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Personal tax

Outside the IR 35 rules

Summary –The First Tier Tribunal had erred when analysing the terms of the actual contract between the radio presenter and BBC. However, the Upper Tribunal still concluded that the correct hypothetical contract was not within the scope of the IR 35 rules.

Atholl House Productions Limited is the personal service company of Kaye Adams, a journalist and broadcaster. During 2015/16 and 2016/17 the company entered into two successive written contracts with BBC Radio Scotland, whereby the company agreed to provide Kaye Adams to present a radio show.

Atholl House Productions Limited was required to provide the services of Ms Adams as presenter of the Kaye Adams Programme for a minimum commitment of 160 programmes during the period governed by each agreement in return for a minimum fee of £155,000. If the BBC required Ms Adams's services for more than 160 programmes, Atholl House Productions Limited would be paid an additional rate. The services of Kaye Adams to the BBC were not exclusive but during the Term of the contract, the BBC had first call on her services subject to any prior commitments. If, in exceptional circumstances, Kaye Adams was not available for reasons beyond her reasonable control, Atholl House Productions Limited could provide a substitute to the BBC, provided that reasonable prior notice was given, and the BBC approved that substitute. The agreements gave the BBC a high degree of editorial control over the content of the programme that Ms Adams broadcast.

HMRC argued that the contracts fell within the intermediaries' legislation, and so the company should have accounted for PAYE and NIC on the receipts from the contract.

The First Tier Tribunal found in favour of Kaye Adams. The Tribunal saw no need to distinguish between the two contracts as they contained 'materially the same terms'. The Tribunal concluded that the actual terms of the contract came from both the written agreement and the conduct of the parties and so the terms of the actual contract would be the same as the hypothetical contract. The First Tier Tribunal concluded that Kaye Adams was in business on her own account. She had over 20 years' experience as a freelance journalist and the BBC's engagement only amounted to between 50% and 70% of her annual income. The Tribunal concluded that there was a contract for services and that no employer-employee relationship existed between BBC and Kaye Adams.

HMRC appealed to the Upper Tribunal.

Decision

The Upper Tribunal concluded that the First Tier Tribunal had erred in law. When looking at the actual contract and applying the principles from *Autoclenz v Belcher*, the terms in the written contract were the only ones that should have been considered. The First Tier Tribunal were wrong to conclude that the actual terms of the contract came from the written agreement as well as the conduct of the parties and so were the same as the hypothetical contact.

The Upper Tribunal found that the First Tier Tribunal had given too much weight to factors from outside the contract.

However, the Upper Tribunal went on to consider the hypothetical contract, which could carry additional terms not found in the actual contract. Here, the Tribunal applied the *Ready Mixed Contract* tests, concluding that based on the mutuality of obligation and control tests, the presenter would have been an employee. At this point, it seemed that HMRC were going to win the appeal. However, the Upper Tribunal moved on to consider other relevant factors. Based on Kaye Adam's other work and her income profile, she was carrying on a business on her own account. The activities of this business and the BBC contract were similar and so the Upper Tribunal found that the hypothetical contract did not fall within IR35 and dismissed the appeal.

HMRC v Atholl House Productions Limited [2021] UKUT 0037 (TCC)

National Minimum and Living Wage **(Lecture P1247 – 17.30 minutes)**

Introduction

The National Minimum Wage (NMW) and National Living Wage (NLW) must be paid to all workers who are eligible to receive it. Note that this is about workers, not employees, and this is a big issue currently due to the decision in the Uber case in the Supreme Court. There has also recently been a key decision relating to care workers.

NMW is paid to workers in the United Kingdom aged 16 – 24 and NLW is paid to workers of 25 and above although the point at which NLW applies is going down to 23 from 1 April 2021.

It is an issue because HMRC are becoming more aggressive in the way they address NMW and NLW failures and it is important to remember that HMRC can go back up to 6 years to address underpayments. Employers who fail to comply can be named and shamed and there are significant financial penalties.

The notes will now refer to NLW but it applies to both, unless otherwise noted.

Rates of NLW/NMW

	Workers aged 23+ (25+ prior to 1 April 2021)	Workers aged at least 21 but under 23 (25)	Workers aged at least 18 but under 21	Workers aged under 18	Apprentices under 19 or in first year
From 1 April 2021	£8.91	£8.36	£6.56	£4.62	£4.30
From 1 April 2020	£8.72	£8.20	£6.45	£4.55	£4.15

How is this calculated?

The NLW legislation considers the worker's average wage over their pay reference period which looks at how much they have earned and divides it by the number of hours they have worked. Various factors can affect the calculation and how the calculation works depends on the type of worker that someone is. It is the responsibility of the employer to keep sufficient records to show that they are paying the NLW.

As noted above, NLW is paid to workers. Employees will fall within this definition and it is now clear from the Uber decision that many persons working within the gig economy will actually be workers too which is a major headache for many engagers within that sector of the business community. Any person with a right to work in the UK who is providing a service for reward on a contractual basis is likely to be a worker.

NMW applies to apprentices. An apprentice for NMW purposes is someone employed under an approved apprentice scheme or engaged under a contract of apprenticeship. This is an important point as the apprenticeship rate is lower.

There are some anomalies. For example, members of the armed forces are not entitled to receive NLW. Volunteers are unlikely to be workers so do not fall within these provisions but then if they receive cash or non-cash rewards you need to be careful that they do not become workers. Company directors are not entitled to NLW unless they have an employment contract. Someone doing work experience may not be a worker but it will depend on what they are actually doing as 'work experience' covers a lot of different experiences in reality. HMRC have been looking very closely at some intern schemes.

What is included a pay?

We look at the pay reference period and this is the period that each payment covers – so could be weekly, monthly, four-weekly etc.

The amounts included are:

- Basic pay;
- Incentives;
- Bonuses;
- Commission.

The amounts not included are:

- Overtime premiums;
- Shift premiums;
- Tips;
- Regional or unsociable allowances;

- Benefits.

There is also the accommodation offset which is where accommodation is provided or rented out by the employer and comes with the job. There is an accommodation offset rate which is £8.36 (daily rate) or £58.52 (weekly rate) from 1 April 2021 with the equivalent figures in the previous year being £8.20 and £57.40. The impact is as follows:

- if accommodation is provided free, the offset rate is added to wages;
- if accommodation is charged at less than offset rate, no offset rate applies and the charge does not affect the pay;
- if accommodation is charged above the offset rate, the excess is deducted from wages.

Apart from the accommodation offset, what else is deducted in calculating the pay?

You have to deduct amount paid by workers for items connected with their job but not where the items are private or for the worker's benefit. This is another significant grey area.

What is included in working hours?

This can be a difficult area and some of the recent failures have been around this point. You must include time working, travelling between appointments, time on call at work or onsite but unable to work. You do not include breaks, private commuting, rest periods, industrial action and leave. We will discuss some of the key issues on this below.

Calculating the wage

There are four types of workers for the purposes of calculating the wage under the NLW regulations:

- paid by the hour (known as time work);
- paid an annual salary under a contract for a basic number of hours each year (salaried hours);
- paid by the piece (output work);
- paid in other ways (unmeasured work).

Time work

This is probably the easiest one to consider as the worker is paid for the number of hours they work so as long as the average hourly rate is more than the NLW then the employer is compliant. You look at each pay period.

Example

Workers in a call centre are paid for the number of hours they work each month. Geoff works in the call centre. He is 22 and is not an apprentice. He works a total of 140 hours during the month of January. How much should he be paid?

The NMW for a worker aged 22 in January 2021 is £8.20 so he should be paid £1,148.

Annual salary

This applies where someone is paid an annual salary in equal weekly or monthly amounts with agreement to work a set number of hours each year under the contract. You work out the wage by finding the hours to be worked per year, dividing this by the number of times they get paid in a year and divide this by the amount they get in each pay package.

Example

Nikki's contract says she must work 2,040 hours each year. She is 25 and not an apprentice. She gets paid monthly on the last day of the month. What does she need to be paid in order for the employer to be compliant with NLW?

Each pay packet covers an average of 170 hours (being 2,040/12) and so she must be paid at least £1,514.70 each month from 1 April 2021.

Although it seems like the most likely option, it is important to note that HMRC will rarely accept that workers are salaried. Here is an example. Lindsey is a class assistant at her local primary school and her basic hours are 35 hours per week but sometimes she works more hours if the teachers need more assistance. The school tries to allow her time off if this happens but this is not a formal process and it is agreed that she almost inevitably works more time that she is contracted to. In this case, HMRC might argue that she is not really working set hours.

Piece workers

If workers are paid per task or piece of work they do, they are classed as doing output work. Output work is usually only applicable in limited situations where the employer does not know the hours worked, such as where they are working from home. A time worker must be paid at the least the minimum wage for every hour worked or on the basis of a fair rate for each task or piece of work they do.

The fair rate is the amount that allows an average worker to be paid the minimum wage per hour if they work at an average rate. There is a way to work out the fair rate per piece of work done which employers must follow.

- Find out the average rate of work per hour (tasks or pieces completed). This must be done by testing some or all of the workers – if a group is tested it must be typical of the whole workforce. This must be redone if the work changes significantly.

- Divide it by 1.2 (this means new workers won't be disadvantaged if they're not as fast as the others yet).

- Divide the relevant minimum wage rate by that number to work out the fair rate for each piece of work completed.

Example

Workers are paid for each shirt they make. A fair rate test shows that workers can produce on average 12 shirts per hour. Felicity is 25 and is not an apprentice. How much must she be paid per shirt to meet NMW requirements?

The average rate of 12 is divided by 1.2 to make 10. The rate of NLW for Felicity is £8.91 from 1 April 2021. She must be paid at least 89p for each shirt she makes (£8.91/10)

Unmeasured work

This is work that is not covered by any other calculation. You have to record every hour worked and make sure the NLW is paid for every hour worked. You can agree a typical number of hours per day but this must be agreed in writing and be a realistic assessment of the hours worked.

Example

Frank is paid weekly and is 31. His agreed daily average number of hours is 6. In a particular week he works 3 days. How much should he be paid in order to meet NLW requirements?

He should be paid 3 x 6 x £8.91 = £160.38.

Problem areas recently seen with HMRC compliance

1. Accommodation offset

As noted above, there is an accommodation offset where the employer provides the accommodation as part of the job. The regulations clearly state that the accommodation offset relates to payment the employer is entitled to receive. The writer is currently dealing with a case involving a hotel where the shareholders/directors of the company have private flats which they rent out to staff in the hotel which is reported as private rental income by those individuals. The HMRC officer is arguing this is treated as provided by the employer as they are connected and whilst it states that in the HMRC guidance, it is unclear where it states this in the actual legislation. There is also no reference to provision of accommodation in the employment contract. However, HMRC are still arguing that the accommodation offset applies.

2. Software not identifying when workers moved to 16

In the same case above, there are some workers who do a few shifts but are aged under 16 where the software did not check the point at which they reached that age and therefore fell within the NMW.

3. Hours worked eg security checks, compulsory meetings

There have been a number of well-publicised cases recently where staff have been treated as working where they were not paid for that time. Sports Direct insist on security checks for all staff on entering and leaving the distribution hub and this was shown to take around 20 minutes a day – it should have been paid as work. Argos has a staff meeting one a week for 30 minutes which was previously unpaid but should not have been. For businesses such as these where staff are likely to be at minimum wage levels in the first place, this makes a big difference.

