Highlights this month include:

- Key announcements from the Chancellor’s Autumn Statement
- An alternative proposal for the non-dom trust regime
- A successful JR against HMRC’s change of guidance on *Mansworth v Jelley*
- A full analysis of the Rangers case, *Murray Group*
- Details of the proposed consolidation of HMRC into 13 offices
- A strange restriction on the multiple use of credit cards to pay tax

Priya Dutta
## CONTENTS

1. **CAPITAL GAINS TAX** .......................... 2  
   1.1 Proposals for non dom trusts regime .......................... 2  
   1.2 Autumn Statement 2015: Tax on residential property .......................... 3  
   1.3 *Mansworth v Jelley* losses .......................... 3  

2. **INHERITANCE TAX** .......................... 5  
   2.1 Autumn Statement 2015: Pensions in drawdown .......................... 5  
   2.2 Deeds of variation .......................... 6  
   2.3 IHT Concessionary Relief .......................... 6  

3. **STAMP TAX** .......................... 6  
   3.1 Autumn Statement 2015: SDLT on second properties .......................... 6  
   3.2 Autumn Statement 2015: Other news 6  

4. **PERSONAL INCOME TAX** .......................... 7  
   4.1 Autumn Statement 2015: Business investment relief .......................... 7  
   4.2 ISA exemption and estates .......................... 7  
   4.3 EIS and preferential rights .......................... 7  
   4.4 Interest arising in the UK .......................... 8  

5. **BUSINESS** .......................... 8  
   5.1 Autumn Statement 2015: Distributions, transactions in securities .......................... 8  
   5.2 Autumn Statement 2015: Loans to participators and charities .......................... 8  
   5.3 Expectation of profit .......................... 9  

6. **EMPLOYMENT** .......................... 9  
   6.1 EBTs, the *Rangers* case .......................... 9  
   6.2 Autumn Statement 2015: Disguised remuneration .......................... 11  
   6.3 Autumn Statement 2015: Intermediaries, travel & subsistence 11  
   6.4 PAYE regulation changes .......................... 12  

7. **NATIONAL INSURANCE** .......................... 12  
   7.1 Employment allowance .......................... 12  

8. **VAT & CUSTOMS DUTIES** .......................... 13  
   8.1 DIY house building .......................... 13  
   8.2 Alternative evidence of input tax .......................... 13  

9. **COMPLIANCE** .......................... 13  
   9.1 Costs for unreasonable behavior .......................... 13  
   9.2 Reasonable excuse .......................... 14  
   9.3 Discovery assessments .......................... 14  
   9.4 Business Records Checks abandoned 15  

10. **ADMINISTRATION** .......................... 15  
    10.1 Autumn Statement 2015: New digital services .......................... 15  
    10.2 IHT electronic filing .......................... 15  
    10.3 GAAR penalties .......................... 15  
    10.4 Restitution interest at 45% .......................... 16  
    10.5 Withdrawal of ESCs .......................... 16  
    10.6 Paying HMRC by credit or debit card 17  
    10.7 HMRC office closures .......................... 17  

11. **EUROPEAN AND INTERNATIONAL** .......................... 18  
    11.1 Offshore evasion .......................... 18  
    11.2 Beneficial ownership disclosure .......................... 19  
    11.3 Freedom of movement .......................... 19  
    11.4 Andorra tax transparency agreement 20  

12. **RESIDUE** .......................... 20  
    12.1 Legislative progress .......................... 20  
    12.2 Rectification .......................... 20  

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1  December 2015
1. CAPITAL GAINS TAX

1.1 Proposals for non dom trusts regime

Representatives of the CIOT, Law Society, STEP and ICAEW who attended a meeting with HMRC about the proposed rules for taxing non-dom trusts have produced their own paper proposing the following alternative regime.

**A. Proposals to apply only to “settlements”**

In the same way that other offshore structures, such as insurance bonds and offshore mutual funds, have their own separate regime, we would propose that offshore “settlements” should be subject to their own single regime as described below.

The following proposals therefore apply only to “settlements”—that is trusts, trust-like equivalents, and (see further below) companies owned by trusts. The Transfer of Assets code would be kept as a residual category for stand-alone companies and other non-trust structures.

**B. UK domiciled settlors**

Where the settlor is UK resident and either actually domiciled or a “returning dom” then the present rules should remain. Some limited aspects of the following proposals might be adopted to ensure consistency. The following therefore applies only to non-UK domiciled settlors.

**C. Same rules to apply before and after “year 15”**

In our view there are significant difficulties with a very different regime applying before and after “year 15”. For instance, there would be scope for planning either side of that anniversary. There would be further issues if a settlor subsequently lost deemed domicile through 6 years of non-residence. We therefore propose that the same rules, but with modified effect, should apply throughout.

The following proposals ensure a consistent regime applies to settlements without the trustees having to keep track of the deemed domicile status of the settlor.

However, although the regime is consistent, the effects vary—in particular after “year 15” the settlor will be incapable of being an RBU [Remittance Basis User?] and would therefore be taxed (see F below) on worldwide benefits.

**D. UK source income**

UK source income is taxed broadly as at present, i.e.:

- on the Settlor if the settlor is UK resident and the trust is settlor-interested
- otherwise on the life-tenant if there is one; potentially - depending upon the exact situation - on the trustees themselves
- otherwise on the recipient if it is distributed as income.

If none of the above apply the UK source income is taxed under the matching rules described at F below. Once income is taxed under the above, it is not taxed again if it is subsequently distributed.

**E. Non-UK source income**

Non-UK source income should be taxed:

- on the Settlor if UK resident and either:
  - the Settlor, the Settlor’s spouse or the Settlor’s minor children have an IIP in that income; or
  - it is otherwise distributed as income to any of them;
- on the recipient (or person entitled) if it is distributed as income to any other person or that other person has an IIP in that income;
- otherwise under the matching rules described at F below.

Any credits attached to such income should be available to the taxpayer in the same way as at present. Once attributed to a taxpayer under any of the above, the income would no longer be available to be matched and would not be taxed again if it is subsequently distributed.

Income attributed to a person in accordance with the above would be taxed according to the residence, domicile and RBU status of that person.

**F. Matching rules for other income**

Any income not taxed in accordance with the above would be matched either under s731 ITA or a modified form of those provisions as described in H below.

This would apply to income that has been retained in the trust (whether formally accumulated or simply rolled-up) and which has not been distributed or used to pay expenses.
The matching would apply to beneficiaries wherever resident if the beneficiary was UK resident this would give rise to a tax charge but – as is currently the case for capital gains – the deemed income would be treated as having the same source as the benefit with which it had been matched. Consequently:

- benefits received in the UK would therefore automatically be taxed;
- benefits received anywhere in the world by a deemed domiciled recipient would also be taxed;
- benefits received outside the UK would potentially be subject to the remittance basis if the recipient is an RBU.

S 731 should ideally be put onto a LIFO basis. This would, in practice, address many of the problems of lack of records.

G. Capital gains treatment as at present
The capital gains position of trusts would be largely as at present.

H. Possible assimilation of s731 and s87
The matching proposals described at F and G above could be dealt with under the existing s731 and s87 mechanisms in a modified form. However, we think that there is scope within the proposal to go further. Although this is not a necessary part of our proposals, we think that there is a good case for amalgamating s731 and s87 into a single regime. The regime would broadly match income first (subject to income tax); offshore income gains (subject to income tax) second; and capital gains third (subject to capital gains tax + supplementary charge as appropriate).

A single matching code would be a significant improvement in many regards. It would remove many of the difficulties that there are at present – for instance around offshore income gains; around the fact that s731 matches on a FIFO basis but s87 on a LIFO basis; and the difficulties with s733 matching. It would also give less scope for interstices between the two codes. Thought would need to be given to whether full alignment of s87 and s731 is possible and, in particular, to companies owned by trusts.

The price for amalgamation might be the loss of the motive defence for nontransferor trust cases. We should only support the removal of the motive defence as part of an assimilation of s731 & s87 in the form outlined in this section H and the proposals at section F.

Joint Working Group discussion draft from www.lawsociety.org.uk

1.2 Autumn Statement 2015: Tax on residential property

The CGT on the gain arising on the sale of a residential property is currently due by 31 January following the tax year in which the disposal occurs. For unconditional contracts the disposal date is the date of exchange.

