Tolley®CPD

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CONTENTS

Personal tax

Company cars - advisory fuel rates from 1 March 2018

HMRC has published revised advisory fuel rates for company cars, applying from 1 March 2018. Previous rates can be used for up to one month from the date the new rates apply.

The rates can be used only where employers either reimburse employees for business travel in their company cars, or require employees to repay the cost of fuel used for private travel.

Engine size	Petrol - amount per mile	LPG - amount per mile
1400cc or less	11 pence	7 pence
1401cc to 2000cc	14 pence	8 pence
Over 2000cc	22 pence	13 pence

Engine size	Diesel – amount per mile
1600cc or less	9 pence
1601cc to 2000cc	11 pence
Over 2000cc	13 pence

Hybrid cars are treated as either petrol or diesel cars for this purpose.

www.gov.uk/government/publications/advisory-fuel-rates

New tax relief for self-funded work-related training

Currently, employees can only receive tax relief in limited circumstances when the training is a contractual duty of their existing employment. The self-employed can deduct the costs of training incurred ‘wholly and exclusively’ for their business where it maintains or updates existing skills but not when it introduces new skills.

In Autumn Budget 2017 the government announced its intention to consult on work-related training costs looking to assist individuals wanting to upskill or retrain, and also enable individuals to undertake training with approved providers leading to qualifications. The government is consulting until 8 June 2018 on extending the tax relief available for self-funded training by employees and the self-employed.

Options being considered include: allowing

- self-funded expenditure incurred for retraining for a new employment or trade to be carried forward and set against the profits or earnings of the new trade or employment within a reasonable timeframe;

- the self employed a deduction for up-skilling expenditure relating to an existing trade subject to it being wholly and exclusively for the purposes of the trade; and

- employees tax relief for expenditure for up-skilling so that employees can maintain and improve existing skills.

www.gov.uk/government/consultations/taxation-of-self-funded-work-related-training

Childcare vouchers deadline extended

We were expecting that from 6 April 2018, childcare vouchers would be closed to new entrants and be replaced by the new Tax Free Childcare scheme.

- If parents were not already signed up for vouchers at that time, they would not be able to claim them in the future.

- Employees already receiving childcare vouchers at that time could continue to receive them as long as their employer ran the scheme or until they changed employer.

In a House of Commons debate on 13 March 2018 the Government announced that this deadline would be extended for a further six months. As a result, parents now have until October 2018 to sign up for childcare vouchers (if they have not done so already).

Parents can either claim childcare vouchers or TFC – not both. It is therefore important for both employers and employees to consider whether childcare vouchers or TFC are appropriate for them.

If childcare vouchers are preferred, and the employee is not yet part of a scheme, they will need to sign up for them before October 2018.

www.att.org.uk/technical/news/childcare-vouchers-deadline-extended

Latest GAAR advisory panel opinion - EFRBS

The GAAR advisory panel has published its latest opinion on a referral from HMRC, concerning ‘abnormal and contrived’ arrangements involving an employer-financed retirement benefit scheme (EFRBS).

The scheme was funded through two deeds of covenant, with the benefit of these covenants subsequently assigned by way of three sets of tripartite deeds involving the employer, the employee beneficiaries, and a company registered in the British Virgin Islands. These arrangements resulted in what the panel considered to be, in substance, loans to the employees.

The scheme was intended to avoid an immediate charge to income tax on the employee benefits, and obtain an immediate corporation tax deduction for the full amount contributed to the EFRBS.

The panel could see no reason, other than for tax purposes, for the steps involving undertakings to pay, assignments of benefits of undertakings, and releases of obligations to pay, in order to provide funding to the EFRB and money to the employees.

The panel’s view was that, had the EFRBS been funded in the normal way, with cash from the employer and the trustee lending funds to the employees concerned, none of the parties would have been in a substantially different economic or commercial position. There would also have been no need to involve the BVI-registered company in the arrangements.

The opinion also stated that a comparable commercial transaction without the tax avoidance element would have resulted in an an upfront corporation tax deduction for the employer, linked to the income tax charge on the loan from the EFRBS under the disguised remuneration legislation.

www.gov.uk/government/publications/gaar-advisory-panel-opinion-of-26-january-2018-employee-rewards-using-multiple-tripartite-arrangements

Contribution in specie to SIPP

Summary – Contributions to a SIPP settled in the form of unquoted shares were eligible for Income tax relief.

Four members of a Self- Invested Pension Plan (SIPP) claimed that they had ‘paid’ pension contributions into their SIPP and were therefore entitled to income tax relief at source. The facts, circumstances and issues pertaining to the four members were identical save for the amount/value of the contributions. For simplicity the Tribunal referred only to the facts and circumstances of one such member, Mr Carlton, but the decision applies to all four members.

Mr Carlton completed an application form on 9 March 2016 indicating that he wished his join the SIPP, he wanted his pension fund to be invested in unquoted shares in a trading company with a value of approximately £70,000 and that he agreed to be bound by the Trust Deed and Rules and the Terms and Conditions.

On 9 March 2016 Mr Carlton executed a legally binding SIPP making a net contribution of £68,342. On 24 March Mr Carlton wrote confirming that his contribution would be made by way of an in-specie transfer of HFM Columbus Group Holdings Ordinary Shares to satisfy the obligation.

SIPPCHOICE Ltd made a claim for relief from income tax at source in respect of a contribution but HMRC denied the claim for relief. SIPPCHOICE contested that decision and included the denied claim in its Annual Relief at Source claim. HMRC decided to refuse that claim asserting that the normal meaning of 'contributions paid' in s 188(1) FA 2004 was confined to a payment of cash.

SIPPCHOICE Limited appealed against that decision.

Decision

The First Tier Tribunal said that when Mr Carlton completed the Contribution Form he agreed to make a contribution of a monetary amount of £68,342 as contemplated by the Trust Deed and Rules and Terms and. Conditions.

The Tribunal said that the legal obligation on Mr Carlton to make a contribution of a monetary amount existed even though Mr Carlton intended to settle the debt obligation he had created by transferring the Shares to the Administrator.

The Tribunal said that this accords with Guidance given by HMRC in the Pensions Manual at para 042100 where HMRC state:

> "...contributions to a registered pension scheme must be a monetary amount. However, it is possible for a member to agree to pay a monetary contribution and then to give effect to the cash contribution by way of a transfer of an asset or assets."

The Tribunal concluded that as a legally binding monetary obligation to make a contribution of £68,342 had been created and discharged by him through the transfer of shares to the SIPP, income tax relief should be available on the contribution.

SIPPCHOICE Limited V HMRC (TC06378)

Pension schemes Scottish rate of income tax newsletter (Feb 2018)

On 20 February 2018 the Scottish Parliament has confirmed the new Scottish income tax rates and bands for 2018/19.

Pension scheme administrators using the relief-at-source mechanism will continue to claim tax relief at 20% for members who are Scottish taxpayers. HMRC will not recover the difference between the Scottish starter and basic rates. This means that pension scheme members paying 19% or no tax continue to receive relief at 20%. However, those paying 21% income tax will have to claim the extra 1% relief due on some or all of their contributions above the 20% relief paid to their scheme administrators. Scottish taxpayers liable to income tax at the higher rate (41%) and top rate (46%) will be able to claim additional relief on their contributions up to their marginal rate of tax.

Scheme members who are Scottish taxpayers liable at the intermediate rate, higher rate or top rate will need to claim the additional relief through their self-assessment returns or by contacting HMRC directly.

www.gov.uk/government/publications/pension-schemes-relief-at-source-for-scottish-income-tax-newsletter-february-2018

Employer Pension Contributions

From April the minimum pensions contributions for employers and their staff will increase from 2% to 5% and then to 8% in April 2019.

EIS knowledge-intensive funds

At Autumn Budget 2017, the government announced its intention to consult on a new EIS fund structure aimed at improving the supply of capital to knowledge-intensive companies. HM Treasury is now consulting until 11 May 2018 on this matter.

The government would expect any new fund model to build on the existing EIS rules. However it is possible that a small proportion of investments, possibly 10-20%, could be in non-knowledge-intensive EIS companies.

They are considering:

- dividend tax exemption applied in respect of investments made through a knowledge-intensive fund after a period of say five or seven years;
- CGT relief on reinvestment into a knowledge-intensive fund;
- extended carry-back of relief for investors in a knowledge-intensive fund; or
- up-front tax relief at the time the investor contributes capital to the fund, provided the capital is invested within a specified time.

www.gov.uk/government/consultations/financing-growth-in-innovative-firms-enterprise-investment-scheme-knowledge-intensive-fund-consultation

Meaning of 'yearly interest' (Lecture P1067 – 6.43 minutes)

In HMRC v Lomas (2017), the Court of Appeal overturned a decision of the High Court, finding that statutory interest payable under what is now the Insolvency (England and Wales) Rules 2016 (SI 2016/1024) is 'yearly interest' within the meaning of S874 ITA 2007 and is subject to deduction of income tax at source.

This represents a significant win for HMRC, given that there is estimated to be over £5,000,000,000 of interest that is subject to the tax deduction at source scheme. The judgment means that HMRC will be entitled to collect tax from the many overseas-based recipients of such interest who would not otherwise have had any UK liability on such interest. While the High Court was correct to hold that the fact that interest was payable over more than one year was not of itself determinative and that the interest did not have the quality of being recurrent or capable of recurrence and accrued on a day-to-day basis, the Court of Appeal held that the High Court view was inconsistent with a number of decided cases which had previously concluded that interest payable from a judgment date but calculated retrospectively was nevertheless 'yearly interest'. Essentially, only if the interest were charged on what are manifestly short-term liabilities, would it fall outside the meaning of the term.

In this case, there was nothing to prevent the interest payable from being treated as the long-term liability that it was.

Contributed by Robert Jamieson

Capital Taxes

Capital loss denied

Summary - Losses claimed in relation to a repurchase of shares were not an allowable capital loss.

Conegate Ltd was an investment company; Mr Sullivan was the director and sole shareholder of that company. Conegate Ltd and Roldvale, a pension fund for the benefit of Mr Sullivan, had entered into a subscription and shareholder agreement in respect of a company called W H Holding Ltd, which owned West Ham United Football Club. Mr Sullivan claimed that he was looking for a way of raising funds for the club. Conegate Ltd implemented a series of transactions involving the purchase of additional ordinary shares by Conegate Ltd and Roldvale. Those shares were converted into deferred shares and then repurchased by W H Holding Ltd at a lower price (£1). Conegate Ltd claimed capital losses totalling £2m resulting from the disposal of the shares.

HMRC's refused the claim and so Conegate appealed.

Decision

As a preliminary issue, the First Tier Tribunal had to decide whether legal privilege had been waived in relation to a series of emails between Conegate and its advisers. HMRC claimed that the taxpayer had waived privilege in respect of communications between them and their legal advisors because it had relied on this material in a witness statement, but the taxpayer denied such a waiver had been made. The Tribunal concluded that privilege had been waived, and consequently drew adverse inference from the taxpayer’s failure to disclose these documents.

The Tribunal accepted that Conegate had entered into the transactions primarily because its director wished to provide additional funds to West Ham football club. However, they found that Conegate Ltd had exercised control of W H Holding Ltd and that value had passed out of the 100 ordinary shares it owned in W H Holding Ltd, when those had become deferred shares. This had therefore constituted a disposal of those shares by Conegate Ltd under s 29 TCGA 1992. The Tribunal found that the consideration that could have been received was considerably higher, and that Conegate Ltd had not presented evidence to support an argument that it could not have achieved greater consideration than £1. Consequently, the disposal must be treated as not being at arm’s length (s17(1) TCGA 1992, with the market value of the shares standing in the place of the actual consideration. Conegate was deemed to have disposed of the shares for £2m. As it had also purchased the shares for £2m, it had not incurred a loss.

While the transactions had been intended to generate funding for the football club, the Tribunal found that Section 16A TCGA 1992 only required the securing of a tax advantage to be “one of the main purposes” not “the main purpose” of the arrangements, and so would have denied relief on this basis if the above arguments had been successful for the taxpayer.

Conegate Limited v HMRC (TC06340)

Late non-resident capital gains tax returns

Summary – HMRC had overlooked paragraph 17(3) and not acknowledged special circumstances resulting in the taxpayer's penalties being reduced to £100.

Alan Jackson left the UK in January 2013 and took up residence in the Isle of Man.

On 18 May 2015 he disposed of his property in Hunts Cross Avenue, Liverpool and then a few months later, on 1 September 2015, he disposed of his property in St. Mary's Court, Liverpool. No capital gains tax was payable on either disposal.

Having visited his accountant to prepare his 2015/16 tax return, he learned that, with effect from 6 April 2015, the UK law on capital gains tax was amended and he should have submitted a non-resident capital gains tax (NRCGT) return within 30 days of each sale. On discovery of his mistake, he submitted this return that was received by HMRC on 2 October 2016. The return showed that no capital gain had been made on either property and no capital gains tax was due.

HMRC issued eight penalty notices covering both disposals such that on 21 November 2016, Alan Jackson received two lots of:

- £100 late payment penalties;
- £900 daily penalties for being more than three months late;
- £300 penalties for being six months late;
- £300 penalties for being 12 months late.

HMRC later cancelled the two lots of £900 penalties, claiming that following a review of representations from a number of customers and agents they were no longer issuing such penalty notices.

Alan Jackson appealed the remaining penalties.

Decision

The First Tier Tribunal said that although HMRC said they had used their discretion and cancelled the daily penalties, this statement hid the fact that HMRC were unable to comply with the conditions specified in paragraph 4 of Schedule 55. In particular the notice could not specify the date from which the penalty was payable and therefore was likely to be unenforceable.

The Tribunal found that in respect of the penalty of £100 for each property sold HMRC had applied the legislation and calculated the penalty correctly. The two £100 penalties were payable unless Alan Jackson had reasonable excuse for the failure or there were special circumstances to be taken into consideration.

Ignorance of the law was not a reasonable excuse but the Tribunal did believe that special circumstances applied to the second of the two £100 penalties because Alan Jackson had been given no opportunity to learn from his non-compliance as both penalties were assessed at the same time.