4. Sleep in shifts

The Supreme Court have just published a decision involving Mencap relating to the NLW implications of sleep in shifts where an individual is expected to be asleep for most of a shift although they might be woken up and have to perform duties. They found that it is only the time when the individual is awake and performing duties that count for NLW purposes. This is a huge decision as the care sector would have been significantly hit if this had been found against them. This only covers those who are woken only occasionally and not those for whom there is an expectation that they will be awake for much of the night.

5. Deductions for uniform etc

Wagamama was recently hit in relation to uniform costs. Front-of-house staff are required to wear black jeans or skirt with a branded Wagamama top. The top was provided but other items had to be purchased and it was decided this represented purchase of a uniform so it should be deducted from wages for NLW purposes.

Contributed by Ros Martin

Enhanced protection warning ignored

Summary – Despite extensive publicity and repeated letters advising him to seek independent advice, the taxpayer took no action to protect himself against the Lifetime Allowance charge. HMRC were within their rights to reject his late application for Enhanced Protection.

In 2003, Robert Bateson converted an existing Small Self-Administered Scheme to a Self-Invested Pension Plan (SIPP) with Suffolk Life.

Suffolk Life wrote to him in December 2005, March 2006 and November 2008 informing him of the forthcoming pension taxation changes, including the introduction of the lifetime allowance and the action that needed to be taken by a taxpayer by 5 April 2009 to protect themselves against the Lifetime Allowance charge.

In 2017, having engaged a new advisor, he was advised that he had a Lifetime Allowance problem and should apply late for Enhanced Protection, which he did by application dated 3 November 2017. HMRC refused the claim, stating that he had not shown that he was unable to obtain advice or to investigate the position for himself and he should have acted on the earlier warnings received from Suffolk Life.

Robert Bateson appealed against HMRC's refusal of a late claim for enhanced protection. He argued that he believed that the value of his pension fund of £700,000 was too low to be affected by the new Lifetime Allowance and that this was a reasonable excuse for his failure to make the claim by the 5 April 2009.

Decision

The First Tier Tribunal stated that the letters from Suffolk Life were clear and Robert Bateson had been repeatedly and adequately warned that he needed to review his personal situation in the light of the changes and should do so before the deadline. Further, the new rules had been extensively publicised and HMRC was under no obligation to inform individual taxpayers about the consequences of changes in legislation.

The Tribunal concluded that Robert Bateson had not acted as an 'objectively reasonable taxpayer in his situation'. His appeal was dismissed.

Robert Anthony Daniel Bateson v HMRC (TC0813)

HICBC hits basic rate taxpayers (Lecture P1248 – 10.11 minutes)

The Low Incomes Tax Reform Group, who describe themselves as 'a voice for the unrepresented', recently pointed out that the threshold for the high income child benefit charge (HICBC), which was introduced in 2013, needs to rise in order to prevent it hitting basic rate taxpayers in 2021/22. They say that, if this happens, it will be contrary to the original policy intent.

The high income child benefit charge is imposed on an individual who is, or whose partner is, in receipt of child benefit and whose 'adjusted net income' (see S58 ITA 2007) exceeds £50,000 in a tax year. If both partners have an adjusted net income in excess of £50,000, the charge falls on the partner with the higher income. The amount of the charge is 1% of the child benefit for every £100 of income above £50,000. If the individual's adjusted net income equals or exceeds £60,000, the charge is on the full amount of the child benefit received. The child benefit itself remains tax-free, but the charge effectively claws back this sum in arriving at the individual's tax liability.

Illustration 1

In 2020/21, James has an adjusted net income of £56,000. James and his wife have two young children. James' wife does not work. The weekly child benefit entitlement for James' wife is:

	£
First child	21.05
Second child	13.95
	35.00

The child benefit received by her in 2020/21 is 52 x £35 = £1,820. Based on James' adjusted net income, the relevant clawback percentage is 60%. James' high income child benefit charge is therefore 60% x £1,820 = £1,092. This sum is added to his income tax liability for 2020/21.

The personal allowance and higher rate threshold have been announced for 2021/22:

	£
Personal allowance	12,570
Ceiling of basic rate band	37,700
Higher rate threshold	50,270

In other words, this exceeds for the first time the £50,000 starting-point beyond which the high income child benefit charge bites. The Low Incomes Tax Reform Group therefore

suggest that this figure should be increased to £60,000 in order to 'compensate for eight years of inflation and rising wages'.

The Low Incomes Tax Reform Group also call for the figure at which child benefit is fully clawed back to rise from £60,000 to £75,000. Although they do not specify the point, this would also involve adjusting the appropriate clawback percentage formula in S681C ITEPA 2003.

The main purpose of this recommendation is to address the fact that families with children can face higher marginal income tax rates where they are liable to the charge. For example, in the case of a family with two children where the individual with the higher adjusted net income has, say, salaried earnings in the £50,000 – £60,000 range for 2020/21, the individual will suffer the following amounts for each additional £100 of income:

	£
High income child benefit charge (rounded down)	18.00
Higher rate income tax	40.00
Class 1 NICs	2.00
	60.00

This represents an effective rate of 60%. If the family have three children, the effective rate goes up to 67%.

Contributed by Robert Jamieson

Distribution to settlor's shareholders

Summary – Arrangements that diverted a distribution through a settlor interested trust in order to avoid the funds being taxable on the shareholders failed. The settlor company was controlled by the shareholders and, under the Ramsey principle, it was the settlor's shareholders who received the distribution made.

This was the lead case for several appeals whereby similar arrangements had been adopted.

Sharon Clipperton and Steven Lloyd were the sole shareholders and directors of Winn & Co (Yorkshire) Ltd. In order to avoid the income tax charge that would have arisen had dividends been paid directly by the company to its shareholders, the company put the following arrangements in place.

The company started by creating a new subsidiary, Winn Scarborough Ltd, and then subscribed for the following shares in that new company:

- 199 A shares;
- one B share;
- one further A share, paying a premium of £200,000 for that share.

The single B share was settled on trust for the mainly for the benefit of Sharon Clipperton and Steven Lloyd; the settlor company was entitled to receive a small amount of any income.

The additional A share was then cancelled, creating distributable funds in the company.

Winn Scarborough Ltd declared a dividend on the single B share now held in trust, with the bulk of this money was paid out by the trust to Sharon Clipperton and Steven Lloyd.

By retaining the B share, Winn Scarborough Ltd had an interest in the settled property, and as settlor, Sharon Clipperton and Steven Lloyd claimed that the income that they had received from the trust should be taxable upon the company (s.624 ITTOIA 2005).

Not surprisingly, HMRC disagreed and put forward two arguments for taxing the B share dividend on Sharon Clipperton and Steven Lloyd:

1. Following Ramsey, taking a purposive approach to the legislation, the dividend should be treated as a distribution to Sharon Clipperton and Steven Lloyd, as Winn Scarborough Ltd's shareholders; or

2. It was Sharon Clipperton and Steven Lloyd who had set up the arrangements and so it was them who were the settlors of the property. On that basis, under the settlements legislation, the income was taxable on them.

Decision

The First Tier Tribunal agreed with HMRC that they should take a purposive approach to the legislation. In previous years, Winn Scarborough Ltd had made annual distributions to the shareholders, resulting in income tax being payable. Neither Sharon Clipperton nor Steven Lloyd disputed that the main purpose of the arrangements was to avoid tax on the dividend.

The arrangements were carefully planned with the trust structured so as to ensure that Winn Scarborough Ltd retained enough income so as to fall under the settlements' legislation. There was no reason to pay a premium of £200,000 for a single A share, other than to fund the B share dividend that was subsequently paid. The Tribunal agreed that, following the Ramsey principle, Sharon Clipperton nor Steven Lloyd should be taxed on the distribution made.

Considering HMRC's second argument, the First Tier Tribunal concluded that the directors were not the indirect settlors of the trust, as they had not provided an element of bounty to another person. They were essentially providing a benefit to themselves.

Sharon Clipperton and Steven Lloyd v (TC07998)

Capital Taxes

Entrepreneurs' relief and a trust's qualifying beneficiary

Summary – The First Tier Tribunal erred in law. For trustees to be eligible for entrepreneurs' relief (now business asset disposal relief), a beneficiary must have been a qualifying beneficiary throughout the period of one year ending not earlier than three years before the disposal.

Since 2011, Ludovic, Rollo and Bruno Skinner had each held 32,250 C shares with full voting rights in DPAS Ltd. All three were officers of the trading company, and their shareholdings were sufficient to mean that they satisfied the entrepreneurs' relief personal company rules as individuals.

In 2015 all three individuals were given interests in possession under three settlements. Quentin David Skinner then gave 55,000 D ordinary shares in DPAS Limited to each of those settlements. Within four months of the trust acquiring the shares, the trustees disposed of the D Ordinary shares and claimed entrepreneurs' relief on the gains.

Entrepreneurs' relief is only available to an interest in possession trust if there is a disposal of trust business assets within the meaning of s.169J TCGA 1992. This states that throughout a period of one year ending (now increased to two years) not earlier than three years before the date of the disposal, the company is "the qualifying beneficiary's personal company" as well as a trading company, and "the qualifying beneficiary is an officer or employee of the company". A "qualifying beneficiary" is defined under s.169J(3) as an individual with an interest in possession under the trust.

The beneficiaries had held their interests in the settlements only for a few months before the disposal. The sole issue in this case was whether the individuals had to be qualifying beneficiaries throughout the one-year period or whether it was sufficient for the qualifying beneficiary to simply hold their interest in possession under the trust on disposal.

- HMRC argued the former and denied the entrepreneurs' relief claims, stating that the beneficiaries were qualifying beneficiaries for less than a year.

- On appeal, the First Tier Tribunal found in favour of the taxpayers, confirming that, to qualify for relief, a qualifying beneficiary only had to hold an interest in possession at the time of the trustees' disposal of the shares.

HMRC appealed to the Upper Tribunal.

Decision

The gain on disposal was the trustees' gain, rather than the gain of the life tenant beneficiaries. The legislation states that, with a joint election, the trustees are able to effectively transfer some or all of a qualifying beneficiary's entrepreneurs' lifetime limit for their benefit.

The Upper Tribunal believed that, for the trustees to be able to use the relief, Parliament had intended there to be an "enduring link between the qualifying beneficiary's business and the interest in possession in the trust enjoyed by the qualifying beneficiary". The Upper Tribunal concluded that this link was provided if there was a requirement in s.169J TCGA 1992 for the beneficiary to be a qualifying beneficiary throughout the one-year period mentioned in s.169J TCGA 1992 (4).

HMRC's appeal was allowed.

HMRC v The Quentin Skinner 2005 Settlement L, R and B [2021] UKUT 0029 (TCC)

Time limits for IHT collection **(Lecture P1249 – 7.28 minutes)**

Time limits: Income tax and CGT

Many tax advisers will be familiar with the time limits for HMRC to issue income tax or capital gains tax (CGT) assessments where (for example) income or gains have not been disclosed or have been under-declared.

For income tax and CGT purposes, there are four main time limits for HMRC to issue assessments:

1. Normal time limit of four years after the end of the tax year to which it relates (TMA 1970, 34(1));

2. Six-year time limit where a loss of tax has been brought about carelessly;

3. 12-year time limit where the lost tax involves an offshore matter or an offshore transfer which makes the lost tax significantly harder to identify (TMA 1970, s 36A);

4. 20-year time limit where the taxpayer brought about the loss of tax deliberately (TMA 1970, s 36(1), (1A)).

