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Autumn Statement 2015 – views from the market

Following George Osborne's first, all-Conservative, Autumn Statement on 25 November 2015, we sought the views of leading business tax practitioners, including members of the Lexis®PSL Tax Consulting Editorial Board (CEB), on the main highlights.

For the Lexis®PSL Tax summary and analysis of the key business tax announcements in Autumn Statement 2015 (AS 2015), see: Autumn Statement 2015—Lexis®PSL Tax analysis

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OVERALL VIEWS OF THE AUTUMN STATEMENT 2015

Natasha Kaye, Cooley (UK) LLP and CEB member – Much was expected from the Autumn [Statement] (with the usual raft of rumours and crystal ball glazing) but very little materialised.

There were relatively [few] new tax measures announced and we still have to wait for detail on the measures which were announced, generally to be published either as part of the draft FB 2016 or in the form of consultation updates.

Simon Walker, Institute of Directors – Businesses see strong public finances as the basis for sustainable economic growth, and will welcome [the Chancellor]'s confirmation today that he aims to run a budget surplus by the end of the Parliament. The Chancellor was dealt a remarkably strong hand by the OBR, which is predicting stronger growth, lower than expected borrowing costs and significantly higher tax receipts.

There will be plenty of complaints about individual cuts, but it's important to remember that total debt will still be colossal, over £1.715tn (70% of GDP), by the end of the spending review period. The Chancellor will know that if the economy chills and tax receipts disappoint, his plans will suddenly become much harder to achieve. With over a dozen tax consultations launched since the election, there is a real worry for businesses that next year's Budget will see further tax increases.

Carolyn Fairbairn, CBI – This was a good spending review for longer-term investment in the economy but there's a sting in the tail in the size and scope of the apprenticeship levy.

Businesses will be pleased to see the Chancellor staying the course on deficit reduction, his commitment to an industrial strategy, and the emphasis on nurturing a vibrant business community. Standouts include maintaining spending on infrastructure; ramping up house building; support for energy-intensive sectors and for advanced manufacturing.

Business recognises there are tough choices to be made in balancing the books, but many are reaching a tipping point, where the cumulative burden of the living wage, apprenticeship levy and business rates risk hurting competitiveness.

Many firms will be disappointed to have been kept hanging on for a much-needed review of business rates until next year's Budget.

Jonathan Hickman, BDO LLP – With the backdrop of a high performing economy, but the deficit still reducing slower than expected, a £27bn windfall from the OBR's favourable forecast for the next five years was a convenient boost for the Chancellor. Although this allowed him to avoid immediate tax increases, there was a continued focus on the collection of additional revenue through tackling avoidance and tax evasion with a range of new measures including several targeted changes being announced. HMRC has acknowledged that it has dealt with the majority of the 'low hanging fruit' and will now be handed additional funding of £800m, in the main funded by cuts to its own spending, to take its collection activities to the next level.

The programme to digitise tax administration and collection is another key long term project. The government is intending to make a £1.3bn investment in this programme over the next five years and will want to see a return on its money in terms of early tax payment and real time contact with taxpayers.

However, before we look too far ahead, further significant tax announcements are expected on 9 December 2015 with the publication of draft [clauses to be included in] FB 2016.

George Bull, RSM – [T]he white rabbit was both huge and invisible, emerging only after the shenanigans in the House of Commons had subsided. I am, of course, referring to the colossal tax yield which this Autumn Statement is set to produce. Measures announced today, even after allowing for the abandonment of the tax credit proposals, will generate an astounding £20.94bn for the Treasury between 25 November 2015 and 5 April 2021.

Some of the tax-raising measures had been widely expected, even if they are finding their way into FB 2016 in a manner which many will continue to regard as unsatisfactory. I am of course referring to the new measures relating to tax avoidance, evasion and tax planning generally; although it's hardly edifying to see HMRC continuing to describe as 'tax avoidance' the performance-based rewards provided to asset managers, which have been the subject of formal agreements between HMRC and the industry for many years.

Chas Roy-Chowdhury, ACCA – The Chancellor managed to deliver an Autumn Statement that was filled with good news, but given the lack of wiggle-room he has, it is concerning that much of the spending is based on the assumption of consistently strong growth figures, especially given the downgrade in world growth forecasts by the OBR.