When considering the four lots of £300 penalties, paragraphs 5 and 6 of Schedule 55 state that the penalty is calculated as the greater of –

- 5% of any liability to tax which would have been shown in the return in question;
- £300.

However, the Tribunal considered that HMRC had overlooked paragraph 17(3) that states:

> (3) Where P is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a liability to tax, the aggregate of the amounts of those penalties must not exceed 100% of the liability to tax.

On that basis, the Tribunal concluded that none of the four £300 penalties should have been assessed.

Alan Leslie Jackson v HMRC (TC06329)

Allowing entrepreneurs' relief for gains before dilution

In Autumn Budget 2017 the government said that they proposed to include legislation in a forthcoming Finance Bill to allow individuals who no longer hold a 5% interest in a company to claim entrepreneurs' relief, where the reduction in their percentage shareholding is due to company issuing shares to raise capital for the purposes of its trade.

HM Treasury is now consulting on this matter until 15 May 2018. The new rules will apply to gains held in shares and securities held at the time of fundraising events taking place on or after 6 April 2019.

Currently, entrepreneurs' relief may be lost when an entrepreneur's company issues new shares and as a result causes the individual's personal stake to fall below 5%. The proposal announced at Autumn Budget 2017, allows an individual in this position to elect to be treated as if they had disposed of their shares and reacquired them at their market value just before the time the company issued new shares.

The individual may claim Entrepreneurs' Relief on that gain either at the time of election, or on a future disposal of shares.

www.gov.uk/government/consultations/allowing-entrepreneurs-relief-on-gains-made-before-dilution

Beneficial ownership of joint bank accounts (Lecture P1066 – 8.50 minutes)

The Privy Council, hearing a case which came up from the Court of Appeal of the Bahamas, have had to consider the law applicable to the beneficial ownership of joint bank accounts.

In Whitlock v Moree (2017), the five judges had to decide whether, on the death of one of two account-holders of a joint bank account, the beneficial interest in the account passed to the other account-holder by survivorship or whether it formed part of the deceased's estate by reason of the operation of the equitable doctrine of a presumed resulting trust, given that the deceased had provided all the money – some £137,000 at today's exchange rate – in the account.

When they originally set up the joint bank account, the deceased and his friend (Mr Moree) signed a bank form containing a standard provision which said:

> 'JOINT TENANCY: Unless otherwise agreed in writing, all money which is now or may later be credited to the account (including all interest) is our joint property with the right of survivorship. That means that, if one of us dies, all money in the account automatically becomes the property of the other account-holder(s). In order to make this legally effective, we each assign such money to the other account-holder (or the others jointly if there is more than one other account-holder).'

By a 3 – 2 majority, the Privy Council agreed that the provision in above applied. In delivering their decision, Lord Briggs set out his conclusion as follows:

> 'Where two or more holders of a joint account all sign an account opening document (or separately sign identical documents) which, on their true construction, declare or set out their respective beneficial interests in the property constituted by the account (loosely, the money in the account), then those are the beneficial interests of the account-holders, pending any subsequent variation of them by agreement or otherwise, and an examination of the subjective intentions of the account-holders (or of those of them who place money in the joint account) is neither relevant nor permissible. Still less is recourse to the doctrine of presumed resulting trusts permissible, because the potential beneficial owners have declared what are their beneficial interests by signed writing.'

Three fundamental consequences flow from this conclusion:

1. whether or not the attention of the account-holder was drawn to the terms of the declaration (ie. the intention of the settlor) is irrelevant in principle, unless challenging the document on the basis of mistake, fraud, duress or undue influence;

2. there is no room for the doctrine of presumed resulting trusts; and

3. where the document, on its true construction, does deal with the account-holders' beneficial interests, then the quantification of those interests is a question of law, not fact.

Lord Briggs held that there was indeed an express declaration as to the beneficial ownership of the money in the account. The appeal was dismissed and the deceased's beneficial interest in the money passed to Mr Moree by way of survivorship. Two of the judges agreed with him.

The remaining two judges dissented from this majority view. In general terms, Lord Carnwath and Lord Wilson argued that it was not appropriate to place emphasis on legal authorities from other property contexts.

As far as bank accounts are concerned, from the point of view of the customer there is an inherent lack of permanency in a transfer to a bank account, viz:

> 'The ordinary expectation is that, rather than being intended to effect a permanent transfer of value from one customer to the other, it is intended as no more than a convenient vehicle for their co-operation (for whatever reasons) in handling funds for the time being. Issues of construction should be approached against that background.'

However, this reasoning did not find favour with the other three judges.

Contributed by Robert Jamieson

Are business and agricultural property relief at risk? (Lecture P1068 – 8.33 minutes)

HMRC have recently published a paper on the influence of IHT reliefs and exemptions for estate planning, with a particular focus on business and agricultural assets. The research found that, for most people, the key objective is keeping assets within the family and not having to break them up on death. Saving IHT is a secondary concern. People rarely purchase business or agricultural assets, they said, with the sole aim of minimising IHT. In fact, it transpires that most people who inherit such assets usually retain them.

There have been long-standing rumours that business relief and agricultural relief may be restricted. At the moment, it is not clear whether the Conservative Government will go ahead with such changes. However, it must be admitted that now may be a good time for clients to organise both their gifts and their lifetime estate planning strategies, while the two main reliefs are still available and are not restricted in value.

If a client holds assets which qualify for business or agricultural relief on death, ideally the will should include provision for leaving such property to a non-exempt legatee, eg. children, grandchildren or a family trust (rather than the spouse). This ensures that, if the relief is still around, it will not be wasted.

Although business or agricultural relief would not be lost if a spouse qualifies for relief under S18 IHTA 1984 on the death of the property owner, there is a significant risk that the critical relief may no longer be available when the surviving spouse dies (or that the rates of relief may have changed). Thus the client has potentially lost the opportunity to pass on business or agricultural assets to the next generation on an IHT-free basis.

If the client's spouse might need the business or agricultural assets after the owner's death or if it would not be appropriate to give the assets to children or other descendants outright, it is always possible to transfer them to a discretionary will trust. The surviving spouse should be included as one of the potential beneficiaries so that they can enjoy the trust's income or capital if they want (subject, of course, to the trustees' discretion).

If, after death, business and agricultural relief continues to be available, the assets can be kept within the trust without attracting an IHT charge and, at a later stage, the trustees can appoint them out to the children (or other beneficiaries) as and when they decide that this is sensible. If the reliefs are no longer available at the date of death, the trustees can transfer the assets to the spouse within two years of the death under S144 IHTA 1984, using the spouse exemption to save IHT.

Contributed by Robert Jamieson

Bitcoin – The UK Tax Implications (Lecture P1069 – 10.59 minutes)

What is Bitcoin and how does it work?

I have in front of me a £10 note. We've all seen them. On one side it has a picture of the Queen and a promise by the Bank of England to pay me – "the bearer" – on demand the sum of ten pounds. On the other it has Jane Austen in a bonnet looking bored. Maybe it was something she read.

In the good olde days, this was worth £10 of gold until the link between sterling and gold was broken in 1971. [Come to think of it we don't have any gold anyway after Gordon Brown sold ours in the 1990s.] So now the £10 note is worth £10 of well…"stuff".

I know that I can get £10 of stuff for my piece of paper (sorry 'durable polymer') because the Bank of England (speaking on behalf of the United Kingdom Treasury) says I can. As the Bank has been around since 1694, I can trust them to be true to their word. This is basically how currencies work. They are underwritten by the State, so when the States say a £10 note is worth £10, we take a leap of faith and believe them.

But things in the banking world haven't been going all that well in the last couple of decades and our faith in them keeping their promises has waned a bit. So into the breach stepped Bitcoin. Bitcoin is a new form of electronic money; it's a sort of peer-to-peer electronic cash system. They call it a "cryptocurrency" (which is basically a decentralised digital currency). It was invented by someone called "Satoshi Nakamoto" who could be real, could be imaginary but is most probably a collective group of Japanese maths nerds who wanted a cool name.

All Bitcoin transactions (yes, every single one) are recorded on a public ledger called a "Blockchain". There is no central authority which controls or underwrites this system. The Blockchain is maintained by a computer network which is – I am reliably informed – 100% trustworthy. [But that's what the banks said and we know what happened next.]

So it's banking without a bank. It's a currency without a State to underwrite it. I can't profess to being 100% sure about how this all works as I don't have a PhD in mathematics, but it's something to do with encryption and algorithms (it's mind-bending stuff). But there must still be a large element of faith here because Bitcoin is no more than an entry on a register which you access through your "cryptographic key" which you keep in your secret "online wallet". And if someone – they call them "hackers" – accesses your online wallet and nicks your cryptographic key, they also nick your Bitcoin. So advice is to keep your online wallet offline. Which makes it an offline wallet. Anyway…

Like most things in this world, a Bitcoin is only worth what someone will pay you for it. But people have been scrambling after Bitcoin like Buzz Lightyear toys at Christmas 1996 to the extent that, as we speak, the value of all Bitcoin in the Blockchain is about GBP185 billion (yes really) divided among around 20 million Bitcoin users. As at today's date, my computer tells me that 1 Bitcoin is worth £7,941.18 (which is 794 of my Jane Austen tenners plus some shiny coins). But prices are very volatile (1 Bitcoin was worth nearly £14,000 in December 2017) so I'll check again in 5 minutes.

What can we do with our Bitcoin? Well - like a £10 note - owners can exchange their Bitcoin for goods and services if they want to. A home-owner in Peckham marketed his townhouse for 500 Bitcoin in September 2017. PwC are reported to have accepted Bitcoin as payment for advisory services provided to cryptocurrency specialist clients in Hong Kong.

But with prices rising, why would we do that? Instead Bitcoins owners can simply lock their Bitcoins in their offline online wallets and sit tight until prices rise at which point they will (hopefully) exchange their cryptocurrency for State-backed "proper money" in sterling, dollars, euros or yen.

Acquiring Bitcoin

There are 2 ways of acquiring Bitcoin.

1. Bitcoin can be created by a process known as "mining" whereby new blocks of Bitcoin are added to the chain only when the answer to a complex cryptographic algorithm is solved. It's like the Krypton Factor but with a better prize because successful miners are rewarded with one new Bitcoin for every new block created. Participants in this activity are almost exclusively techno-nerds who spend their lives locked in a darkened room trying to outdo each other and mine Bitcoin. We can leave these people in their own world and they are unlikely to enter ours.

2. Far more commonly, Bitcoin can be bought and sold via a Bitcoin broker, online exchange or other trading platform. You can even get them through a Bitcoin ATM.

Tax treatment of Bitcoin disposals

There is no specific UK tax legislation dealing with Bitcoin gains as HMRC believes that existing legislation is sufficient to impose any tax charges which are due. HMRC did issue a Revenue & Customs Brief in March 2014 which opened by saying that whether any profit or gain is chargeable or any loss is allowable will be looked at on a case-by-case basis taking into account the specific facts. The general conclusion from the Brief was that capital gains made on Bitcoin will normally be chargeable to CGT (or to corporation tax if accruing to a company), but as someone once said "they would say that wouldn't they?"

So in the absence of any further guidance, let's examine the law.

First is Bitcoin a commodity or a currency? A commodity has intrinsic value and prices rise or fall based on supply and demand. US Government Regulators take the view that Bitcoin - like gold or oil - is a commodity. However, the EU's opinion is that Bitcoin can and is being used to facilitate commerce and is therefore more akin to a currency. In reality, it's a bit of both. Therefore even though Bitcoin doesn't behave like a normal currency, unless and until we are told otherwise we should treat it as such for tax purposes.

This means that we first look at the special rules in the UK tax legislation for dealing with gains and losses on exchanges of currency.

Currency (other than sterling) is a chargeable asset for CGT purposes and its disposal can give rise to a chargeable gain or an allowable loss. There is a CGT exemption (S.269 TCGA 1992) in respect of gains on the disposal of foreign currency acquired by individuals for the personal expenditure outside the UK. Therefore where Bitcoin is used or intended to be used for personal use as a means of currency - in other words to buy goods and services - there should be no chargeable gains arising on any exchange profits.

This may have some legs but it might be difficult to prove given that S.269 requires the taxpayer to have acquired the currency with the specific intention of using it for personal expenditure outside the UK. After all, other more "accessible" currencies are available to facilitate one's holiday expenditure, most notably the one used by the country one is visiting…

When foreign currency is held in a bank account and the account has a credit balance, the account is an asset for CGT purposes. The disposal of all or part of this asset - for example by converting ones dollars into sterling – in theory gives rise to chargeable gains or allowable losses. However due to the number and complexity of computations that were usually required to arrive at what was usually a small chargeable gain or allowable loss, the government decided to remove foreign currency accounts from the scope of CGT in April 2012.

I'm not sure this is of any help to us either because a Bitcoin wallet cannot be said to be a "bank account" in any sense not least because a) the wallet is not a bank and b) the wallet seems to be there to hold the cryptographic key rather than the Bitcoin itself.

So two potential CGT exemptions seem to be out of reach.

However some hope of tax exemption is offered by the HMRC Brief from 2014 when they say that…

"Depending on the facts, a transaction may be so highly speculative that it is not taxable or any losses relievable. For example gambling or betting wins are not taxable and gambling losses cannot be offset against other taxable profits".

Bitcoin would certainly seem to me to be an investment which falls squarely within the definition of "speculative".

However there must be a very fine dividing line here between Mr X who purchases Bitcoin as a bit of a "punt" (in the same way as one would "invest" in a participant of the 3:15 at Kempton Park), and Mrs Y who intends to hold Bitcoin with the intention of creating long-term appreciation. Profits made by Mr X would seem to be tax-free whereas Mrs Y's profits would be liable to CGT. The line in the sand between X and Y is far from clear.

There is some internet chatter along the lines that profits from trading Bitcoin cannot be justified as being gambling winnings as the sophisticated investment strategies adopted by many Bitcoin investors means that their returns are not purely reliant on chance. However the door for an argument was opened by the HMRC Brief and good luck to anyone who wants to push through it.