In his Autumn Statement, the Chancellor announced that from April 2019 taxpayers will be required to make a payment on account of any CGT due on the disposal of UK residential property within 30 days of the completion of the disposal. A payment on account will not be due on properties which are not liable to CGT because they qualify for principal private residence relief. Draft legislation will be published for consultation in 2016.

Those individuals relying on use of sale proceeds from the sale of a residential property that does not qualify for PPR, to fund a contemporaneous purchase of a second property may need to consider alternative means to fund the CGT liability.

It is not clear at this stage how the new changes will be administered. The compliance burden may rest on the conveyancer, who may need to deduct CGT and file a tax return on the vendor’s behalf. No doubt the result will be higher sale expenses.

Reported in, gabelletax.com

1.3 Mansworth v Jelley losses

The High Court has held that a taxpayer who incurred capital losses as a result of the Court of Appeal decision in Mansworth v Jelley [2002] EWCA Civ 1829 and subsequent HMRC guidance had a legitimate expectation that those capital losses would not be denied, and that the closure notices denying the losses should be quashed.

In its judgment in Mansworth v Jelley, the Court of Appeal held that the acquisition cost for CGT purposes of shares acquired on exercise of a non tax-advantaged employee share option was deemed to be the market value of the shares at the time of exercise of the option, rather than the actual
amount paid to exercise the option and acquire the shares.

Following the Court of Appeal judgment, on 8 January 2003, HMRC issued guidance explaining that it would treat the CGT base cost of shares acquired on an exercise of an employee share option which gave rise to an income tax liability as the sum of:

- The market value of the shares at exercise (as decided in Mansworth v Jelley).
- The amount charged to income tax on exercise (under section 120, TCGA 1992).

The effect of this was that the amount charged to income tax was included in the base cost twice. Someone who exercised a share option and immediately sold the shares would make a capital loss equal to the amount charged to income tax.

HMRC also announced that this very beneficial treatment would apply only for shares acquired under options exercised before 10 April 2003. For shares acquired on the exercise of an option on or after that date, TCGA 1992 was amended by the Finance Act 2003 so that the CGT base cost of option shares was the exercise price plus any amount charged to income tax on exercise (see section 144ZA, TCGA 1992). This brought the tax treatment back to what had been the understanding before Mansworth v Jelley.

Following publication of the 2003 guidance, HMRC published a number of related publications, repeating and expanding on the 2003 guidance.

On 12 May 2009, HMRC published Revenue & Customs Brief 30/09 announcing that it had received legal advice that its original guidance on the effects of Mansworth v Jelley was wrong, as it allowed the option holder to increase the base cost by adding on the amount chargeable to income tax. As a result, HMRC considered that the correct CGT base cost for shares acquired on exercise of an employee share option before 10 April 2003 was limited to the market value of the shares on exercise. HMRC noted that it would apply its new understanding of the CGT position to any enquiry or appeal open at the time.

In May 2014, HMRC published the decision of its Personal Taxes Contentious Issues Panel (PTCIP) on the outstanding Mansworth v Jelley CGT claim cases, stating that HMRC could use its collection and management powers to give taxpayers the benefit of the incorrect guidance where:

- The taxpayer could make a realistic case that on the balance of probabilities they relied on incorrect guidance.
- The taxpayer would suffer detriment if those losses were denied by HMRC.
- The taxpayer would have been able to demonstrate a legitimate expectation that they could rely on the guidance, except that HMRC’s delay in dealing with the enquiry meant that the level of evidence they could provide was limited (again, on the balance of probabilities).

The taxpayer in this case, a bank employee, was granted options over shares at some time following the commencement of his employment in 1989. The taxpayer exercised his options in 1999 and 2000 and, in each case, disposed of the shares on the same day. The taxpayer completed his tax returns for the relevant years on the basis that (as was the understanding at that time) no gain or loss arose on the disposals.

Following the Court of Appeal’s decision in Mansworth v Jelley and the publication of the 2003 guidance, the taxpayer adjusted his tax returns for the relevant years to claim capital losses for the amounts charged to income tax. In June 2003, HMRC opened enquiries into those returns (for reasons initially unconnected with these claims) and, following lengthy correspondence and the publication of RCB 30/09 on 20 March 2009, on 12 November 2010 issued closure notices denying the capital losses. On 7 December 2010, the taxpayer indicated his intention to appeal and, following further correspondence with HMRC, commenced judicial review proceedings.

The High Court found for the taxpayer. The court set out a number of principles which, when applied to the facts, led it to quash the closure notices and remit the matter to HMRC to make a fresh decision.

The court made the following findings. HMRC’s responsibility for the collection and management of taxes under section 1 of the Taxes Management Act 1970 co-existed with:

- a duty to treat taxpayers fairly and not discriminate between them without good reason (R v IRC ex parte Unilever plc [1996] STC 681); and
a duty to stand by its published statements, to provide certainty among taxpayers (R (Davies and another) v HMRC; R (Gaines-Cooper) v HMRC [2011] UKSC 47).

HMRC's duty to collect tax could not be used as a "trump card", prevailing over all other considerations, where collection of that tax would cause such conspicuous unfairness as to amount to an abuse of power (R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd [1990] 1 All ER 91).

Contrary to the decision of PTCIP, conspicuous unfairness was not restricted to cases where a taxpayer had relied, to his detriment, on HMRC's advice or guidance.

Where a taxpayer had a legitimate expectation to be taxed on a particular basis, that legitimate expectation could be overridden by public interest imposing different treatment, except where to do so was so unfair as to amount to an abuse of power (or, in other words, was "conspicuously unfair").

The 2003 guidance was clear, unambiguous and devoid of relevant qualification. Therefore, the court held that the 2003 guidance gave the taxpayer a legitimate expectation that his capital losses would be taxed in accordance with it.

Although HMRC's publication of RCB 30/09 was a valid exercise of its powers, the court held that HMRC failed to exercise its duty of fairness, which required it to balance the taxpayer's legitimate expectation arising from the 2003 guidance and the unfairness caused by its withdrawal against its duty to collect tax. The court noted that HMRC had appeared to establish only that there was no detrimental reliance by the taxpayer; however, the court concluded that HMRC should also have considered whether its course of action was comparatively fair between taxpayers.

The court found that HMRC had accepted numerous claims for capital losses on the basis of Mansworth v Jelley; only taxpayers who were bank employees and whose tax returns remained under enquiry at the date of publication of RCB 30/09 had been treated differently. While the court acknowledged that there were factual differences distinguishing the taxpayers whose claims had been allowed from those whose had not, those differences did not make it fair to apply different tax treatment to the two groups.

HMRC should also have considered:

- Whether RCB 30/09 was unfair because it applied a new interpretation of law to past disposals, despite HMRC guidance on correcting mistakes which stated that where HMRC had provided incorrect advice, taxpayers would only be required to account for tax on the correct basis from the date on which notification of the error was made.
- The fact that the unfairness had arisen as a result of a mistake by HMRC.
- That it had taken HMRC 11 years from the date of the taxpayer's claims to issue closure notices, which the court considered to be "on any view, a very long time" (albeit the court agreed that the delay was not deliberate).

Although it stopped short of remaking HMRC's decision, the court recorded that, in its view, the withdrawal of the 2003 guidance and the issue of the closure notices were "very unfair".

R (otao Ralph Hely-Hutchinson) v HMRC [2015 EWHC 3261]

2. INHERITANCE TAX

2.1 Autumn Statement 2015: Pensions in drawdown

Where an individual fails to exercise a right which increases the value of another person's estate, an inheritance tax charge can arise on their death as if the failure had been a disposition by them. This could include, for example, a pension fund in drawdown where there are undrawn funds at death that would normally pass to the beneficiaries of the deceased free of inheritance tax. HMRC could argue that the undrawn pension represents a failure to exercise the right to take pension benefits so that an inheritance tax charge arises.

The Autumn Statement revealed that Finance Bill 2016 will include legislation to ensure that no inheritance tax charge will arise on pension funds designated for drawdown but not fully drawn down by death. The change will be backdated to deaths on or after 6 April 2011.

Drawdown was specifically introduced to provide flexibility when taking pension benefits. This change
will provide much needed certainty over inheritance tax charges where this flexibility is used for the purpose envisaged by legislation but where funds remain at death.

