Analysis

Brexit, *Air Berlin* and the 1.5% stamp duty charge: reasons to be cheerful

Speed read

It has been settled HMRC practice for some time now that the 1.5% stamp charge set out in FA 1986 in relation to the issue and transfer of UK shares to clearance services and depositaries was restricted by EU law, such that it should arise only on the transfer of shares which were not integral to the raising of capital for the company in question. However, there has been growing uncertainty as to the future of the charge after Brexit. Two recent developments have changed matters here. Firstly, the *Air Berlin* case (Case C-573/16) has broadened even further the scope of the derogation from the charge; and secondly, the UK government has confirmed that it does not intend to reintroduce the charge following the UK's exit from the EU. While both of these developments should give potentially affected taxpayers a reason to be cheerful, they must be approached with caution.

Jessica Kemp
Travers Smith
Jessica Kemp is a tax partner at Travers Smith. She advises on mergers and acquisitions in both the public and private space, advising corporates, private equity houses, investee companies and management teams on a wide range of transactional, structural and incentive based issues. Email: jessica.kemp@traverssmith.com; tel: 020 7295 3040.

The history of the charge: a summary

The Finance Act 1986 contains provision at ss 67, 70, 93 and 96 for the application of a 1.5% stamp duty charge on the *issue* and/or *transfer* of shares in a UK company into a depositary or clearance service.

The origin of the 1.5% charge was a probably accurate perception on the part of the government of the day that it would be impractical to enforce the 0.5% stamp duty reserve tax (SDRT) charge that would otherwise arise on the transfer of depositary receipts or of interests in UK securities within clearance systems. The 1.5% charge was therefore introduced as a 'season ticket' (albeit of indefinite duration), being the price of entry into a share dealing structure which would permit future transfers to be made stamp free.

The validity of certain aspects of the charge was challenged in what are generally known as the *HSBC* cases: *HSBC Holdings plc and Vidacos Nominees Ltd v HMRC* (Case C-569/07) in the CJEU; and *HSBC and The Bank of New York Mellon Corporation v HMRC* [2012] UKFTT 163 (TC), in the UK's First-tier Tax Tribunal. In these cases, the courts considered the provisions of the EU's Capital Duties Directive (EU Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital, and its predecessor EU Council Directive 69/335/EEC of 17 July 1969). This Directive allows for the imposition of duties on the transfer of securities but not on a range of other transactions, including the creation, issue and admission to quotation of shares on a stock exchange.

The conclusion reached in these cases was that the charge was prohibited by EU law on the issue and transfer of shares integral to the raising of capital.

Following these cases, HMRC issued a statement ('SDRT: *HSBC Holdings PLC and the Bank of New York Mellon v HMRC*: First-tier Tax Tribunal decision – further announcement'), in which it confirmed that it would not be appealing the *Bank of New York* decision. It stated:

> 'HMRC will no longer seek to impose SDRT at the rate of 1.5% on issues of UK shares to depositary receipt issuers and clearance services outside the EU … HMRC does not consider that the tribunal's decision has any impact upon transfers (on sale or otherwise than on sale) of shares and securities to depositary receipt systems or clearance services that are not an integral part of an issue of share capital. The stamp duty and stamp duty reserve tax charges under sections 67, 70, 93 and 96 therefore continue to apply to such transactions.'

The 1.5% charge is therefore limited, but not entirely abolished. Taxpayers must be wary of any transfers of shares to depositaries and clearance services; and, in particular, of the precise parameters of what is or is not 'integral to the raising of capital'.

Recent developments

The above summary represents a generally accepted position which has been in place since HMRC published its statement in April 2011. Little has changed in this area since then.

However, two recent developments mean that it is worthwhile revisiting the position: the *Air Berlin* case, and a statement in the 2017 Autumn Budget.

The *Air Berlin* case: the ruling

In *Air Berlin plc v HMRC* [2017] EUECJ (Case C-573/16) (reported in *Tax Journal*, 27 October 2017), the CJEU was asked for a preliminary ruling as to the application of FA 1986 s 70, pursuant to which a stamp duty charge arises at 1.5% of the value or consideration where relevant securities are transferred to a clearance service.

That case involved two different series of transactions.

Firstly, in 2006, Air Berlin undertook an initial public offering (IPO) on the Frankfurt Stock Exchange. In order to achieve this, German law required the company to list all shares of the same class, including those which were not to be sold in the IPO. The legal title in all the existing ordinary shares in Air Berlin was therefore transferred to Clearstream Banking AG, as nominee of the Frankfurt Stock Exchange's settlement and clearing service. Certain of the existing shares were sold pursuant to the IPO and, in addition, a number of new shares were issued to the public, also held through the nominee arrangements described above.

Subsequently, in June 2009, further ordinary shares were issued to three shareholders. In October 2009, they were then transferred to Clearstream Banking AG, as nominee for Clearstream Frankfurt, to be traded on the Frankfurt Stock Exchange.