What we are reasonably certain of is that if someone is mining Bitcoins in a serious and organised way, HMRC will regard this as a trade. They haven't specifically said so but a glance through the Badges of Trade would seem to confirm that many of the "trading" indicators are in place such as the existence of a profit motive, the frequency of transactions and the nature of the asset itself. Bitcoin mining is – after all – what Bitcoin miners do. [And for what it's worth, the IRS in the United States treats Bitcoin miners as self-employed traders.] Profits will therefore be chargeable to income tax and national insurance. Income and expenses need to be calculated in sterling. Expenses specifically related to the mining process will be deductible. The annual profits will be reported to HMRC via self-assessment.

Those non-miners who trade Bitcoin in a regular and systematic way could also (potentially) be exposed to having their gains treated as income under the trading rules. However Bitcoin transactions are analogous to share dealing, and following the case of Salt v Chamberlain (1979) it was concluded that share trading by a private individual can never have the "Badges of Trade" pinned to them.

The more recent cases of Dannell v Rothwell [1996] and Mansur v HMRC [2010] have supported this view thereby creating what seems to be a high hurdle for HMRC to get over if they wish to charge profits made by non-miners to income tax. BIM56850 states that…"for individuals we take the view that transactions in shares which do not amount to investment are speculative transactions falling short of trading, unless there are particular factors which take the case out of the norm". HMRC may of course argue that the BIM instruction in this case does not apply since Bitcoin is not a "share" but this is nit-picking.

All this leaves us with the (probably correct) conclusion that Bitcoins are chargeable assets for CGT and any profits on disposal will be chargeable to capital gains tax. Bitcoins are intangible assets which can be bought and sold. There is no specific exemption so by default they must are chargeable. This is probably what leads HMRC to believe that existing legislation is sufficient to determine taxability – if you can't prove it isn't taxable, then it must be.

Bitcoins are not chattels so capital gains are calculated using the normal principles of sales proceeds less base cost (each expressed in sterling). A CGT charge will however only crystallise when the Bitcoins are converted into a different currency be that sterling, euros, dollars or even another cryptocurrency (yes others do exist). The CGT rate is either 10% or 20% depending on the level of the taxpayer's other income.

Bitcoins are not UK situs assets as they are not governed by UK law. This means that UK resident non-doms using the remittance basis can shelter Bitcoin gains from UK CGT by retaining the proceeds offshore.

If HMRC accepts that Bitcoins gains are chargeable to CGT, any Bitcoin losses must be allowable. There are no provisions for losses to be set against income so any losses reduce general capital gains of the current or subsequent tax years. [This is perhaps a reason why HMRC may not pursue the "trading income" angle for Bitcoin investors as any losses on Bitcoin transactions would then be available to reduce general income. The CGT route keeps this particular cat away from the pigeons.]

Finally one can't help but have a sinking feeling that someone somewhere is going to be on the thin end of this particular wedge when the Bitcoin bubble bursts and will have to enter a very large number in the "Capital losses b/fwd" box on their CGT pages for the rest of their lives. Caveat emptor.

Contributed by Steve Sanders, Tolley Tax Training

Trust registration service penalties

HMRC has released details to the professional bodies of its late filing penalties for the trust registration service. There will be fixed penalties for trusts registered up to six months late and tax-geared penalties of 5% for registrations made more than six months late. These tax-geared penalties may include IHT, SDLT, LBTT and SRDT as well as income tax and CGT.

HMRC has confirmed it will take a risk-based approach, rather than charge penalties automatically, 'particularly where it is clear that trustees or their agents have made every reasonable effort to meet their obligations under the regulations'. It will also tend towards leniency for the first year of TRS obligations.

Penalties can be charged for administrative offences relating to a requirement to:

- register using the TRS by the due date of 31 January after the end of the tax year in which the trustees pay tax on trust assets or income; and

- notify any change of information by the due date of 31 January after the end of the tax year in which the trustees pay tax on trust assets or income.

No penalties will be charged for contravention of the requirement to notify changes of information until the online facility to notify HMRC becomes available.

The amount of the penalty will reflect the length of delay in registering:

- up to three months after the due date: £100 penalty;

- three to six months after the due date: £200 penalty; and

- more than six months late: the greater of either 5% of the tax liability or £300.

HMRC intends to consult later this year on more serious penalties for money laundering.

Land transaction tax registration opens in Wales

On 27 February 2018, the Welsh Revenue Authority opened its new online land transaction tax (LTT) system for registration by professional agents expecting to carry out residential and non-residential property transactions in Wales from 1 April 2018.

Professionals are advised to register at least 10 days before undertaking their first property or land transaction to make sure the transition to land transaction tax ‘goes as smoothly as possible’.

A checklist is now available to help taxpayers decide what information is relevant to include when they make applications to the Welsh Revenue Authority for a tax opinion. The Welsh Revenue Authority will give a written opinion on the application of the devolved taxes to a particular transaction in circumstances where there is genuine uncertainty and the published guidance does not resolve the uncertainty.

https://beta.gov.wales/land-transaction-tax-registration

Administration

Form P11D(b) filed on time

Summary –Uncontested evidence confirmed that the company's form P11D(b) form had been filed on time.

An employer was penalised by HMRC for filing their form P11D(b) for 2014/15 late.

Trent Personnel Ltd's accountant said that the P11D and related P11D(b) had been filed on time in June 2015. However, in July 2016 they wrote to HMRC attaching copies of the original documents, together with a form 64-8 because the accountant, acting as company agent had been incorrectly removed from HMRC's records. The accountant claimed that HMRC had incorrectly removed several clients when it updated its website so that the accountant could not access the clients' records, but was unaware of this when submitting forms P11D(b). The accountant also claimed that HMRC had ignored their letter.

Decision

HMRC were required to show that an authorised officer of HMRC made the determination but in the tribunal's view, they had not done so. They referred to Khan Properties Ltd (TC06225) where it was held that if a s 100 TMA 1970 determination is made it cannot be made by a computer or by an officer who is not authorised. The same applied in this case when s 100 was adapted for the purpose of making the determination.

The First Tier Tribunal said that there was uncontested evidence from the accountant that the forms were filed on time, that HMRC was in error in removing the client from the agent's online list of clients and had ignored letters from the agent explaining what had happened

The taxpayer's appeal was allowed.

Trent Personnel Ltd v HMRC (TC06319)

Director filing tax returns with no income

Summary – The taxpayer did have a reasonable excuse for the late filing of her 2015/16, as she relied on advice from her accountant, which was correct.

Karen Symes had received just over £25,000 of dividends in 2015/16, but those fell into her basic rate band with the 10% tax credit covering all the tax payable on those dividends, and she was expecting a refund.

In November 2016, Karen Symes' accountant registered her for self-assessment enabling her to declare and pay the relevant tax on dividends that she had received in 2016/17.

She was somewhat surprised when on 16 December 2016, HMRC issued a notice to file a tax return for 2015/16. She incorrectly assumed that the notice was for 2016/17. A few months later, realising her mistake, she filed a 2015/16 paper form on 7 April 2017 but she was already three months late.

HMRC claimed that as she was appointed as a company director on 20 June 2014, she had a statutory obligation to notify HMRC of her requirement to complete a self assessment tax return. But did she need to file a return for 2015/16?

Decision

The First Tier Tribunal judge said there is a statutory obligation on every person to notify liability if they are chargeable to tax and their income and gains do not fall within at least one of the exceptions in s7(4) to (7) TMA 1970. If dividends from a company in 2015/16 fell within the higher rate band, there is a liability to notify, but not because of being a director.

The Tribunal decided that Karen Symes did have a reasonable excuse for the late filing of her 2015/16, as she relied on advice from her accountant, which was correct.

Karen Symes v HMRC (TC06320)

Note: From 2016/17 onwards it is more likely that a director/ shareholder will have a liability to tax due to dividends received, so it is important to check that all shareholders are registered for self-assessment. From 6 April 2016 there is a tax liability arising from dividends in excess of £5,000 falling with the basic rate band and so there would be a liability to notify if dividends were in excess of this amount in 2016/17.

Penalties not properly notified

Summary - None of the penalties complied with the conditions in FA 2009, Sch 55 paras 4(1)(c) and 18 and so the penalties were cancelled

Rafik Patel was in partnership with his wife. He claimed that the 2012/13 partnership return had been filed on paper before the 31 October 2013 deadline, suggesting that HMRC had mislaid it. HMRC said the return was filed in mid-January 2015 and imposed late filing penalties.

Decision

The First Tier Tribunal decided that the return had not been submitted by 31 October 2013 but accepted it had been sent in January 2015.

However, they said the daily penalty reminder notice referred to 'your tax return' rather than the ‘partnership return’ and included an incorrect unique tax reference. HMRC were unable to produce any evidence demonstrating that it had sent other reminders to Rafik Patel and, in any case, these did not specify the date from which daily penalties were payable.

As none of the penalties complied with the conditions in paras 4(1)(c) and 18 of Schedule 55 FA 2009, the penalties were cancelled.

The appeal was allowed.

Rafik Adam Patel v HMRC (TC06315)

Employment-related Securities Bulletin No 26

The Bulletin reminds us that for 2017/18:

- Annual returns for ERS must be submitted online by 6 July 2018;

- New schemes established during the tax year must be registered by 6 July 2018;

SAYE savings holiday

Autumn Statement 2017 announced an extension to the SAYE savings holiday for employees on qualifying parental leave from 6 months to 12 months. This was due to take effect from 6 April 2018. The government is delaying implementation of this holiday to provide plan providers and administrators with time to make and test system changes. The government has also announced that the SAYE savings holiday will now be extended to 12 months for all SAYE plans, not just those with qualifying parental leave. This change will take effect on 1 September 2018.

Most common ERS issues

<u>Registering schemes incorrectly or duplication</u>

Customers select ‘register a scheme or arrangement’ instead of ‘view schemes or arrangements’, causing duplication of the scheme with penalties charged unnecessarily.

<u>Not filing in good time and failing to file nil returns</u>

The filing deadline is 6 July following the end of the tax year. Failure to submit your return, including a nil return, by the deadline will result in penalties being issued.

<u>ERS online access and uploading templates</u>

HMRC acknowledge that the current templates display a non-current year but they should continue to be used and unchanged until amendments are made by HMRC. If templates are altered, an error message will be received and the gateway will not allow it. So do not delete tabs or columns, alter the format or change the name of the template..

<u>Late notification of EMI options</u>

Once registered, it is the company’s responsibility to check back via the ERS online service, under ‘view schemes and arrangements’ for their scheme reference number which can take up to 10 days to appear. It is imperative that the options are then notified within 92 days. If the deadline has been missed, the system will not allow notification.

www.gov.uk/government/publications/employment-related-securities-bulletin

Enactment of ESCs

The Enactment of Extra-Statutory Concessions Order, SI 2018/282, puts four existing ESCs on a statutory footing with effect from 6 April 2018. These are:

1. ESC A37 (treating directors' fees as trading income);

2. EIM3002 (treating professional practitioners' incidental employment income as trading income);

3. EIM01120 (exempting financial loss allowance paid to employees by public bodies); and

4. EIM61030 (treating payments from medical committees to members as trading income) which HMRC also considers to be covered by the legislation for EIM03002 and EIM01120.

Unidentified source of income

Summary - In the absence of an identified source of income, HMRC’s discovery assessments were not valid

In December 2012, an HMRC investigator looking in to civil fraud received a report from a VAT compliance officer dealing with Zonehead, a company controlled by Mr Ashraf. The report related to claims by Zonehead for input tax on imports that were not evidenced by forms C79, a form which is issued to an importer when they pay customs duty and import VAT.

As a result of this report, HMRC reviewed the case for potential investigation under HMRC's code of practice 9 and opened an investigation.

HMRC found a shortfall between Mr Ashraf 's income and his expenditure, leading to discovery assessments being issued under s29 TMA for years 2004/05 to 2013/14. They had allocated the unassessed amounts to 'other income' in the self-assessment calculations. Could s687 ITTOIA 2005 cover the amounts received by Mr Ashraf?

Decision

The First Tier Tribunal found that as the loss of tax had not been attributed to an identified source of income, the discovery assessments seeking to charge Mr Ashraf under s 687 were invalid and therefore cancelled.

Mr Mohammed Ashraf v HMRC (TC06355)

Did a partnership exist?

Summary – There was no partnership in existence in 2011/12 and so the penalties relating to filing a late return should be cancelled.

Rangeela Spice, a partnership notified to HMRC as being between Zakir Ahammed and Mr B Babul, was issued with a notice to file a partnership return for the tax year 2011/12 on 6 April 2012. That notice required Zakir Ahammed, as the nominated partner, to deliver the return by 31 October 2012 if filed in paper form or by 31 January 2013 if filed electronically

On the basis that none was submitted, it issued penalty notices on 12 February and 14 August 2013.

The taxpayer filed the return electronically on 7 August, appealing against the penalties but HMRC rejected the appeal. The taxpayer asked for a review that upheld the penalties.

Zakir Ahammed appealed. The grounds of appeal are that although a SA400 (registering a partnership for self-assessment) was filed in September 2011, the partnership was not agreed until May 2012. Before then Zakir Ahammed was operating the restaurant on his own account and has returned the profits as his own on his personal return, while Mr Babul had not and remained taxed as an employee, the agents were not given the UTR and there was no partnership income in the tax return, because there was none. Individual tax returns were submitted before the filing date and the 2011/12 partnership return was only submitted because of the penalty notice and then, Mr Babul was not shown as a partner.

Decision

The First Tier Tribunal said HMRC had produced no evidence to show a partnership was in place in 2011/12. There should perhaps have been VAT registration details and returns as well as evidence from PAYE systems. The Tribunal said that the income and tax deducted under PAYE on Zakir Ahammed ‘s personal return supported his argument that there was no partnership, but that he was an employee.

The Tribunal concluded that the penalties should be cancelled.

The appeal was allowed.

Zakir Ahammed (as representative partner of Rangeela Spice) v HMRC (TC06318)

New pensions online service

Phase one of the new service should be launched this month April 2018.

This initial release will be for all new pension scheme administrator registrations and all new pension scheme applications for registration (excluding retirement annuity contracts and deferred annuity contracts).

Updating scheme administrator details

HMRC plan to cleanse data before moving schemes and their administrator details across to the new service.

Make sure that clients have logged onto the online service to check their scheme details are complete and up to date.

