State aid measures in FB 2016

Finance Bill 2016 includes provisions for HMRC to require information on certain state aid issues so that the department can provide it to the European Commission.

Budget 2016 included a tax information and impact note (TIIN) on state aid modernisation (see para 1.75, page 181 of the Overview of Tax Legislation and Rates (OOTLAR)). This proposal set out a measure designed to provide HMRC with additional powers to collect information on specified state aids and to share the information with the European Commission through a legal gateway. The TIIN referred to the European Commission's state aid modernisation programme of 2012 (COM/2012/0209 final) ('SAM').

What's proposed: The TIIN notes that HMRC's current information powers are 'generally restricted for the purpose of checking a tax position, for example, checking the amount of the claim is correct or checking a tax position in a tax return'. The proposal therefore is to allow HMRC to require information from beneficiaries of specifically named state aids as a condition for entitlement for tax relief, to require information for the purpose of checking that state aid requirements have been met and to disclose information through a legal gateway 'for the purpose of publication'. The aids targeted by the legislation are those which are notified aids or general block exemption regulation (GBER) aids.

The TIIN identifies the affected reliefs, which include the enterprise investment scheme, venture capital trusts, film tax relief, climate change agreements and several others. However, it is worth noting that OOTLAR also points out that: 'HMRC is reviewing the implications of the new state aid requirements across all of the taxes affected'.

The explanatory notes to the Bill note (at para 18 on clause 168) that the specific amount of the tax advantage will not be published, but ranges will be published.

The provisions in the Bill: The provisions are set out in clauses 168, 169 and 170 and Sch 24.

The measure provides that the information powers may only be exercised in order to comply with 'relevant EU obligations', being obligations under the GBER relating to tax advantages and obligations that apply to the grant of a notified state aid relating to a tax advantage. The legislation allows HMRC to determine that claims for a tax advantage must include information specified by their determination, which includes information about the claimant of the tax advantage, the subject matter of the claim and 'other information' relating to the grant of the aid. The measure also requires that the information to be provided includes both information about the person to whom the request has been given and 'any other person who is the beneficiary of the tax advantage' (cl 168(9)).

Clause 169 provides for the power to publish the state aid information, in order to secure compliance with its EU obligations, but does not specify to whom it shall be published, apart from to say that it includes the disclosure of the information to another person for the purpose of securing its publication, for the purpose of compliance with its EU obligations.

Schedule 24 sets out in Part 1 the specific tax advantages and provisions to which cl 168(2) applies, i.e. claims made for a tax advantage.

Part 2 sets out the specific tax advantages, legislation and persons liable to a request for information where cl 168(5) (and cl 168(6)) applies, being where the beneficiary and recipient of the aid are not the same person.

Provision has been made in cl 170 for regulations to amend Sch 24, so it is worth noting that while the current draft is limited, HMRC could add other tax measures to the scope of this legislation with some ease, provided the measures are notified aid or GBER aid. The requirements under these provisions must therefore be borne in mind when a measure is notified to the Commission. ■

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VAT: *Aspiro* (C-40/15) CJEU judgment

The CJEU rules that claims handling services supplied by Aspiro are not exempt under article 135(1)(a) of the VAT Directive.

The CJEU has followed the opinion of the advocate general and concluded that Aspiro's comprehensive claims handling service is neither VAT exempt as the provision of insurance nor VAT exempt as the provision of an insurance related service by an insurance broker or agent. The supply was not insurance as there is no assumption of risk by Aspiro in return for a premium, and Aspiro has no direct contract with the insured. The insurance exemption is more tightly drawn than the finance exemptions and does not exempt related services merely because they form a distinct whole and are essential for and specific to the exempt insurance service.

Although claims handling is an insurance related service, insurance related services are only exempt if the supplier is an insurance broker or agent. As Aspiro had no involvement in finding prospects and introducing the insured to the insurer, with a view to an insurance contract being concluded, it was not an insurance broker or agent as that is the core function of an insurance broker or agent.

The CJEU's judgment comes as no surprise, given the wording of the Directive and previous decisions about the scope of this exemption such as *Arthur Andersen* (C-472/03). The decision was released very soon after the advocate general's opinion, which is often a good indicator that the CJEU has agreed with the advocate general.

The key question is what does the UK do in response to Aspiro, and when? UK law also requires that the supplier of insurance intermediary services, as defined, should be an insurance broker or agent if exemption is to apply to such services, but in practice, claims handling by a supplier to whom written authority has been delegated by the insurer is exempt under UK law even if the supplier does nothing else.

