# Joys of Spring

General Features

02 May 2013

Rebecca Cave rounds up the main topics covered in this year’s conference, which took place in Cambridge

## Key Points

What does the new GAAR rule have in common with Trident missiles? HM Treasury shines the tax avoidance light on small companies and their owners Could traders using the cash basis really be an end to civilisation as we know it? Determining when and where a rabbit is moveable

As delegates folded their dripping umbrellas, Stephen Coleclough, the conference chairman, welcomed us to the ‘it’s still winter and I’m fed up of this weather’ conference. But our spirits were high as we anticipated nine mind-stretching lectures

on a wide range of taxes, including the priceless opportunity to network with top tax people.

This is a little known advantage of all the CIOT residential conferences; the relaxed atmosphere and generous refreshment breaks allow ample time to pick the brains of the brightest in UK tax. At the first coffee break, I shared my non-dom worries with two experts in the field. As they say; ‘a problem shared is a problem you now don’t have to worry about because you know who to call should it all go pear-shaped’.

## Dissolving a company

Paula Tallon kicked off the conference with a discussion of the tax efficient options for dissolving a company, including the new disincorporation relief introduced by **Finance Bill 2013**.

The goal of disincorporation relief was to remove the tax charges that arise on the transfer of a business out of a company to its shareholders, but Paula believes this aim has not been achieved by the legislation we have. Under the new relief, the only gains considered for protection from tax paid by the company are those arising from the transfer of land and goodwill. The transfer of assets and cash to the shareholders will still be taxed as a distribution and generally subject to income tax in the shareholders’ hands. Thus, if you work though the figures for clients, the total tax payable under a formal liquidation will probably be less than using disincorporation relief.

When a taxpayer liquidates his company but continues the business in a new company, this is referred to as a phoenix arrangement. HMRC will attack this using the transactions in securities (TIS) rules in **ITA 2007 ss 682–712**, which will apply income tax on the proceeds received from liquidation, instead of CGT. A distribution made during a liquidation will not normally be a TIS if the proceeds go to a sole trader, partnership or LLP. However, if the LLP contains a corporate partner, the TIS rules may well be in point.

Paula had a final warning about the complex TIS legislation; never, ever take the client to a technical meeting with HMRC when his transactions, which could be caught by TIS, will be discussed.

## New clear GAAR

The best session of the conference had to be James Bullock talking about the new general anti-abuse rule (GAAR).

This is a subject that most of us haven't begun to understand, but James put it in context with the whole tax avoidance armoury available to HMRC. He compared the GAAR to Trident missiles – something which exists but which the controllers hope to never use. James believes that if the GAAR is brought, out then it will be in the sphere of tax on individuals who don't have to worry about reputational risk as corporates do.

To continue the analogy, the GAAR advisory panel is like an anti-missile system. Their anonymised decisions about potential GAAR targets will be published, but HMRC will not be bound to follow those decisions. The taxpayer will not be able to take judicial review action if HMRC go ahead with counter-action on the taxpayer, against the advice of the GAAR panel. However, the taxpayer will have the normal right of appeal against any assessments and penalties raised by HMRC.

## Loans to participators

Andrew Hubbard explained how the rules for close company loans have been significantly changed by **Finance Bill 2013**. These are not minor technical adjustments; the new rules are designed to ensure that most small companies and their owners pay tax. This is a deliberate attempt by HM Treasury to shine the tax avoidance light on smaller companies and their proprietors.

The expanded scope of **CTA 2010 s 455**, which determines when a repayment of a loan from a close company is effective, came into effect from 20 March 2013. Repayments of loans on or after that date need to be tested against the new rules. If directors repaid loans on, say, 31 March 2013, and have already taken further loans out of their company, they may be caught by these new provisions.

RTI implications for withdrawals from small companies should not be under estimated. The view of HMRC is that it is no longer possible to retrospectively decide the nature of a withdrawal: dividend, loan, salary, etc. You need to know when the director is paid to determine the reporting point for RTI; to know the 'when' you

need to understand what amounts to a ‘payment of earnings’. Remember there will be penalties under RTI for late reporting, even if all the tax is paid on time.

## R&D misunderstood

David O’Keeffe claims that research and development (R&D) tax reliefs are vastly misunderstood by business owners, and in some aspects by HMRC inspectors.

One example is the definition of qualifying costs under the heading of ‘software and consumable or transformable items’ for R&D tax relief. Consumable items are used up in the R&D process and are not reflected in any sort of output from that process. There may be some residue or scrap from the process, which may be sold. However, the legislation does not require you to deduct or net-off the proceeds from selling such scrap from the cost of the consumables, although some HMRC inspectors believe that to be the case.

A confusing area is the deduction for costs of externally provided workers. The legislation was introduced in 2003 but changed in 2012. Now it is much easier to get a full deduction for the costs of workers who provide their services through a personal service company and an agency on to the R&D company.

David took questions at the end of his talk, when he confirmed that an improvement to an industrial process can qualify as an R&D project. For example, speeding up a production line or altering it to cope with, say, a customer’s requirements or a new material will qualify as R&D.

## Red Bull Budget

Chris Jones rushed on to the stage, energy drink in hand, and charged through the Budget announcements with an appropriate degree of enthusiasm. But it was the new cash basis rules (simplified taxation for small businesses) which really made him see red.