New pensions online service newsletter

HMRC are planning to publish a newsletter on the new pensions online service to keep us up to date with their work and provide further information about the next releases.

www.gov.uk/government/publications/pension-schemes-newsletter-96-february-2018

Reliance on HMRC Manuals (Lecture P1070 – 6.04 minutes)

If a taxpayer wishes to rely on the content of one of the HMRC Manuals, he needs to be quite sure that they will provide him with the comfort that he requires. This was the issue before the High Court recently when a company sought a Judicial Review to force HMRC to adhere to the terms of their Manuals (Regina (on the application of Aozora GMAC Investment Ltd) v HMRC (2017)). HMRC's argument was that the Manual was wrong and that the company was anyway not able to rely on it.

The High Court decided that HMRC were obliged to honour their Manuals, but only if:

1. HMRC had made a representation in the Manual under consideration;
2. the representation in the Manual was clear, unambiguous and devoid of relevant qualification;
3. the taxpayer relied on the Manual to his detriment; and
4. it gave rise to conspicuous unfairness.

These are tough conditions but not new and do not appear to break any new ground.

In this case, the High Court found that the first two conditions had been satisfied (which is good news for taxpayers generally), but the judge went on to say that there was no evidence that the company had actually relied on the Manual (or indeed that they were even aware of it) before undertaking the relevant transaction. Without such reliance, it is difficult to argue that it was conspicuously unfair for HMRC not to follow the content of their Manual.

This was a pity for the company, but it demonstrates that one cannot just point at the Manuals and insist that HMRC follow them. If they fail to do so, all four of the conditions spelled out above need to be satisfied.

Having regard to the above, it was interesting – not to say ironic – to read the First-Tier Tribunal's decision in Cooke v HMRC (2017), released late last year. In that case, HMRC claimed that the taxpayer (Mr Cooke) was careless and culpable because he had failed to check the relevant HMRC Manual to do with double taxation relief. Can that really be so? Is it careless not to check the Manual which HMRC might say is wrong and on which you cannot rely anyway? One is surprised that Mr Cooke did not argue that relying on the Manuals should itself be regarded as careless conduct!

Contributed by Robert Jamieson

Deadlines

1 April 2018

Corporation tax due for APs ended 30 June 2017 for SMEs not liable to pay by instalments

Multiple contractors to advise they wish to be treated as a single contractor for 2018-19

5 April 2018

2017-18 tax year ends

Deadline to pay previously unpaid class 3 NICs for 2011-12

6 April 2018

Personal allowances increased to £11,850.

The lifetime allowance for pensions savings rises to £1,030,000.

7 April 2018

Due date for VAT returns and payment for 28 February 2018 quarter (electronic)

14 April 2018

Quarterly corporation tax instalment for large companies depending on year end

Forms CT61 to be submitted and tax paid for the quarter ended 31 March 2018

19 April 2018

Payment of PAYE, NIC, CIS and student loan liabilities for month ended 5 April 2018 if not paying electronically

Payment of PAYE liability for quarter ended 5 April 2018 if average monthly liability < £1,500

21 April 2018

Deadline for online monthly EC sales list.

Submit supplementary Intrastat declarations for March 2018.

22 April 2018

PAYE, NICs and student loan liabilities to have cleared HMRC's bank account

30 April 2018

Private companies’ accounts with 31 July 2017 year end filed with Companies House

Public companies with 31 October 2017 year end filed with Companies House

CTSA returns for companies with accounting periods ended 30 April 2017 filed

R&D tax relief claims extended from 31 January 2018 to 30 April 2018.

HMRC News

Making tax digital pilot - guide for self-employed taxpayers

As part of the Making Tax Digital pilot, self-employed businesses can voluntarily use software to keep their business records digitally and send Income Tax updates to HMRC, instead of filing a Self Assessment tax return. HMRC has issued a guide for self-employed taxpayers intending to take part in this pilot.

Who can use this service?

Sole traders with income from one business and a current accounting period ending after 5 April 2018 will be able to participate. However, income from any other sources will need reporting on a Self Assessment tax return.

Sign up

Sole traders will need to use their Government Gateway user ID and password to sign up for the pilot.

When to send updates

Once a taxpayer's software has been linked to HMRC, they will receive reminders every three months to upload their Income Tax updates. They will also need to send a final report for the year and claim allowances and reliefs at that time.

Example 1 - accounting period is 6 April 2018 to 5 April 2019

Taxpayers will send in four Income Tax updates, the last one on 6 April 2019 and the final report is due by 31 January 2020 (31 January after the end of the tax year 2018/19).

Example 2 - your accounting period is 6 May 2018 to 5 May 2019

Once again there will be four Income Tax updates to upload, the last one on 6 May 2019. As the last one falls in 2019/20, the final report is not due until 31 January 2021

These taxpayers will still need to submit their Self Assessment tax return for 2018/19 no later than 31 January 2020.

www.gov.uk/guidance/use-software-to-send-income-tax-updates

Extending offshore time limits for assessment

HMRC is consulting until 14 May 2018 on the design principles for legislation to extend the tax assessment time limit to a minimum of 12 years for cases involving offshore income, gains or chargeable transfers, as announced at Autumn Budget 2017.

The legislation will apply to income tax, CGT and IHT, the taxes currently in scope for the requirement to correct rules and other civil measures tackling offshore tax evasion.

www.gov.uk/government/consultations/extension-of-offshore-time-limits

Agent Update 64 - February/March 2018

Taxpayers with overseas interests – action needed now

HMRC's "Requirement to Correct" (RTC) obliges taxpayers to make a disclosure of unpaid tax on assets, income and activities in other countries and transfers from the UK to other countries. Taxpayers who know or suspect that they have unpaid tax relating to overseas assets, income or activities need to act before 30 September 2018 to avoid incurring much higher penalties for their non-compliance.

The RTC has no minimum level cut-off point so all those with any unpaid offshore tax will need to make a disclosure. This means, that taxpayers who have simply rented out a holiday home in another country and failed to declare the income should check their position. In addition, those who have moved to the UK from abroad but who have, for example, assets or income, perhaps from family holdings or businesses, in their country of origin may need to make sure that they have properly declared their tax position.

The RTC applies to Income Tax, Capital Gains Tax and Inheritance Tax and we therefore expect it to apply in the main to individual taxpayers. However, companies that pay Income Tax, for example, as non-resident landlords, will also need to ensure they have paid the correct tax and if necessary make a disclosure. Trustees, settlors and beneficiaries of trusts with overseas interests may also need to check whether they have unpaid UK tax liabilities.

From 1 October 2018 failure to correct will result in penalties including a tax geared penalty from 100 to 200% of the uncorrected tax. Anyone who fails to correct their position despite knowing that they should do so may also face and asset based penalty of up to 10% of the asset where the tax at stake is over £25,000 in any tax year as well as possible "naming and shaming" where over £25,000 of tax per investigation is involved.

No penalty will be chargeable where the taxpayer has a reasonable excuse for failing to correct the position.

Fulfilment House Due Diligence Scheme

From 1 April 2018, the Fulfilment House Due Diligence Scheme will open for online applications.

Businesses in the United Kingdom (UK) that store any goods imported from outside the European Union (EU) that are owned by, or on behalf of, someone established outside the EU, will need to apply for approval by HMRC if those goods are offered for sale in the UK. The deadline for applications from existing fulfilment businesses falling within the scope of the scheme is 30 June 2018. Businesses that start trading on or after 1 April 2018 need to apply on or before 30 September 2018. There are penalties for late applications.

Businesses that only store or fulfil goods that they own, or only store or fulfil goods that are not imported from outside the EU, are not required to register.

Registered businesses must carry out certain checks and keep records from 1 April 2019. Businesses who meet the criteria of this scheme will not be allowed to trade as a fulfilment business from 1 April 2019 if they do not have approval from HMRC. Those that do, risk a £10,000 penalty and a criminal conviction.

Serial Tax Avoidance Regime (STAR)

HMRC has published new guidance on the Serial Tax Avoidance Regime, which is designed to deter people from using avoidance schemes and to encourage those already involved in avoidance to bring their scheme use to a close.

The guidance explains the STAR legislation in Finance Act 2016 Schedule 18, which imposes a range of sanctions on users of tax avoidance schemes that are defeated.

The sanctions include:

- a penalty of 20% of the understated tax, rising to a maximum of 60% for further defeats of schemes used in the same warning period;
- being named as a serial avoider after the third defeat;
- access to direct tax reliefs denied after using three defeated schemes, which misuse reliefs.

The legislation does not just apply to persistent avoiders. It can apply to taxpayers who have used only one avoidance arrangement that has been defeated. It will affect all avoidance arrangements entered into on or after 15 September 2016 and defeated after that date and may affect avoidance arrangements entered into before 15 September 2016 but defeated after 5 April 2017.

Tax avoidance - tackling the supply chain

New guidance has been published setting out the rules and risks for people involved in designing, marketing and facilitating tax avoidance schemes.

Legislation passed in the Finance Act 2017 means anybody involved in supplying a tax avoidance scheme that has been defeated by HMRC will face a penalty of 100% of their fees. They also risk being publically named as an enabler of tax avoidance.

The vast majority of people provide legitimate and genuine advice and services, but there remains a persistent minority who help others enter into abusive tax arrangements.

The legislation aims to tackle this minority by taking the financial incentives out of supplying highly contrived tax avoidance schemes. It will make scheme suppliers accountable for their actions and will safeguard professionals who provide genuine commercial arrangements.

New from April 2018 - Mandatory box for Student Loan plan types

From 6 April 2018, the payroll software that used to send an employer’s Full Payment Submission to HMRC will be updated to include a new box for an employee’s Student Loan plan types. This box will be mandatory for all employees who are in repayment of a Student Loan. If the employee does not know their plan type, help can be found on the Student Loan Company webpages.

PAYE settlement agreements (PSAs) - proposed changes from April 2018

The administrative burden on employers operating PSAs will benefit from:

- removal of the requirement for employers to renew their PSAs annually, and instead creating an enduring agreement. Agreements will remain in place for subsequent tax years unless varied or cancelled by the employer or HMRC;

- future-proofing the regulations to allow for a digitised process if, and when, this can be introduced.

Employers will still be required to provide an annual calculation.

Automatic Enrolment Update

From April 2018 the minimum pensions contributions for employers and their staff will increase from 2% to 5% and then to 8% in April 2019.

Annual Tax on Enveloped Dwellings (ATED)

From 1 April 2018, all online ATED returns must be filed using the ATED digital service. Register now with HMRC to use this service before 1 April 2018. The old-style online forms will be withdrawn on 31 March 2018, so can no longer be used.

Tax-Free Childcare Opens to Parents of Under 12's

Parents whose youngest child is under 12 can now get up to £2,000 a year towards their childcare costs through Tax-Free Childcare.

Tax-Free Childcare is a new government scheme to help parents with the cost of childcare, allowing parents to work or work more, if they want to.

Parents can apply for Tax-Free Childcare online - reducing their childcare costs by up to £2,000 per child per year, or £4,000 for disabled children.

The scheme, launched in April 2017, has been gradually rolled out to parents, with all eligible parents now able to apply across the UK.

The money can go towards a whole range of regulated childcare, whether nurseries, childminders, after-school clubs or holiday clubs.

Parents in England can also apply for 30 hours free childcare through the same online application, and are encouraged to apply now for the April term.

www.gov.uk/government/publications/agent-update-issue-64

Statement of Practice 1/2018: Mutual Agreement Procedure

The UK has made efforts to strengthen the efficiency and effectiveness of the dispute resolution process and minimise incidences of unintended double taxation in light of recent experience and developments, in particular Action 14 'Making Dispute Resolution more Effective' (the Action 14 Report) of the Base Erosion Profit Shifting (BEPS) project.

The UK has committed to implementing the minimum standard in respect of:

- preventing disputes;
- availability and access to MAP;
- resolution of MAP cases;
- implementation of MAP agreements.

This Statement of Practice:

- describes the UK's practice in relation to methods for reducing or preventing double taxation and supersedes Statement of Practice 1 (2011);
- outlines the MAP process and the use of MAP under the relevant UK Double Taxation Agreements and/or the EU Arbitration Convention (EUAC). It also outlines the UK's approach to the role of arbitration as part of the MAP process;
- should be read in conjunction with HMRC's guidance in the International Manual (INTM) at INTM 423000 onwards.

The aim of MAP

A MAP request can be made when a person considers that the actions of one of both countries' tax administrations result or will result in taxation not in accordance with the relevant tax treaty. The person may request Competent Authority (CA) assistance under the MAP.

Older treaties require that the taxpayer approaches the CA of their country of residence to request relief under a tax treaty. Where the adjustment will affect related parties in both jurisdictions, it's advisable for each taxpayer to make a separate request for assistance to the CA of the country in which it is resident. Newer treaties contain a provision which provides that the taxpayer can make a request for MAP assistance to the CA of either country.

A person who is a resident of European Union may also request access to MAP through the European Union Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, 90/463/EEC (EUAC) if they consider that, for the purposes of taxation, profits which are included in the profits of an associated enterprise of a contracting state are also included or are also likely to be included in the profits of an enterprise of another contracting state on the grounds that the principles set out in Article 4 of the EUAC and applied either directly or in corresponding provisions of the law of the state concerned haven't been observed.

The Statement of Practice covers the following areas:

- Eligibility for MAP;
- Rejection of MAP requests;
- The MAP process including how to make a request and the time limits involved;
- Scope and methods for granting relief;
- Arbitration;
- Repatriation of funds

www.gov.uk/government/publications/statement-of-practice-1-2018

Changes to the corporate intangible fixed assets regime

Following the announcement in the Autumn Budget 2017 the government is consulting until 11 May 2018 on the scope for changes to the corporate intangible fixed assets regime that support the regime's administration and international competitiveness.

Particular aspects on which views are sought include:

- Exclusion of pre-2002 assets;
- Exclusion of goodwill and customer-related intangibles;
- De-grouping charge; and
- Election for the alternative of fixed rate relief at 4% pa.

www.gov.uk/government/consultations/review-of-the-corporate-intangible-fixed-assets-regime

Model disclosure rules for CRS avoidance schemes

Responding to a request by G7 finance ministers to develop rules based on the approach in BEPS Action 12, the OECD has issued new model disclosure rules.