Reported at gabelletax.com 25 November 2015

2.2 Autumn Statement 2015: Deeds of variation

Deeds of variation enable a beneficiary of an estate to redirect all or part of their inheritance so that for inheritance tax and capital gains tax purposes the redirection is read back to the date of death and treated as if made by the deceased. The Government has been concerned over abuse of the tax advantages of variations and published a review to seek evidence from practitioners to explore the extent of the use of variations for tax purposes.

Following responses to the review, the government announced in the Autumn Statement that they have decided not to introduce any restrictions on the use of variations for tax purposes but will keep their use under review.

This is a common sense decision and is good news for families who need to use deeds of variation for a number of familial reasons. The original announcement of a review seemed to owe more to political gesturing than real concern about any particular misuse. Variations are most often used for family rather than tax reasons – often being referred to as deeds of family arrangement – and it is helpful that variations will continue to receive beneficial tax treatment.

Reported at gabelletax.com 25 November 2015

2.3 IHT Concessionary Relief

Extra Statutory Concession F20 provides an inheritance tax exemption for a variety of compensation payments including those relating to World War II. Most significant concessions such as this are now being enacted as a result of the decision in IR ex parte Wilkinson v CIR.

The Autumn Statement confirms that Finance Bill 2016 will include legislation to enact this concession for deaths on or after 1 January 2015. The legislation will also include payments made under a newly created Child Survivor Fund.

As this is an enactment of a concession, the change relating to compensation covered by the concession should be neutral. However, our experience is that such enactments do not always mirror the original concession.

Tax News, gabelletax.com

3. STAMP TAX

3.1 Autumn Statement 2015: SDLT on second properties

In his Autumn Statement, the Chancellor announced that from 1 April 2016, an additional 3% will be applied to the current SDLT rate for the purchase of additional residential properties above £40,000, such as buy to let properties and second homes.

The higher rate will not apply to purchases of caravans, mobile homes or houseboats, or to corporates or funds making significant investments in residential property.

There will be a further consultation on the policy detail, including whether an exemption for corporates and funds owning more than 15 residential properties is appropriate.

Following on from the Summer Budget, this legislation is yet another blow to buy to let landlords. The details of how the policy will be applied have not yet been published and it will be important for potentially affected taxpayers to participate in the forthcoming consultation process. For instance, it is not clear yet how this will impact the relatively common position of parents helping children to buy property or of Trusts which own a number of properties for different beneficiaries.

Reported at gabelletax.com 25 November 2015

3.2 Autumn Statement 2015: Other news

For SDLT purposes, a property valued at more than £500,000 is considered to be a “higher threshold interest” and in the absence of any exemption, SDLT is payable at the slab rate of 15% on the purchase of such interest by a company, partnership with a corporate member or collective investment scheme.

There are three main reliefs available from this additional rate being applied:

- A property letting business;
- A property trading business; or
- A property development business.
The above reliefs will be extended to cover equity release schemes (home reversion plans), property development activities and properties occupied by employees. These extensions will apply from 1 April 2016. A similar extension is made to the reliefs from ATED.

The inclusion of these reliefs is welcomed as arguably, such transactions should never have fallen within the scope of the ATED and 15% SDLT regimes. The Government does not intend for the extension to these reliefs to apply until April 2016 so purchasers in such circumstances may wish to defer their acquisitions.

The Government has announced that it will consult on changes to the SDLT filing and payment process, including a reduction in the filing and payment window from 30 days to 14 days after the effective date of the transaction. The reduced deadline is proposed to come into effect in 2017/18.

Changing the SDLT filing and payment process follows on from several changes HMRC has made recently in this area, including digital tax accounts and the processing of LBTT in Scotland. The shortening of the window for filing and payment will mean that taxpayers and their advisers will have less time to consider what the appropriate rate of SDLT is and the availability of reliefs.

In practice, the SDLT due is already retained by solicitors and therefore the acceleration of the payment deadline will be most acutely felt by the advisers who will need to ensure that the shorter filing and payment deadlines are met.

The government announced in the Autumn Statement that it will consult on how to change the rules on Business Investment Relief to encourage greater use of the relief and increase investment in UK business by non-UK domiciled individuals.

Reported at gabelletax.com 25 November 2015

4.2 ISA exemption and estates

Income or gains on investments held in a qualifying ISA are exempt from tax but this exemption no longer applies after the investor dies unless the income was payable or the gain arose before death.

A technical consultation will be held with ISA providers with a view to including legislation in Finance Bill 2016 to extend the tax free exemption to estates during the administration period.

This change will provide a valuable relief to executors and will be particularly useful for ISAs transferred under the surviving spouse provisions where the change would avoid a break in the exemption.

Tax News, gabelletax.com

4.3 EIS and preferential rights

The First-tier Tribunal has determined that shares carrying insignificant preferential rights to a company’s assets on its winding up breached the requirements of s 173(2)(aa) Income Tax Act 2007 (which prohibits any preferential rights on a winding-up) and, therefore, were not eligible for relief under the enterprise investment scheme.

The taxpayer company reorganised its share capital by converting 1.5 million ordinary shares of £0.0001 each into valueless deferred shares. This was done for genuine commercial reasons. The ordinary shares carried the right to the return of the nominal amount on a return of assets on a winding up. Likewise, the deferred shares carried that right but only after the ordinary shareholders received their return. The maximum amount the ordinary shareholders could receive in preference to the deferred shareholders was £933. The total market value of all shares in the company at the relevant time was around £2.2 million. The maximum preference therefore represented less than 0.05% of market value or 14% of nominal value.

The government announced in the Autumn Statement that it will consult on how to change the rules on Business Investment Relief to encourage greater use of the relief and increase investment in UK business by non-UK domiciled individuals.

Reported at gabelletax.com 25 November 2015

4. PERSONAL INCOME TAX

4.1 Autumn Statement 2015: Business investment relief

Historically the way that the remittance basis worked for non-doms was thought to discourage investment in the UK, and for this reason a special type of relief – ‘Business Investment Relief’ was introduced in April 2012 to encourage investment in the UK by not taxing qualifying remittances. Some of the conditions are perhaps unnecessarily restrictive. In many instances, for example, an investment in a UK company will qualify for relief but an investment in a UK partnership will not.
The tribunal accepted that a de minimis approach to construing tax legislation was possible. That approach reflects the idea that certain matters may be too negligible for the law to be concerned about. However, the tribunal determined that a de minimis approach could not be applied here because it was clear from the closely articulated provisions of the scheme that Parliament did not intend small or insignificant matters to be disregarded. Nor did a purposive construction assist because the purpose of the scheme is to provide relief for shares that carry genuine economic risk provided they do not carry any preferential rights on a winding up. Nevertheless, the tribunal confirmed that, if it were possible to ignore insignificant preferential rights, the rights in question would have been sufficiently small to have been ignored.

The decision illustrates, yet again, how the complex technical rules of the scheme can operate to deny relief where, but for a minor breach, relief would have been available.

Flix Innovations Ltd v HMRC [2015] UKFTT 0558 reported on Practical Law Tax

4.4 Interest arising in the UK

The Upper Tribunal has held that a multi-factorial test applied to determine whether interest arose in the UK for the purposes of UK withholding tax on interest. The tribunal's decision accords with HMRC's Savings and Investments Manual guidance that a number of factors must be considered, with the residence of the debtor being material. It is interesting to note that section 874(6A) Income Tax Act 2007 now expressly provides that, with effect on and from 17 July 2013, the legal situs of a debt is irrelevant to determining whether interest arises in the UK.

The tribunal rejected the appellants' arguments that the source of interest should be determined by reference to the nationality of the relevant loan instrument or to the place where the credit was provided. It concluded that Westminster Bank Executor and Trustee Co and Channel Islands Ltd v National Bank of Greece SA [1970] 46 TC 471 applied so that the source of the obligation to pay interest was relevant and had to be determined by reference to all the relevant factors. The tribunal stated that it was not possible to list an exhaustive set of relevant factors, since this would depend on the facts of each case. However, the residence of the debtor was material.

Consequently, the tribunal found that the two differently constituted First-tier Tribunals did not err in law by applying this test to find that the source of interest paid by each appellant was the UK and they were liable for tax that should have been withheld from the interest payments.

Ardmore Construction Ltd and another v HMRC [2015] UKUT 063, reported on Practical Law Tax

5. BUSINESS

5.1 Autumn Statement 2015: Distributions, transactions in securities

The government has announced, in the Autumn Statement, the publication of a consultation on the rules concerning company distributions.