Separate legislation applies four, six and twenty-year assessment time limits for corporation tax purposes (FA 1998, Sch 18, para 46).

IHT clearance certificates

For inheritance tax (IHT) purposes, taxpayers (i.e. normally personal representatives and trustees) can apply to HMRC for a 'clearance certificate' on a form IHT30 (which can be downloaded from HMRC's website; tinyurl.com/HMRC-IHT30).

However, the application can only be submitted when the person liable for the IHT is sure, to the best of their knowledge, that there will be no further changes to the asset values submitted to HMRC, and that all material facts have been disclosed.

Furthermore, taxpayers generally need to wait at least two years from the transfer, although HMRC have discretion to consider a clearance application within the two-year period.

IHT time limits

The general rule is that there is no liability to pay additional IHT on any property after four years from the later of the date on which the payment (or for instalments, the last payment) was made and accepted, and the date on which the tax (or the last instalment) became due, where the tax attributable to that property was paid in accordance with an IHT account delivered to HMRC and the payment was made and accepted in full satisfaction of the IHT (IHTA 1984, s 240(2)).

However, if the loss of IHT was brought about carelessly (i.e. there is a failure to take reasonable care to avoid the loss), the time limit for recovering any additional IHT is six years.

An extended time limit of 12 years applies to IHT underpayments involving an offshore matter, or an offshore transfer that makes the lost tax significantly harder to identify (IHTA 1984, s 240B).

If the loss of tax was brought about deliberately, the time limit is extended to 20 years.

No time limit

The normal time limits for IHT mentioned above apply where an IHT return has been submitted to HMRC, and payment was made in full satisfaction of the IHT attributable to the return.

What if no IHT return has been submitted? The normal time limit in such circumstances is extended to 20 years from the date of the chargeable transfer. This time limit applies if the loss of tax was not brought about deliberately by the person liable for the tax, or by a person acting on their behalf (e.g. an agent) (IHTA 1984, s 240(6), (7)).

However, if no IHT return was submitted and the loss of tax was brought about deliberately, there is no time limit for HMRC to recover the tax underpayment.

Furthermore, HMRC guidance points out that a 20-year time limit generally applies if an IHT return was submitted but the return omitted an asset, where there is consequently an unpaid IHT liability in respect of that asset. However, if the omission, and therefore the loss of tax, was deliberate, there is no time limit for the recovery of the unpaid tax (see HMRC's Inheritance Tax manual at IHTM30462).

Contributed by Mark McLaughlin

No multiple dwellings relief

Two recent Tribunal cases both saw multiple dwellings relief denied on the grounds that the house and annexe were not suitable for use as single, separate dwellings, with the annexe lacking sufficient privacy or security from the main property.

In Edward And Clare Partridge v HMRC (TC07991) the taxpayers submitted an amended SDLT return, claiming multiple dwellings relief. Although initially allowed, following an enquiry, the relief was denied by HMRC. The couple bought the property to live in with their three children, planning that in the future, Clare Partridge's parents would move into the Annexe. The annexe had its own garden, entrance and kitchen area.

The Tribunal stated that a dwelling should accommodate the basic living needs of the occupant, giving them a degree of security and privacy. With no separated bathroom or living area, relief was denied. It made no difference that the couple were considering plans to make alterations to the property to portion off the bathroom from the hallway of the main house. The annexe was not suitable for independent living when bought.

In Andrew and Tiffany Doe v HMRC (TC08003), the couple bought a house with a separate annexe that shared a front door, a hallway and stairs. The annexe was on the first floor, separated from the main house by six steps and lockable doors. It contained a bedroom, bathroom and kitchen. Unlike the Partridge case, the sales particulars made reference to the main house and a separate annexe. The First Tier Tribunal rejected the taxpayers' argument. To prevent the annexe occupants accessing rooms in the main house, anyone living in the main house would need to lock each room whenever they left a room. There was insufficient privacy and security for anyone other than family members occupying both the house and annexe. The relief was denied.

SDLT on cash payment, not the annuity

Summary – SDLT was payable on the consideration paid to the vendor and not the 5% deposit plus annuity that was redeemed prior to completion.

David Hannah and Carla Hodgson entered into a contract to buy a residential property for £765,000 and paid a 5% deposit totalling £38,250.

Under the terms of the contract, the taxpayers could satisfy their obligation to pay the balance by granting an annuity to the vendors. Between contract and completion, the taxpayers did grant such an annuity agreeing to pay £383.84 a year, in perpetuity. However, under the terms of their contract, before completion they redeemed the annuity. On completion, the sellers received a cash sum of £726,750, the balance that was due.

David Hannah and Carla Hodgson delivered an SDLT return following the grant of the annuity and before completion, arguing that the consideration for the purchase was the 5% deposit plus 12 times the annual amount of the annuity (relying on s52 FA2003). If correct, no SDLT was payable.

For the purposes of completion, the taxpayers' solicitors prepared a completion statement showing the purchase price as £765,000, the payment of a deposit of £38,250 and a calculation of the sums required for completion on that basis. However, no SDLT return was delivered on completion.

HMRC issued a discovery assessment on the basis that the consideration was the full purchase price paid of £765,000 by completion, and sought to collect the additional tax, interest and a joint penalty.

The First Tier Tribunal found in HMRC's favour and so David Hannah and Carla Hodgson appealed to the Upper Tribunal.

Decision

The Upper Tribunal found that the effective date of the transaction was the date of completion, not the date the annuity was granted. The annuity was held on trust pending completion and the First Tier Tribunal was correct to find that the contract had not been substantially performed when the annuity was issued. There was no notifiable transaction on that date.

The Upper Tribunal concluded that consideration for the purchase of the property was the amount that was paid over following the outcome of all of the steps undertaken in the deal. The Tribunal stated:

> "The statutory provisions are interested in the overall economic outcome of the series of steps involved in the transaction and are not confined to the analysis of an individual step to the exclusion of the other steps. "

Selling the house for the 5% deposit plus the annuity was unrealistic. Everything to do with the annuity was "artificial, uncommercial and its cancellation … pre-ordained". It was clear from the contract that the annuity was held on trust for the taxpayers pending completion. Its grant was not consideration that was 'paid or provided' within FA 2003, s 44(5)(b). The Upper Tribunal concluded that the First Tier Tribunal was right to conclude that, on completion, the consideration for the purchase of the property £765,000.

The taxpayers had challenged the validity of the discovery assessment but the Upper Tribunal confirmed its validity. A hypothetical officer given with the relevant information could not have been reasonably expected to be aware of the insufficiency of tax.

Finally, the Tribunal confirmed the penalty imposed which had been arrived at on the basis that the inaccuracies were deliberate but not concealed.

The appeal was dismissed.

David Hannah and Carla Hodgson v HMRC [2021] UKUT 0022 (TCC)

Administration

Withdrawal of gross payment status disproportionate

Summary – The objective of the construction industry scheme is to ensure compliance, rather than impose a penalty for non-compliance. Withdrawal of gross payment status some eight years after the non-compliance, when the company was now fully compliant, would serve no purpose but rather create unnecessary work.

RMF Construction Services Ltd was incorporated and commenced trading in the construction industry in 2000. In 2011, following a Scheduled Review, HMRC identified three failures by the company during the period from 2 September 2010 to 2 September 2011. The company's Corporation Tax Return for the period ended 31 July 2010 was 431 days late and two Contractor's Returns were filed late by 78 and 34 days respectively.

Under the Construction Industry Scheme (CIS), payments to subcontractors can be made without deduction of tax only if the contractor meets strict compliance requirements. HMRC accepted the late Contractor's Returns were a genuine mistake but stated that the company had no reasonable excuse for the failure to submit the CT Return on time. HMRC withdrew Gross Payment Status.

HMRC's noted five additional failures during the period following their subsequent review, involving the CT return for the accounting period ended 31 July 2011 and the P35 due for the year ended 5 April 2012. Consequently, HMRC upheld their withdrawal of Gross Payment Status.

RMF Construction Services Ltd appealed to the First Tier Tribunal. The hearing was delayed as HMRC requested that this appeal be stayed behind another case, JP Whitter (Water Well Engineers) Limited v HMRC. This case was eventually decided by the Supreme Court some eight years later in HMRC's favour, with the taxpayer's gross payment status under the CIS being withdrawn.

RMF Construction Services Ltd accepted that HMRC's review was technically correct but argued that withdrawing gross payment status eight years later served no purpose. The company currently satisfied all of the requirements to be granted gross payment status and had done so for some years. If it were to apply for gross payment status now, it would be granted.

Decision

The First Tier Tribunal confirmed that it was common ground that RMF Construction Services Ltd had not met its compliance obligations and that the company were asking the Tribunal to consider the questions of staleness and proportionality.

The Tribunal noted that the reason for the eight year delay was that HMRC had requested that the appeal be stayed behind Whitter case and the Tribunal could find no reference to the issue of staleness in the legislation or the case law on this subject. The Supreme Court had stated that the tribunal should exercise some flexibility in the case of a limited and temporary failure. However, this did not apply here as a delay of 431 days in making a corporation tax return, together with the other failures around the same time, could not constitute a limited and temporary failure.

The Whitter decision made it quite clear that HMRC had no obligation, nor ability, to take into account the financial consequences of the withdrawal of gross status. However, given the significant lapse of time, the First Tier Tribunal stated that they should be able to consider whether or not the punishment of withdrawing gross status would be proportionate. The objective of the scheme was to ensure compliance and this had been "achieved by the mere threat of the withdrawal of gross status". Withdrawal of gross payment status some eight years later, at a time when the company was now fully compliant, would only create work. The company would reapply for gross status now and it would be granted. The punishment of withdrawing gross payment status would be disproportionate.

The appeal was allowed.

RMF Construction Services Ltd v HMRC (TC07995)

Dealing with information requests from HMRC (Lecture P1250 – 15.01 minutes)

This article considers information requests from HMRC in the context of an enquiry into a tax return. It focuses on HMRC's civil information powers at Schedule 36, Finance Act 2008.

Informal requests for information and documents

Information is an intrinsic part of a HMRC enquiry. Although the investigating officer has access to numerous information sources, he will seek further information, and documents, from the taxpayer as a part of the enquiry process.

HMRC should, generally, issue any information requests on an informal basis, at least initially. However, this cannot be guaranteed, and the inspector may start with a formal request (see below). Although an information request is usually sent with the opening letter from the officer, they can also be issued at other times of an enquiry, as the case progresses.

The first action on receiving the initial information request should be to establish from the client whether there is a disclosure to be made. It is far better from a case management perspective to take a pro-active approach if there is a disclosure to be notified to HMRC. A voluntary, albeit prompted, disclosure, will help to mitigate the position if penalties are in point, rather than having the inspector raise the question of a disclosure following a review of information or documents provided.

Advisers should consider the information request, and apply the rules, as they relate to a formal notice, to determine whether the officer is entitled to the items they are requesting. My view is that, if the adviser is satisfied that there is not a disclosure to be made, and the inspector is entitled to the items being requested, the information or documents should be voluntarily supplied to the inspector.

Officers should only be requesting information or documents that can be the subject of a formal notice. The onus is on advisers to make sure that officers are observing this requirement and ensure that they are not giving information or documents that the officer is not entitled to. To do otherwise can lead to claims against the adviser's professional indemnity insurance, particularly where the client suffers a loss.