Air Berlin had accounted for stamp duty in relation to the 2006 and 2009 transfers. In March 2010, it had requested that HMRC repay that stamp duty, a request which was refused by HMRC in September 2011. The proceedings reached the High Court, at which point they were stayed and referred to the CJEU for a preliminary ruling.

The CJEU's ruling continues the trend of the HSBC cases in limiting the scope of the 1.5% charge. The court takes a broad view of the Capital Duties Directive stating that:

> 'It is clear from the court's case law that, in view of the objectives pursued by [the Capital Duties Directive, it] must be interpreted broadly so as to ensure that the prohibitions laid down in those provisions are not denied practical effect … The prohibition of the taxation of transactions for the raising of capital also applies to transactions which are not expressly covered by that prohibition, where such taxation is tantamount to taxing a transaction forming an integral part of an overall transaction with regard to the raising of capital.'

In relation to the 2006 transfer, the court noted:

- although legal title to the shares had transferred, beneficial ownership in the shares had not changed; and
- the transfer of legal title was required under German law and was an operational requirement of the clearance system which did not have any impact on the benefit of the shares or the right to dispose of them.

The court therefore took the view that the transfer was incidental to the transaction of admitting the shares to listing on the Frankfurt Stock Exchange, which was integral to the raising of capital, and therefore that the Capital Duties Directive prohibited the application of the 1.5% charge.

The court also emphasised (albeit arguably *obiter*) that although in this case there was a legal requirement to transfer all the shares to the clearance service in order that any of them could be listed, the existence of such a legal obligation was not a prerequisite in determining whether a transaction should be considered to be integral to the raising of capital. It remains to be seen how far reaching this statement might be.

In addition in relation to the 2009 transaction, notwithstanding that there was a delay of some months until the transfer to the clearance service and that the transfer to the clearance service did not involve any simultaneous increase in capital of the company, the court noted that:

> 'The fact remains … that the Air Berlin shares that were transferred to the clearance service were new shares and corresponded to an increase in capital … To permit the levying of tax or duty on the initial acquisition of a newly issued security amounts in reality to taxing the very issue of that security as it forms an integral part of an overall transaction with regard to the raising of capital. The issue of securities is not an end in itself and has no point until those securities find investors … Therefore "issue" for the purposes of that provision must include the first acquisition of securities immediately consequent upon their issue.'

The court therefore concluded that the 1.5% charge could not apply to the 2009 transfer.

The *Air Berlin* case: practical consequences

This case is helpful to taxpayers in two regards:

- Firstly, as a general matter it demonstrates that the CJEU adopts an extremely broad approach to the interpretation of the Capital Duties Directive, and would suggest that the CJEU will seek to hold the 1.5% charge to be unenforceable in a wide range of circumstances.
- Secondly, it provides confirmation that no charge should arise in two specific factual circumstances, namely: (i) where all shares in a company are required to be transferred to a clearance service in order for a listing to occur at all; and (ii) on the first transfer of a share to a clearance service following its issue.

From a backward looking perspective, taxpayers who have accounted for stamp duty in the circumstances identified in the case would therefore be well advised to consider making reclaims of that stamp duty.

However, the case should not yet be taken as a guide to future actions. Until such time as it is clear what HMRC's position on the case may be, it seems highly unlikely that depositaries and clearance services will accept shares without being required to be put in funds for the stamp duty in the circumstances outlined. It would therefore be advisable either to seek to avoid transfers of these sorts to the extent possible or, if they are unavoidable, to pursue specific HMRC clearance on the anticipated treatment before any such transfers of shares are made.

Brexit, the European Union (Withdrawal) Bill and Autumn Budget 2017

Although some way down the list of most significant possible consequences, the question of what might happen to the 1.5% charge in the event that the UK were to leave the EU has been a matter of some speculation since the June 2016 referendum was called. Notwithstanding that it is accepted by HMRC that the charge applies neither to the issue of shares, nor to the transfer of shares integral to the raising of capital, the terms of the relevant statute have never been amended. Rather, it is disapplied only by the effect of the Capital Duties Directive and the interpretation of it by court decisions.

The current draft of the European Union (Withdrawal) Bill (EUWB) should arguably result in a maintenance of the status quo. This is because the EUWB and accompanying explanatory notes indicate that EU law preserved or converted into UK domestic law under the EUWB ('retained EU law') will be supreme to existing UK domestic legislation. By virtue of clause 4 of the EUWB, this body of preserved/converted EU law will include rights and restrictions under an EU directive which have been recognised as having direct effect by the CJEU or a UK court or tribunal in a case decided before exit day.

Following *Air Berlin* and the *HSBC* cases, the relevant provisions of the Capital Duties Directive should therefore be 'retained EU law'; and, notwithstanding that the terms of the 1.5% charge in the UK statute are clear, the result of the EUWB should be that the Capital Duties Directive remains supreme over the charge.

However, if Britain does leave the EU, it will no longer necessarily be subject to CJEU decisions and/or provisions of EU law. Therefore, it would be entirely open to any future UK government to reinstate the 1.5% charge, and indeed it would arguably require only a minor amendment to the legislation to do so. This is because, under the terms of the EUWB as currently drawn, to the extent legislation is amended following Brexit, the amended legislation then prevails over any retained EU law.

