



Tax clearances update and VAT preparations for Brexit

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Tax clearances: where are we now?

- / The clearances available
- / Statutory vs non-statutory clearances
- / What's the problem?
- / Interaction with CGT planning

Tax clearances available

- / Share for share exchanges (s138 TCGA)
- / Reconstructions (s139 TCGA and possibly s831 CTA 2010)
- / Statutory demergers (s1091 CTA 2010)
- / Share buybacks (s1044 CTA 2010)
- / Transactions in securities (s701 ITA 2007)

Non-statutory clearances

- / Available where there is a genuine point of uncertainty
- / Not for tax avoidance arrangements or tax planning
- / HMRC aim to respond within 28 days
- / Need to weigh up the benefits of full disclosure against likelihood of HMRC response

Statutory clearances: the background

- / Clearance under s138 dependent on the arrangements being:
 - Effected for bona fide commercial reasons; and
 - Not for the avoidance of CGT or corporation tax.
- / Typically, clearance normally requested under transaction in securities rules at the same time
- / Historically, share for share exchanges have largely gone through without difficulty
- / Don't forget about stamp duty:
 - Post-transaction relief may be available under s75/s77 FA1986
 - If not, "swamping" no longer effective

Statutory clearances: personal holding companies

- / HMRC now pushing back on the insertion of personal holding companies and even vanilla share for share exchanges.
- / For example, Mr A and Mr B own C Limited equally
- / Mr A wishes to insert A Limited:
 - To “warehouse” dividends for private investment;
 - To split shareholdings with family members;
 - To extract profits personally only when required without reference to Mr B.

Statutory clearances: HMRC pushback

- / HMRC now contending that such arrangements are not for bona fide commercial reasons – for whose benefit?
- / PIC not needed as shareholders could just take a dividend
- / A less tax efficient alternative doesn't make the proposals non-commercial!
- / Similar pushbacks where individual owns shares already in his PIC and wishes to consolidate in additional shares held personally
- / HMRC also refusing clearances on cash demergers whereby cash is demerged into a separate company for bespoke investment

Statutory clearances: link to opt out elections?

- / HMRC scrutiny may relate to perceived misuse of elections under section 169Q TCGA 1992
- / Allows an opt out of section 135 rollover so as to enable an individual to “bank” Entrepreneurs’ Relief (or BADR)
- / Typically used on company takeovers where new shareholding would fail the 5% ownership test for ER going forward
- / Election to be made by anniversary of 31 January following end of tax year of transaction

Statutory clearances: link to opt out elections?

- / Are taxpayers edging their bets by seeking to insert a holding company so having the option to elect out of rollover if CGT rates generally change?
- / cf anti-forestalling rules included in the changes to ER lifetime limit

Statutory clearances: where do we go from here?

- / Awaiting definitive case law to clarify the position
- / CIOT have sought a meeting with the clearance office to discuss.
- / HMRC had expressed a willingness but that was pre-COVID...
- / In the meantime, do not assume that apparently innocent clearances will go through or not even required!



Share buybacks

The oddity of the
clearance application



Share buybacks

- / s1044: the “clearance” being sought
- / s1046: voiding the clearance – a recent case
- / CA2006: does it need to be for cash – a recent case

s1044: advance clearance for payments

- / A company may make an application under this section to the Commissioners for HMRC before making a payment on the redemption, repayment or purchase of its own shares
- / If, before the payment is made, the Commissioners notify the company that they are satisfied that s1033 will apply to it, the payment is treated as one to which s1033 applies
- / If, before the payment is made, the Commissioners notify the company that they are satisfied that s1033 will not apply to it, the payment is treated as one to which s1033 does not apply

Is clearance mandatory? s1046 information return

s1033

A payment on a POS is not a distribution if:

- / The company is an unquoted trading company or the unquoted holding company of a trading group; and
- / Either Condition A or B is met.