Where the justification for the items cannot be established, the inspector should be asked to clarify. The comments, below, regarding formal requests in relation to deadlines, etc, equally apply to informal requests.

Formal requests for information and documents

The comments, above, about a pro-active approach equally apply if HMRC start with a formal information notice.

Although an informal information request can be made by telephone, particularly in the context of an aspect enquiry, a formal notice must be in writing. The issue of a formal notice should be avoided, if possible, because of the impact on the penalty position, if penalties are subsequently imposed.

The statutory position is that an officer of HMRC can issue a notice requiring a person to provide information or to produce a document if the information or document is "reasonably required" for the purpose of checking the taxpayer's tax position (Sch 36, para 1). There are separate provisions regarding information notices issued to third parties (Sch 36, para 2), and those relating to persons whose identity is not known (Sch 36, para 5).

What is "reasonably required" is a subjective condition, and there may be disagreement between the adviser and HMRC officer as to what items on the information request meet this criterion. If agreement cannot be reached, the officer may agree to "park" the request for disputed items and review the position later in the enquiry process. Ideally, this should be done prior to the issue of the formal notice. What is "reasonably required" is likely to change as the enquiry progresses.

Typical contentious items include statements and other items relating to private bank and building society accounts, and a director's bank statements requested in the context of a company enquiry.

The notice should specify the period for which the information or documents are required. This should relate to the tax return(s) under enquiry. However, the requirement that the information relates to the officer's ability to check the taxpayer's position means that the request is not restricted to historical liabilities. Advisers should be satisfied that any request for information or documents outside the enquiry period is justified or seek clarification from the officer.

Advisers should make sure that they adhere to any timetable for the provision of information, where that is considered reasonable. HMRC officers should, generally, be giving a minimum of 30 days to comply with any information request, and longer in relation to notices issued during December and January. In practice, that does not always happen, particularly with informal requests. Advisers should seek to agree an extension with HMRC, where necessary, for the provision of the information requested, or those items which are going to be provided.

It is prudent to review any items to be sent to HMRC, even where the client has not indicated that there is a disclosure to make, particularly where those items were not provided when the accounts or tax return was being prepared.

Advisers should be aware that an officer can ask the tribunal to approve the issue of a taxpayer notice (Sch 36, para 3(2)), subject to certain conditions (Sch 36, para 3(3)). This will have an impact on a taxpayer's right of appeal (see below).

Elements of an information request

If an adviser is to effectively deal with an information request, he must consider the various elements of a typical request. An information request will vary depending on the circumstances of the case, but there are common elements, which the adviser must consider:

- Who has the request been sent to?
- What taxpayer does the request relate to?
- What information has been requested (including the period covered)?
- What documents have been requested?
- How is the information to be presented, and where are the documents to be produced or made available (if specified)?
- What is the deadline for compliance?

Restrictions on formal notices

Aside from the "reasonably required" condition, there are various restrictions and safeguards on the issue of a formal information notice. The information or documents requested must be in the person's "possession or power" (Sch 36, para 18).

Other statutory restrictions apply to the issue of information notices, including where old documents are requested (Sch 36, para 20), where documents benefit from legal professional privilege (Sch 36, para 23), and certain information or documents relating to auditors and tax advisers (Sch 18, paras 24 to 26).

Appeals and penalties

The taxpayer has the right of appeal against a formal information notice. However, the right of appeal does not extend to statutory records, although there may be debate as to what constitutes statutory records.

There is a penalty regime to encourage compliance. Failure to comply with a formal information notice can render the person liable to an initial penalty not exceeding £300, against which there is the right of appeal. When an initial penalty has been assessed, a daily penalty of up to £60 a day can be imposed for each day that the failure continues (after the date the initial penalty has been assessed). There are other penalties that may apply, including for concealing, destroying or otherwise disposing of documents, or for providing inaccurate information in response to an information notice.

There have, as might be expected, been mixed outcomes when taxpayers have appealed, and sought clarification from the tribunal on the validity of an information notice. Where there is any doubt as to the nature of an information request, whether formal or informal, advisers are recommended to seek specialist advice. Ideally, this should be taken on receipt of the request, and before any information or documents have been provided to HMRC.

Contributed by Phil Berwick, Berwick Tax

Deadlines

1 April 2021

- Corporation tax due for periods to 30 June 2020 for SMEs not paying by instalments
- Multiple contractors to advise they wish to be treated as a single contractor for 2021/22

5 April 2021

- Pay unpaid class 3 NICs for 2014/15

7 April 2021

- VAT returns and payment due for 28 February 2021 quarter (electronic payment)

14 April 2021

- Quarterly corporation tax instalment for large companies depending on period end
- Submit forms CT61 and pay tax for the quarter ended 31 March 2021

19 April 2021

- PAYE, NICs, CIS and student loan liabilities due for month ended 5 April 2021 (cheque)
- PAYE due for quarter to 5 April 2021 if average monthly liability is less than £1,500

21 April 2021

- File online monthly EC sales list (Northern Ireland businesses selling goods)
- Supplementary intrastat declarations for March 2021
  - arrivals only for a GB business
  - arrivals and despatch for a business in Northern Ireland

22 April 2021

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

30 April 2021

- Companies House should have received accounts of:
  - private companies with 31 July 2020 year end
  - public limited companies with 31 October 2020 year end
- CT SA returns due for companies with accounting periods ended 30 April 2020

News

HMRC verifying 'new' grant 4 SEISS claimants

The CIOT has reproduced an announcement by HMRC stating that HMRC is contacting self-employed taxpayers who started trading during 2019/20, who may be eligible to claim the 4th and 5th SEISS grant SEISS.

This is an anti-fraud measure, under which HMRC is sending a letter to a number of these 'new' self-employed taxpayers, asking them to provide information to confirm their identity and business activity by uploading ID and three months' of business bank statements via a Dropbox link.

A copy of the letter being sent can be accessed via the link below. The letter explains that the taxpayer will be called from an unknown number and asked to provide their email address for HMRC to use to provide them with their Dropbox link. This link must be used within 2 days to upload the requested information. Failure to do so will mean taxpayers will not be able to claim the fourth SEISS grant.

What could possibly go wrong?

https://www.tax.org.uk/policy-technical/technical-news/self-employment-income-support-scheme-–-fourth-grant-–-hmrc

Pay as you grow: Repaying Bounce Back Loans

Applications for Bounce Back loans opened last May, and finally closed for new applications on 31 March 2021.

Under the scheme:

- small and medium-sized businesses have been able to borrow between £2,000 and 25% of their turnover, up to a maximum amount of £50,000;
- there are no fees or interest to pay for the first 12 months but after 12 months the interest rate will be 2.5% a year;
- the government guarantees 100% of the loan.

Initially the repayment period was set at 6 years. However, provided that borrowers contact their lender before the first repayment is due, under the government's Pay As You Grow scheme, borrowers can:

- extend the term to 10 years;
- move to interest-only repayments for a period of 6 months, and can use this option up to 3 times;
- pause their repayments for a period of 6 months but can only use this option once.

https://www.gov.uk/guidance/apply-for-a-coronavirus-bounce-back-loan#history

Option to tax: Time limit extended

The temporary changes on the rules on notifying an option to tax land and property during coronavirus (COVID-19) have been extended to 30 June 2021.

Taxpayers are normally required to notify HMRC within 30 days of their decision to opt to tax land and buildings by either:

- printing and sending HMRC the notification, signed by an authorised person within the business;

- emailing a scanned copy of the signed notification

HMRC has confirmed that the 90 day time limit using an authorised electronic signature will now apply until 30 June 2021.

https://www.gov.uk/guidance/changes-to-notifying-an-option-to-tax-land-and-buildings-during-coronavirus-covid-19

Bulk appeals for late tax returns

HMRC has announced that, from 24 March for six months, tax agents can send bulk appeals against late filing penalties for Self Assessment income tax returns filed after 28 February due to COVID-19.

Having completed bulk appeals form, agents should post the form to:

Bulk Agent Appeals,

HM Revenue and Customs,

BX9 1ZH.

Each form can be used for up to 25 clients, with additional forms submitted as required.

The department acknowledges that some individuals, businesses and agents may still be experiencing difficulties in meeting filing deadlines due to COVID-19. This may be accepted as a reasonable excuse for any appeals made against a late filing penalty.

Business Taxation

Off-payroll working – Important changes (Lecture B1247 – 24.49 minutes)

Introduction

For individuals providing services through their own company from 6 April 2021, the 'off-payroll' working rules (which have previously only affected work for public sector engagers) are being extended to include a lot of private sector clients too. Whether private sector clients are affected depends on their size, as discussed below.

These changes are a further attempt to extend the reach of payroll taxes (PAYE, employer and employee National Insurance Contributions (NIC)) to those contracting with clients via their 'personal service company' (PSC).

Note that the rules can apply:

- even if an agency is the fee-payer rather than the end-client; and
- if the worker uses a different form of intermediary vehicle to a PSC, such as a partnership, to contract for their services (although in this article we will only consider the impact on PSCs).

The April 2017 changes

After years of HMRC struggling to enforce compliance with IR35, on 6 April 2017 new rules came in for PSCs contracting with public sector engagers, referred to as the "off-payroll working" rules. The IR35 rules have always put the onus on the PSC to determine whether there is an underlying employment relationship with the client and to then self-assess tax accordingly. In contrast, the public sector off-payroll working rules make the client (such as an NHS trust or the BBC) determine whether there is an underlying employment relationship with the worker. If it determines that there is, then the public sector body (or, if appropriate, an intermediary such as an employment agency) must register the worker for PAYE and deduct the worker's payroll taxes when paying the fees that the PSC has billed (even though the worker is employed by the PSC, not the public sector body, and does not themself contract directly with the client or agency).

The deemed employment payment is the VAT-exclusive amount due to be paid to the PSC, less the direct cost of materials included in the invoice. The fee-payer may, at their discretion, also exclude from the deemed payment any expenses met by the PSC that, had they been incurred directly by the worker, would have been allowable against earnings if the worker were an employee.

This complicates both the tax position of the PSC and the way the worker can tax-efficiently withdraw funds from their company. However, the good news is that responsibility for compliance rests with the engager rather than the PSC, so that the worker does not have the risk of an IR35 enquiry on their company.

The government regards these off-payroll working rules as having been so successful that they are extending them to many private sector clients of PSCs from 6 April 2021, having previously delayed this twice. Those PSCs that do not contract with public sector engagers will therefore be meeting the rules for the first time.

Extension of off-payroll working rules to the private sector for 2021/22

From 6 April 2021, the off-payroll working rules will also apply to private sector work done via a PSC, unless the client is 'small' (see below). To fall within the new rules, the work must be performed and the payment for the work made after 5 April 2021.

The legislation largely rolls out the current rules applicable to public sector clients to medium or large (i.e. non-small) private sector clients that receive services from PSCs. 'Small' for companies or limited liability partnerships (LLPs) means that they must meet two of the following three tests:

- Turnover ≤ £10.2m;
- Assets ≤ £5.1m;
- Employees ≤ 50.

For other clients (e.g. an unincorporated partnership), only the turnover test is used.

Businesses will be legally required to provide information regarding the size of the business to agencies and contractors, upon request, within 45 days. Remember that, where the PSC's client is **small**, they continue to pay the invoices received in full and the PSC must decide if IR35 applies to the contract.