Changes to the transactions in securities provisions and the introduction of a targeted anti-avoidance rule which prevent the conversion of income into capital in order to gain a tax advantage will be contained in Finance Bill 2016.

With the increase in income tax rates on dividends coming into force in April 2016, it seems opportune to look at which transactions should be treated as distributions as there may be a greater incentive to convert income into capital gains.

HMRC have been looking closely at applications for clearance in respect of transactions in securities and have no doubt identified trends in the types of transaction that they would like to stop.

Reported at gabelletax.com 25 November 2015

5.2 Autumn Statement 2015: Loans to participators and charities

Loans made by close companies to trustees of a settlement where the trustees or the beneficiaries of the trust are participators in the company may be liable to a charge under CTA 2010, s 455.

The government has recognised that some of the transactions being caught did not fit the policy rationale of the rules (because the funds could not end up in the hands of individuals for their personal use). Therefore the Autumn Statement announced that a targeted exemption will be introduced removing the exposure to the s 455 charge for charities where it is clear that the loan or advance is
being made for wholly charitable purposes. Charities will not have to account for any s 455 charge in respect of loans or advances made on or after 25 November 2015 subject to Royal Assent to Finance Bill 2016.

This long overdue announcement will remove an unwelcome cashflow disadvantage for charities, especially those which are structured in such a way that exposure to this charge has been unavoidable.

*Reported at gabelletax.com 25 November 2015*

### 5.3 Expectation of profit

In *John Henderson v HMRC* [2015] UKFTT 584 (25 November), the FTT found that the losses made by a farmer could not be set off against his rental income.

Mr Henderson carried out general farming activities but had done so at a loss over several tax years. His income was supplemented by rental income paid under a lease of part of his farm so that the tenant could quarry the land and excavate gravel. The issue was whether the farming losses could be claimed: generally, if the rental income was part of his farming/trade income; or, if it was not, then 'sideways' against the rental income under ITA 2007 s 64.

The FTT explained that, under ITTOIA 2005 ss 12 and 335, profits arising from land in respect of certain concerns (for example, mines, quarries, etc.) are taxed as if they were from trades, even though the source of the profits is land. The rental income received by Mr Henderson fell into this category and could therefore not be part of his general trading income.

Sideway loss relief was not available either, as Mr Henderson had not provided any evidence of an intention to make a profit from his business.

The case shows that, while the FTT accepted that traders can have unexpected losses which arise for reasons outside their control, the taxpayer was not able to show that he had had 'a reasonable expectation of profit'. His claim for sideway loss relief must therefore fail.

*Reported in Tax Journal 4 December, reproduced with permission*

### 6. EMPLOYMENT

#### 6.1 EBTs, the Rangers case

The Court of Session has overturned the decision of the Upper Tribunal, finding that payments made by companies in the Murray group (which owned Rangers Football Club) to an employee benefit trust were redirected payments of earnings, taxable in the hands of the employee.

Very briefly, the facts were as follows:

Murray Group Management Limited set up an English law discretionary trust, known as the Murray Group Management Remuneration Trust, with a Jersey-resident trustee, in April 2001 (the principal trust).

108 active sub-trusts were set up at various times between 2002 and 2008. The sub-trusts were funded from the principal trust, which in turn was funded by Murray Group Holdings Limited (MGHL) group employers.

Each sub-trust was in the name of an individual employee and for the benefit of beneficiaries within his family nominated by him, but not for the sole benefit of the employee.

In almost all cases, the full amount of the sub-trust funding (discounted for the interest due over the term) was then lent to the employee.

HMRC assessed MGHL group employers to PAYE and NICs in respect of payments into the sub-trusts (grossed-up for income tax and NICs, to reflect an apparent intention to make a tax-free payment).

The investigating inspectors of taxes concluded that the sub-trust loans were sham and that in fact the gross amounts were contractual earnings of the employees concerned and taxable accordingly.

The Upper Tribunal had upheld the decision of the First-tier Tribunal that the employees received loans and not earnings, there was no "payment" of earnings and nor were monies placed unreservedly at the disposal of the employee, even though they accepted there was some element of orchestration between the employer and the employee.

HMRC appealed the Upper Tribunal's decision on two grounds. The first was that the contributions into the EBT by group employers were redirected payments of earnings to employees, and should be
taxed as employment income when the contributions were made. This was a new ground for appeal, not raised in the First-tier Tribunal or the Upper Tribunal, which the Court of Session decided it was able to consider. The second was that because the employee for whom a sub-trust was created was appointed as protector they had power to obtain the sub-trust funds absolutely.

HMRC argued that the payment of monies by the employer to the EBT, or alternatively the appointment of monies by the EBT to a sub-trust set up for the benefit of an employee, constituted a payment of earnings, taxable in the hands of the employees at that time. As a result, HMRC’s view was that arrangements were a redirection of earnings which did not remove the employee’s liability to income tax.

The court accepted HMRC’s argument, allowing its appeal on this ground. It held that the fundamental principle derived from case law is clear: if income is derived from an employee’s services as an employee, it is an emolument, and is assessable to employment income tax, even if the employee requests or agrees that it be redirected to a third party. On this point, Lord Drummond Young noted:

"That accords with common sense. If the law were otherwise, an employee could readily avoid tax by redirecting income to members of his family to meet outgoings that he would normally pay: for example to a trust for his wife . . . or to trustees to pay for his children’s education or the outgoings on the family home. It follows that, if the principle applies, it is irrelevant that the redirection is through the medium of trust arrangements. It is equally irrelevant that the trustees who receive the payment, at whatever remove, exercise a genuine discretion as to what happens to the funds."

In applying this principle to the current case, the court decided that it was also essential to have regard to the true nature of the individual transactions involving the EBT, and held that the amounts received by the EBT amounted to a "mere redirection of income".

The court interpreted the Court of Appeal’s judgment in UBS AG v HMRC [2014] EWCA Civ 452 (the appeal against which was heard in the Supreme Court on Friday 4 December) to mean that if an employee is entitled to payment of a bonus that can, realistically, be considered as money, he is treated as receiving it as soon as he becomes entitled to payment of the bonus.

HMRC also argued that, applying Ramsay, when monies were appointed to a sub-trust, the monies were placed at the unreserved disposal of the employee. This was because the employee was also the protector of the sub-trust and had the power to exclude all the other beneficiaries of the sub-trust, appoint himself the sole beneficiary, and then wind up the sub-trust.

The court decided against HMRC on this point. This was for two reasons. The first was because the protector had a fiduciary duty, and it would be a clear breach of that duty for a protector to make himself the sole beneficiary. Secondly, the actual wording of the sub-trust deed did not permit the protector to amend the definition of the class of beneficiaries in this way.

It is unclear as to whether the case is of general application, or is dependent on its own facts. The judge states as a matter of fact that the payments into the EBT were "redirected earnings" but does not adequately explain why this is the case.

The employer wrote side letters to certain employees regarding the way in which the sub-trust would be operated, and these were explicit regarding the employer’s obligation to continue funding the EBT. The court considered that the obligations in the side letters were part of the employees’ remuneration packages and provided additional remuneration. It may be that this is the reason the payments were redirected earnings and, if so, it may be possible to distinguish this from other cases.

However, the judge does say that it was irrelevant that the payments were discretionary and there was no contractual entitlement to them. It was only necessary to show that the payment was remuneration for an employee’s services.

This calls into question the basis of bonus sacrifice and salary sacrifice arrangements. These operate on the basis that amounts which would otherwise have been employment income are waived before any legal entitlement has arisen. A wide interpretation of this case suggests that this is not sufficient to prevent the waived amounts from being taxable.

The court declined to follow the decisions of the Supreme Court in Forde and McHugh and the House of Lords in Dextra on the basis (amongst others) that Forde and McHugh was concerned with National Insurance contributions, and in both cases
there would have been scope for double taxation if HMRC’s arguments had been accepted.

Lord Drummond Young said that accepting HMRC’s argument in this case did not create any scope for double taxation, because once the payments went into the trust they were “transformed into capital in the hands of the trustees”. Payments out of the trust would not be taxable as employment income. It is unclear why Lord Drummond Young considered this to be the case. Since the introduction of Part 7A, payments from an EBT to an employee have been explicitly taxable by statute; before Part 7A, they were taxable either as general earnings under section 62 of ITEPA 2003 or under the residual benefits rules in section 201 of ITEPA 2003. There is usually no argument that a payment from an EBT is not taxable as employment income.