Condition A is that:

- / Wholly or mainly for the purpose of benefitting a trade carried on by the company or any of its 75% subsidiaries
- / Does not form part of a scheme of arrangement, the main purpose(s) of which is:
 - To enable the owner of the shares to participate in the profits of the company without receiving a dividend;
 - The avoidance of tax; and
- / The requirements set out in s1034-s1043 (so far as applicable) are met

s1045(6)

If particulars provided under this section do not fully and accurately disclose all facts and circumstances material for the decision of the Commissioners, any resulting notification of the Commissioners is void.

/ *R oao J Boulting v HMRC (August 2020, High Court)*

/ Consideration; SP 2/82

Does a buyback have to be for cash?

/ CA06 s691(2):

- *'Where a limited company purchases its own shares, the shares must be paid for on purchase'*

/ HMRC view is that 'paid' means a cash payment

/ Case on CA85 provisions suggested an 'in-kind' payment would satisfy the test under that Act:

- *BDG Roof-Bond Ltd v Douglas (2000)*

/ Recent CA judgment appears to validate that approach under the above CA06 provision:

- *Henry George Dickinson v NAL Realisations*
- *'Park J's decision in BDG Roof-Bond v Douglas indicates that payment need not necessarily be in money, but it strikes me as clear that payment, in whatever form, must be made when purchase is effected.'*



VAT: Preparing for Brexit



VAT: Preparing for Brexit

- / Changes to supplies of services
- / Changes to supplies of goods
- / E-commerce – online marketplaces
- / B2C goods sold to UK consumers from 1 January 2021
- / B2C goods sold to EU consumers
- / Other Brexit VAT Issues

VAT changes – Services

/ B2B supplies of services: UK - EU

- No significant changes
- Removal of requirement to show customer's VAT number

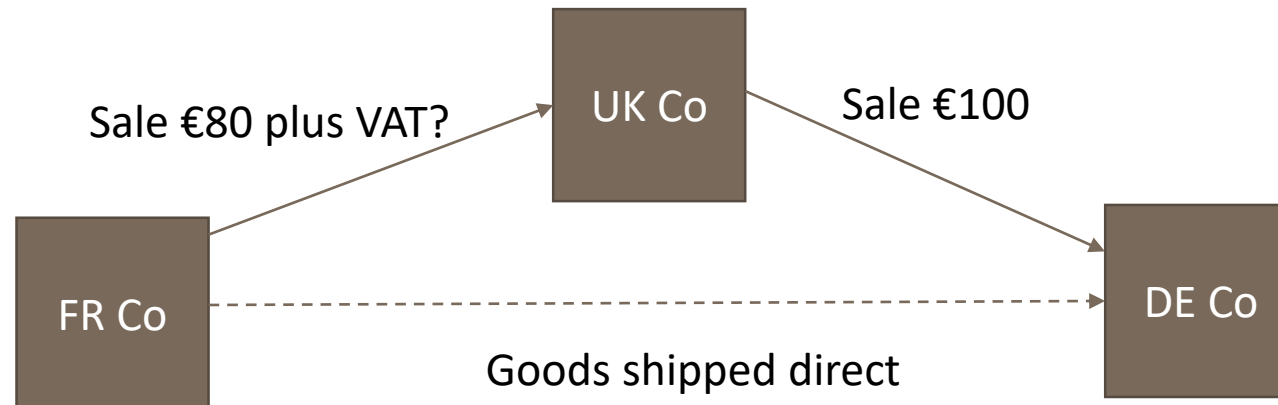
/ B2C Supplies of Services: UK - EU

- Outside the scope of VAT
- Digital services, if currently registered under MOSS, will need to register for the non-Union MOSS scheme
- Consider where to register
- No minimum threshold for the non-Union MOSS scheme

Supplies of goods

/ B2B Sales UK - EU

- Zero-rated export, no need to put customer's VAT number
- Potential customs Duty increase
- Consider INCOTERMS. May result in VAT registration
- Triangulation no longer available
- May result in VAT registration obligation in the EU (fiscal rep requirement)



Supplies of goods

/ Imports

- Postponed Accounting for Import VAT
- Require EORI
- Customs duties will still be payable at import. Scope for relief until July under Border Operating Model – contact freight agent
- No more C79s – downloadable from HMRC website

/ Intrastat?