Exclusion for overseas clients

Where a large or medium-sized private sector client is based wholly overseas and has no UK connection, the off-payroll rules do not apply. The worker's PSC will remain responsible for deciding the contractor's employment status for tax purposes and self-assessing whether IR35 applies. "No UK connection" means that the client is neither UK resident nor has a 'permanent establishment' (broadly, a fixed place of business) in the UK.

Contractors operating under Construction Industry Scheme (CIS) rules

The off-payroll working rules take precedence over the CIS rules. Thus, if they apply, the fee-payer would not need to consider applying the CIS rules (which may also necessitate withholding of tax) to payments made.

If the party receiving the worker's services is a small private company, the worker's PSC would be responsible for considering whether IR35 applies and self-assessing accordingly. Any deductions made by the client under the CIS when paying the PSC would be a separate matter dealt with under normal CIS rules.

Status Determination Statement

The end-client must provide a Status Determination Statement (SDS) to the contractor and all relevant parties (e.g. a recruitment agency) in the contractual chain, at the time the contract starts or before the off-payroll worker starts work. All such businesses using contractors must therefore make sure that they have the appropriate processes in place to produce and pass on the SDS to all relevant parties. In the absence of this, the PSC's end-client will take on the responsibilities of the fee payer (if they are not the fee-payer) to operate PAYE and NIC, where applicable.

If the client decides that off-payroll working rules apply, the client (or any agency responsible for paying fees to the PSC for the worker's services) must create a payroll record for the worker. This means that they must:

- obtain the National Insurance Number (NINO) from that worker;
- withhold PAYE and employee's NIC when paying invoices of the PSC;
- account for employer's NIC; and
- send the worker a P60 if still engaged at tax year-end, or a P45 if the engagement has ceased.

Although they must treat the worker as if they are an employee for payroll tax purposes, the worker has no employment rights at all from the client, which also does not make student loan deductions.

Disputing a decision

If contractors disagree with the decision made by their client on their employment status for tax purposes, they will be able to raise concerns through a client's status disagreement process. All clients are required to introduce a process, from 6 April 2021, to allow contractors to disagree with the decision.

Under the Finance Act 2020, the client has 45 days to respond to representations by a worker who has received an SDS. During this time, the client (or other fee-payer) should continue to apply the rules in line with the original determination. HMRC will not get involved in any disputes.

After completing the client's status disagreement process, if the contractor believes that they have paid too much income tax and NIC, they can follow existing Self Assessment and National Insurance processes to seek a repayment.

The client's responsibility

A client must take reasonable care when making a determination.

HMRC guidance cites various examples of what does not constitute "reasonable care", including:

- determining that every worker who provides their services through an intermediary is caught by the off-payroll working rules without giving any consideration to the specific facts of each individual case;

- failing to reconsider determinations where there has been a material change in circumstances;

- inputting inaccurate information into CEST.

Failure to take reasonable care means that the issuer becomes the deemed employer (if they are not already) and is responsible for applying PAYE to the worker's PSC invoice. There is no financial sanction.

FB 2021 changes

The substantive rules were included in FA2020, but these are now amended so that they work as intended, with additional provisions introduced to tighten up the impact of the rules. All these provisions are within Clause 21 and take effect from 6 April 2021.

Definition of intermediary

For the off-payrolling rules to apply, there has to be an intermediary, which is most commonly a PSC. To come within the provisions, the PSC has to meet certain conditions. The intermediary is caught if the worker either has a material interest in that company or is receiving income from the intermediary that represents payment for services rendered but is not taxable as employment income. This latter provision prevents avoidance by diluting shareholdings below the material interest figure. These conditions have been in place for IR35 since it was introduced in 2000.

The FA 2020 rules updated these conditions, so that the company could be caught where the worker has a non-material interest in the intermediary but receives payment for services from anyone within the supply chain (such as where they get direct payment from the end-client), but the wording was such that it applied in all cases where a worker was getting a payment from elsewhere in the supply chain. The legislation is being amended, so it now makes reference to situations where a worker receives payments that are not already wholly taxed as employment income.

The definition of 'non-material interest' is having:

- 5% or less of the ordinary share capital;

- Having entitlement to receive 5% or less of any distributions that may be made by the company; or

- Where the company is a close company, having entitlement to receive 5% or less of the assets available for distribution on a winding up.

Information provisions

Another change relates to provision of information within the supply chain. There is currently a requirement for the worker to provide information to the potential deemed employer regarding the application of the off-payroll working rules. This basically requires the worker to notify the potential deemed employer that the basic structure is such that these rules might apply (e.g. the worker has a material interest).

This is amended so that the intermediary will have a requirement to provide the necessary confirmation, where the worker does not do so. The changes will bring the intermediary into the process of confirming whether a worker is potentially caught by the off-payroll working rules. If no confirmation is given by the worker or intermediary, it can be assumed by the end-client that the rules apply.

Fraudulent provision of information

There are specific provisions where fraudulent information is provided, so that the person providing that information becomes liable for any taxes which arise by virtue of their actions. This currently only applies to the worker or anyone connected with the worker but will be extended to cover any UK-based party in the supply chain.

Targeted Anti-Avoidance Rule

Finally, there is a new TAAR, which will apply where at least one relevant person within the supply chain is involved in a 'relevant avoidance arrangement'. These are arrangements where the main purpose (or one of the main purposes) is to gain a tax advantage by circumventing the conditions of the provisions, such that the off-payrolling rules do not apply.

If these conditions apply, the person who has entered into the arrangements will be treated as the deemed employer and will become liable for the taxes due on payments to the worker. Where more than one relevant person participates in the avoidance arrangements, HMRC will treat the higher person in the supply chain (assuming there is a realistic prospect of recovering the tax) as the deemed employer. This could be the worker or intermediary if other members of the supply chain no longer exist.

Impact of new rules on pre- 6 April 2021 years

HMRC has said that it will not normally open a new compliance enquiry into a contractor's tax return for tax years before 6 April 2021 in circumstances where:

- a client decides that a contract is within the off-payroll working rules from 6 April 2021;
- a contractor changes the way they work from providing and invoicing services through a PSC to being employed directly by the client; or
- a contractor ends a contract because they disagree with a client's decision on status.

HMRC will only open an enquiry using information acquired through the changes to off-payroll working rules if it suspects fraud or criminal behaviour.

'Light touch' on penalties

HMRC has confirmed it will adopt a light touch approach to penalties. Consequently, there will be no penalties for inaccuracies relating to the off-payroll working rules in the first 12 months, unless there is evidence of deliberate non-compliance. However, where HMRC believe contractors are adopting artificial, contrived arrangements claiming to avoid the application of the off-payroll working rules or result in customers paying less tax than should be the case, HMRC will take action.

Contributed by Kevin Read

Off-payroll: Impact on worker and PSC (Lecture B1248 – 14.20 minutes)

Summary of the rules post 5 April 2021

Client	Who assesses the worker's employment status?	Who deducts PAYE/NIC where appropriate?	When applicable?
Public sector	Client	Fee-payer	From 6 April 2017
Large or medium-sized: private sector	Client	Fee-payer	From 6 April 2021
Large or medium-sized: private sector	PSC	PSC (under IR35)	Until 5 April 2021
Small: private sector	PSC	PSC (under IR35)	Unchanged

Example

Donna runs Donna Enterprises Ltd ("DEL"), of which she is the 100% shareholder. It has a year-end of 5 April and is registered for VAT.

DEL enters a one-year contract for Donna's services with Westwich Consultancy plc ("Westwich") in April 2021.

Westwich gives Donna a Status Determination Statement, stating that the off-payroll working rules apply.

DEL invoices Westwich for the agreed fees of £2,500 /month plus VAT.

DEL has other income in y/e 5 April 2022 of £18,000 plus VAT, derived from Donna's sundry private sector assignments for non-small clients. All these clients have issued Status Determination Statements confirming that this work is outside the off-payroll working rules

What are the tax issues here?

Payments from Westwich

Westwich will treat Donna as an employee for employment tax purposes and will therefore need her NINO to set up a payroll record.

Although DEL will invoice Westwich for £2,500 plus £500 VAT per month, it will not receive this amount. Westwich will withhold income tax and employee's NIC from the £2,500 and pay them over to HMRC through the PAYE system. Unlike when calculating an IR35 deemed payment, there is no 5% deduction for general expenses. All of the ex-VAT fees are subject to payroll taxes. In addition, Westwich will need to pay employer's NIC @13.8% on the £2,500 fees, to the extent they fall above the 2021/22 monthly nil rate 'secondary threshold' of £737.

The monthly ex-VAT amount received by DEL from Westwich can be paid to Donna through DEL's payroll under RTI, without any further deductions. It should be recorded on an FPS as non-taxable income and the amount of gross taxable employment income recorded reduced accordingly.

Note: If running a payroll, to report non-taxable income, you should use the FPS data field 58A: Value of payments not subject to tax or NIC in pay period.

Alternatively, this income from Westwich can be drawn as a tax-free dividend from DEL.

Both methods of withdrawing the funds from DEL avoid a double charge to tax on the earnings, which suffered deduction of payroll taxes by Westwich.

Payment for other work

The £18,000 plus VAT billed for the other work will not suffer any deduction of payroll taxes by the clients; it will be paid gross.

As the payments are from non-small clients, there is no IR35 risk for the PSC.

These fees can be withdrawn from DEL flexibly by Donna, either

- as salary (while accounting for appropriate payroll taxes); or
- as dividends (which will be taxable, subject to the £2,000 dividend allowance).

At the year end

At the end of the tax year, Donna will receive two P60s: one from Westwich and one from DEL. The latter will not include the income passed on to her by DEL for the Westwich work.

The taxable income from both P60s will need to be included as earnings on Donna's tax return.

Accounting and tax for DEL

Accounting: Although the contracted fees for the Westwich work are £2,500 per month, an adjustment is required to this figure to write off a part of the debtor balance that will not be received by DEL, due to the withholding of payroll taxes.

Corporation tax: The net income from Westwich that is included in the accounts can be omitted when calculating the profits for corporation tax purposes. This is because it is treated as employment income of Donna and has already been taxed accordingly. The £18,000 income from other engagements will be included in the corporation tax computation, along with normal allowable expenses of DEL.

VAT: The new off-payroll working rules have no impact on the VAT position of DEL. Its total VATable turnover for the year will be (12 x £2,500) plus £18,000, i.e. £48,000. The payments received from clients, including Westwich, will include the full amount of VAT charged for which DEL will account to HMRC in the normal way.

Work for a small client

The rules become more complicated where some of the work done by the PSC is for a small client. Although this work would be outside the off-payroll rules, it potentially remains within the IR35 provisions. This means that the PSC will need to self-assess whether there is an underlying employment relationship with the client; and if there is, calculate income tax and NIC on a deemed employment payment (unless a sufficient amount of this income has been passed on through the PSC's payroll to the worker).

Becoming an employee of your client

Note that, if a PSC has all its income dealt with under the off-payroll rules, there will be no income assessable to corporation tax. This means there will be no tax relief for any costs incurred by the company, such as stationery or professional fees. In such circumstances, a PSC is unlikely to continue to be a sensible vehicle for running your business.