Similarly, loans from an EBT to an employee were taxable under the beneficial loans rules before Part 7A and are now explicitly taxable as payments to the employee.

It is possible for the taxpayers to appeal to the Supreme Court. However, only one of the five respondents opposed HMRC’s appeal as the four other respondents are in liquidation. It is not clear whether the remaining respondent will wish or be able to appeal.

If no appeal is made, or leave to appeal is not granted, then HMRC may decide to treat this case as a final judicial ruling on EBT arrangements entered into before 6 April 2011. This would enable HMRC to issue follower notices to taxpayers with unresolved EBT arrangements, and subsequently accelerated payment notices.

Advocate General for Scotland v Murray Group Holdings Limited and Others [2015] CSIH 77 reported on Practical Law Tax

6.2 Autumn Statement 2015: Disguised remuneration

The rules on disguised remuneration were introduced in Finance Act 2011 to combat the proliferation of planning using employee benefit trusts to avoid income tax.

The legislation effectively prevented many new schemes from being implemented and was coupled with a settlement opportunity provided by HMRC to allow employers to unwind EBTs and to settle their liabilities. However, many employers took the view that the terms of the EBT settlement opportunity were insufficiently attractive and elected to leave their EBTs in place.

The Government has announced in the Autumn Statement that it intends to take action against those who have used or continue to use disguised remuneration schemes and who have not yet “paid their fair share of tax”. What form this action will take is not spelled out in the Blue Book.

As part of the same announcement, the Government set out its intention to legislate in the future to close down any new forms of tax planning that avoid tax on earned income and raised the possibility that the future legislation could be backdated to 25 November 2015.

Companies that have outstanding EBTs should, as a minimum, expect further contact from HMRC and further pressure to settle their cases. It is understood that a number of companies have received advance notice that APNs will be issued.

HMRC will also seek to capitalise on their recent win in the Court of Session in the Rangers case to apply pressure on companies with unsettled EBT liabilities, although, until that case has been considered by the Supreme Court, or further appeals have been dropped, the case does not give HMRC the ability to issue Follower Notices at this stage.

Reported at gabelletax.com 25 November 2015

6.3 Autumn Statement 2015: Intermediaries, travel & subsistence

Under the temporary workplace rules, an employment intermediary such as a personal service company (PSC) or umbrella company can provide a worker with an opportunity to claim for travel and subsistence expenses incurred in relation to various work assignments, by using overarching employment contracts.

The Government confirmed at Summer Budget 2015, that it will legislate to restrict tax relief, with effect from 6 April 2016, for travel and subsistence expenses for workers engaged through an employment intermediary such as a PSC. The restriction will only apply where the worker is providing personal services to an engager where they are under the right of supervision, direction or control of any person.
In the Autumn Statement the government said it proposes to include a transfer of liability provision whereby the exposure can be transferred to the engager where false information has been provided. Payments made for expenses under such circumstances will be treated as earnings subject to PAYE.

The introduction of these rules alongside new rules restricting the use of salary sacrifice by employment intermediaries will have a fundamental effect on such businesses and workers that operate within them. All current arrangements should be reviewed to assess the level of exposure.

Reported at gabelletax.com 25 November 2015

6.4 PAYE regulation changes

As part of the legislation for the new rules on reimbursed expenses and payroll benefits, changes to the PAYE regulations have been passed, taking effect from 14 December.

Regulations 4, 5 and 8 amend the principal Regulations to remove the requirement for employers to report expenses paid to employees (whether deductible or not) on form P11D at the end of the tax year. These amendments are consequential on the amendments made to the ITEPA 2003 by FA 2015 exempting certain expense payments and benefits in kind provided to employees from income tax.

Regulation 6 inserts new Chapter 3A: Benefits in Kind, consisting of new regulations 61A to 61M, into Part 3 of the principal Regulations (Deductions and repayments of tax), which introduces a scheme to authorise employers to deduct tax from employees' pay in respect of certain benefits in kind that they provide to their employees through PAYE (“payrolling benefits”) from the 2016–17 tax year.

New regulation 61B provides that Chapter 3A applies to employers who are authorised by HMRC, in accordance with the procedure set out in regulation 61C, and who provide specified benefits to specified employees (both 'specified employee' and 'specified benefit' are defined in new regulation 61A). Where Chapter 3A applies, the provision of a specified benefit is treated as a payment of PAYE income for the purpose of the principal Regulations. New regulation 61B provides that any reference in the principal Regulations to 'relevant payment' includes an amount that is to be payrolled in accordance with Chapter 3A. But an amount to be payrolled will not be taken into account for the purposes of the overriding limit (as defined by regulation 2 of the principal Regulations). As a result the rule that employers may not deduct more than 50% of an employee's pay, as provided by regulations 23(5) and 28(5) of the principal Regulations, is unaffected by any provision made in these Regulations.

New regulation 61C defines who is an authorised employer for the purposes of Chapter 3A. An employer will be an authorised employer if, before the start of the tax year in which the employer wants to payroll benefits, they apply to HMRC in respect of an employee receiving a specified benefit. An employer may make an application during the tax year only in limited circumstances. Provision is also made for the circumstances in which an employer ceases to be an authorised employer.

Income Tax (Pay As You Earn) (Amendment No 4) Regulations 2015 (SI 2015/1927)

7. NATIONAL INSURANCE

7.1 Employment allowance

At Summer Budget 2015 the Chancellor announced that, in order for the Employment Allowance to continue to meet its objective of supporting employment, from April 2016 it would no longer be available to companies where the director is the sole employee.

Draft regulations to achieve this are now being consulted on. Regulation 2 inserts new subsection (4A) into section 2 NICA 2014. The new subsection provides that a company cannot qualify for an employment allowance where all the payments of earnings it pays in a tax year are paid to or for the benefit of one employed earner only who is also a director of the company at the time the payments are made.

If passed in such a restricted form, the new provisions will be easy to circumvent: either another earner, such as a spouse, is paid a salary which triggers a few pounds of secondary NIC, or the main earner ceases to be a director and becomes, for example, company secretary.

HMRC consultation 26 November 2015
8. VAT & CUSTOMS DUTIES

8.1 DIY house building

In *Thomas Brennan v HMRC [2015] UKFTT 557*, the FTT found that a builder who had built a new dwelling, having obtained planning permission for an extension only, was not entitled to a refund of VAT.

Mr Brennan had obtained planning consent for a ‘two-storey extension to the side of dwelling and single-storey extensions to side and rear’. He had then obtained a further planning consent for ‘extensions and alterations to dwelling’. Extensive alterations and other works had been undertaken, some of which had exceeded those authorised, which effectively resulted in the property being almost entirely rebuilt.

Mr Brennan had applied for a refund of VAT under the DIY Builders Refund Scheme (VATA 1994 s 35), on the basis that he had built a new dwelling. HMRC had refused the application on the ground that the works carried out were not lawful and that planning permission had not been granted in respect of a new dwelling.

The FTT found that Mr Brennan had not set out to construct a new dwelling. The virtual reconstruction of the dwelling had happened for various reasons but there had never been any intention, either at the outset or during the course of alteration works, to demolish the dwelling and build an entirely new one, as contemplated by s 35. The application for a DIY refund was an afterthought which, given the strict requirements of the legislation, was bound to be fundamentally flawed.

Reported in *Tax Journal* 4 December, reproduced with permission

8.2 Alternative evidence of input tax

Mr Boyce traded as Glenwood. His business was involved in the purchase, supply and export of new and used motor vehicles such as Porsches, Mercedes and Range Rovers. They were exported by Mr Boyce’s customer, Great Harvest Limited to Singapore. However, the manufacturers of the vehicles and the owners of the dealership franchises would not have approved of Great Harvest purchasing them in the United Kingdom for the purposes of export in this way. Great Harvest’s solution to this was to disguise its involvement by Mr Boyce purchasing the vehicles and then selling them on to Great Harvest. In turn, Mr Boyce’s involvement was disguised by individuals purchasing the vehicles from the dealership franchises for him.

The managers of the dealerships where the vehicles were purchased were not only well aware of what is happening but in fact actively sought Mr Boyce out to sell the vehicles to him.

