Analysis

The international briefing for June

SPEED READ This month, the G8 summit at Lough Erne has been the focus of media attention and there were a number of commitments on taxation made by the leaders, mainly around transparency and information sharing. The EU has also been making progress on transparency. Meanwhile, in Switzerland, the government has published plans to strengthen the competitiveness of the Swiss tax regime for holding companies. In the UK, we have seen an update to the CFC draft guidance and the FATCA draft guidance and regulations, while the *Marks & Spencer* case on cross-border group relief has continued its journey through the courts.

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Media attention has continued to be focused on tax over the last month. At the time of writing, all eyes are on the G8 summit at Lough Erne.

Just before the summit, the government announced that it is to introduce new rules requiring companies to obtain and hold information on who owns and controls them and that it has also secured agreements from all the British overseas territories and crown dependencies to publish their own action plans. In the Leaders' Communiqué, issued at the end of the G8 meeting, it was confirmed that all the G8 have made similar commitments to improving transparency on company ownership. A consultation on the detail of the UK rules will take place later in the summer. While the initial announcement talks about holding this information at Companies House and making it available to law enforcement agencies and tax authorities, one of the issues that will be the subject of consultation will be whether this register should also be open to the public. It is this aspect that is likely to be the most controversial and not necessarily because of any issues around taxation. In some cases, there may be legitimate concerns about security and competitor intelligence if this information is to be openly available.

The G8 leaders made a commitment to automatic information exchange (supporting an OECD report on this subject prepared for the summit), and to helping developing countries build capacity to collect the taxes owed to them. They also called upon the OECD to produce a common template for 'country by country reporting' to tax authorities. This will focus on the allocation of profits and taxes paid but will not involve reporting of a detailed P&L. It will not be publicly available. There was further support for the OECD base erosion and profit shifting (BEPS) project, on which we expect to see more next month at the G20 summit.

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There were also developments on transparency at the EU level, which I discuss further below, plus a number of other developments in Switzerland and closer to home.

Updated CFC guidance

On 4 June, HMRC issued an update to the controlled foreign companies (CFC) draft guidance published last year. Many chapters have been updated with chapter 9 – the finance company rules – having a significant amount of new material. The updated guidance includes new chapters on clearance procedures and the interaction with the branch exemption, but does not yet include anything on the interaction of the finance company exemption with the loans for unallowable purposes rules in CTA 2009 s 441. Whilst the update is extensive, incorporating many new examples and clarifications, there are no significant new points of interpretation or application of the rules highlighted.

FATCA guidance and regulations

The latest draft guidance and regulations on implementing the Foreign Account Tax Compliance Act (FATCA) agreement with the US were published by HMRC on 31 May. They are expected to be finalised following Royal Assent of Finance Bill 2013, which includes the legislation allowing the regulations to be made.

The revised draft guidance goes a long way towards harmonising the rules and definitions governing what entities are in-scope as 'financial institutions' with the final US Treasury regulations. In particular, holding companies and treasury centres of groups that include financial institutions generally are now financial institutions themselves, just as they are under the US Treasury regulations. However, the inclusion of these entities has not been incorporated in the recently released US model I inter-governmental agreement template.

The revised draft also integrates many more exceptions on deemed-compliant entities found in the US regulations, but certain additional exceptions (such as those for investment advisers and investment managers provided in the recently released US model I inter-governmental agreement template) have yet to be incorporated. Hopefully, guidance on these exceptions will be provided very soon, as many UK groups are currently determining which of the entities within their group need to register with the US Internal Revenue Service as financial institutions.