Some contractors will understandably feel that, if their work is going to be subject to payroll taxes in any case, they may as well become a normal employee of that client. Although this may sometimes be an option, many clients will not offer it, as it would give you full employment rights (e.g. holiday pay and statutory sick pay). This is not the case with the off-payroll rules, where the client or other fee-payer merely pays over payroll taxes, but such statutory employment rights are given by the worker's own PSC.

Where contractors no longer need their PSC, it can be struck off or liquidated. The trade-off between the costs and tax-efficiency of these alternatives will need to be considered.

Updated HMRC guidance

HMRC has updated its guidance on off-payroll working in ESM10000, including:

- A new page on how to calculate a worker's statutory payment entitlement.
- Updates to existing pages to clarify:
  - when a status determination statement should be issued;
  - what constitutes reasonable care;
  - payroll processes; and
  - calculating statutory payment entitlements.
- Some smaller changes to clarify sections of the guidance, following feedback.

Contributed by Kevin Read

Hydroelectric power generation scheme

SSE Generation Limited undertook a hydroelectric power generation scheme and, under s11 CAA 2001, claimed capital allowances totalling £260m on items of plant. HMRC argued that, under s 21 and s 22, all but £34m was disqualified from relief.

On appeal to the First Tier Tribunal, SSE Generation Limited was successful.

Having had no success at the Upper Tribunal, HMRC took the case to the Court of Appeal. The only items which remained in dispute were conduits of various kinds that channelled water to the main reservoir, the headrace that carried water under increasing pressure from the reservoir to the turbine and the tailrace that carried water away from the turbine. It was common ground that all of the disputed items were 'plant' according to its common law definition, so the only issue was whether the expenditure was excluded by s22 CAA 2001.

Decision

The Court of Appeal considered the interaction of the two exclusions in s22. It held that if the plant in question was a structure or an asset it is either excluded by s22(1)(a) (structures and assets within List B) or it qualifies for allowances. There was no need then to consider whether it was caught by the exclusion in s22(1)(b) (works involving the alteration of land).

The Court of Appeal then considered the meaning of the words 'tunnel' and 'aqueduct' in List B item 1. In the context of item 1 it concluded that a 'tunnel' was something along which people or vehicles are intended to travel and not simply any subterranean passage. Similarly, an aqueduct was a bridge or viaduct-like structure which carries a canal.

Applying these conclusions to the expenditure in dispute, the court agreed with the Upper Tribunal's decision that the disputed items were neither tunnels nor aqueducts and so were not excluded from qualifying for allowances on that basis. Further, they were not caught by the 'sweep-up' rule in List B item 7 as they fell within the definition of industrial buildings. As they were structures, they were not covered by s 22(1)(b). All of the expenditure therefore qualified in principle for capital allowances.

The Court rejected HMRC's appeal, but with one exception, relating to the expenditure on one particular type of conduit ('cut and cover' conduits). The First Tier Tribunal had allowed only part of the costs. This was on the technical ground that the company, having lost on the issue before the First Tier Tribunal, had failed to seek permission from the First Tier Tribunal to appeal against that decision.

HMRC v SSE Generation Limited [2021] EWCA Civ 105

Adapted from the case summary in Tax Journal (12 February 2021)

Partnership deferred remuneration schemes

The First Tier Tribunal has heard two similar cases concerning asset management LLPs. Both cases sought to defer members' entitlement to part of their profits share, resulting in these amounts being received in later years, once certain conditions were met.

In Odey Asset Management LLP and others v HMRC (TC08018), the LLP effectively withheld part of its members' profit shares, paying these amounts to a corporate member of the LLP. The corporate member had discretion to contribute the amounts back to the LLP as special capital, to be invested in the funds managed by each member. The members could withdraw the amounts from the fund later provided they met certain conditions. The First Tier Tribunal held that the deferred amounts received by members were not partnership profits, as the members were not entitled to receive the deferred profits. Instead, the members were taxable on miscellaneous income, being the special capital withdrawn at a later stage. The Tribunal stated that money received arose as a result of the members' continued activity as LLP members, providing fund management services.

In HFFX LLP and others v HMRC (TC08023), there was an organisational restructuring that resulted in certain company employees becoming members of a new LLP. Seconded back to their old company, these employees continued to carry out the same work as before. The LLP was entitled to a share of the company profits, which was paid to a corporate LLP member to invest. On the first, second and third anniversaries of recommendation being made, the corporate member would sell one third of the investment and contribute the amount to HFFX as "Special Capital". The individual members of HFFX were then able to withdraw these amounts on demand, provided they had not been removed from or retired from HFFX as "bad leavers". As in the Odey case, the First Tier Tribunal found that the members had no rights to the amounts allocated to the corporate member, and that the members were again taxable on miscellaneous income when the special capital was withdrawn later.

Property transaction was not trading

Summary –A partnership, established to construct a hotel and apartment complex in Montenegro, was not trading and so relief for a £36million loss was denied.

Foundation Partners (GP) was established to form a vehicle for a property development in Montenegro. Its 2008/09 partnership tax return showed some £36 million of losses that had arisen on the accounting write down of stock.

HMRC issued a closure notice denying this partnership trading loss and the partnership appealed to the First Tier Tribunal.

Decision

The First Tier Tribunal found that Foundation Partners (GP) was not trading. The partnership had failed to raise the funds it needed to complete the project and, at the time it entered into the contractual arrangements, the project as a whole was only 'half-baked'. The contractual arrangements in March and April 2009 'made no sense', and no commercially motivated business would have entered into the agreements in these circumstances. The reason why the partnership did so was to secure the write-down of its stock in the 2008/09 tax year, enabling sideways loss relief claims for its partners.

The artificiality and lack of commerciality in the contracts showed that it did not have a 'commercial character' but rather was a speculative investment. The judge noted that the existence of a tax motive does not, of itself, prevent activities from being treated as a trade, but concluded that the arrangements were 'so distorted by tax considerations, that they break down as a credible trading proposition'.

Although that decision was sufficient to dispose of the case, the Tribunal also found that if a trade ever commenced, it did so after 5 April 2009. The uncertainties in the project at that time were so substantial that it could not be said to have commenced a trade.

Further, the amounts paid by the partnership were for the rights to use the tax structure and for the group's work in finding prospective investors, which were capital in nature and would, therefore, not have been deductible expenses even if a trade had been carried on.

Payments made by Foundation to another company under a construction sub-contract had not been expended wholly and exclusively for the purposes of Foundation's trade (had it been carried on); taking into account the motive of avoiding tax; and the length of time for the project to start generating income. And finally, the Tribunal found that the accounting treatment of the write down of stock was also wrong. The appeal was dismissed.

Foundation Partners (GP) v HMRC (TC08005)

Adapted from the case summary in Tax Journal (6 March 2021)

Consortium relief claims

HMRC opened enquiries into the consortium relief claims made by the four appellant companies. The companies provided much, but not all, of the information requested by HMRC and applied to the First Tier Tribunal for a direction for closure notices. HMRC considered that the anti-avoidance rule in s146B CTA 2010 (arrangements preventing a link company from controlling the claimant company) might apply and so opposed the application. HMRC argued that they required the outstanding information to determine the purpose of the 'arrangements' as required by s 146B(3)(b). The companies contended that HMRC did not need the information because, as a matter of law, there were no arrangements within s 146B and therefore no need to consider their purpose.

The First Tier Tribunal considered that it had jurisdiction to decide the point of law, on the authority of Vodafone 2 v HMRC heard by the Court of Appeal, as to do so would determine the application for the closure notices. It held that there were arrangements within the definition in s146B(3)(a) consisting of an amendment to the articles of association of the consortium company (of which the claimant companies were subsidiaries) so that the voting threshold for passing shareholder resolutions was increased from a simple majority to 75%. This prevented the three consortium members, all of which were also link companies to the same group, from controlling the consortium company and indirectly the claimant companies. However, the First Tier Tribunal held that no person was enabled by the arrangement to prevent the link companies exercising control (as required by s 146B(2)(b)) and therefore that there was no arrangement to which the anti-avoidance rule applied. The First Tier Tribunal therefore directed HMRC to issue closure notices.

The Upper Tribunal overturned this decision, holding that the First Tier Tribunal's interpretation of s 146B(2)(b) had been too restrictive.

The Court of Appeal has now rejected the companies' appeal. The court was highly critical of the approach taken by the taxpayers and the First Tier Tribunal. It would often be the case, as here, that a statutory provision set a number of cumulative conditions. Those conditions could require varying amounts of information to determine and 'taxpayers should not be encouraged to pick and choose which information they provide and then ask the tribunal to decide the applicability of one element in the hope that a 'quick win' will bring the rest of

the enquiry to a halt.' The approach adopted here required the tribunals to apply the statute without any clear findings of fact or agreed statement of facts.

The jurisdiction to decide an incidental point of law in a closure notice application was useful, as in Vodafone, but only if used sparingly; applications for closure notices were not generally a suitable vehicle for deciding points of law.

Eastern Power Networks Plc and others v HMRC [2021] EWCA Civ 283

Adapted from the case summary in Tax Journal (12 March 2021)

Connected companies and loan relationships **(Lecture B1249 – 15.47 minutes)**

There are several special rules that apply where there is a loan relationship between connected companies.

A loan relationship must be measured for tax purposes on an amortised cost basis, irrespective of the accounting treatment adopted. A check should be made to see if the loan has been fair valued in the accounts and ask for figures on an amortised cost basis if so – it may not be obvious from the draft accounts.

Generally there is no deduction for releasing, impairing or writing off a receivable from a connected person (s354), unless:

1. The borrower is in insolvency procedure (s.357); or

2. There is a debt for equity swap which creates the connection (s356).

The borrower is not generally taxed on the credit to P&L on release of the debt (s358).

Watch for the sale of connected party impaired debt to 3rd party at a loss – no deduction is allowed for the loss on disposal.

If a connected party debt is sold to a third party for less than its carrying value, the loss on de-recognition is not a deductible LR debit (s352).

Subsequent impairment reversal or write back is not a taxable LR credit (s360).

Exchange gains and losses on connected party loans are not restricted (s354(3)) and follow the normal taxation rules.

Releasing a debt

Releasing a debt must be a formal procedure using a deed of waiver, properly witnessed.

The lender's directors must consider their statutory duty to act in best interests of the members (but having regard for other stakeholders) before agreeing to the waiver (s172 CA 2006).

There should be a Board meeting minute documenting the decision-making process and reasoning.

Example 1

A parent company lent £10 million to a subsidiary 3 years ago, charging a market rate of interest (currently 5%). In the year ended 31 December 2020, the subsidiary's financial situation has deteriorated significantly because of the effects of Covid-19.

It has failed to pay the interest due on the debt in 2020 of £500,000 and the parent has serious doubts that the subsidiary will be able to repay the loan.

As a result, after taking legal advice, and after concluding that the subsidiary can only continue trading if the parent decides to waive the outstanding interest and the principal sum, the directors sign a deed of waiver on 30 December 2020.

Analysis

Parent:

- Interest receivable of £500,000 in 2020 is a taxable LR credit;
- The write off of the interest receivable is not a deductible LR debit;
- The write off of the principal sum (£50 million) is not a deductible LR debit.

Subsidiary:

- The interest expense of £500,000 in 2020 is a deductible debit (subject to any restrictions such as CIR, etc.);
- The release of the liabilities to pay the interest and the principal sum which are credited in the P&L are not taxable LR credits.