An inevitable result of this was that Mr Boyce’s name did not appear on the invoices, only the names of those buying the cars on his behalf. HMRC therefore refused an input tax deduction.

HMRC have a discretion under reg 29(2) VATR 1995 to accept alternative evidence of input tax other than a VAT invoice made out to the taxpayer. HMRC drew heavily upon the First-Tier Tribunal case of *Everycar Contracts Limited and Sabrina Hammon trading as SJM Group v HMRC [2013] UKFTT 405* which similarly dealt with the purchase of cars for export through nominees, but distinguished it on its context.

HMRC’s case was that Mr Boyce could have asked the dealers for an invoice made out to him, and it was not therefore “virtually impossible or excessively difficult” to obtain regular VAT invoices.

The FTT disagreed: “HMRC failed to take into account the fact that the whole point of the arrangements as described by Mr Boyce was that he and his customers were being hidden from view from the manufacturers or the owners of the dealerships. It was virtually impossible or excessively difficult for Mr Boyce to obtain a regular VAT invoice because the dealerships were not prepared to give him them at the time of the transactions. There was no basis presented to us for suggesting that they would have been any more prepared to do so at any later date.”

*Boyce, trading as Glenwood, [2015] UKFTT 0489*

9. COMPLIANCE

9.1 Costs for unreasonable behavior

In the case of *Tor View Self Storage*, HMRC successfully applied for costs due to the unreasonable behavior of the taxpayer during the appeal.
The Company's appeal related to the question of whether supplies of self-storage facilities that it made should be exempt from VAT on the grounds that they amounted to the grant of a licence to occupy land. It was originally stayed behind another case (Hanbidge) and when that was decided against the taxpayer HMRC applied to have the case restored before the tribunal and asked the company for fuller and better particulars of appeal if they wanted to continue.

No substantive reply was received until a month before the hearing from new agents, not yet properly appointed, asking for copies of all the correspondence. The notice confirming their appointment was sent to the wrong address, and a letter withdrawing the appeal was not received until three days after the hearing date. No one from the company or their representatives attended the hearing to strike the appeal out.

The tribunal decided not to strike the case out without hearing a full argument, but issued an “unless” order requiring that, if the Company did not withdraw its appeal, it should set out its position on Hanbidge and, if it failed to do so, striking out the appeal would be a possible sanction. The Tribunal also stipulated the period of time in which HMRC should apply for costs if they wished to do so.

The tribunal considered that the taxpayer company had acted unreasonably in three areas:

1. By failing to comply with correspondence, and directions, from the Tribunal requiring it to set out its position on Hanbidge.
2. By failing to withdraw its appeal earlier than it did.
3. By failing to notify HMRC and the Tribunal of withdrawal in sufficient time to save HMRC the costs of attending, and preparing for, the hearing on 10 April 2015.

It therefore exercised its discretion to award costs to HMRC.

[2015] UKFTT 564

9.2 Reasonable excuse

Dr Amanda Brown was charged penalties for late submission of her tax returns and late payment of tax over several years, which she disputed. She claimed to be totally reliant on her accountant, but the tribunal did not accept this.

Her accountant claimed that the returns were submitted on time based on the print outs from his computer system, but they were sent by post and received significantly after the due date. The tribunal said that while one return might be lost or delayed in the post, it was highly unlikely that this would happen year after year.

The taxpayer had made payments, and a further issue arose about the allocation of these. If HMRC had allocated her payments against tax rather than interest and penalties already charged, and against earlier rather than later tax due, the penalty would have been reduced.

Because she did not specify the allocation that she wanted, she relied on precedents about how to treat payments into a “running account”. However, the tribunal disagreed:

“While taxpayers and HMRC alike refer to ‘payments on account’ of income tax, we consider that the appellant’s tax liability for each tax year resulted in a separate debt becoming due to HMRC and that she had no ‘running account’ with HMRC. We therefore concluded that, in the absence of any allocation by the appellant, HMRC could allocate the payments as they saw fit although their public law duties would preclude them from making an unreasonable allocation.”

[2015] UKFTT 571

9.3 Discovery assessments

The Upper Tribunal has allowed an appeal against the decision of the First-tier Tribunal (FTT) to uphold HMRC’s discovery assessment.

The tribunal agreed with the taxpayers that HMRC had not discharged the burden of proving that the conditions for issuing a discovery assessment were met (in this case, that the tax loss arose from the taxpayers' deliberate conduct and that the assessments were, therefore, in time). This was a positive requirement of the legislation and it was not sufficient for HMRC to rely on the taxpayers’ failure to raise validity objections in their appeal (effectively to assume that validity issues had been conceded). The tribunal did not construe the provisions concerning appeals against discovery assessments as requiring an express objection on validity grounds to be made. Given HMRC’s failure,
it was not open to the FTT to uphold the discovery assessments just because it was established that there were undeclared profits. The FTT erred in not allowing the appeal because HMRC had failed to prove that the assessments were validly made. Further, it was not appropriate to remit the matter to the FTT because to do so would be to give HMRC a "second bite of the cherry", which would not be just and fair in this case.

The case illustrates the importance of HMRC positively establishing that legislative conditions are met.

*Burgess and anor v HMRC [2015] UKUT 0578, reported on Practical Law Tax*

9.4 Business Records Checks abandoned

From 20 October 2015, HMRC has 'wound down' its business record checks involving a telephone questionnaire and will no longer initiate new checks using this process. Business record checks were first piloted during 2011, then suspended and re-launched in revised form towards the end of 2012. From the outset, the professional bodies regarded these checks as poorly targeted and ineffective.

*LNB News*

10. ADMINISTRATION

10.1 Autumn Statement 2015: New digital services

The UK government has tasked HMRC with reducing the cost of tax administration by £400m. The key to this is the introduction of digital tax accounts for businesses, self-employed people and landlords. The digital account will need to be updated quarterly and will presumably be a stepping stone to real time information for businesses and individuals who would normally file tax returns.

In details released in the Autumn Statement, HMRC make it clear that people with simple tax affairs will only need to operate a digital account if they have secondary income of £10,000 or more.

At present, HMRC are very paper based so there will need to be a step change within HMRC to reach the intended goal. Individuals with digital accounts will need to ensure that they have broadband access and the necessary hardware and software to keep their accounts up to date. There is a risk that the elderly and people on low incomes may be adversely affected by the introduction of a digital account. The costs of complying could in reality increase for taxpayers while HMRC make significant savings in terms of the manpower and resources required to maintain the current compliance system.

HMRC also need to take into account the fact that limited broadband access in certain geographical areas may restrict people’s ability to access their digital accounts.

In time it is intended that the digital account will lead to real time information (RTI) for UK businesses.

*Reported at gabelletax.com 25 November 2015*

10.2 IHT electronic filing

Following adverse comments, HMRC has issued revised directions, which state that when an agent submits electronic IHT information on behalf of a client, the agent is confirming that the client, not the agent, has approved the information. The new directions are effective from 2 November 2015.

In contrast to the previous version, which required the agent to verify the accuracy of the information, the new directions now require the agent submitting the information to have obtained from the client confirmation that the information is correct and complete to the best of the client’s knowledge and belief.

It is not yet clear if HMRC’s IT systems will enable IHT information to be entered and saved for possible amendment and/or pending client approval before submission. This may dictate the extent to which electronic submission is used.

*Smith & Williamson Tax update, 9 November*

10.3 GAAR penalties

One of the key compliance proposals in the Autumn Statement is the introduction of a new penalty of 60% of the tax due to be charged in all cases successfully tackled by the General Anti Abuse Rule.

To date HMRC has not reported on any cases going to the GAAR panel formed after the 2013 legislation, so it seems rather premature to bring in GAAR penalties.
10.4 **Restitution interest at 45%**

HMRC will charge corporation tax at a special rate of 45% on any interest it is required to pay to taxpayers who overpaid tax under 'a mistake of law'.

The move comes in response to a Court of Appeal judgment in May that said compound interest should be paid to catalogue company Littlewoods on overpaid VAT.

In 2012 the Court of Justice of the European Union said that under EU law a taxpayer was entitled to receive 'adequate indemnity' and that it was for national law to decide "in compliance with the principles of effectiveness and equivalence, whether the principal sum must bear 'simple interest', 'compound interest' or another type of interest."