BUSINESS AND ENTERPRISE

Bill Dodwell, Deloitte LLP – Contrary to some press reports, the Chancellor confirmed that the outcome of the Business Rates Review will wait to be announced at Budget 2016. Given that the Chancellor did talk at length about devolving business rates to local councils it seems virtually certain that the main system will remain in place. He did confirm that the small business rate relief, which apparently benefits 600,000 small businesses, will be extended for another year, at a cost of £700 million.

Company distributions

Robert Langston, Saffery Champness LLP – Buried in the small print of the 'Policy Costings' document are details of a new targeted anti avoidance rule (TAAR) which will affect some liquidation distributions.

When a company is liquidated, the distribution is usually subject to capital gains tax. Under the proposed new rule, the distribution will be subject to income tax if a business carried on by the

company is transferred to a new company - this is known as 'phoenixing'.

HMRC already have the ability to counteract such arrangements under 'transactions in securities' anti-avoidance rules, but only if they issue a counteraction notice. I expect that the new rules will require shareholders to report the distribution as income on their tax return and will make it easier for HMRC therefore to tax these types of transaction[s].

Apprenticeship levy

Eloise Walker, Pinsent Masons LLP and CEB member – Tucked in amongst sundry measures—museums and galleries tax relief, consultation for tax deductions for contributions to grassroots sports—you'll see a seemingly innocuous reference to an 'apprenticeship levy'.

You've got to give the government credit for sheer gall. If they had increased employers' NICs by 0.5%, there would be an outcry and it would make newspaper headlines along the lines of, 'Government increases tax burden on employers', or 'Workers stand to lose wages as strained employers have to divert 0.5% of their salary pool to HMRC', and indeed, some of the news services (including the BBC) have spotted it. But in an effort to be low key they are introducing an 'apprenticeship levy'—it is a tax on employers calculated by reference to employee salaries, but because it is called a 'levy', and it has got the word 'apprentice' stuck to it, it must be alright then? No, I don't think so.

I am pleased for smaller business that they will escape it, but it is bad news for everyone else. If we're lucky HM Treasury will volte face (not unlike the Chancellor today on income tax credits in a beautiful example of spin) and turn it into a tax on businesses that use apprentices instead of giving employees proper jobs—social engineering by taxation, instead of a new stealth tax. Fingers crossed, but don't hold your breath.

Bill Dodwell, Deloitte LLP – The major burden falls on larger business in the form of the apprenticeship levy. This is expected to raise £2.7 billion from 2017, increasing annually thereafter. Small business is effectively exempted from the levy thanks to a £15,000 rebate. The levy increase is substantially more than the cuts in corporation tax announced at the Summer Budget.

George Bull, RSM – The biggest 'hit' ... has been reserved for large employers faced with an apprenticeship levy which will be collected through the PAYE system at the annual rate of over £2.5bn from its introduction in 2017/18 to over £3bn in 2020/21. It's hard to escape the conclusion that the apprenticeship levy has been designed to side-step the 'lock' on National Insurance and will come as a real blow to large business, in particular agencies that supply temporary staff, who will see it as a 'levy on employment'. Ironically, that's just the kind of language which George Osborne might have used if Labour had tried something similar when Osborne was in opposition. Osborne would also have unhesitatingly described the measure as a 'stealth tax' but that's another story.

Seamus Nevin, Institute of Directors – Employers are committed to tackling the skills shortage and apprenticeships will be a big help. Businesses are keen to work with government but the focus needs to be on quality training, not just the race to reach the targeted 3m apprenticeship starts.

The Chancellor cannot pretend the apprenticeship levy is anything but a payroll tax—and a considerable one which will raise £12bn over the Parliament. At 0.5% of payroll, it will be a big hit to big employers. With the OBR also saying that employers could pass the cost of the levy onto employees, the government must also be careful of the impact the levy, combined with the incoming national living wage, could have on wage growth and job creation.

Moreover, businesses still need clarity about how they will get more out of the levy than they put in. It is a worry that the government are working on the assumption that up to one-quarter of the money collected will be spent on administration and bureaucracy, rather than the apprentices themselves.