The new rules require lawyers, accountants, financial advisors, banks and other service providers to inform tax authorities of any schemes they put in place for their clients to avoid reporting under the OECD/G20 Common Reporting Standard (CRS) or prevent the identification of the beneficial owners of entities or trusts. They also require the reporting of structures that hide beneficial owners of offshore assets, companies and trusts.

www.oecd.org/tax/game-over-for-crs-avoidance-oecd-adopts-tax-disclosure-rules-for-advisors.htm

Business Taxation

Trade carried on a commercial basis

Summary – The use of a grand Tuscan villa to run a 'hospitality at home' business had been carried out on a commercial basis.

In 2003, Jonathan Beacon bought a dilapidated villa in Tuscany. In 2006, once he had acquired legal title under Italian law, he restored the property with the intention being to operate a 'hospitality home', where stays in the villa were tailored to the exact requirements of each guest. Restoration was completed in 2012 with some guests having stayed from 2010.

Unsurprisingly, Jonathan Beacon suffered losses in 2010/11 and 2011/12 and claimed relief against his general income. HMRC denied the relief on the ground that the trade carried out was not on a commercial basis with a view to profit. HMRC argued that he had bought the villa to use as a home in addition to his business venture and that the prices charged were below the commercial rate.

Jonathan Beacon appealed.

Decision

The First Tier Tribunal said that it was not unusual for bed and breakfast business owners to also occupy their property. Jonathan Beacon occupying his villa as a home did not preclude the trade from being carried out on a commercial basis.

Customer testimonials had been used by the Tribunal to conclude that he had carried out his trade adopting ordinary prudent business principles but had suffered as a result of the 2008 recession.

The appeal was allowed

Jonathan Beacon v HMRC (TC06362)

Partnership payments tax deductible?

Summary – The First Tier Tribunal struck out an appeal on the ground that the taxpayers had no reasonable prospect of succeeding in establishing that large payments to employees were tax deductible.

A number of partnerships and LLPs had entered into disclosed DOTAS arrangements, claiming tax relief for large payments of several hundred million pounds that they had made.

HMRC submitted that there was no reasonable chance of the partnerships establishing that the payments were tax deductible and so the appeals should be struck out. They argued that little evidence had been provided to explain why such large payments, in respect of restrictive undertakings given by employees who performed administrative roles for relatively small salaries, in connection with small businesses, were commercially justified.

Decision

The First Tier Tribunal stated that the payments of several hundred million pounds were made in relation to employees on modest salaries, whose duties were primarily administrative. The businesses were conducted on a modest scale. Even if the employees had the right to compete with the taxpayers' businesses after they left, the loss to the partnerships could only ever be modest. The restrictive undertakings endured for just 6 months after the employment ceased. Those factors alone strongly suggest that the payments were not in respect of the restrictive undertakings and were, instead, were part of a tax avoidance arrangement. The Appeal was struck out.

The First De Sales Limited Partnership, Twofold First Services LLP, Trident First Services LLP & Trident Second Services LLP v HMRC (TC06365)

Payment by an investment platform

Summary - Loyalty bonus payments made to investors were not annual payments as they were not pure income profit *in the recipient's hands but rather* a reduction of his net cost

Hargreaves Lansdown Asset Management Limited is a 'platform service provider' providing a platform for the distribution to investors of investment products offered by different fund providers as well as administration services to investors.

In 2013, HMRC announced that from April 2013 financial intermediaries making certain payments to investors must deduct basic rate tax at source. Hargreaves Lansdown Asset Management Limited considered that this did not apply to the paying 'loyalty bonuses' to investors. Given the substantial number of investors receiving such payments, and the relatively small amounts per investor, HMRC and Hargreaves Lansdown Asset Management Limited reached an agreement, intended to avoid the necessity of multiple appeals. Under that agreement, Hargreaves Lansdown Asset Management Limited retained an amount equal to the basic rate of income tax on the payments to investors, and HMRC assessed Hargreaves Lansdown Asset Management Limited for that amount under s957 ITA 2007. Hargreaves Lansdown Asset Management Limited appealed against the assessment.

Decision

The First Tier Tribunal observed that case law had established a number of characteristics of an annual payment, the last of which was that payments must be 'pure income profit', The Tribunal found that once the investor had made his investment in a fund through Hargreaves Lansdown Asset Management Limited, they did not need to do anything more of substance in order to satisfy the non-withdrawal 'condition' and receive the relevant loyalty bonus. The requirement to maintain the investment (or maintain it at a minimum level) did not suffice to prevent the loyalty bonus from being pure income profit.

However, the Tribunal also found that the nature and quality of a loyalty bonus payment was not that of a 'profit' to an investor, but a reduction of his net cost. The terms and conditions, and the marketing material made it clear that a schedule of charges applied to any investment in a fund. The loyalty bonus was unlike an annuity payment or interest, in respect of which a recipient 'need do nothing but sit back and receive the payments'.

Hargreaves Lansdown Asset Management Limited v HMRC
Adapted from Tax Journal (23 March 2018)

Research and development tax relief for SMEs

The deadline for businesses to make amended claims for reimbursed employee expenses under revised guidance on staff costs in CIRD83200 has been extended from 31 January to 30 April 2018 .

www.gov.uk/guidance/corporation-tax-research-and-development-tax-relief-for-small-and-medium-sized-enterprise

EC highlights harmful tax practices

The EC's 2018 'European semester winter package' has identified harmful tax practices in seven EU member states.

Ireland: Absence of anti-abuse rules for the exemption from withholding taxes on dividend payments made by companies based in Ireland.

Luxembourg: Absence of withholding taxes on royalty and interest payments and the lack of some anti-abuse rules.

The Netherlands: Absence of withholding taxes on dividend payments by co-operatives, the possibility for hybrid mismatches using the limited partnership, absence of withholding taxes on royalties and interest payments, and the lack of anti-abuse rules.

Belgium: Patent box and delay in transposing ATAD into national law.

Cyprus: Tax rules on corporate tax residency, absence of withholding taxes on dividend, interest and royalty payments by Cyprus companies, risks associated with the design of Cyprus's notional interest regime, and the lack of anti-abuse rules.

Hungary: Relatively high capital inflows and outflows through special purpose entities having little or no effect on the real economy, absence of withholding taxes on dividend, interest, and royalty payments made by companies based in Hungary, and patent box.

Malta: Planned notional interest deduction regime, absence of withholding taxes, and the lack of anti-abuse rules.

EU updates tax havens blacklist

The EU has added the Bahamas, Saint Kitts and Nevis, and the US Virgin Islands to its list of non-cooperative jurisdictions. Three jurisdictions, Bahrain, the Marshall Islands and Saint Lucia, have been moved to the lower-risk category of 'subject to close monitoring'.

www.consilium.europa.eu/en/press/press-releases/2018/03/13/taxation-3-jurisdictions-removed-3-added-to-eu-list-of-non-cooperative-jurisdictions/

EU reporting rules for tax planning intermediaries

ECOFIN ministers have agreed the European Commission's proposal for new disclosure and reporting rules for intermediaries, such as tax advisers, accountants and lawyers, involved the design and promotion of 'aggressive' cross-border tax planning schemes.

The new reporting requirements, introduced through an amendment to the administrative cooperation directive, will apply from 1 July 2020, with member states obliged to exchange information every three months.

The final version of the directive includes a revised hallmark for payments to connected companies in low-tax jurisdictions, which will now apply to jurisdictions with a zero or 'almost zero' corporate tax rate, removing references linking the hallmark to a rate lower than 35% of the average corporate tax rate in the EU.

Five hallmarks will define what is potentially an aggressive tax planning scheme:

1. generic arrangements such as those in which the intermediary is entitled to receive, for example, a fee based on the amount of the tax advantage derived from the tax scheme;

2. specific hallmarks linked to the 'main benefit test' of obtaining a tax advantage;

3. cross-border transactions between related parties, designed to exploit jurisdictions where the corporate tax rate is zero, or 'almost zero';

4. any scheme designed to circumvent EU legislation or agreements on automatic exchange of information; and

5. schemes not conforming to the arm's-length principle or the OECD's transfer pricing guidelines.

www.consilium.europa.eu/en/press/press-releases/2018/03/13/corporate-tax-avoidance-agreement-reached-on-tax-intermediaries/

Common corporate tax base and digital permanent establishment

Common corporate tax base

MEPs have voted to approve directives to establish the common corporate tax base (CCTB) and the common consolidated corporate tax base (CCCTB) across the EU from 1 January 2020. Both should be implemented at the same time. The CCCTB will apply to groups with revenues exceeding €750m, although this threshold would be lowered to zero over a period of seven years. The amended proposal introduces a fourth factor to the formula for distributing taxable profits between member states within the consolidated tax base: collection and use of personal data of online platforms and services users. The other three factors, as contained in the original proposal, were: labour; assets; and sales by destination.

Digital permanent establishment

The draft directives introduce criteria for defining a ‘digital permanent establishment’, to ensure that companies with a significant digital presence receive similar tax treatment to those with physical permanent establishments.

‘Digital permanent establishment’ is defined in the draft directives as: ‘a significant digital presence of a taxpayer that provides services in a jurisdiction directed towards consumers or businesses in that jurisdiction’. A taxpayer will have a digital presence where its business involves ‘a digital platform or any other business model based on the collection and exploitation of data for a commercial purpose’.

This will amount to a digital permanent establishment where the platform generates revenue in excess of €5m from remote transactions in the non-resident jurisdiction and any of the following conditions is met:

- the platform has at least 1000 registered users outside the jurisdiction in which the business is resident for tax purposes; or
- at least 1000 digital contracts per month have been concluded with customers in the non-resident jurisdiction in a taxable year; or
- the volume of digital content collected by the taxpayer in a taxable year exceeds 10% of the group's overall stored digital content.

The parliament's amendments will now be passed on to the Council and Commission for their consideration.

www.europarl.europa.eu/news/en/press-room/20180309IPR99422/meps-approve-new-eu-corporate-tax-plan-which-embraces-digital-presence

Dealing With Non-Resident Landlords In 2018 – Income tax (Lecture B1066 – 9.02 minutes)

These notes deal with the current tax regime where non-resident individuals own property in the UK which is being let out. We shall call these people "Non-Resident Landlords" (NRLs).

NRLs can be individuals, Trustees or companies. These notes will concentrate on the rules as they apply for individuals.

A NRL need not be someone who is non-UK resident under the Statutory Residence Test. The NRL rules apply where an individual's "usual place of abode" is outside the UK which means that the individual lives abroad for at least 6 months of the year. It is very possible for someone spending less than 6 months of the year in the UK to be UK resident for tax purposes; however the NRL Scheme would still apply.

Income Tax

NRLs pay UK income tax on profits from the letting of land and buildings in the UK.

Profits from a UK property business are determined under normal commercial business principles being rents receivable less expenses attributable to the letting.

However for 2017/18 onwards, deductions for mortgage interest payments are restricted such that part of the interest cost is disallowed and replaced with a 20% tax reducer in the individual's income tax computation. This has been discussed in previous lectures and will not be expanded on here. Suffice to say that the same rules apply irrespective of the residence status of the landlord.

NRLs will receive a UK personal allowance only if they are UK resident or (if not) they are British citizens, Crown employees or citizens of an EEA state (the latter may of course change under Brexit).

Tax withholding:

The NRL Scheme requires letting agents and tenants to deduct basic rate tax (currently 20%) from rents paid to the landlord and to pay the tax deducted to HMRC. Tax is accounted for on a quarterly basis for 3 month periods ended on 30 June, 30 September, 31 December and 31 March.

Tenants paying rent of less than £100 a week directly to a NRL do not have to withhold tax. This limit applies per tenant (therefore if 2 tenants rent a property from a NRL for less than £200 per week, no tax needs to be deducted). However where 2 or more people occupy a property but only one of them is the tenant under the lease, the threshold is £100 per week only.

There is no such lower rent limit for letting agents.

Expenses paid by the agent or tenant on behalf of the landlord during the quarter can be deducted from rents in order to calculate the tax to be withheld. The letting agent or tenant can deduct expenses where they are “reasonably satisfied” that the expense they have incurred on behalf of the landlord will be an allowable deduction in computing his taxable profits. This will typically include cleaning, utility costs and repair and maintenance expenditure incurred by the agent or tenant. It will also include the letting agent’s own fees retained by the agent out of the rents.

If expenses in a quarter exceed rents, no tax is withheld for that quarter. The excess expenses are then carried back and deducted from rental payments made to the same landlord in previous quarters during the same NRL Scheme year (taking later quarters first). Any excess expenses remaining after carry back are then carried forward when calculating the tax withholding for the following quarter. Carrying back excess expenses triggers a “repayable amount” which can be set against tax due or is repaid by HMRC.

Application for gross payment:

Letting agents and tenants are not required to deduct income tax at source from rents paid to a NRL if HMRC has informed them in writing that the landlord has been approved to receive the rents gross.

NRLs who want to receive rents without tax deductions should complete and file a form NRL1i. Applications cannot be made any longer than 3 months before the NRL leaves the UK (HMRC will not consider applications made before that date).

The NRL1i asks for:

- Contact details (name, address, contact number etc);
- Personal information, such as a tax reference, most recent Tax Office and a NI number;
- How long a landlord will live outside the UK; and
- Information about any UK properties rented out.

HMRC will approve applications where the NRL1i is correctly completed, the NRL's UK tax affairs are up to date and HMRC has no reason to believe that the NRL will not comply with his future UK tax obligations as regards reporting his property business profits. The NRL is notified of the approval. If a letting agent or tenant is named on the application form, HMRC will send a copy of the approval to that agent or tenant authorising them to pay rents without deduction of tax. Approval typically applies from the first day of the quarter in which the application is received by HMRC.

Approval does not mean that rents are exempt from UK tax. Approval simply gives NRLs a cash-flow advantage in that tax will be paid at a later date. HMRC can withdraw approval if the NRL fails to comply with his tax obligations (or HMRC has reason to believe he will no longer comply).

Where a NRL changes his letting agent or there is a change of tenant (where there is no agent), the authority to pay rents without deducting tax does not automatically transfer to the new agent or tenant. In this case the landlord should inform HMRC of the change and HMRC will send an authority notice to the new agent or tenant. Until this new notice is issued, tax should be deducted from any rents paid.