Stuart Walsh of Pinsent Masons said: "HMRC is readying itself for the prospect of having to make substantial payments of restitution interest to a large number of taxpayers who overpaid VAT for many years."

"Given the value of the claims, coupled with recent judgments that statutory interest payments on overpaid VAT are subject to corporation tax, the chancellor’s announcement is perhaps not that surprising. Left unchallenged, it serves to immediately and significantly reduce the value of all open claims that are awaiting the final Littlewoods decision."

"However, there are clear grounds to challenge the proposed measure. HMRC justifies the 45% rate by claiming that it reflects, in part, the corporation tax rates applicable over the period to which 'typical awards' relate."

"It is true that many of the claims do include periods extending back to the 1970s and mid-1980s when the rate of corporation tax was 52%. But not all claims fall within this definition.

"The blanket rate makes no allowance for these distinctions and therefore it is difficult to see how, in every case, the proposed measure could possibly result in HMRC giving up all of the benefit it has gained through the overpayment of tax, as they are required to do, or the taxpayers receiving the 'adequate indemnity' to which they are entitled. If the measure is retained in its current form, then a challenge is inevitable."

**Pinsent Masons “Out-Law”, 28 October 2015**

10.5 **Withdrawal of ESCs**

HMRC has given notice that nine ESCs will be withdrawn from 1 or 6 April 2017 and that ESC 3.20 on insolvent business VAT will be given statutory effect. Each of the 10 ESCs is thought to be beyond the scope of HMRC’s administrative discretion and therefore should be outside the ESC regime.

The nine ESCs to be withdrawn relate to income, corporation tax, excise duty and VAT:

1. VAT - Para 9.8 Notice 708 – Apportionment of works of approved alterations to a qualifying protected building;
2. A94 – Profits and losses of theatre backers (Angels);
3. A69 – Building Societies: conversion to company status;
4. C1 – Credit for underlying tax: dividends from trade investments in overseas companies;
5. 6.2 Excise: hydrocarbon oil duties: duty - paid deliveries for refinery boilers;
6. BIM66301 Remuneration of sub-postmasters;
7. 3.23 VAT: supplies by Financial Ombudsman Services Ltd to ombudsman authorities;
8. 3.28 VAT: supplies by Financial Services Authority to self-regulating organisations; and
9. 3.31 VAT: supplies by Financial Services Compensation Scheme Ltd to compensation scheme authorities.

The ESC that will be legislated is ESC 3.20 VAT: Bad Debt Relief and insolvent businesses: revocation of clawback, which ensures insolvency practitioners do not become liable for the clawback of input tax on bad debts where the supply took place before the insolvency of the business for which they act. HMRC invites responses to its mini consultation, including draft legislation that intends to ensure the purpose and effect of the existing ESC is maintained, by 16 December 2015.

**Smith & Williamson Tax Update 9 November**
10.6 Paying HMRC by credit or debit card

From 1 January 2016, HMRC will limit the number of times you can use a credit or debit card within a certain time to pay your tax.

There isn’t a set limit - it depends on HMRC’s view of what’s reasonable based on payment card industry standards and guidance.

The rules apply to multiple card payments against the same tax - you can only make extra card payments if each one’s for a different tax, e.g. Corporation Tax and employers’ PAYE.

If you’re unable to pay your bill in full by card, you should use another payment method like a bank transfer.

No explanation has been given by HMRC for the above restriction.

www.gov.uk/pay-tax-debit-credit-card

10.7 HMRC office closures

A briefing seen by Civil Service World on Thursday shows the scale of the changes planned by the tax authority, with 43 office closures in the London, South East and East of England region alone, and 1,000 staff set to move out of HMRC’s headquarters in the capital.

The key, region-by-region announcements are:

North East England: HMRC will open a regional centre at its existing Newcastle site in 2018-19, staffed by 6,000-6,300 full-time officials focusing on operational delivery and digital work. Five offices in the region will close between 2018-21, with a transitional site kept in place at Waterview Park in Washington.

North West England: Two regional centres will open in Liverpool and Manchester in 2018-20. Liverpool will be home to between 2,800 and 3,100 full-time staff, while Manchester will employ up to 5,900. Twenty offices in the region will be closed between 2017-21.

Yorkshire and Humberside: A regional centre will open in Leeds, employing 4,100-4,400 full-time staff focused on operational delivery and digital work. Twelve other offices in Yorkshire and Humberside will close.

East Midlands: Five offices in the East Midlands will close between 2016-21 as HMRC opens a regional centre in Nottingham. That will accommodate up to 2,600 full-time staff, focusing on "high-grade" corporate services roles and an expanded enforcement and compliance team. Five offices across the region will close between 2016-17 and 2020-21.

West Midlands: Birmingham will host HMRC’s regional centre for the West Midlands. Set to open in 2019-20, it will employ between 3,100 and 3,400 full-time staff, but 16 offices in the region will close.

South West: Bristol will be home to "one of the very first" regional centres, with the hub set to open in 2017-18. Eleven offices in the region will close. The Bristol site will employ between 1,400 and 1,700 full-time officials.

London, South East and the East of England: Eight offices will close in London, 20 offices will go in the South East, and 15 offices are set to be vacated in the East of England.

HMRC’s headquarters will continue to be based on Parliament Street, Westminster, but the tax authority expects around 1,000 members of staff to move to other locations. Two regional centres will be opened in London. A Croydon centre is set to open in 2016-17 and CSW understands that HMRC’s preferred location for the second site is Stratford, which would open in 2019-20. Those two sites will accommodate up to 8,100 full-time staff.

Transitional sites will be kept open in Portsmouth, Ipswich and Reading, with the last closure expected in 2027-28.

Scotland: Two new regional centres will be established in Glasgow and Edinburgh in 2019-20, employing up to 6,300 full-time staff between them. HMRC will retain a presence at the Scottish Crime operations site in Gartcosh, but 12 offices across the country will be closed between 2017-18 and 2020-21. HMRC plans to retain East Kilbride as a transitional site until 2025-26, subject to agreeing suitable terms with landlords and contractors.

Northern Ireland: Belfast will host HMRC’s regional centre in Northern Ireland, with 1,300 to 1,600 full-time officials expected to work at the site. Londonderry will be retained as a transitional site until 2020-21, but nine offices are set to close in 2017-18. There will be an expansion of business tax work, and HMRC expects the Belfast site to include
"a mix of operational delivery profession and tax professional roles".

Wales: A new regional centre will be opened in Cardiff by 2019-20, staffed by up to 3,800 full-timers. Four other offices around the country will be closed, "probably" in 2019-20. HMRC plans to keep its Wrexham office open until 2020-21.

Civil Service World, 12 November

11. EUROPEAN AND INTERNATIONAL

11.1 Offshore evasion

While the Liechtenstein Disclosure Facility (LDF) and other similar disclosure routes have offered beneficial terms under which individuals and other entities might bring their offshore tax affairs up to date, there has also been a move towards toughening the measures relating to offshore evasion.

Increased penalties in relation to offshore evasion have been in place since 6 April 2011, with a maximum penalty of up to 200% applying in the most serious cases.

The Autumn Statement confirmed the introduction of a number of further measures designed to tackle offshore tax evasion and provide the legislative support to penalise and prosecute those who continue to fail to disclose offshore income and assets.

Finance Bill 2016 will introduce various new measures designed to tackle offshore evasion, including a criminal offence removing the need to prove intent in the most serious cases of offshore evasion.

The strict liability offence has been the subject of ongoing debate since the first consultation paper was issued in August 2014. Despite strong opposition from a number of representative bodies and a further consultation, this proposal is now to be legislated.

The offences are listed as failing to notify chargeability, failing to deliver a return or submitting an inaccurate return, all in relation to tax which has arisen wholly or in part from offshore ‘income, assets or activities’.

The draft legislation includes various safeguards including a ‘reasonable excuse’ defence and a threshold of £5,000 of undeclared tax on an annual basis.

Since 2011/12, penalties in relation to offshore evasion have been based on the transparency of the jurisdiction involved. A further distinction is to be made in relation to those territories which are part of the Common Reporting Standard (CRS) and those yet to sign up. A maximum penalty of 200% of the tax due will apply in relation to those jurisdictions least willing to exchange or provide information.