Carolyn Fairbairn, CBI – The apprenticeship levy, set at 0.5%, is a significant extra payroll tax on business and by widening the net it will now catch more smaller firms. We welcome the creation of a levy board to give business a voice on how the money is spent and will work with the government to ensure a focus on quality.

Stephen Ibbotson, ICAEW – Smaller businesses have been protected and should benefit from further investment in apprenticeships. There will be a charge of 0.5% of the payroll cost but because of the threshold it will only be businesses with a payroll greater than £3 million. This will raise £3 billion – will all of this be invested in apprenticeships?

Chas Roy-Chowdhury, ACCA – The new 0.5% levy is ripe for future tax hikes we need to be cautious around any 'mission creep'. It might be increased in future years and all the funding received from it should be ring-fenced and any surpluses solely used for future apprenticeships.

Ben McDonald, KPMG – [T]he financing of much larger apprenticeship programmes through the levy on larger employers, in addition to further investment in science, should be good news for our inventors and innovators looking to create and produce new technology on our shores.

Related party rules—partnerships and transfers of intangible assets

Anne Fairpo, Temple Tax Chambers and CEB member – The government has introduced a couple of clauses into the corporate intangibles rules, with immediate effect, to deal with a (somewhat longstanding) oversight in the rules in respect of corporate partners. A company that is a member of a partnership will have its partnership share calculated on corporation tax rules, including the corporate intangibles rules.

The corporate intangibles rules apply to intangible assets created or acquired by a company on or after 1 April 2002 and, amongst other provisions, allow a company with relevant intangibles to deduct amortisation of expenditure on those intangibles for tax purposes. To ensure that groups and related parties don't get an unintended benefit, a transfer between related parties of an intangible that was owned by a related party at 1 April 2002 does not bring that intangible into the corporate intangibles regime – it continues to be dealt with under the old rules, which have very

limited deductions available for expenditure on the intangible asset before it is disposed of.

The changes on 25 November 2015 are intended to address the point that the related parties provisions in the corporate intangibles rules did not specifically address whether transfers of pre-1 April 2002 intangibles to partnerships were within those provisions and are, in effect, anti-avoidance provisions. Unsurprisingly, HMRC considers that such transfers were between related parties and did not bring a pre-1 April 2002 intangible into the corporate intangibles rules.

The first clause is, as HMRC put it, to confirm, 'that these arrangements are not effective to avoid the Part 8 commencement rules' [and is aimed] at a number of arrangements that had attempted to suggest that such an intangible would come into the corporate intangibles rules when transferred to a partnership with a corporate partner. In effect, if a participation condition is met in considering the relationship between the transferor and transferee, then the transfer is ineffective at bringing the intangible into the corporate intangibles rules.

The changes apply to debits and credits relating to the relevant intangible asset from 25 November 2015 irrespective of when the relevant transfers of intangible fixed assets took place, suggesting that debits and credits for the period up to 25 November 2015 are still within the corporate intangibles regime ... despite the fact that HMRC say that they believe that such transfers were ineffective to bring the intangible into the corporate intangibles regime in any case.

The second clause is an extension of the overall point, and makes it clear that market value applies (for all tax purposes) when intangibles which actually are within the corporate intangibles regime are transferred between companies and persons such as partnerships or LLPs, where the company is a participator in the partnership or LLP.

Natasha Kaye, Cooley (UK) LLP and CEB member – The changes to the intangible fixed assets rules to ensure that they apply to acquisitions and disposals of intangibles by partnerships (with company partners) in the same way as they do for companies highlights the government's intention to crack down on perceived tax avoidance by legislative change immediately when such avoidance comes to their attention, rather than rely on enforcing existing legislation and case law. This is made clear by HMRC's explanation of the new draft clauses in which it is stated, in respect of the arrangements targeted by the new legislation, 'HMRC does not consider that these arrangements work in the way that they are claimed to work'.

Capital allowances and leasing

Martin Wilson, The Capital Allowances Partnership Limited – These measures [two new anti-avoidance measures relating to capital allowances and leasing designed to counter schemes that have been disclosed to HMRC under the disclosure of tax avoidance rules (DOTAS)] address, with immediate effect, a number of tax avoidance schemes aimed at artificially inflating capital allowances claims or reducing balancing charges or claw-backs.