Other possible scenarios

If the parent sold the debt to a third party for £1, s352 prevents it from claiming an allowable LR debit for the loss on disposal it would book of £50,499,999 (principal plus accrued interest minus £1 received).

Assume the parent sold the subsidiary in (say) June 2020 to a third party:

- If it writes off the accrued interest of £250,000 and the principal sum of £50 million in the year ended 31 December 2020, the debits are still not deductible (s355);

- If it releases the amounts in the year ended 31 December 2021 (and this in accordance with GAAP), the write-offs will be deductible LR debits as the two companies are not connected at any point in this period.

If the subsidiary is in insolvent administration, insolvent liquidation, administrative receivership, provisional liquidation (or foreign equivalents) when the loan and interest are impaired or released, the debit to P&L will be allowable for LR purposes (s357), but not amounts accruing before one of these events.

Example 2

A Ltd borrows £400,000 from a third party lender.

Due to Covid-19, A Ltd has cash flow difficulties and the lender agrees to discharge 50% of the debt in exchange for 1,000 ordinary shares in A Ltd, with an agreed value of £130,000.

After the share issue, A Ltd has 1,600 shares in issue.

Although the lender and A Ltd are now connected (the lender owns 62.5%), this is only as a result of the debt to equity swap.

The £70,000 loss on derecognising the loan will be an allowable LR debit for the lender (s356).

A Ltd's gain on derecognition of the loan is not taxable (s358).

Any future impairment would not be deductible as the parties are now connected.

Loans to connected persons granted in accounting periods prior to 1 January 2016

'Amortised cost' for tax purposes used to be defined as booking the loan initially at the amount lent (net of any transaction costs).

It is then be amortised (if necessary) to the amount payable on redemption.

If the loan has been amortised in the accounts, this needs adjustment to ensure the CT600 and tax computation reflects the tax definition, for both lenders and borrowers.

For loan granted in periods beginning 1 January 2016, the definition of amortised cost follows the accounting definition removing this problem.

Example

A controlling shareholder lent a UK company £1,000,000 on 1 April 2015, interest free and repayable on 31 March 2025. The company could have borrowed at a market rate of 6%

There were no issue costs.

The loan has been recorded in accordance with FRS 102/IFRS as set out in the table below.

Explain the adjustments needed when computing the corporation tax liability of the company each period.

Year ended	Bal B/fwd	Accounts Interest 6%	Amortised cost c/fwd
31-Mar-16	558,395	33,504	591,899
31-Mar-17	591,899	35,514	627,413
31-Mar-18	627,413	37,645	665,058
31-Mar-19	665,058	39,903	704,961
31-Mar-20	704,961	42,298	747,259
31-Mar-21	747,259	44,836	792,095
31-Mar-22	792,095	47,526	839,621
31-Mar-23	839,621	50,377	889,998
31-Mar-24	889,998	53,399	943,397
31-Mar-25	943,397	56,603	1,000,000

For tax purposes, the amortised cost is the amount lent of £1m. As the amount repayable is £1m, for tax purposes it is treated as a no interest loan.

All of the accounting interest expense booked for the loan must be disallowed each period.

Contributed by Malcolm Greenbaum

VAT and indirect taxes

Consideration for services or advance of a loan

Summary – Funds received from a financing company were loans rather than consideration for the supply of construction services.

GLS Limited is a property development company and in 2016 it was providing construction services for the development of a new Aldi store.

Through 2016 the company borrowed a total of £282,000 from Midside Finances as one of its directors was unable to access bank finance owing to his personal circumstances and impending significant divorce settlement. Some of the advances were to cover general running expenses and others were used to enable the company to make loans to some of the associated companies. As loans, GLS Limited claimed that these payments were exempt from VAT and so did not include them on their VAT returns.

Following a VAT compliance review, and based on the documentation provided at the time, HMRC concluded that the payments were consideration for taxable supplies. These should have been subject to VAT and so HMRC raised an assessment using its 'best judgement' powers on the basis that the £282,000 receipts were inclusive of VAT at 20%.

The company appealed.

Decision

At the hearing, HMRC claimed not to have seen some of the supporting documentation but the First Tier Tribunal concluded that, based on the evidence that HMRC had seen, the payments were clearly advances by way of a loan.

There was no evidence that GLS Limited had carried out any building work for Midside Finances Ltd that would be subject to VAT.

The Tribunal concluded that the company had discharged its burden of proving that the £282,000 payments were loans rather than consideration for taxable supplies. The VAT returns were complete and correct and the company's appeal was allowed.

GLS Limited v HMRC (TC07985)

Place of supply when supplying educational services

Summary – Despite students undertaking part of a medical degree in the UK, the taxpayer supplied educational services where the place of supply was Grenada and no VAT was payable.

St George's University Limited was a university based in Grenada, West Indies that offered a four year medical degree course. Students on the course could opt to complete parts of the course, including some or all of their clinical training, in the UK.

HMRC determined that St George's University Limited was not an 'eligible body' for the purpose of the education exemption. It decided that the university should be registered in the UK as it was making taxable supplies of education in the UK and should account for VAT on the consideration payable by the students when they chose to study in the UK.

St George's University Limited disagreed and appealed.

Decision

The First Tier Tribunal concluded that, having read of the various contracts and assessed the economic reality of the arrangements, St George's University Limited supplied educational services to its students in return for the termly fees to be paid by those students. There was no obligation for the students to pay either University of Northumbria in Newcastle or the UK Teaching Hospitals, if they decided to study at any point in the UK.

The Tribunal moved on to consider the place of supply. The Tribunal concluded that the supplies fell within Directive 2006/112/EC article 54(1), which provides that:

> 'The place of supply of services and ancillary services, relating to ... educational ... or similar activities, ... including the supply of services of the organisers of such activities, supplied to a non-taxable person shall be the place where those activities actually take place.'

St George's University Limited made supplies of services relating to educational activities and also services of organising such activities by making all necessary arrangements for the students to enable them to take those parts of the four year course in the UK. The Tribunal concluded that the fees paid by students for the course, were for a single supply of services, and so did not need to be apportioned to reflect those parts of the course taken by students in the UK. With the place of supply held to be Grenada, the supply was outside the scope of UK VAT and the appeal was allowed.

Given this decision, there was no need for the Tribunal to go further. However, the Tribunal went on to consider whether, if the supplies had been UK supplies, would they have been taxable and if so on what value VAT should have been accounted for. The Tribunal concluded that HMRC had discretion under Directive 2006/112/EC article 132(1)(i) to decide who was eligible for the education exemption, other than bodies governed by public law. The UK would be within its rights to disallow exemption and require output VAT to be accounted for on the fees payable for each term during which the students were studying and/or training in the UK.

St George's University Limited v HMRC (TC07999)

Cricket Club construction eligible for zero rating

Summary – Relying on misleading advice from HMRC, who had incorrectly believed that the Club was a charity, meant that the Westow Cricket Club had a reasonable excuse for issuing a zero-rating certificate.

Westlow Cricket Club was registered as a Community Amateur Sports Club (CASC) and was not a registered charity. The Club raised funds to build a pavilion and prior to the construction starting, the Club wrote to HMRC to take advantage of certain zero-rating which are available for the construction of a building by a 'charity'.

HMRC responded to the Club by letter stating that:

> "HM Revenue & Customs policy prevents this Department from providing a definitive response where we believe that the point is covered by our Public Notices or other published guidance, which, in this case, I believe it is."

The Club was referred to Public Notice 708 Buildings and construction that explains when a certificate can be issued. However, having stated that HMRC could not give a definitive response, HMRC went on to state:

> "I would refer you to sub-paragraph 14.7.4 which covers what is classed as a village hall or similar building. Providing the new pavilion meets the conditions set out, and it appears to do so, the construction work will be zero- rated for VAT purposes."

Having read paragraph 14.7.4 of VAT notice 708 and based on HMRC confirming that the building appeared to qualify, the cricket club completed a certificate for zero-rated and reduced rated the building work.

However, following a check, HMRC stated that the zero-rated VAT certificate had been issued incorrectly, as the Club was a CASC and not a charity, and that a penalty of £20,937 under s 62(1) VATA was due as a result.

The Club appealed arguing that it had a reasonable excuse for issuing the certificate.

The First Tier Tribunal disagreed, finding that it was not a registered charity and the Club should not have relied on the HMRC written response as definite advice. Even if there was a reasonable excuse, it expired when the Club completed the certificate where it confirmed that the building would be used solely for a relevant charitable purpose by a charity.

Westow Cricket Club appealed to the Upper Tribunal.

Decision

The Upper Tribunal confirmed that a CASC is not a charity. This has since been confirmed in the Eynsham Cricket Club case by the Court of Appeal (see below). However, in this case, the Upper Tribunal stated that the First Tier Tribunal had adopted the wrong approach when deciding whether HMRC's letter provided a definitive response.

The Upper Tribunal stated that the correct approach was to take into account all of the relevant circumstances, including the fact that the Club was run by volunteers with little knowledge on VAT matters. The Tribunal concluded that it was reasonable for the Club to complete the certificate declaration confirming that the pavilion was to be used for a relevant charitable purpose. It was not reasonable to expect the Club to seek further advice as to whether it was a charity. After all, the Club had described itself as a non-profit making entity to HMRC and HMRC had answered their question without indicating there were any other issues to consider.

The Upper Tribunal overturned the First Tier Tribunal's decision. Based on the letter received from HMRC, the Club honestly believed that their construction work qualified for zero-rating. The Upper Tribunal stated that the First Tier Tribunal should have adopted a considerable degree of flexibility in approaching such cases where the taxpayer is usually unrepresented and not apply an overly legalistic and narrow approach.

Westow Cricket Club v HMRC [2021] UKUT 0023 (TCC)

CASC not a charity

Summary – Shortly after the Westow case, the Court of Appeal released its decision in the Eynsham Cricket Club case, concluding that a CASC was not a charity for VAT purposes, and so not entitled zero rating on the construction of their new cricket pavilion.

Like Westow Cricket Club, Eynsham Cricket Club was registered as a CASC.

Eynsham Cricket Club built a new pavilion, following the destruction of its former building in a suspected arson attack. Initially, the contractor charged VAT on its supplies at the standard rate which the Cub settled in full.

However, the Club subsequently challenged HMRC, arguing that the services should have been zero-rated supplies in the course of construction of a building intended for use for a 'relevant charitable purpose' for use by a charity.

The Upper Tribunal had stated that a CASC is a "creature of statute introduced by s.58 of and Schedule 18 to the Finance Act 2002 that exists for the purposes of some taxation treatment and in certain circumstances, a CASC is given the same tax treatment as a charity." However, ultimately for the purpose of zero rating, it was not a charity.

Decision

The Court of Appeal observed that s.6 Charities Act 2011 states that a CASC established for charitable purposes 'is to be treated as not being so established, and accordingly cannot be a charity'.

In giving the judgment, Judge Simler concluded that as a matter of statutory construction, s.6 Charities Act 2011 stands as a statement of the general law of England and Wales for all purposes, unless and until expressly disapplied and, that in the absence of any such disapplication, a CASC cannot be a charity. This was consistent with the broader legislative context, history and purpose of the Acts.

The Court of Appeal also rejected the Club's claim that denial of zero-rating would breach the EU principles of equal treatment and/or fiscal neutrality because the Charity and CASC statutory regimes are different in terms of the burdens and reliefs available.