Registration

The NRL Scheme is not voluntary and all tenants of NRLs and letting agents acting on behalf of a NRL must comply. Registration responsibilities are however slightly different.

Lettings agents must register with HMRC no later than 30 days from the date on which they are first required to operate the Scheme (being 30 days from the beginning of the first tenancy). This includes letting agents who are authorised to pay rents to NRLs without deduction of tax.

Registration is normally made online by submitting for NRL4i. Lettings agents should supply their name, address, Tax Office and tax reference number (a contact name and telephone number is also requested). HMRC then provides a registration number to be used in future correspondence and on the quarterly and annual returns.

Tenants do not have to operate the Scheme if they pay rents to a letting agent in the UK. Otherwise tenants must register with HMRC. Tenants do not register using form NRL4i. Instead tenants should write to HMRC at Personal Tax International in Bootle.

Annual and quarterly returns:

Letting agents and tenants are also required to make annual and quarterly returns to HMRC declaring how much rent they have collected on behalf of the landlord and the tax they have withheld.

The quarterly return form NRLQ, together with payment of tax due, must be submitted to HMRC's Accounts Office, Shipley within 30 days of the end of the quarter. Interest is charged on tax paid late. Where a tax payment is not required for a quarter, there is generally no need to complete a quarterly return.

Letting agents and tenants are also required to send an annual rent report to HMRC on form NRLY. The report details rent payments and tax deductions for the NRL Scheme year to 31 March and is due by the following 5 July. Letting agents and tenants should also complete certificate NRL6 for the landlord detailing the tax withheld and paid on behalf of the landlord for the year to 31 March. This enables the landlord to complete his SA return. All forms are downloadable from the HMRC website.

NRLs themselves do not have special tax returns and instead the NRL will simply declare his rental income and expenses on the UK Property pages (SA105) of their annual self-assessment return. NRLs can credit any tax withheld at source by the letting agent or tenant against any tax liability. Any excess tax deducted will be repaid.

The maximum penalty for failing to make a return or filing an incorrect return is £3,000. This can be mitigated based on normal mitigation factors such as disclosure, degrees of culpability and extent of co-operation.

Joint owners

Where a husband and wife jointly own a property and both have their usual place of abode outside the UK, each is treated as a NRL in his/her own right and the NRL Scheme applies to each of them separately. Each spouse must therefore make a separate application to receive their share of rents gross. Letting agents and tenants should only pay rents gross to the spouse for whom an authority is held.

If one spouse normally lives in the UK and the other does not – for example one spouse is working overseas while the other stays behind in the UK – the NRL scheme only applies to the spouse living abroad. Rents can therefore be paid gross to the spouse living in the UK without any specific authority.

Finally

The NRL Scheme places a large responsibility on a tenant who is renting a property from an overseas landlord. One should expect professional letting agents to be aware of their responsibilities but the Scheme is harsh for tenants as it places an onerous burden on individuals who may not have the tax knowledge to accurately comply with the Scheme. But as people often say to me when I raise these things: "It is what it is". Yes it is but it is still harsh.

Contributed by Steve Sanders, Tolley Tax Training

Dealing With Non-Resident Landlords In 2018 – Capital Gains Tax

(Lecture B1067 – 14.51 minutes)

Before April 2015, individuals who were not tax resident in the UK were (with some very minor exceptions) not chargeable to UK CGT even in respect of assets situated in the UK.

Since April 2015 we have the non-resident capital gains tax (NRCGT) rules which make non-residents liable to UK CGT on disposals of UK residential property.

Unlike the NRL Scheme for income tax, the NRCGT regime only applies to individuals who are non-UK resident for tax purposes under the UK statutory residence rules. For non-resident landlords who are UK resident, gains on property disposals are chargeable to CGT under basic principles with gains being equal to sales proceeds less historic base cost. Special NRCGT returns are not required as the gains are disclosable on the annual SA return in the usual way.

Non-resident capital gains tax (NRCGT)

Since April 2015, non-resident NRLs are liable to UK CGT on disposals of UK residential property under the NRCGT regime.

Gains or losses are normally calculated by reference to the 5 April 2015 value of the property although taxpayers can elect to calculate gains either by time apportionment either side of 5 April 2015 or by a "retrospective method" using historic base cost. Taxpayers with NRCGT gains can claim an annual exempt amount. CGT is charged at the residential property rates of either 18% or 28% (depending on the level of the individual's UK taxable income in that year). Losses are ring-fenced and can only be set against NRCGT in the same or future tax years.

As a planning point for British NRLs intending to sell a UK property, contracts should ideally be signed while the NRL remains non-UK resident rather than once he has returned home. This way the disposal falls into the NRCGT regime and benefits from April 2015 rebasing. Pre-2015 gains will therefore be eliminated.

The good news is that NRCGT returns coming through seem to suggest that UK property prices were quite buoyant in April 2015 and have flattened a little since then with NRCGT gains being relatively modest (although that could of course be down to clients being bullish with their 2015 valuations). The NRCGT yield will naturally increase as UK property prices rise over time.

PPR relief

PPR relief is available to reduce NRCGT gains where the taxpayer has lived in the property as their only or main residence at some point during the period of ownership. This will apply to NRLs who leave the UK to live abroad, let out their home for a period of time and then sell it whilst still non-UK resident.

PPR is calculated by reference to the period of occupation over ownership with only the post April 2015 period being considered (unless the retrospective method of calculating the gains is chosen in which case we start counting from the actual date of acquisition). The last 18 months of ownership will always count as a period of occupation for PPR as long as the taxpayer had lived in the property at some point, even if this was before April 2015.

Anti-avoidance legislation exists to prevent non-residents from nominating a UK property to be their only or main residence in order to secure PPR. From April 2015, a UK residential property owned by a NRL will only qualify for PPR relief if the NRL meets the "day count test" in relation to the property. This test requires the individual or their spouse / civil partner to spend at least 90 days in the property in the tax year. These days need not be consecutive and can be fulfilled by either spouse (although naturally the same day cannot be counted twice). If the day count test is not satisfied for a tax year, that year is a non-qualifying year for PPR and the whole tax year is then treated as a period of absence.

In reality the 90-day test is not likely to trouble many NRLs given that a) spending 90 days in the UK will increase the probability of triggering UK residence under the "sufficient ties" arm of the SRT and more practically b) if a NRL has been letting out the property he is unlikely to have been able to spend 3 months a year living there himself.

In reality most NRLs who have been letting out their former homes since April 2015 will be able to claim PPR on NRCGT gains for the last 18 months only. But given that the regime is only 3 years old, this is sufficient in itself to exempt at least half of the gains arising in this period even before deducting the annual exemption (which may go some way to explain the very modest tax yields which have so far been harvested from this regime).

Note also that if a NRL is able to benefit from PPR relief (even for the last 18 months only), extra help may be claimed in the form of lettings relief which exempts gains in the period since April 2015 during which the property was let (up to a maximum of £40,000).

PPR relief must be claimed via the NRCGT return.

NRCGT returns

An online NRCGT return must be filed within 30 days of the completion of the purchase (there is an exception for no-gain-no-loss disposals such as transfers between spouses). The return is required whether or not there is any resulting CGT liability. Therefore even in cases where PPR relief wipes out the post-2015 gains, a return should still be filed.

The NRCGT compliance system is very unpopular. Many commentators (even Tribunal Judges) have said that the NRCGT return system is poorly thought-through by HMRC and not fit-for-purpose. Third-party evidence suggests that up to one-third of all NRCGT returns due since April 2015 have been submitted late or not at all (yes you read this correctly – one in three). That is not indicative of a system which taxpayers understand.

The high failure rate suggests that many NRLs are blissfully unaware of their UK CGT obligations which is hardly surprising given that the target population do not live in the UK and are not likely to be reading the UK tax press or following HMRC on Twitter. More pertinently not all solicitors and conveyancers dealing with non-resident vendors are as up-to-speed with NRCGT as perhaps they ought to be.

Tax practitioners should be more aware of their responsibilities (and many of course are) but the problem is that our non-resident clients often do not inform us of the disposal until the time comes for preparing their SA return (an annual obligation which is on the client's radar). This could be a full 12 months or more after the due date for the NRCGT return. For example, a property disposal in May 2016 should have been followed by a NRCGT return in June 2016 but our client only tells us about this in January 2018 when the time comes for us to complete his 2016/17 SA return. Already the NRCGT return is a year late. The disclosure of the UK property disposal on the SA return thereby triggers a NRCGT late-filing penalty.

If the individual does not file a self-assessment return, any CGT due has to be paid at the same time as the NRCGT return is filed. Individuals within the SA system have longer to pay the tax - they can wait until the 31 January following the year of the disposal. Not only does this give SA taxpayers a cash-flow advantage over non-SA taxpayers (which cannot be equitable), it also means that a husband and wife (or an unmarried couple for that matter) who have sold a jointly-owned property could have different CGT payment dates, a point which is a) often overlooked and can lead to interest charges and b) plain daft.

Penalties

HMRC's approach to the imposition of NRCGT penalties has come in for much criticism.

The penalties for the late filing of NRCGT returns are in line with late filing penalties for other types of return. The penalties are as follows:

- Initial penalty of £100 in all cases;
- Further penalty of 5% of the tax due or £300 if greater for returns over 6 months late;
- Further penalty of 5% of the tax due or £300 if greater for returns over 12 months late.

The penalties apply regardless of whether there is a CGT liability. These penalties can be appealed if there is a 'reasonable justification' for the return being late. Regular readers will know how easy this one is to prove.

However, taking a wider view for a moment, penalties - like parking tickets - are meant to "encourage taxpayers to comply with their obligations and to act as a sanction for those who don't" (HMRC Powers Review 2015). They are not meant to be a revenue raising tool (like parking fines, at least not officially). "We don't use penalties as a way of raising revenue" is a HMRC statement which is pretty categorical.

Example

Felix, a non-resident client, sells a UK property in November 2016. The sale is arranged by a conveyancer in the UK who gives him no specific tax advice. Felix however is an honest citizen who is aware of his UK self-assessment obligations and duly discloses the details of the sale to you in January 2018 as part of his 2016/17 SA submission. The SA return is filed in January 2018 disclosing the gain.

You ask him whether an NRCGT return has been filed and receive the expected response. This is hastily rectified. No CGT is payable on the disposal due to a combination of factors (ie, the modest increase in value between April 2015 and November 2016, a sprinkling of PPR relief and the annual CGT exemption). There is no attempt by Felix to mislead HMRC or avoid UK tax. There is after all, no tax to avoid.

HMRC duly issues a penalty notice in the sum of £700 as the NRCGT return is over 12 months late. As ignorance of the law is not accepted as a reasonable excuse, any appeals against the penalty notice will fall on deaf ears. So through no real fault of his own – apart from failing to stay up to date with changes in UK tax law as publicised on Gov.uk (incidentally all written in English which is not Felix's first language) – Felix is faced with a penalty which is massively disproportionate to any 'offence' he is deemed to have committed. One could argue that he might have been better off not saying anything to anyone (after all he does live thousands of miles away). Instead he has been penalised for his compliance.

The position could have been worse had HMRC not bowed to representations by taxpayers and the professional bodies and removed the daily penalties for NRCGT return failures which they previously impose. The £10 per day penalties for returns filed between 3 and 6 months late will no longer be issued. If your clients have been charged these daily penalties, you should ask for them to be repaid. This could be worth £900.

To date a substantial proportion of the government's modest NRCGT yield (some have suggested somewhere in the region of 35-40%) has come from penalties, many of which will have been levied on taxpayers who believed (not unreasonably) that it was sufficient to simply include details of their NRCGT gains on their annual SA return.

Instead we need to explain to our non-resident clients that they have incurred a hefty penalty for failing to file a pre-return return returning details of the disposal which at some point later needs to be returned on a different return. If we put it this way, the whole thing seems very British and frankly a little silly.

Rachel McGreevy v HMRC (2017)

The issue of the fairness of NRCGT penalties came to a head in September 2017 in the case of Rachel McGreevy.

The taxpayer (RM) was resident in New South Wales, Australia. She disposed of a UK property on 7 July 2015. The NRCGT return was filed on 7 August 2016. The gain was shown to be exempt because of PPR relief so the CGT payable per the return was nil. This was not disputed.

HMRC subsequently wrote to RM on 6 September 2016 stating that the NRCGT return was late and she was liable for penalties in the sum of £1,600. This was made up of fixed penalties of £700 and daily penalties of £900. The taxpayer duly appealed against the penalty notices on the grounds that she understood that CGT in the UK is payable as part of the annual self-assessment which she makes annually as a non-resident in good faith. It was not until she read the SA section associated with CGT that she became aware that a specific CGT return was due within 30 days of the sale. This had never been advised to her previously. She duly complied without further delay. The penalty charged was therefore grossly unfair.

The taxpayer's appeal was rejected on the grounds that she did not have a "reasonable excuse". It was the taxpayer's responsibility to file a NRCGT return on time and all the relevant information advising taxpayers of this requirement was clearly publicised on the Gov.uk website. HMRC later withdrew the £900 daily penalties (in line with their change in policy) but their Reviewing Officer upheld the decision to charge the fixed penalties of £700 on the basis that information about NRCGT was well within the public domain and widely available on the internet (the Reviewing Officer specifically referenced the Autumn Statement in December 2013 which heralded the introduction of NRCGT). The Reviewing Officer said that the taxpayer should have taken the necessary steps to fulfil her UK tax obligations and that was required to give notice of her chargeability and failed to do so.

The taxpayer appealed to the FTT and the case was heard in September 2017.

As HMRC were clearly relying on the fact that a taxpayer's NRCGT responsibilities were "clearly publicised", the Tribunal took the trouble to research this statement. Forgive my indulgence here but some of the Judge's comments in this regard are worthy of sharing with you and I hope you enjoy them as much as I did. I have shortened them a little in the interests of space. Take it away Judge Richard Thomas:

"I am sure that every December the appellant, like many other inhabitants of Roselle, New South Wales, Australia, has been agog with excitement waiting for the British Chancellor of the Exchequer's Autumn Statement…..The contention by HMRC that the new legislation had been announced in the Autumn Statement and was seriously advanced as a ground for denying that the taxpayer had a reasonable excuse for not knowing about the NRCGT return deadlines, is a prime example of the concept of "nerd-view". Only a small coterie of people obsessed by tax would admit that the Chancellor's Autumn Statement on tax matters is something that should register in anyone's consciousness.