The vast majority of taxpayers and advisers will have been unaware of these schemes and will be unaffected. On a wider issue, if the Chancellor is concerned about the artificial avoidance of balancing charges, he might turn to the far more common situation where a property is sold and the amount attributed to fixtures by a CAA 2001, s 198 election is significantly less than a just and reasonable figure.

Taxation of asset managers' performance-based rewards

Stephen Pevsner, King & Wood Mallesons – [W]e in the private funds and private equity business await with anticipation sight of how the government proposes to tackle the tax treatment of performance related rewards received by asset managers while sticking to its stated purpose of tackling aggressive arrangements in respect of funds that would generally be considered to be carrying out trading activity but not adversely affecting, in either tax outcome or compliance cost, traditional investment funds. It is also unclear whether the statement on changes to entrepreneurs' relief will result in corrections to the rules limiting its availability from the last Finance Act or further limits to its availability.

Ceinwen Rees, Debevoise & Plimpton LLP – The UK government has announced plans to tax carried interest as income except where the underlying fund undertakes 'long term' investment activity. No detail has been provided yet but we expect the legislation implementing this announcement to be published on 9 December 2015.

The key question is what constitutes 'long term'. In its consultation document on this issue, the government indicated that an average holding period of six months will enable carried interest partially to qualify for capital gains tax treatment moving up to full qualification where a fund has an average holding period of two years. Although nothing contrary to this has been published, we are aware the government has informally indicated that a longer period may to be required before carried interest begins to qualify for capital gains tax treatment.

Close company loans to participators

Graham Muir, Nabarro LLP and CEB member – FA 2016 will ... contain a partial exemption from the rules applying to loans by close companies to participators where the relevant participator is a charity.

The significance of that may be that it indicates that the government may finally have decided not to give any such concession where the participator is an employee trust—previously, HMRC has indicated that is has been considering whether employee trusts could, in limited circumstances, be exempted from the rules.

Entrepreneurs' relief

Ben McDonald, KPMG – While entrepreneurs and owner managers may be breathing a collective sigh of relief that the rumoured cuts to entrepreneurs relief did not come to fruition, there is a risk that grants being replaced by repayable loans will

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have the unintended consequence of stifling innovation, rather than encouraging it. There is a certain psychology attached to indebtedness, rather than the incentivisation attached to grant funding. So while any increase in availability of finance will always be welcomed, young fast-growing businesses don't necessarily want to be burdened with short-term cash interest and the longer term spectre of repaying loans.

FINANCE

Stamp taxes and deep in the money options (DITMOs)

Michael Quinlan, Temple Tax Chambers and CEB member – HMRC Stamp Taxes Policy refreshed its focus on SDRT tax leakage when the yield from SDRT was perceived to drop in 2013. Among other things, HMRC have taken a particular interest in deep in the money call options (those with a high premium and low, sometimes very low, exercise price, or in market jargon, strike) due to the tax advantage inherent in SDRT being chargeable only on the strike price.

American style options are available on exchange and over the counter that may be for long terms but, unlike European style options, can be exercised at any time within that term. So, for example, I could buy a call option over 1,000 shares in a company in the FTSE 100 for 90% of their then market value (MV) with a strike price of 10% of that value exercisable in six months time. When I exercise the option (which could be days or months later) for delivery of the shares (rather than electing for cash), SDRT is payable at 0.5% of 10% of MV at the time the option was written, escaping SDRT on the 90%. If the option holder directs delivery of the shares to a nominee for a higher rate clearance service or a depositary receipt issuer, the tax saving is 1.5% on 90% of MV.

The new measure is to counter this for the 1.5% charges by charging the higher of (i) the strike price and (ii) the MV of the shares, for which the relevant higher rate nominee will be both liable and accountable, but which in practice is charged back to the delivering broker under contract and CREST protocols. The change will have effect from Budget Day 2016 and apply to options which were entered into on or after 25 November 2015 and exercised on or after Budget day 2016.