According to Chris, the cash basis could be the end of civilisation as we know it. The trader will be able add up all the money that’s come in, take off all the money that’s gone out, and the result is the business profit or loss. That means clients will be able to work out their own profit without going to an accountant.

Well, perhaps not, as when the trader makes a loss under the cash basis that loss can only be carried forward to set against profits from the same trade. If the trader consults an accountant to work out the loss on an accruals basis, it will be possible to offset the loss (on accruals basis) sideways against other income, or in the early years of the trade, to carry it back. This, says Chris, is a good reason to market your services, and is a trap for the unwary trader.

However, the complications when using the cash basis don't end there, as the normal wholly and exclusively rules will apply with some further restrictions. For example, the deduction for loan interest is restricted to £500 a year. 'Why introduce a simplification just to complicate it, and make it unattractive?' Chris asked.

## STR complexities

Emma Chamberlain has been involved in the development of the statutory residence test (SRT) for many years, and admits the result is quite complicated. However, the SRT is better than what we had in previous tax years, when it was difficult to determine if leavers had ever actually gone from the UK for tax purposes, and precisely when people coming to the UK would become UK resident.

The new SRT is effective from 6 April 2013, but a taxpayer can elect for limited purposes for the SRT be to used to determine if the person is a leaver or an arriver to the UK. Emma has also found the new SRT useful when negotiating with HMRC on cases relevant to earlier tax years. If you can say, 'Under the SRT, this person would not be UK resident,' it can be very persuasive. This is because the SRT is supposed to be yield neutral and to put on to statutory footing the rules HMRC has already applied.

The SRT does not apply to determine if someone is resident in England, Wales, Scotland or Northern Ireland, as opposed to just resident in the UK. Thus the SRT as it stands will not be useful for determining if a person is resident in Scotland for the Scottish rate of income tax.

The five-year period for the temporary non-residence rule has been extended so it covers a wider range of taxes. Also the five years of non-UK residence considered for this test are now five periods of 12 months, not five tax years.

## Property puzzle

Nigel Popplewell guided us through the sticky wicket of buying an investment property, using one of his own cases to illustrate the myriad of tax issues involved. Nigel had some excellent practical tips for any tax adviser involved with complex deals:

- Each party will have its own set of advisers, who need to be managed. Somebody has to take responsibility for managing them and making sure they reach decisions on a timely basis, and that task can be costly in terms of professional time. However, it's more costly if the various advisers can't agree.
- If a bank is providing development finance for the deal, it will want to sign off every document at each stage, which racks up the costs. Investment finance (to buy a completed property) is simpler and cheaper in the long term.

> **If the rabbit lives in England it is moveable property, but a rabbit living in a Belgium field is 'fruit of the land' ie immoveable property**

HMRC are very sensitive about stamp duty land tax (SDLT) avoidance and are reluctant to grant group relief for SDLT. Their view is that if a specially formed company A buys the shares of company B which owns a property, then company B immediately transfers the property to company A, that amounts to SDLT avoidance and no group relief is available. The tax profession largely disagrees with this stance. The CIOT has been corresponding with HMRC on this issue since October 2012. A press release from HMRC is expected soon on the application of the SDLT group relief anti-avoidance provisions on the purchase of property owning companies.

## Moveable rabbits

Stephen Coleclough moved to centre stage to present his talk on: *Why EU law is relevant to all tax advisers*. He started by explaining that misunderstandings across Europe often have their seeds in the different bases of law used. The UK broadly has a 'common law' base, whereby citizens can do anything unless the law prohibits it. Most other European countries use 'civil law' under which the citizens can only do what the government says they can do.

Problems also arise with the understanding of legal terms such as ‘movable property’ and ‘immovable property’, which can be very important in VAT law. This is illustrated by considering a rabbit. If the rabbit lives in England it is moveable property, but a rabbit living in a Belgium field is ‘fruit of the land’, ie immoveable property.

However, once the English rabbit dies it is reduced into the landowner’s possession and becomes immovable property. But when the Belgium rabbit dies, it becomes moveable property as it can be picked up. If Stephen visits your local branch as CIOT president, ask him to tell the rabbit story.

## The ATED taxes

Most of John Barnett’s talk on capital taxes was taken up with discussion of the new annual tax on enveloped dwellings (ATED) and its siblings; extended SDLT and CGT on non-natural persons (generally companies). These taxes all apply to residential properties in the UK worth £2 million or more.

John questioned why we needed a new ATED. All the Government had to do was to treat anyone connected with the owner of the property and who was in occupation of it, as a deemed employee of the owning company, then the benefit in kind (BIK) rules would apply. The BIK charge would raise up to 1.8% pa of the value of the property, which would be about three times as much as the ATED charge. The change to the BIK rules would take about two lines of legislation and the collection mechanism is already in place.

John highlighted that the BIK change could apply in addition to the ATED charge if the occupiers of the property are shadow or actual directors of the property owning company. A shadow director is any person upon whose instructions or directions the actual directors are accustomed to act – so it is very easy to be a shadow director.

## And finally

By Sunday lunch our brains were full, our questions satisfied, and friendships cemented. The sun also decided to shine, so perhaps Spring had arrived at last.

The autumn CIOT residential conference will be held at the Jubilee Campus of University of Nottingham from 6 to 8 September 2013. If you can‘t make that

weekend, then consider the CIOT Scotland branch conference at Stirling Management Centre from 8 to 9 November 2013.