HMRC seem to be suggesting that the appellant should have been knowledgeable about the law in this area, where in my view the subject matter is arcane, difficult to follow and counter intuitive. I consider I have a better than average grasp of tax law and how it is constructed and interpreted. But as I have read Section 7A and 12ZA to 12ZI TMA and the NRCGT provisions in TCGA 1992, my eyes have glazed over and my senses reeled. Do HMRC really think that ordinary taxpayers even, or rather especially, non-residents, should be expected to understand Section 12ZH TMA on the interaction of NRCGT returns and Section 8 returns, or to understand the implications for late filing of NRCGT returns…..? The arguments advanced by HMRC about knowledge of the law are little short of preposterous. To say that information about NRCGT returns is well within the public domain is claptrap…. There is a serious deficiency exhibited here in common sense, proportion and an ability to consider the position of what HMRC calls its customers".

There is more but you get the picture (see UKFTT TC 06109 for the full unabridged judgement).

The Tribunal therefore found that the taxpayer had a reasonable excuse for not filing her NRCGT return on time and no penalties were due.

This decision and Judge Thomas's comments should give some hope to other taxpayers that the courts will give a sympathetic hearing to penalty appeals in relation to late NRCGT returns. So if you find yourself in this position, it is certainly worth quoting this case and asking for some common sense to prevail.

Inheritance tax

Finally, on a lighter note, death.

UK property owned by NRLs will be chargeable to IHT by virtue of its UK situs. NRLs who are not domiciled in the UK used to be able to protect their UK properties from IHT by wrapping them in some sort of offshore envelope – typically a non-UK company or offshore family trust – but this planning is now itself deceased from April 2017.

Claims for BPR by NRLs on let properties are unlikely to be successful as businesses which consist of the letting of land are strictly excluded from qualifying. Even satisfying the criteria for furnished holiday accommodation doesn't improve the BPR outlook following the recent cases of Mrs Pawson and Mrs Ross.

It may be possible to secure BPR if the NRL has a genuine bona fide trading company and that company owns the UK residential property (or properties) which are let out. As long as the company is "wholly or mainly" carrying on a trade (broadly meaning that more than 50% of its activities are trading activities), case law supports the view that the UK residential properties are used in the 'business' of the company ('business' carrying a different and less restrictive meaning to 'trade'). This is important as it would not then preclude the full value of the shares (even the bit represented by the UK properties) being eligible for BPR.

Contributed by Steve Sanders, Tolley Tax Training

Proposed changes for non resident corporate landlords (Lecture B1068 – 8.42 minutes)

When corporation tax was introduced in 1965, the UK profits of non-resident companies were included within new corporation tax regime while other UK sources income fell within the income tax and capital gains tax regime.

Non resident corporate landlords were liable to income tax on their rental profits and capital gains tax on any gains. More recently the rules have been amended so that non-resident corporate landlords have become liable to tax on ATED-related gains from April 2013, UK residential property gains from April 2015 and all UK property from April 2019.

Moving non-resident corporate property owners into the corporate regime

On 20 March 2017 the government published a consultation document seeking views on changing the way that the UK taxes rental income from UK property owned by non-UK resident companies, as well as gains on disposals of UK residential properties by certain non-resident companies. They proposed that non-resident corporate property owners should become liable to corporation tax on UK property income and gains.

This change would ensure that from April 2020:

- both resident and non-resident corporate landlords would be subject to the same interest restrictions and loss rules;
- non-resident corporate property owners would become liable to corporation tax rather than capital gains tax on the disposal of UK property. Gains would fall within corporate reporting and payment deadlines, replacing the current 30-day NRCGT rule.

Accounting periods

Under the new rules, there would be a deemed cessation of the UK property business at 5 April 2020 for income tax but with no balancing allowances or charges for capital allowance purposes. The first corporation tax period would start on 6 April 2020. If a non-resident company was already within the corporation tax regime then their property profits would be time apportioned around 5 April 2020.

The computational rules would be unchanged, adopting the accruals basis. Interest would be dealt with under the loan relationship rules, with a company having property profit, a loan relationship deficit with sideways offset of the deficit being available.

Corporation tax loss reforms

The new loss relief regime would not apply to losses that arose before the UK property business profits came within the corporation charge so thee would need to be ring fenced.

Once under the new regime:

- the first £5m of profits can be relieved in full; then only 50% of profits can be relieved by losses brought forward.

- brought forward losses and loan relationship deficits can be grouped provided they are not losses relating furnished holiday lettings.

The new interest restriction

From 1 April 2017 there is a £2m de-minimis exemption of net interest expenses to be shared by any worldwide group.

A non-resident company may qualify for exemption from the £2m restriction in respect of its third party debt for their UK property rental business.

Management expenses

A non-resident company holding an investment property may fall within the definition of an investment company.

HMRC are concerned that "management expenses" might be claimed in respect of assets that are not within the UK corporation regime and are looking to restrict the deductibility of such expenses to those that relate to UK chargeable assets only.

If a non-resident company ceases to carry on their UK property business then any unused property losses would not "convert" to management expenses and so would be lost.

Transitional provisions

Any unused losses to carry forward at 5 April 2020 would be computed under income tax principles but then available for use under the corporate regime against profits of the UK property business without restriction.

If the UK property business were to cease then any unused income tax property losses would be extinguished.

VAT

Collision damage waivers

Summary – Collision Damage Waiver payments were not made in respect of any supplies exempt from VAT under Items 1 or 4 of Group 2, Schedule 9 VATA 1994.

Supercar Drive Days Limited provides driving experiences in expensive high-powered ‘supercars’. The company sells vouchers, either direct to the public through its website or via intermediaries, such as Virgin Experience Days. Purchasers of vouchers can either use them themselves or can transfer them to another person. A voucher can be redeemed for a supercar driving experience – i.e. the opportunity to drive one or more expensive high-powered cars on a race track, accompanied by qualified instructors, with the vehicles fitted with dual control pedals.

Under the terms and conditions:

> ‘The Buyer of the voucher is liable for the first £2500 plus VAT of any damage beyond normal wear and tear to each and every vehicle or other item of equipment supplied for the Experience by Supercar Drive Days Ltd., arising out of any act or omission of the Participant.
>
> The Buyer shall not be liable under the terms where the Participant has opted to take out Collision Damage Waiver.’

The issue in this case was whether the waivers qualified for exemption under the insurance provisions.

HMRC said that, in the absence of specific supplies of insurance underwritten by a registered insurer, they considered the supplies in exchange for the collision damage waiver payments to be taxable.

The company appealed.

Decision

The First Tier Tribunal said that whilst the practical effect of making the Collision Damage Waiver payment might be similar to purchasing insurance, they considered the legal nature of the transaction to be crucially different because it simply varied the potential liability of the Buyer under, and in accordance with, the original contract.

The Tribunal did not consider the arrangement to amount to insurance at all (whether applying the English law or EU law tests) and so it followed that it could not amount to an ‘insurance transaction’ for the purposes of the VAT exemption.

The appeal was dismissed.

Supercar Drive Days Limited v HMRC (TC06311)

What is a timeshare?

Summary - The supply of a right to occupy a residence up to a maximum number of nights per year was an exempt supply of land.

Fortyseven Park Street Ltd owned a 60-year lease expiring on 31 October 2050, on 47 Park Street in Mayfair, a property which had formerly been an hotel. In 2002, the company refurbished the property and created 49 self-contained apartments or ‘residences’, divided into five categories based on the number of bedrooms, additional facilities and approximate floor space.

Fortyseven Park Street Ltd sold Fractional Interests in the residences with each buyer acquiring the right to occupy a residence for a maximum number of nights in each year until 31 October 2050. The buyer could also exchange stays at the property for stays in other properties.

The company argued that it provided exempt licences to occupy land while HMRC contended that members did not acquire any right to occupy a residence as owner but only an opportunity to occupy a residence. They also claimed that even if a member acquired an exclusive right to occupy a residence, the services provided at the residences went beyond the passive supply of land.

Decision

The Upper Tribunal found that the supply was the grant of a right to occupy which could be exercised by the making of a reservation. This right to exclusive occupation lasted for the given period, whether or not the member was in residence. It was therefore a letting of immovable property as described in Temco (Case C-284/03).

The Tribunal, like the First Tier Tribunal, said that members were paying solely for the right to occupy the residences. In order to obtain other benefits, members had to pay an additional 'annual residence fee' to a third party provider. Fortyseven Park Street Ltd was not liable to provide these additional services. The company supplied only immoveable property.

It was accepted that the company provided sleeping accommodation and that the setting of the accommodation was of the nature of a small boutique hotel, making 47 Park Street a 'similar establishment' to a hotel. The First Tier Tribunal had concluded yes. However the Upper Tribunal disagreed saying that the supplies were for a long-term right to occupy a reserved residence during the relevant periods. This right could be sold, used as security or as a guarantee for a loan to fund the purchase of the fractional interest, or turned to account through the optional rental programme. This was not a supply of hotel accommodation. The supplies were exempt supplies within the meaning of Item 1 of Group 1 of Sch 9 VATA 1994

Fortyseven Park Street Ltd’s appeal was allowed.

Fortyseven Park Street Ltd v HMRC [2018] UKUT 41

Nesquik powders are not food

Summary – The supply of Nesquik strawberry and banana milkshake powders were not zero-rated under VATA 1994 Sch 8 Group 1.

Nestlé UK Ltd produces Nesquik powder. When added to milk, this powder produces strawberry or banana flavoured milk. The powder contains strawberry or banana flavouring as well as sugar, vitamins and minerals.

HMRC had refused a repayment claim made by Nestlé, stating that the strawberry and banana Nesquik were standard rated products.

Decision

The Upper Tribunal noted that Parliament had had a clear intention that milk 'and preparations and extracts thereof ' should be zero-rated, but there was no obvious intention to zero rate products added to milk. They noted that ice creams were specifically excluded from zero-rating as were protein powders that are added to milk (excepted item 4A).

The Tribunal stated that the wording of group 1 required a step-by-step approach whereby milk was zero-rated but a powder designed to be added to milk was not.

The appeal was dismissed.

Nestlé UK Ltd v HMRC [2018] UKUT 29

Validity of penalty notice

Summary - A penalty notice issued under VATA 1994 could be valid even though it failed to mention the taxpayer's entitlement to request a review.

The underlying dispute related to whether a Jersey incorporated company, NT ADA (formerly NT Jersey Limited), was within the scope of UK VAT for supplies made to UK-based customers.

The First Tier Tribunal had struck out the appeal on the ground that HMRC had failed to comply with the requirements of s83A VATA 1994 relating to the offer of a review, and that this failure invalidated the decision to impose the penalty. Following that decision, HMRC had cancelled the original penalty but still appealed to the First Tier Tribunal on the basis that the issue raised was of general importance.

It was accepted that s 83A imposes an obligation on HMRC to offer a review in respect of an appealable decision, and to do so at the same time as notifying the decision. The key question of principle raised by the appeal was whether a failure to offer a review in accordance with s 83A affects the jurisdiction of the First Tier Tribunal to consider an appeal.

Decision

The Upper Tribunal found that whilst it is clear that Parliament did intend that a person receiving an appealable decision should be offered a review, there is nothing in s 83A that supports the proposition that failure to do so renders an assessment invalid, invalidly notified, or not capable of appeal. The Upper Tribunal said that the drafting suggests that the decision and the offer of a review exist independently. Consequently, a breach of the obligation to review does not preclude an appeal against the decision.

The decision highlighted the difference between VATA 1994 and TMA 1970 when it comes to the required contents of a penalty notice. Whilst the absence of an offer to review may invalidate a penalty issued under TMA 1970, this will not be the case under VATA 1994. By contrast, when s 83A was inserted into VATA 1994, no provision was added providing that a decision, or notice of it, must itself contain an offer of a review.

HMRC v NT ADA Limited [2018] UKUT 0059 (TCC)

Blocked input tax for builders

Summary - Input tax recovery on appliances installed by property developers was blocked on all the items except for extractor hoods.

Taylor Wimpey built new homes, installing white goods, such as built-in ovens, hobs, extractor hoods, washing machines, etc. in those properties. The basis for Taylor Wimpey's claims was that the restrictions in legislation on the deductibility of input tax on expenditure on certain goods incorporated in a new dwelling supplied by way of a zero-rated supply, described as "the Builder's Block", did not apply to their items.

The Upper Tribunal had previously decided ([2017] UKUT 34, that white goods wired in and attached by screws to the kitchen units, the work surface or a kitchen unit door, or to the kitchen wall, were fixtures, incorporated into the building and so subject to the 'block'. White goods that were merely plugged in, or were plugged in and attached to the water supply and drains, were not fixtures. However, an item incorporated into a building could nonetheless be excluded from the block by being 'ordinarily installed as fixtures'.

A number of outstanding issues remained open following this decision in February 2017. In this case the Upper Tribunal had to decide whether items, which were not fixtures, were nonetheless fittings and incorporated into the building.

Decision

The Upper Tribunal found that items may be free-standing but still be installed fittings by being fitted into a kitchen in a location where they can reasonably be expected to remain and not be moved on a regular basis. They gave the examples of wired and plumbed-in washing machine and a wired and plumbed-in dishwasher would be installed fittings. Stand-alone washer driers and tumble driers would likewise be installed fittings if either they were attached in a non-temporary manner to ventilation or were installed in a location with some reasonable expectation of permanence, in the sense of the expected working life of the appliance. In the Tribunal's view claim items that are placed in a space in a kitchen designed or intended to accommodate those items, are installed as fittings and are to be regarded as incorporated in the building for the purposes of the Builder's Block. In this case, they concluded that all of the claim items were either fixtures or installed fittings, and so were incorporated in the buildings for the purposes of the Builder's Block.

Having decided that the items were incorporated into the buildings they moved on to consider whether those items could be excluded from the block by being 'ordinarily installed as fixtures'.