There is to be a new penalty calculated as a percentage of the asset linked to the evasion. The consultation paper on this issue proposed a level of 10% although it remains to be seen what the legislation will prescribe. This penalty is likely to be applied in more serious cases, those where the tax due exceeds £25,000 and the behaviour is deliberate.

Public naming of offshore evaders, and those providing assistance, is to be increased, with only those making a full and unprompted disclosure to HMRC likely to escape being listed.

There will also be new civil penalties for those enabling offshore evasion. Alongside the risk of being included on a publicly available list of those assisting offshore evaders, ‘enablers’ will also face penalties of up to 100% of the tax due. The legislation will be specifically targeted at those deemed to be careless or deliberate in assisting evasion, while those who have unwittingly provided assistance will not face a penalty.

The Government are also going to introduce a criminal offence for corporates which fail to prevent their employees from criminally facilitating offshore tax evasion.

There is to be a new consultation on an additional requirement for individuals to correct any historical offshore compliance, with penalties applying for those who fail to do so. Following the closure of the LDF on 31 December 2015 and the ‘last chance’ disclosure facility which is to follow, from 1 January 2016 to mid-2017, HMRC will be in receipt of information exchanged through the CRS, providing all they need to target persistent offshore evaders. Those who fail to come forward by the time the ‘last chance’ facility closes are likely to be treated harshly by HMRC in terms of the level of penalties.
to be applied and the new consultation should give an idea as to what these will be.

These measures are aimed exclusively at those with offshore issues, whether this be those who persist in keeping income and assets hidden from HMRC, or those providing assistance. There will, of course, be others who may have failed to disclose offshore assets to HMRC on the basis of a misunderstanding as to the tax treatment.

Going forward, the message from HMRC is very clear in that they intend to use all resources available, and what is soon to be legislation, to seek out and bring to justice those failing to ensure that their UK tax affairs are compliant in every respect.

Those who are aware that an offshore issue may exist are urged to seek professional advice without delay, while advisers should be having open and honest conversations with clients where they have concerns. The consequences of not making a full and complete disclosure will become unavoidable and severe.

Reported at gabelletax.com 25 November 2015

11.2 Beneficial ownership disclosure

On 16 November 2015, HMRC published details of how the UK will implement the G20 High Level Principles on Beneficial Ownership Transparency.

The plan includes specific commitments relating to trusts. The UK will hold beneficial ownership information relating to trusts that generate UK tax consequences in a central register and ensure that trustees of express trusts hold information about settlors, trustees and beneficiaries. Domestic competent authorities will have access to all this information.

The plan also confirms measures enacted in the Small Business, Enterprise and Employment Act 2015 including the public register of company beneficial ownership information, which is expected to become operational in June 2016. Financial institutions and designated non-financial businesses and professions will be able to access this information when undertaking customer due diligence. Trustees of express trusts will be required to disclose their status, and provide beneficial ownership information relating to the trust, on this register. It is unclear whether this commitment goes any further than the legislation already enacted.

Another measure already implemented is the national risk assessment of money laundering and terrorist financing published on 15 October 2015.

The UK will implement most of its remaining commitments in 2017 through new money laundering regulations implementing the Fourth Money Laundering Directive ((EU) 2015/849). The G20 made a commitment to implement the Principles at its Brisbane summit in November 2014, following an earlier commitment to lead by example in meeting Financial Action Task Force (FATF) standards on beneficial ownership. Pressure group Transparency International recently categorised the UK as the only G20 member whose beneficial ownership transparency legal framework was very strong, but gave the UK a poor score in relation to trusts.

Reported on Practical Law Private Client, 18 November

11.3 Freedom of movement

In Roman Bukovansky v Finanzamt Lörrach (C-241/14) (19 November), the CJEU found that a double taxation agreement which discriminated between individuals on the basis of nationality was not in breach of the principle of freedom of movement.

In March 2006, Mr Bukovansky, a German national, had been transferred by his Swiss employer to a German subsidiary. On 1 August 2008, Mr Bukovansky, while continuing to work for the German subsidiary, had transferred his residence back to Switzerland. He contended that he should be subject to tax in Switzerland as a 'reverse' frontier worker, but the German tax authorities took the view that he was still subject to German tax.

The issue was whether the principles of non-discrimination and equal treatment, set out in the Agreement on the Free Movement of Persons, article 2 (entered into by the European Community and the Swiss Confederation), precluded a bilateral agreement on double taxation, like the German/Swiss Agreement. Under the German/Swiss Agreement, the right to tax the employment income of an individual employed by a German company who does not have Swiss nationality, but is resident in Switzerland, remains vested in Germany.

The CJEU referred to its case law and noted that member states are free to determine the
connecting factors for the allocation of fiscal sovereignty in double tax treaties. That case law applied by analogy to the relationship between the agreement on the free movement of persons and the double taxation agreements concluded between member states and the Swiss Confederation.

Mr Bukovansky claimed that he had suffered unequal treatment in comparison with a Swiss national who, like him, had transferred his residence from Germany to Switzerland, while retaining the place of his employment in Germany. This is because the power to tax that person’s employment income was vested in the Swiss Confederation, and not, as in Mr Bukovansky’s case, in Germany.

The CJEU found, however, that the difference in treatment resulted from the allocation of fiscal sovereignty between the parties to the agreement; and followed from the disparities existing between the tax schemes of those parties. This did not constitute prohibited discrimination.

A related case was *Skatteverket v Hilkka Hirvonen* (C-632/13) (19 November), where the CJEU found that the unavailability of the right to a deduction, resulting from the taxpayer’s decision to be taxable at source as a non-resident, was not discriminatory.

Ms Hirvonen had moved to Finland during 2000, after having worked in Sweden all her working life. All her income came from Sweden in the form of a pension, an annuity and sickness benefit. Under the double tax treaty between Sweden and Finland, income obtained in Sweden was taxable only in that country. Since Ms Hirvonen did not earn any income in Finland, she was not able to set off interest costs relating to a housing loan taken out in Finland against income tax in that state.

Under Swedish tax law, non-resident taxpayers may opt for the ordinary taxation regime and benefit from the relevant deductions. This regime therefore allows the deduction of interest paid on a housing loan, where that interest cannot be deducted in the taxpayer’s state of residence. Ms Hirvonen had, however, opted for the taxation at source regime, so that the deduction was not available to her. The question was whether this constituted discrimination under TFEU article 21 (freedom of movement as a citizen of the EU).

The CJEU noted that Ms Hirvonen benefited from more advantageous taxation than that which would have applied to her had she opted for the ordinary taxation regime. She could not therefore, in addition, claim a tax advantage which would have been granted to her under the ordinary taxation system.

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### 11.4 Andorra tax transparency agreement

In a sign of how far the transparency agenda has progressed, under a new agreement the previously highly secretive Andorra will automatically exchange information on the financial accounts of its residents with EU member states from 2018 (and vice versa, although Andorra’s lack of direct taxation will mean it has less interest in the information...)

The new agreement should be formally signed early next year, following authorisation by the EU’s Council of Ministers and the Andorran Government. The EU has already signed similar agreements with Switzerland and Liechtenstein, and further agreements with San Marino and Monaco are currently progressing.

*European Commission press release 4 November*

### 12. RESIDUE

#### 12.1 Legislative progress

Royal Assent to Finance (No 2) Act 2015 was granted on 18 November. Meanwhile, the draft legislation for Finance Act 2016 will be issued on 9 December.

#### 12.2 Rectification

The High Court has ordered the rectification of two share acquisition agreements so as to increase the number of shares transferred by trustees, finding that the evidence established that the intention of the parties was that the number of shares transferred would satisfy the requirements for entrepreneur’s relief.

In this application for the rectification of agreements, in which the stated number of shares transferred by the settlement trustees did not meet the required 5% of nominal share capital to qualify for entrepreneur’s relief the court applied the established legal principles for rectification of an instrument for common mistake and the case was
decided on the facts. The decision, therefore, does not represent any legal development but provides a useful analysis of the existing authorities.

Considering the criterion that there must be an error as to the intended effect of an instrument rather than a misapprehension as to its fiscal and other consequences, the judge noted that such a distinction was not always clear-cut. He then gave a summary of the authorities, presenting the decisions as on a continuum, moving from a formulation of a general intent to a specific understanding of how that intention was to be met, in documentary form.

\textit{Prowting 1968 Trustee One Ltd and others v Amos-Yeo & another [2015] EWHC 2480, reported on Practical Law Tax}

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