The justification for the change is, of course, to counter avoidance, but commercial strategies will also be affected. DITMOs have been used to arbitrage the price differential between an American Depositary Receipt (ADR) over UK shares trading in New York against the price of the same ordinary shares trading in London. There is an SDRT advantage but, as with most equity derivatives, the main driver is commercial. Perhaps this is why the measure has been confined to the higher rate charges rather than applied to UK equity options generally.

HM Treasury forecast additional revenue of £40m per year from the change but I think it will simply stop most of the targeted option trades, giving new business to cross book platforms on which ordinary shares can be exchanged for ADRs. While ADR liquidity might be squeezed, the 1.5% SDRT charges on the issue of new shares has been declared invalid as contrary to European law so new issues of shares into ADR form are constantly feeding the ADR liquidity pool.

My sense is that it will not affect policy thinking on SDRT and UK equity derivatives generally, where the impact of any change would cause more widespread disruption.

EMPLOYMENT TAXES AND SHARE INCENTIVES

Graham Muir, Nabarro LLP and CEB member – AS 2015 contains little new to interest employment tax practitioners—most of what is said merely reiterates previous government announcements about possible areas for amendment or reform.

Employee share schemes

Graham Muir, Nabarro LLP and CEB member – FA 2016 will contain a number of technical changes to streamline and simplify certain aspects of the tax rules for employee share schemes (both tax-advantaged and otherwise).

The draft legislation containing the relevant provisions is due to be published on 9 December 2015 and it will not be entirely clear until then which matters will be covered (although it seems unlikely that they will be controversial). One particular area which will be dealt with, however, is an amendment to clarify the tax treatment of restricted stock units (RSUs) in the hands of internationally mobile employees, making clear that any charge to tax will arise under the regime applying to share options (rather than that applying to earnings generally).

Taxation of accommodation benefits

Graham Muir, Nabarro LLP and CEB member – [F]ollowing a recommendation in the 2014 report published by the OTS, the government has announced a call for evidence in relation to the current tax treatment of employer-provided living accommodation, which is currently an area of rather greater complexity than appears necessary.

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REAL ESTATE TAXES

Paul Emery, PwC – Taken together, these recent measures [an additional 3% SDLT on new purchases and the recent restriction on mortgage interest tax relief for buy-to-let landlords] seem to show the Chancellor encouraging a shift in the residential rental sector away from amateur landlords.

The government does not intend to make residential property less attractive for institutional investors and will consult on exemptions. Investors will be keen for clarification given the short amount of time until the 1st April 2016 implementation. It remains to be seen how 'second homes' will be defined, particularly with regards to overseas buyers.

Stamp duty is a tax on capital; buy-to-let and second home owners will now need more funds to enter the market as a bigger chunk of their deposit will be spent on stamp duty.

Rates of SDLT for additional residential properties

Michael Quinlan, Temple Tax Chambers and CEB member – While the exclusion of corporates (which seems to be expressed as such to include LLPs) and funds that hold significant residential portfolios is welcome, the rationale for this is that it supports the government's housing agenda and one wonders why housing made available by more modest investors should, on this basis, be targeted again. Perhaps the perceived mischief is the purchase of relatively low value properties that tightens the market for first time buyers, in which case a ceiling of, say, £500,000 inside the M25 and £250,000 for the rest of the UK may have made more sense, albeit that it would not raise as much tax.

As it stands, the extra 3% makes a good case for individuals to invest collectively through corporates and funds. Existing residential property funds should engage in the consultation regarding what amounts to significant residential holdings (more than 15 properties is mooted in the Autumn Statement) and welcome seeding relief for PAIFs and co-ownership authorised contractual schemes from Royal Assent to the Finance Bill 2016.

Bill Dodwell, Deloitte LLP – The second major tax increase is an additional 3% SDLT charge on the acquisition of buy-to-let residential property and second homes. This starts on 1 April 2016 and is thought to bring in £625m in its first year – nearly £4bn in this Parliament.

George Bull, RSM – Buy-to-let landlords have suffered again. Having felt some pain in the July 2015 Budget when the Chancellor announced tax increases for them from 2017, they have now been hit with a 3% stamp duty surcharge on buy-to-let properties. This also applies to the acquisition of any second home. There is a real risk here that rents could increase as landlords pass down the additional costs to their tenants, or that the rental property sector could shrink as landlords sell up. As private landlords have an important role to play in the provision of housing in the UK, the government's approach here looks more like a political play than a policy decision.