EU update

***Marks & Spencer* Supreme Court judgment**: The Supreme Court handed down a judgment in the long-running *Marks & Spencer* (M&S)

case on cross-border group relief on 22 May (*HMRC v Marks & Spencer PLC* [2013] UKSC 30). It is worth quickly recapping what led up to this latest judgment as it can be difficult to keep track of where things stand with this case. There were five issues arising from the second Court of Appeal judgment on 14 October 2011:

1. when the so-called 'no possibilities test' (NPT) must be satisfied (at the end of the accounting period in which the losses crystallised or by the time the actual claim is made);
2. whether sequential/cumulative claims are allowed;
3. whether all the surrendering company's losses must meet the NPT before any relief can be allowed;
4. should the principle of effectiveness allow M&S's pay and file period claims to succeed, even though otherwise out of time; and
5. what is the correct method of calculating the overseas losses.

The original purpose of the latest hearing was for the Supreme Court to decide whether to make a further reference to the CJEU on the first issue above. In the event, the court was invited to make its own decision on the issue in the light of recent European jurisprudence. It unanimously dismissed HMRC's appeal in relation to the first issue, without the need for a further reference to the CJEU. In summary, this means that the conditions of the NPT must be satisfied at the time the actual claim has been made, and not at the end of the relevant accounting period in which the losses crystallised. This is a sensible outcome, which will be of benefit to a number of taxpayers with loss relief claims that were dependent on this point.

Issue 3 above now falls away on the facts of this specific appeal, with the remaining issues 2, 4 and 5 subject to a further hearing before the Supreme Court in due course.

Tax transparency: On 12 June, members of the European Parliament voted to adopt the accounting and transparency directives by a large majority (approval is still required from the Council of the EU). Under the new directives, listed and large non-listed companies with activities in the extractive industry and the logging of primary forests will be required to disclose payments made to governments. Payments to be reported include royalty and dividend payments, but also taxes on income, production or profits of companies. Payments that do not exceed €100,000 in a financial year or that do not result from extractive and/or logging operations do not need to be reported.

In a Commission press release issued after the vote, Commissioner Barnier noted that the EU 'must go further now and take measures on more transparency on tax for all large companies and groups – the taxes they pay, how much and to whom'. This is in line with reported opinions voiced by some member states, notably France, and by the European Parliament itself, that such reporting requirements should not be limited to particular sectors but should be extended to large companies active in all sectors. However, the UK government is not currently supporting an extension of compulsory publicised country by country reporting for all sectors. As stated above, the G8 also took a much narrower view of country by country reporting.

UK patent box: Following a member state request, the European Commission has launched a review of the UK patent box regime, to consider whether it constitutes a 'harmful tax regime'. The review is currently taking place and is expected to conclude by October 2013.

There are several, long-standing patent/innovation 'box' regimes across Europe, none of which have to date fallen foul of the EU State Aid rules or code of conduct for business taxation. Hopefully, therefore, this review will conclude that the patent box legislation meets EU requirements and should not need to be amended as a result of the review.

Global update

Switzerland – corporate tax reform: The attractiveness of the Swiss tax system is widely acknowledged but the Swiss federal government has made it clear it is not complacent about the country's competitiveness. Last month it published a report on the upcoming 'Swiss Corporate Tax Reform III', which aims to strengthen Switzerland's attractiveness as a holding company location. The government is proposing to replace the current holding, domiciliary and mixed company regimes in the next five to seven years with a series of measures that are intended to be at least as attractive as the current system. The reform process is still in its early stages and the suggestions that were initially put forward include:

- tax incentives for innovative business activities, such as research and development and exploitation of intellectual property;
- the introduction of a notional interest deduction on equity; and
- a general lowering of ordinary tax rates. Certain Swiss cantons already have ordinary effective income tax rates of approximately 12% (including federal, cantonal and local tax). Comparably low tax rates could be introduced in other cantons as well.

Discussions are underway and a number of further measures are being discussed at a political level, including a direct exemption for dividend income without any minimum threshold or holding period requirements and without introducing any limitation on the deductibility of acquisition financing costs. The abolition of stamp duty on an equity issuance or increase is also being discussed.

The discussions will continue during the rest of the year, with final proposals expected in 2014. ■

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