This was not a case considering a harmonised VAT exemption for EU law purposes. This was a domestic UK VAT zero-rating exemption where Parliament had decided to treat a CASC and a charity as different entities, under different rules and so eligible for different tax treatments.

The appeal was dismissed.

Eynsham Cricket Club v The Commissioners for Her Majesty's Revenue & Customs [2021] EWCA Civ 225

Independent parenting capacity assessments

Summary - Accommodation provided by a charity as part of independent parenting capacity assessments was part of a single supply of exempt welfare services under Item 9, Group 7 Schedule 9 VATA 1994.

Where a council needs to assess parental ability of satisfy their child's needs, they may request additional evidence-based information to ensure that it is safe for the child to remain with their family. The Lilias Graham Trust facilitates this process by running a residential assessment centre for these families. Typically, families stay for around 12 weeks and, during this time, they are provided with parenting support and advice. The trust invoices the local authorities a fixed fee per family per week for its services.

Both the Trust and HMRC accepted that there was a single supply of welfare services under Item 9, Group 7 Schedule 9 VATA 1994. This item exempts the supply, otherwise than for profit, by a charity or public body of welfare services.

The Lilias Graham Trust wanted its supplies to be taxable rather than exempt as it sought to recover significant amounts of input tax. Consequently, it argued that Note 7 applied, making the supply of accommodation standard rated. This states that the Item 9 exemption does not include the supply of accommodation or catering, unless it is ancillary to the provision of care, treatment or instruction. The Lilias Graham Trust believed that their provision of accommodation, whilst part of a single larger supply, was not ancillary to the provision of assessment services and so was standard rated. The supply of assessment services and accommodation supplies were as important as each other and one could not be provided without the other.

HMRC argued that the supply that had been made was the supply of welfare services. There had been no supply of accommodation at all and so Note 7 was not in point.

The First Tier Tribunal had found in HMRC's favour and The Lilias Graham Trust appealed to the Upper Tribunal.

Decision

The Upper Tribunal concluded that the supplies excluded by Note 7 cannot refer to a supply that is part of a larger single supply. This was a residential assessment centre where the supply of accommodation was fundamental to the whole welfare assessment process.

The Lilias Graham Trust had argued that the First Tier Tribunal had erred in law by not applying the full interpretation of the word 'ancillary' under the ECJ's ruling in Card Protection Plan v CCE (Case C-349/96). The Upper Tribunal stated that Note 7 pre-dated this case, and so should not be interpreted using that definition. Further, if this definition of ancillary were to be used, it would have led to an 'outcome with no apparent rationale'. Separating out the supply of accommodation that was part of the essential care and support being provided, made no sense.

The Upper Tribunal concluded that the accommodation as part of the exempt welfare services and the appeal was dismissed.

The appeal was dismissed.

The Lilias Graham Trust v HMRC [2021] UKUT 36

Input tax recovery

Summary – Where a supplier had issued VAT invoices that ***contained neither a VAT registration number nor the customer's name, and later*** *fraudulently defaulted on paying the output VAT due, HMRC's decision to refuse input tax recovery was reasonable.*

Tower Bridge GP Ltd is the representative member of the Cantor Fitzgerald Group VAT group. A group member, called Cantor Fitzgerald Europe Limited, started trading in carbon credit transactions. Between 18 May 2009 and 3 June 2009, the company bought carbon credits from Stratex in 17 separate transactions to be used by the company for the purpose of its own onward taxable transactions in carbon credits.

Of the 17 invoices issued by Stratex, 15 included VAT totalling over £5.6 million which Cantor Fitzgerald Europe Limited duly paid. Tower Bridge GP Ltd claimed a deduction in respect of that input tax in its VAT return for the period 06/09.

However, HMRC disallowed the input tax claimed as, with no VAT registration number or customer name, the VAT invoices were invalid. Later, it was discovered that Stratex was not registered for VAT and so did not have a valid VAT registration number and further, it fraudulently defaulted on its obligation to account for the VAT charged.

The First Tier Tribunal found that Cantor Fitzgerald Europe Limited neither knew nor should have known that the transactions it entered into at this time were linked to VAT fraud. However, in the absence of any evidence as to why the invoices were processed and paid without querying the validity of the invoices or VAT registration status of Stratex, HMRC's refusal of the input tax claim was held to be reasonable.

Tower Bridge GP Ltd appealed to the Upper Tribunal.

Decision

The Upper Tribunal confirmed that, under Article 226 of the Principal VAT Directive, in order to reclaim input VAT, it was mandatory for there to be a valid VAT invoice. The presence of a valid invoice proved the taxpayer's right to reclaim VAT but also, it supported HMRC's attempts to counter fraud, ensuring that the correct amount of VAT was accounted for and paid over.

The Upper Tribunal acknowledged that HMRC does have discretion under Regulation 29 of the VAT Regulations 1995 to accept alternative evidence in place of a valid invoice but in this case, HMRC was fully entitled to act as they had done, given the company's failure to check on the VAT invoice or the VAT status of their supplier.

The taxpayer's appeal was dismissed.

Tower Bridge GP Ltd v HMRC [2021] UKUT 0030 (TCC)

Courier becomes driving instructor

Summary – HMRC had failed to exercise their discretion under Regulation 29 to accept the alternative evidence that was available for certain periods. These assessments were invalid and should be set aside.

Harry Edebiri used to work as a courier for DHL on a self-employed franchisee basis. Although well below the VAT registration threshold, DHL registered him for VAT on a voluntary basis. He did not realise that VAT was being charged on his sales as the company dealt with his VAT returns. However, he was told that by submitting his petrol receipts to DHL each quarter, they could reclaim the VAT on his petrol and franchise fee charged for him.

In 2013, Harry Edebiri left DHL and retrained as a driving instructor. Now responsible for submitting his own VAT returns, he reclaimed the input tax suffered on his fuel and driving school franchise fees but failed to account for any output tax on his lesson fees. Between 2014 and 2018, he submitted VAT returns showing repayments which HMRC duly settled.

In 2017 he was diagnosed with kidney problems and advised to change his work because it was contributing to the deterioration in his health. He carried out a property conversion so that he could let rooms to students. He knew that letting rooms was a business and assumed he would be continuing to work on a self-employed basis and so could reclaim the VAT on the conversion costs. He included input tax of nearly £12,000 on his VAT return for the period 04/18.

Following a visit in June 2018, HMRC explained that letting rooms is exempt from VAT, and so he could not claim that input tax. HMRC identified that he had not been charging or collecting output tax on his driving instructor income. Consequently, HMRC disallowed the input VAT relating to the property and informed him that he owed output VAT relating to the periods from 07/14 to 04/18. Further, HMRC disallowed most of the input tax claimed in relation to his driving school business for the same period, as no receipts were available. HMRC issued VAT assessments to collect the £20,000 VAT that was due.

Harry Edebiri appealed stating that he had major health issue, on top of which he had contracted COVID-19 and had been hospitalised for two months. He had now been discharged, but had lost all use of one leg, and was unable to work. His mental health was poor and exacerbated by the stress of the assessments. Further, he claimed that he had never understood VAT, believing it was simply a way for a business to reclaim VAT suffered on expenses. Had it been explained to him sooner he would have corrected the position. He was willing to repay the input VAT but asked that HMRC not collect the output VAT being assessed.

Decision

The First Tier Tribunal confirmed that Para 13, sch 1 VATA 1994 states that he could "cancel his registration with effect from the day on which the request is made or from such later date as may be agreed between them and him." Deregistration could not be backdated to 2014.

The First Tier Tribunal acknowledged that, under Regulation 29, HMRC had exercised their discretion to accept alternative evidence for periods 07/16 to 04/17. However, this was not the case for the other periods both before and after these dates. Had HMRC done so, it was

likely that the bank statements would have provided the required alternative evidence, meaning a reduction in Harry Edebiri's assessments.

Following the Court of Appeal's decision in *GB Housley v HMRC*, the First Tier Tribunal allowed Harry Edebiri's appeal in part, finding that the assessments either side of 07/16 to 04/17 were invalid and should be set aside. *In this case* Gloster LJ stated that:

> "the appellant's appeal against the assessment is to be allowed, on the grounds that HMRC wrongly failed even to consider the exercise of the reg 29(2) discretion, then necessarily—since the appeal is against the assessment itself - the assessment falls to be discharged, leaving HMRC, if they wish to do so, to consider the proper exercise of their discretion on the correct legal basis and, if they are able (given the statutory time constraints), to issue a new assessment if so advised."

In line with the *GB Housley* decision, where it is in time to do so, the First Tier Tribunal asked that in deciding whether and how to exercise their discretion to raise another assessment for the output tax errors, HMRC should consider:

- Harry Edebiri's health and inability to work;
- the effect that the previous assessments had had on his mental health;
- his lack of understanding of the VAT system, and the fact that had he understood VAT he would have deregistered and no output tax would have been due; and
- his honest and straightforward response when the error was identified.

Harry Edebiri t/a TT Trading v HMRC (TC07988)

Export of goods (Lecture B1250 – 13.47 minutes)

All goods leaving the UK from 1 January 2021 will be a zero rated export.

For larger contracts one would expect our customer to be the importer of record in the destination country and as such it is they that must deal with the import formalities in their own country (entry declarations, VAT and duty declarations). This would be under incoterms such as EXW, FOB, CIF and DAP.

Direct or indirect exports?

From an invoicing perspective we need to understand the difference between direct exports and indirect exports.

Direct exports are when the UK supplier arranges the transport of their goods to their French customer. The UK supplier can zero rate their direct exports.

Indirect exports are simply where the customer arranges the transports of the goods. To secure zero rating on indirect exports the EU customer must not have a UK establishment e.g. a UK branch. If there is a UK branch then the sale must be standard rated.

If goods were sold to a UK customer but delivered to their branch in France (say) the rules are fundamentally the same. Where the UK supplier arranges the transport we have a zero

rated direct export. If the UK customer arranges the transport the supply will be standard rated as an indirect export.

It should be noted that if there are two UK parties involved with the second UK party selling goods to their French customer (say) then the supply between the two UK parties is standard rated. The supply from the second UK party to their French customer is the one zero rated supply.

Exporting under DDP terms

Some EU customers are insisting that the goods are delivered duty paid (DDP) and this will mean that the UK supplier becomes the importer of record. The UK supplier will need to be VAT registered in the destination country so that they can deal with the import formalities and then the domestic onward supply to their EU customer. UK clients would be best advised to avoid DDP terms of trade.

If they have no choice but to accept DDP terms then they should consider appointing a limited fiscal representative in the destination state. The limited fiscal representative can deal with your local obligations without the need for a formal registration of the UK supplier.

Importing into the EU

Many UK suppliers import goods into the EU for onward supply. For example, importing goods from Japan into The Netherlands for onward supply within the EU. This will invariably create a Dutch VAT registration obligation for the UK supplier but this can be discharged by appointing a Dutch limited fiscal representative. The representative can deal with the import formalities and then the onward supply. The use of limited fiscal representatives is very popular as it is a cost effective way of avoiding formal registration in the Netherlands (in this example).

Triangulation

If a UK company is the intermediary in a triangulation chain of transactions, they will normally have to register for VAT in the destination state. The triangulation simplification is no longer available to UK businesses.

It is possible to appoint a general fiscal representative to deal with your registration obligations. This is different to a limited fiscal representative as you will have your own VAT number and a responsibility to submit your own VAT return.

Article supplied by Dean Wootten (www.woottenconsultants.com)