Paul Smee, Council of Mortgage Lenders –Additional stamp duty on buy-to-let transactions comes hot on the heels of the forthcoming tax changes to landlords already announced. Government will need to keep a careful eye on the cumulative effects—with the private rented sector housing around a fifth of the population, we do need to avoid unintended consequences.

ANTI-AVOIDANCE AND EVASION

Natasha Kaye, Cooley (UK) LLP and CEB member – I was slightly surprised to see that there will be a TAAR introduced into the 'Transactions in Securities' rules. Subject to the specified exclusions for non-close companies and fundamental changes of ownership, these rules are extremely widely drafted and the income tax provisions increased in scope following their rewrite in 2010. Perhaps it is the case that the TAAR will be aimed at arrangements put in place to fall within the exclusions themselves.

Chas Roy-Chowdhury, Head of Taxation, ACCA –As expected, the Chancellor is expecting the Treasury coffers to be swelled by more anti-avoidance measures. This, alongside public spending cuts, has been the mainstay of his monetary policy; the problem now is that HMRC has just about exhausted the well of easy to reach targets. This past year saw a fall in corporation tax collected through anti-avoidance measures; this would imply that they are moving in to areas where collection is more difficult and time consuming.

The new penalties announced under the GAAR is a further announcement of tax creep, which is unwelcome.

The failure of the government to get the tax credits cut through the House of Lords has taken away near enough all of the Chancellor's room for manoeuvre, so relying on the latest anti-avoidance expectation would be dangerous.

Disguised remuneration

Graham Muir, Nabarro LLP and CEB member – The Chancellor reiterated the government's continued intention to take action against those who have used or continue to use schemes under which remuneration is effectively disguised. Further, consideration will be given to counteracting new schemes established for the purpose of avoiding or minimising tax on earned income including 'where necessary' with effect from the date of the Autumn Statement.

This announcement of potential retrospective application seems clearly intended to discourage taxpayers and their advisers from

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implementing schemes in future utilising any newly-discovered loopholes in the tax regime for earned income.

Natasha Kaye, Cooley (UK) LLP and CEB member – With HMRC's recent success in the Rangers case and the existence of the disguised remuneration legislation, the government consider they may still not have closed down all disguised remuneration schemes. Either this is in fact the case, or the government's view of 'disguised remuneration' may continually be widening.

GAAR penalties

Stephen Pevsner, King & Wood Mallesons – In the context of the drive to raise revenue from clamping down on tax avoidance, the proposed 60% penalty on arrangements successfully challenged under the GAAR is interesting, but it is hoped that it reflects the general view of HMRC and the GAAR panel that the GAAR should only be used in obvious cases of abuse and not as a general tool against less aggressive tax avoidance arrangements.

TAX ADMINISTRATION

Making tax digital

George Bull, RSM – Today, we also heard a great deal about HMRC's plans to move to an entirely digital service, with the emphasis now on taxpayers paying any outstanding taxes earlier. There is no doubt that this will generate additional income for the government who will hope that this will also be a more efficient and accurate way for taxpayers to interact with HMRC.

However, there remains a huge lack of transparency around deadlines. I am disappointed that the Chancellor didn't provide more detail. Concerns also remain that those who are digitally excluded – whether by virtue of location, inability to afford computer equipment, age or infirmity – will find it increasingly difficult to deal with their obligations as the State continues its inexorable move towards 'digital by default'. With HMRC developing a taste for collecting the cash first and then agreeing the correct liability afterwards, this is a growing worry.