The review of the finance and insurance exemptions by the Commission was used by HMRC as a reason to do nothing to the UK law in the aftermath of the *Andersen* decision on the grounds that changes to the EU law were expected as a result of that review, but the Commission has effectively abandoned that strategy. Of course, the question of whether the UK stays in the EU or decides on 23 June to leave may well have a bearing on what action if any HMRC now takes, though any changes that are made to narrow the scope of the UK insurance exemption would be prospective and presumably implemented only after a period of consultation with the sector. However, taxing claims handling services where the supplier has had no involvement in bringing about the original insurance contract will increase the costs of any insurer

that outsources claims handling to such a supplier, ultimately this may mean that that the premiums charged by that insurer may also increase. Taken together with the two rises in insurance premium tax, this could mean some difficult decisions lie ahead.

It would therefore be sensible for any businesses potentially affected by this CJEU judgment to consider the financial impact any change to the UK policy on the liability of claims handling supplies would have and what steps could be taken to mitigate this. ■

Kevin Carletti & Richard Louden, KPMG (KPMG's Weekly Tax Matters)

The Panama papers and HMRC

Expect HMRC to act.

The release of the Panama papers is the latest in a series of leaks in what is a very 21st century problem for institutions which are required to hold their client's data confidentially. In an age where huge quantities of data can be transferred at the press of a button, and where the international political climate is resolutely hostile to those who are perceived to be evading tax, money laundering or breaching sanctions, those who believe that their confidentiality is assured are at increased risk of discovery.

In respect of those who have concerns about their tax affairs, HMRC has today announced that: 'HMRC can confirm that we have already received a great deal of information on offshore companies, including in Panama, from a wide range of sources, which is currently the subject of intensive investigation. We have asked the International Consortium of Investigative Journalists to share the leaked data that they have obtained with us. We will closely examine this data and will act on it swiftly and appropriately.'

As a matter of policy, HMRC is not afraid of using illicitly sourced information to launch investigations. In 2010, following the theft of data from the Swiss division of HSBC by an IT contractor, HMRC acquired the details of hundreds of UK taxpayers who held accounts. The first prosecution relating to the material was disposed of in July 2012: Michael Shanley was found to have evaded £430,000 in inheritance tax; he was ordered to pay a fine equating to almost 100% of the tax evaded plus costs. However, when the Swiss private bank Julius Baer suffered a similar leak in 2012 the UK government declared that it would not 'actively seek to acquire customer data stolen from Swiss banks' perhaps seeking to distance themselves from the German tax investigators who paid the bank employee for the information.

It appears from the statement that HMRC has no qualms about the manner in which the Panama papers has come to light and plan on making full use of any intelligence it contains. ■

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Panama papers: take a deep breath

HMRC is likely to deal with most cases under civil procedures.

Not surprisingly, the Panama leaks have created a huge media frenzy and jurisdictions seem to falling over themselves to show how tough they can be in responding. In the UK, HMRC has published a statement saying there are no safe havens and have written to *The Guardian* asking for a copy of the leaked data. Given the criticism over the department's apparent failure to make effective use of the HSBC data, HMRC's speed of response isn't unexpected.

But before the story engulfs us, there should be at least a small pause for thought.

I'm not naïve. There will be individuals caught up in this who have undoubtedly used the secrecy of Panama to hide money and evade UK taxes. I've no sympathy for them and they deserve all that is coming to them. But even here I would not expect a whole raft of prosecutions. The rules about admissibility of evidence are complex, and it can't be taken for granted that a court would accept evidence based on what appears to be stolen information. So it may well be that some cases will be settled on a civil basis, with interest and penalties – but no prosecution.

But there will be cases where offshore structures have been used in tax avoidance. In many of these, HMRC will already be aware of the avoidance scheme and will already be challenging it. For example, the leaked documents include reference to 'bearer shares' which were used for a particular form of capital gains tax planning some years ago. Whatever one's view of the planning (it was closed down in 2005) it would be wrong to assume that it inevitably involves tax evasion.

This then links to another reason to draw breath. The leaked data covers a period of 40 years – indeed there seems to have been a significant decline in the number of individuals and companies involved over the last ten years or so: the peak seems to have been around 2000 to 2005. HMRC is unable to assess undeclared liabilities which date back more than 20 years – even in cases of fraud – and therefore even if tax has been evaded it may not necessarily be collectable. The rules for criminal prosecution are different, and there may be more scope to bring earlier years into play if a criminal route is appropriate.

Finally, it's worth pointing out that there are some legitimate reasons why an individual might want to put their wealth into an offshore structure. Those cases will be in the minority, perhaps a small minority, but cannot be entirely discounted.

The existence of all of this data might be regarded as a bonanza for HMRC. In some ways it is, but it also gives them a huge headache. How are they actually going to deal with it? Prosecution is an extremely difficult, costly and time consuming exercise and it's hard to believe that HMRC could ever prosecute more than a handful of those who appear to be involved – a case perhaps of 'hanging an admiral to encourage the others'. So it would not be a surprise to find most cases being dealt with under civil procedures, particularly where people come forward voluntarily. ■

Andrew Hubbard, RSM (RSM's Weekly Tax Brief)

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