), HMRC has accepted that manufacturers (and others in the transaction chain) who supply 'money off' coupons can (in some circumstances) reduce their output VAT liability. The intended effect of the adjustments is to ensure that the VAT collected through the supply chain is proportional to the amount actually paid by the final consumer (taking account of the 'cashback'). However, HMRC has always interpreted the judgment narrowly and took the view that it did not cover payments made to consumers by manufacturers (and anyone else above the retailer in the supply chain) in relation to faulty or damaged products, or in response to customer dissatisfaction. HMRC viewed such payments as compensatory in nature and outside the scope of VAT, and refused to allow VAT adjustments in respect of them. HMRC has now accepted that this interpretation of the ECJ judgment was too narrow. Plainly, the European Commission agrees, since it has delivered a 'reasoned opinion' to the UK and is threatening to bring the UK before the CJEU over its failure to bring domestic law into line with its EU counterpart, as interpreted in the *Elida Gibbs* case.

Businesses that make payments of this sort would be well advised to respond to the consultation, to make sure that their views on the design of the legislation (and the associated administrative practices) are taken into account. Moreover, businesses that have made such payments in the past, and have either not claimed, or been denied, a refund of VAT might wish to consider making, or reviving, a refund claim.

Consultation tracker

Details of all the tax consultations which are currently live are available via *Tax Journal's* consultation tracker on our website at taxjournal.com (under the 'Trackers' link).

What's ahead in August

- 05 Regulations:** The following statutory instruments come into force: The Individual Savings Account (Amendment No. 3) Reg, SI 2013/1743; and The Child Trust Funds (Amendment No. 2) Regs, SI 2013/1744; and The Working Tax Credit (Entitlement and Maximum Rate) (Amendment) Regs 2013, SI 2013/1736.
- 06 Consultations:** Closing date for comments on: *National Insurance and Self-employed entertainers*; & *Child trust fund: consultation on allowing the transfer of savings from a child trust fund to a junior ISA*.
- 07 Regulations:** The following SIs come into force: The Capital Allowances (Environmentally Beneficial Plant and Machinery) (Amendment) Order, SI 2013/1762; the Capital Allowances (Energy-saving Plant and Machinery) (Amendment) Order, SI 2013/1763; the Offshore Funds (Tax) (Amendment No. 3) Regs, SI 2013/1770; & the Authorised Investment Funds (Tax) (Amendment) Regs, SI 2013/1772.
- 08 Consultations:** Closing date for comments on *Offshore employment intermediaries*.
- 09 Consultations:** Closing date for comments on *A review of two aspects of the tax rules on partnerships*.
- 12 Consultations:** Closing date for comments on *Community amateur sports clubs scheme*.
Regulations: The following SIs come into force: The Annual Tax on Enveloped Dwellings (Returns) Regs, SI 2013/1844; The Life Insurance Qualifying Policies (Statement and Reporting Requirements) Regs 2013, SI 2013/1820; and The Registered Pension Schemes and Relieved Non-UK Pension Schemes (Lifetime Allowance Transitional Protection) (Amendment) Regs 2013, SI 2013/1740.
- 13 Regulations:** The Cultural Test (Television Programmes) Regulations 2013, SI 2013/1831, come into force.
- 16 Consultations:** Closing date for comments on: *Office of Tax Simplification: review of unapproved share schemes*; informal consultation *Implementation of a tax exemption for employer expenditure on health-related interventions recommended by the new health and work assessment and advisory service*; discussion paper by the European Insurance and Occupational Pensions Authority on a possible EU single market for personal pension products; and *Strengthening the Code of Practice on taxation for banks*.
- 17 Draft regulations:** Closing date for comments on the following draft SIs: The Income Tax (Pay As You Earn) (Amendment) Regs, SI 2013/Draft; and The Social Security (Contributions) (Amendment) Regs, SI 2013/Draft.
- 23 Consultations:** Closing date for comments on *IHT: simplifying charges on trusts – the next stage*.
- 27 Draft regulations:** Closing date for comments on the following draft SIs: The Annual Tax on Enveloped Dwellings Avoidance Schemes (Prescribed Descriptions of Arrangements) Regs, SI 2013/Draft; and The Tax Avoidance Schemes (Information) (Amendment) Regs, SI 2013/Draft.
- 28 Draft regulations:** Closing date for comments on draft amendments to *Disclosure of tax avoidance schemes (DOTAS) regime: The confidentiality and employment income hallmarks*.
- 29 Consultations:** Closing date for comments on *Modernising the taxation of corporate debt and derivative contracts*.
- 31 Consultations:** Closing date for comments on *VAT treatment of refunds made by manufacturers*.