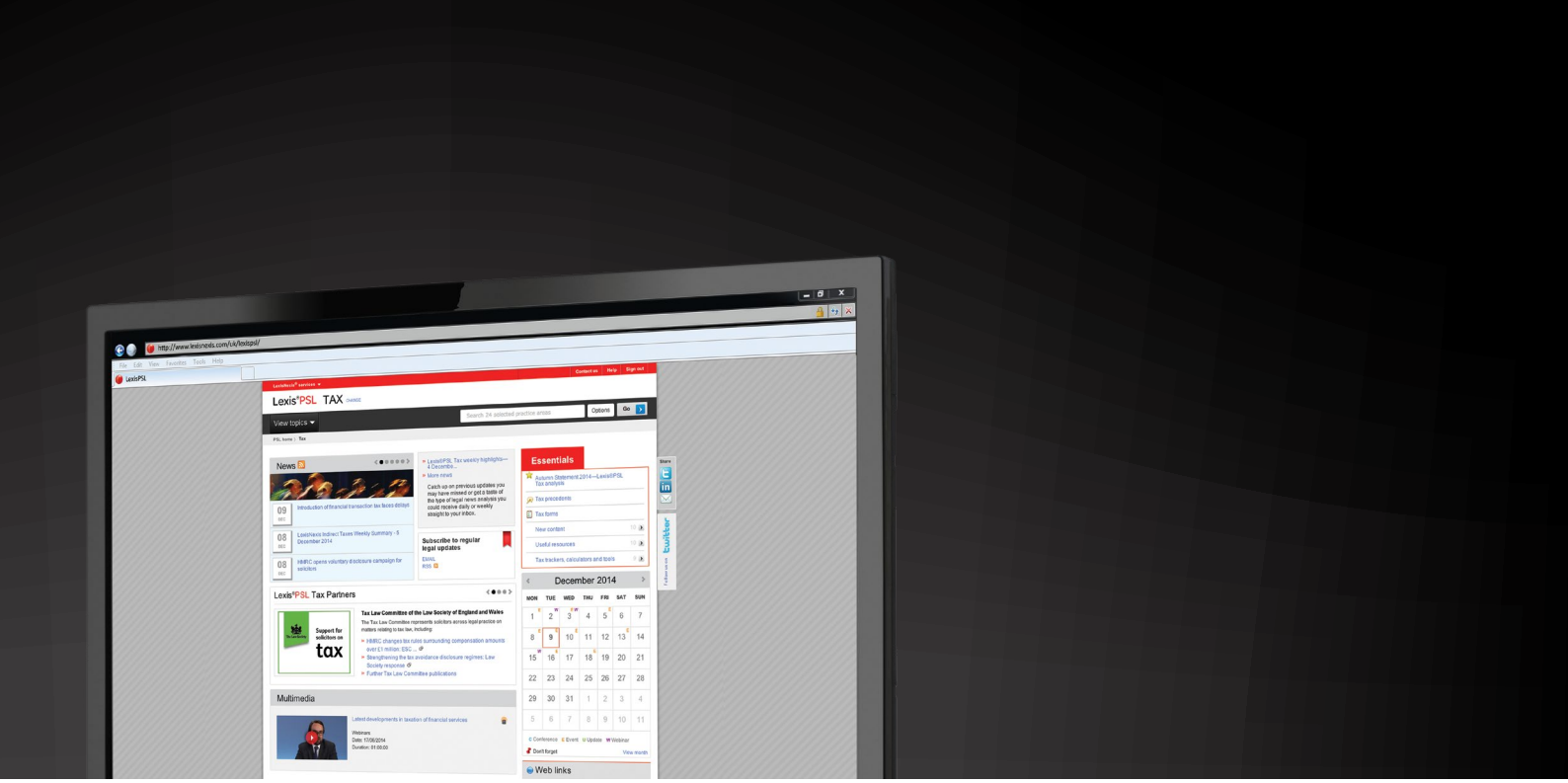
Kevin Nicholson, PwC – Moving the world of tax compliance into the digital age is a really positive step. Helping people pay tax quickly and more easily will save time and money for taxpayers and HMRC.

The announcement that the platform will be used to accelerate CGT payments on second homes suggests this is ultimately about collecting revenue faster. But if digital tax accounts ultimately make it easier to pay tax, this should also reduce penalties for taxpayers. The tax system needs to be simplified and this is a helpful step forward.

Iain McCluskey, PwC – Taxpayers who have suffered from incorrect coding notices and endless time on hold to HMRC will be watching this transformation to digital tax accounts with great optimism, as well as a little fear.

An easier to use, digital platform for self assessment should be a great benefit. It will be important to make sure that sufficient HMRC capacity in the 'old way of doing things' is maintained for those taxpayers who, for numerous reasons, are not comfortable or are unable to use a digital system.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.



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