In this context, the 2017 Autumn Budget contained a helpful statement that: 'The government will not reintroduce the stamp duty and stamp duty reserve tax 1.5% charge on the issue of shares (and transfers integral to capital raising) into overseas clearance services and depositary receipt systems following the UK's exit from the EU.'

This increased certainty is to be welcomed, though it is worth bearing in mind that the legislative framework exists, and is enshrined in statute, in order for the charge to easily be reintroduced depending on the view of the government of the day. It should be noted that a reintroduction of the charge could cause significant disruption in trading in shares in UK companies in depositaries and clearance services, including such services refusing to accept shares for trading and/or ceasing to trade in UK shares, in particular where they do not have a mechanism to account for tax due. We should therefore hope that subsequent governments will maintain the same view.

What next?

For now, at least, the scope of the 1.5% charge continues to wither under scrutiny by the courts. The *Air Berlin* case is evidence of a further reduction in its scope.

While taxpayers may wish to consider applications for repayment of any stamp duty paid in the circumstances identified in that case, practitioners should be cautious in acting in reliance on it until such time as HMRC has clarified its position on the effect of the outcome of the case. However, in the current political climate it is perhaps unlikely that HMRC will rush to put out an official pronouncement to the effect that taxpayers are entitled to recover tax, due to the CJEU having held that UK law is incompatible with an EU directive.

Likewise, the indication that there is no intention to reinstate the charge following Brexit is a welcome one, though this ought perhaps to be approached with caution given how easy it would be for a future government to change the law in the event it had a different view as to the desirability of collecting the charge. ■

For related reading visit www.taxjournal.com

- Cases: *Air Berlin v HMRC* (24.10.17)
- The *HSBC* SDRT case (Tom Cartwright, 25.4.12)
- Tax and the Great Repeal Bill (Lydia Challen, 27.7.17)

Analysis

Spurs FC severance payments: remuneration or damages?

Nigel Doran
Macfarlanes
Nigel Doran is a consultant with Macfarlanes LLP and a member of its tax group. He specialises in employment tax and incentives work, advising employers and management in both a domestic and international context. Email: nigel.doran@macfarlanes.com; tel: 020 7849 2382.

Speed read

At a time when it wished to reduce its wage bill, Spurs FC persuaded two of its players to accept transfers to another club in return for substantial severance payments. The payments were made pursuant to FIFA rules providing that, if a player's fixed term of employment was terminated by mutual agreement, compensation was to be paid. HMRC assessed the payments to income tax and NICs on the basis that, like contractual payments in lieu of notice, they were earnings from the employment. However, Spurs FC argued that compensation paid to achieve a termination by mutual agreement did not constitute earnings, but was taxable (above £30,000) only under the termination payment provisions of ITEPA 2003 s 401, and it made no difference that the compensation was provided for in the employment contract. The Upper Tribunal agreed.

Those of us practising in the area of remuneration taxes have good reason to be thankful to the world of football for recent clarification of two contentious aspects of the charge to tax on earnings. Last summer, in the *Rangers FC* case (*RFC 2012 Plc v AG for Scotland* [2017] UKSC 45), the Supreme Court confirmed that the flaw in employee benefit trusts was not that earmarking or allocating funds for an employee's potential benefit might give rise to earnings but that the contribution to the trust itself constituted earnings. Now, in the *Spurs FC* case (*HMRC v Tottenham Hotspur Ltd* [2017] UKUT 453, reported in *Tax Journal*, 1 December 2017), the Upper Tribunal (UT) has shed some useful light on the distinction between earnings paid on the termination of employment and consideration received for relinquishing the employment.

The facts

In 2009, Wilson Palacios and Peter Crouch entered into employment contracts with Spurs FC for fixed terms of five and four years respectively. In 2011, Spurs FC wanted to reduce its wage bill, not having been involved in the Champions League that season. The club, therefore, sought transfers for the two players to Stoke City FC. At first, neither player wished to be transferred but ultimately agreed to the transfers in return for substantial lump sum severance payments (£3m in Crouch's case). There was some suggestion that the two players would be left on the bench if they insisted on remaining at Spurs FC for the remainder of their fixed terms, which might impair their careers.

The employment contracts of the players were subject to FIFA rules, which provided for compensation to be paid to the player if (as happened in this case) a fixed term contract was terminated by mutual agreement and without just cause. The severance payments appear to have been made under this provision of the FIFA rules.

HMRC assessed the severance payments to income tax and NICs as earnings. Spurs FC considered that they were only liable to income tax (above £30,000) under the termination payment provisions of ITEPA 2003 s 401 and were not liable to NICs. Spurs FC made a successful appeal to the FTT and HMRC appealed to the UT.

The existing law

Earnings from employments

Payments to employees are taxable as earnings under ITEPA 2003 s 62 if they are emoluments deriving from the employment. Earnings derive 'from' an employment if they are paid to the employee as a 'reward for services' or in return for 'acting as or being an employee' and for no other reason (*Hochstrasser v Mayes* [1960] AC 376).