The Tribunal decided that the test was one of ordinariness or commonness. The question was one of judgment, having regard to the evidence as to the relative frequency of installation by builders of the item in question at the date when the right to input tax deduction would arise. However, there were existing provisions that expressly applied the builder's block to specific items, even if these items were ordinarily installed at the relevant time. Other issues necessarily narrowed the Tribunal’s analysis of 'ordinarily installed', such as the fact that input tax was recovered in relation to microwaves during the relevant period. As a result, the only item that needed a decision was the extractor hoods. Where te Tribunal found that extractor hoods were ordinarily installed by builders as fixtures for the purpose of the exclusion from the builder's block.

Taylor Wimpey plc v HMRC [2018] UKUT 55 TCC

Adapted from case summary in Tax Journal (9 March 2018)

MTIC fraud – did the company know?

Summary - HMRC had not proven that Synectiv Ltd should have known that it was taking part in transactions connected with missing trader intra-community (MTIC) fraud.

The Upper Tribunal had allowed Synectiv Limited's appeal against the First Tier Tribunal’s decision that the relevant individual, Mr Chandoo, should have known that the transactions involving mobile phones were connected with MTIC fraud. The decision had been set aside and remitted to a differently constituted tribunal.

Decision

The burden of proof was on HMRC. It was not enough to show that the trader should have known that he was running a risk that a transaction might be connected with fraud, or even that it was more likely than not that it was so connected; it must be shown that he should have known that he was taking part in such a transaction.

The Tribunal said that a number of features relied upon by HMRC were capable of legitimate explanation. Back to back trading was a common feature in commodity markets and it was a feature of back to back trading that arbitrage dealers did not acquire stock but exploited price differentials. Similarly, Synectiv Limited's lack of physical contact with the goods was justified; it was clearly preferable for the goods to be kept in a secure facility.

The Tribunal said that, in view of the known fraud risk, a prudent businessman would have carried out further enquiries to check the credit worthiness of customers. Although it retained title until it was paid, it was still taking a risk that it would be left with unsold stock. However, the Tribunal observed that:

1. Synectiv Limited had been trading in the sector for some time and had developed many contacts with counterparties and so this was not a case of being contacted out of the blue by a supplier and customer;

2. The phones traded were actually exported;

3. The volume of the transactions was in line with Synectiv Limited's prior transactions;

4. The pricing was generally explicable.

HMRC had not established that the company should have known that it was taking part in transactions connected with fraud.

The appeal was allowed.

Synectiv Limited v HMRC (TC06350)

Adapted from case summary in Tax Journal (9 March 2018)

College was not a university

Summary - a college providing qualifications recognised by universities did not fall within the education exemption.

Essex College provided tertiary level education courses, leading to accredited Edexcel qualifications recognised by universities. The college treated two thirds of the fees charged to students as standard rated services and one third as zero-rated supplies of books.

HMRC considered that the college made single standard rated supplies as students were unable to buy the elements separately.

The college argued that it made exempt supplies of education. They argued that the term 'university' in Group 6 note 1(b) should have a broad meaning for VAT purposes informed by the term 'university education' in the principal VAT directive art 132(1), which was itself given a wide meaning in Haderer (Case C-445/05).

Decision

The First Tier Tribunal held that the students were charged a single fee that may have included the supply of books and so the college was making single supplies.

The Tribunal rejected the college's argument that its supplies should be treated as exempt under the principal directive art 132(1)(i). They noted that the exemption is limited to the provision of education by bodies governed by public law or recognised by member states as having 'similar objects'. Member states have a discretion to set the conditions for such recognition, and the UK had done so by listing eligible bodies.

Essex International College Limited v HMRC (TC06343)

Sale of development site

Summary - The sale of a building was standard rated as it did not fall within Schedule 8 Group 5 VATA 1994.

Cavendish Green Limited sold a development site in Surrey arguing that it was zero rated for VAT as it fell within Schedule 8 Group 5 VATA 1994. They argued that the sale constituted a first grant by a person 'constructing a building designed as a dwelling, of a major interest in, or any part of, the building or its site'.

At the time of sale, a garden wall had been constructed and nothing more. Was this 'constructing a building designed as a dwelling'?

Decision

The First Tier Tribunal found that the garden wall was an integral part of the overall design, and concluded that the company were 'constructing a building designed as a dwelling'.

However, Note 2(d) to Group 5 requires that statutory planning consent must have been granted in respect of the dwelling and its construction must have been carried out in accordance with that consent. The Tribunal found that there was no express planning consent, so that the construction of the wall could only be a permitted Class A development under The Town and Country Planning (General Permitted Development) Order 1995 if it did not exceed two metres. The First Tier Tribunal had found that the wall exceeded two metres and the Upper Tribunal was not prepared to consider fresh evidence to the contrary.

The appeal was dismissed.

Cavendish Green Limited v HMRC [2018] UKUT 0066 (TCC)

Partial exemption **(Lecture B1069 – 14.41 minutes)**

The challenge for a partly exempt business is to allocate its expenses into three different input tax categories:

1. Taxable input tax – expenses relate wholly to taxable sales and can be fully reclaimed, subject to normal rules.

2. Exempt input tax – expenses wholly relate to exempt activities – no input tax claim here subject to de minimis considerations (below)

3. Residual input tax – sometimes described as 'the pot' – and relates to mixed costs or general overhead items e.g. telephone bills, accountancy fees, website costs, premises costs i.e. expenditure relevant to both parts of the business. A proportion of this input tax can be claimed, usually based on the standard method of calculation based on income:

$$\text{Residual input to claim} = \frac{\text{Taxable sales (excl VAT)}}{\text{Taxable sales (excl VAT)} + \text{Exempt sales}} \times \text{Residual input tax}$$

This fraction is rounded to the next whole percentage if unattributed input tax is not more than £400,000 per month, so for example, 60.1% would be rounded to 61%.

If the unattributed input tax is more than £400,000 per month, the fraction is rounded to 2 decimal places.

Sale of capital goods used in business and anything which is not the normal sales of the business are excluded from the calculations.

Partial exemption special methods

Businesses can apply for a special method of apportioning residual input VAT between taxable and exempt supplies if it gives a fairer allocation than the standard method.

Examples include:

- output values
- numbers of transactions
- staff time or numbers
- inputs or input tax
- floor area
- costs allocations
- management accounts

HMRC can impose particular methods or stop a business using an existing special method but generally only where they believe there is abuse.

Partial exemption de minimis tests since 1 April 2010

Original test – exempt input tax is less than £625 a month on average; and also less than 50% of total input tax (exempt input tax consists of input tax directly relevant to exempt supplies plus the proportion of residual input tax that is not claimed);

Simplified Test One - total input tax incurred is no more than £625 per month on average and the value of exempt supplies is no more than 50% of the value of all supplies;

Simplified Test Two - total input tax incurred less input tax directly attributable to taxable supplies is no more than £625 per month on average and the value of exempt supplies is no more than 50% of the value of all supplies.

The simplified tests supplement the original test. A business is de minimis if it passes Test One, Test Two or the original test, and if it passes any one test there is no need for it to consider the other two.

A partial exemption calculation is made at the end of each VAT period, and superseded by an annual adjustment to the end of March, April or May each year, depending on the VAT periods of the business in question.

Example

A partially exempt trader has the following information for his VAT year ended 30 April 2017:

	Q1	Q2	Q3	Q4
Taxable sales	40,000	75,000	25,000	60,000
Exempt sales	10,000	25,000	5,000	40,000
Attributed to exempt supplies:	1,200	2,400	700	3,100

Input VAT on exempt supplies in Q1 and Q3 is less than £1,875 (i.e. £625 per month on average) can be recovered in those quarters' VAT returns.

Input VAT attributed to exempt supplies in Q2 and Q4 cannot be recovered in their respective VAT returns.

The annual calculation will have total input VAT on exempt supplies of £7,400.

As this is less than £7,500 per annum it can all be recovered so there will be an adjustment to recover the £5,500 input VAT from Q2 and Q4

Contributed by Malcolm Greenbaum

Partial exemption – Queens Club case (Lecture B1070 – 12.02 minutes)

Partial exemption will always be one of the most difficult aspects of the VAT system. It is intended to be a black and white subject with logical outcomes but the reality is that there are many shades of grey to confuse the issues. These shades of grey can sometimes involve hundreds of thousands of pounds of VAT and put immense pressure on advisers and business owners to make correct decisions regarding input tax allocations.

And this fact was highlighted in the recent FTT case of London's international tennis club Queens Club Ltd (TC6119), about whether input tax could be fully reclaimed on the renovation costs of its restaurant. HMRC said 'no'…..the taxpayer said 'yes'……and the court agreed with the taxpayer. My main concern is that an important FTT case a couple of years asked the same question in relation to bar expenditure at a golf club Bedale Golf Club Ltd (TC4619). HMRC said 'no'......the taxpayer said 'yes'…..and the court agreed with HMRC.

Principles of partial exemption

If a business has some income that is exempt from VAT and some that is taxable, then it is a partially exempt trader and needs to apportion its input tax into three categories. Don't forget that there is a big difference between zero-rated and exempt sales. A zero-rated sale is a 'taxable' sale with VAT being charged at 0% whereas an exempt sale does not charge VAT.

The three categories of input tax are: taxable, exempt and residual. Taxable input tax is relevant to an expense that wholly relates to taxable sales and can be fully claimed; exempt input tax wholly relates to exempt activities and is input tax blocked; residual input tax relates to ‘mixed costs’ ie relevant to both taxable and exempt activities or general overheads of the business such as accountancy fees and telephone bills.

A proportion of residual input tax can be claimed, usually based on the standard method of calculation based on income splits for the period in question. The percentage claimed is as follows: Taxable sales divided by Taxable plus exempt sales (all figures exclude VAT).

The percentage figure is rounded up to the nearest whole number as long as the total residual input tax figure is less than £400,000 per month on average (VAT Notice 706, para 4.7). The end result is that a business that has most of its sales as taxable will claim more residual input tax than a business with a high proportion of exempt income. That is the intention of the legislation.

So to give an easy example, if Queens Club purchase beer and wine for their bar, the input tax can be fully claimed. This is because the expense is directly related to taxable sales ie the onward sale of the stock to club members and guests enjoying a drink after a hard fought game of tennis. The relevant phrase that has stood the test of time is “direct and immediate link”. But if the Club spend money on grass and fertiliser for the courts, then no input tax can be claimed if all of the income from the courts relates to exempt playing fees (exempt by VATA1994, Sch 9, Group 10).

Queens Club facts

The Club is internationally recognised as a top tennis facility (the phrase “world class” was used in the case report on more than one occasion). Members pay an annual fee of £1,820 to join and play tennis and there is a ten-year waiting list for new members. The Club argued that members were only interested in the tennis playing faciltiies when they joined, and not the quality of the catering and bar facilities. So the upgrading of the café to a restaurant was wholly relevant to taxable supplies argued the Club ie sales of food and drink to members and guests using the facility. HMRC concluded that the costs were “residual” for input tax purposes, ie partly relevant to the exempt membership fees of tennis players because the restaurant is a benefit of membership. But the court disagreed.

Bedale Golf Club facts

The input tax in this case related to repair costs for the lift at the clubhouse, new curtains for the bar and lounge area and repair of bar furniture as well. The taxpayer claimed that all items of expenditure were wholly linked to the taxable bar and dining areas which were exclusive to the first floor ie the same argument successfully put forward by Queens Club. HMRC ruled that the costs were also linked to ‘exempt’ golf club membership because the bar was a benefit of membership.

The assessing officer’s view was that the first floor bar area was “part and parcel of the running and benefit of the club as a whole.” All parties were agreed that there was no specific exempt income generated by the first floor, which was wholly relevant to the bar and dining area. So surely the fact that no income was generated from the first floor must mean that input tax can be fully claimed and that the link with the playing membership is an indirect link?

Our challenge is to compare the thinking of the judges in both cases.

Court findings

In the Bedale case, a significant factor in the judge's thinking was that the bar was also used for non-eating and drinking purposes eg team meetings, AGMs etc.

> "Crucially, it is at least in part a meeting place for golfers to manage, coordinate and enhance their golfing activities. The same is true of the annual general meeting and, albeit to a lesser degree, trophy presentations and entertaining other teams. From an economic perspective, the availability of the bar and lounge area is an incidence of membership of the golf club as well as a place to buy food and drink."

A further comment was that the bar facilities "are part of an overall supply of exempt golf club membership, the consideration for which is the membership subscription."

So what was the thinking in the Queens case? The key question was whether there is a "direct and immediate link" between the restaurant and the decision of players to either become members or to renew their membership. The tribunal did not think this was the case and that members were only attracted to the 'world class' playing facilities of the club when they applied to join. The report even noted that the waiting list for potential members actually increased when the restaurant was closed while it was being upgraded.

In short, viewed objectively, what members obtain when they join the Club is a right of access to world-class sporting facilities together with such additional facilities as the Club decides, in its discretion, to offer. The focus is on the sporting facilities" (para 41).

Conclusions

The reality is that the courts returned different verdicts because Bedale Golf Club and Queens Tennis Club are two very different organisations. The bar was an attraction for members joining Bedale Golf Club but not for those joining Queens Club, who were only interested in the tennis. So if there was no link or use between the exempt tennis playing facilities and the restaurant, so the whole of the input tax on restaurant expenditure could be claimed as being relevant to taxable food and drink sales.

Contributed by Neil Warren

Split payment for online sales

HMRC is consulting until 29 June 2018 on 'split payment' as a means of preventing online VAT fraud. Under this system the supplier would receive the net amount, with the VAT element remitted directly to HMRC.

The government's view is that the supplier is likely to be the best party to effect the split of VAT from the gross payment (with card issuers or banks as fall back options).

During a setup stage, HMRC could create a list of fit and proper acquirers and payment service providers, which card issuers would check for each transaction, before deciding either to release the full payment, or make the split themselves. HMRC would then credit the supplier's VAT account with the amount received from either the acquirer, payment service provider, or the card issuer.

The amount of VAT to be split could be calculated in a number of ways: a standard rate split, flat rate scheme or net effective rate.

www.gov.uk/government/consultations/alternative-method-of-vat-collection-split-payment