- No Intrastat for dispatches UK – EU
- Yes Intrastat for arrivals in 2021
- Special rules for Northern Ireland

/ No EC Sales Lists

E-commerce – online marketplace (OMP)

- / Latest attempt to make OMPs responsible for VAT
- / Follows joint and several liability for market places and Fulfilment House Due Diligence Scheme (FHDDS)
- / OMP is a marketplace, portal which facilitates sale of goods to customers
- / Features of an OMP:
 - Sets T&Cs under which supply of goods is made
 - Authorises charges made to customers for payment of goods
 - Involved in ordering or delivery of goods

E-commerce: goods sold from overseas inventory from 2021

- / Goods imported from outside UK in consignments less than £135, VAT collected at point of sale (not at import)
- / Low Value Consignment Relief (£15) abolished
- / Goods located overseas and sold direct by overseas seller – deemed UK sale and seller will need to register for and charge UK VAT
- / Online marketplace (OMP) facilitates sale – OMP deemed to make sale and will need to charge VAT
- / B2B sales – UK business provides its UK VAT number to seller/OMP and UK business to account for VAT under reverse charge
- / Customs declarations required to check £135 value
- / VAT invoicing requirements
- / Value of Import exceeds £135, import VAT will be due (same as old rules)

E-commerce: goods sold from overseas inventory from 2021 – summary

/ Consignment of goods less than £135:

Goods from outside UK			
Location of seller	OMP	Customer	VAT position
Overseas seller	No	UK consumer	Seller accounts for VAT at time of sale
Overseas seller	Yes	UK consumer	OMP accounts for VAT at time of sale
Overseas seller	No	Business customer	Customer reverse charge
Overseas seller	Yes	Business customer	Customer reverse charge
UK seller	No	UK consumer	Seller accounts for VAT at time of sale
UK seller	Yes	UK consumer	OMP accounts for VAT at time of sale

/ Consignment of goods more than £135: normal rules and importer pays import VAT

E-commerce – goods sold from UK inventory from 2021

- / Goods owned by overseas seller or sold via OMP – either seller or OMP accounts for VAT at time of sale
- / (Overseas) seller should already be VAT registered
- / For sale via OMP, goods would have been previously imported into the UK and seller has recovered VAT via postponed accounting
- / Seller is deemed to be making a zero-rated sale to OMP to allow seller to recover UK VAT
- / B2B sales – if purchaser is VAT registered, purchaser needs to supply valid VAT number – seller will charge UK VAT and seller will need to raise a VAT invoice, not OMP

E-commerce – goods sold from UK inventory from 2021

Goods inside UK			
Location of seller	OMP	Customer	VAT position
Overseas seller	No	UK consumer	Seller accounts for VAT at time of sale
Overseas seller	Yes	UK consumer	OMP accounts for VAT at time of sale
Overseas seller	No	Business customer	Seller charges VAT
Overseas seller	Yes	Business customer	Seller charges VAT
UK seller	Yes/No	Any UK customer	Seller charges VAT

E-commerce – B2C sale of goods from UK to EU consumers

- / For UK inventory – no distance selling thresholds
- / May result in EU VAT registrations, or arrange with freight/shipping agent to pay for import VAT / duty on customer's behalf
- / From July 2021 (?), EU to implement similar rules to UK under €150. Also covers OMPs
- / Removal of €22 limit
- / One Stop Shop (“OSS”) for B2C supply of goods within EU, similar to MOSS
- / Non-EU sellers will charge VAT at point of sale and declare on an Import One Stop Shop (“IOSS”). This will exempt sellers from having to pay import VAT

Other issues

- / Financial services – trades with EU counterparties will give rise to VAT recovery
- / Supplies of goods involving Northern Ireland – special rules Northern Ireland Protocol
- / VAT Refunds
 - EU refund deadline by 31 March 2021
 - From 2021: 13th Directive
 - May require appointment of tax agent

Thank you



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