Tolley®CPD

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The Spring Statement (Lecture P1306 – 22.01 minutes)

Introduction

There was some uncertainty as to what was actually going to happen at the time of the Spring Statement but some anticipation that we might be getting some significant announcements. In the end it was something and nothing (as is often the case!).

The Chancellor waved a blue booklet entitled 'The Tax Plan' which turned out to contain nothing of any substance. There were some announcements, mostly relating to personal tax. There were also some promises of changes to be brought in from the Autumn Budget with some details of the direction of travel for those changes (but which it is stressed are still subject to change).

The overall aim is to reduce taxes and promote prosperity at a time when unprecedented (at least in recent years) rises in the cost of living are threatening those working class voters that the current Government cannot afford to alienate.

The Government is investing £161m over the next five years to increase compliance and debt management resource in HMRC. This will fund additional staff primarily. There is also an addition £510m to increase the capacity of DWP to prevent and detect fraud and error in the benefits system and £12m to help claimants keep tax credit claims accurate through health-check calls, compliance activity and use of SMS nudges.

Income tax

It has been announced that the basic rate of income tax will be reduced to 19% with effect from April 2024. This will apply to the basic rate of non-savings, non-dividend income for taxpayers in England, Wales and Northern Ireland as well as the savings basic rate (which applies to savings income for taxpayers across the UK) and the default basic rate for trustees and non-residents.

A three-year transition period will apply to maintain the rate of relief on Gift Aid payments to 20% to reduce the impact on charities of this reduction which will impact their income where the gift aid payments they receive are significant.

Health and Social Care Levy

The Health and Social Care Levy which is coming in from 6 April 2022 is not being changed. There will be a rise in all rates of Class 1 and 4 National Insurance Contributions rates and a rise in the rates of dividend tax. This has been announced and discussed at length already. This is being introduced to fund the NHS and Social Care, as the name suggests.

National Insurance Contributions

The Primary Threshold (PT) for Class 1 NICs and the Lower Profits Limit (LPL) for Class 4 NICs will be aligned with the income tax personal allowance at £12,570 from July 2022. The intention is to keep those thresholds aligned, although the personal allowance is currently frozen until 5 April 2026. This change will apply from 6 July 2022 for employees (as the beginning of month 4).

For the self-employed, there will be a pro-rated Lower Profits Limit for the 2022/23 tax year being £11,908 (as 13 weeks @ £9,880 and 39 weeks @ £12,570). This will go up to the full £12,570 from 6 April 2023.

From April 2022, self-employed individuals between the small profits threshold (SPT) and the Lower Profits Limit will be able to build up NI credits without having to pay any Class 2 NICs.

There are no changes to the secondary threshold for employers.

		2021/22	2022/23		2023/24
			6 April – 5 July	6 July – 5 April	
PT	Weekly	£184	£190	£242	£242
	Monthly	£797	£823	£1,048	£1,048
	Annual	£9,568	£9,880	£12,570	£12,570
LPL		£9,568		£11,908	£12,570
Class 2		£3.05			

Example 1

For an individual who is earning £20,000 per year, the figures (ignoring the split year, so treating the income as arising in 2023/24):

Tax payable would be £20,000 less £12,570 x 20% = £1,486

Class 1 NICs payable would be £20,000 less £12,570 x 13.25% = £984.48

The net take-home pay would be £17,529.52. Without an increase in the NI threshold, the Class 1 NICs would have been £20,000 less £9,880 x 13.25% = £1,340.90 so take-home pay would have been £17,173.10. The individual is £356.42 better off.

If the limit had remained the same, but the HSL had been removed, then the Class 1 NICs would have been £1,214.40 and the take-home pay would have been £17,299.60. So this individual is better off with the rise in the threshold.

Example 2

For an individual who is earning £50,000 per year, the figures (ignoring the split year, so treating the income as arising in 2023/24):

Tax payable would be £50,000 less £12,570 x 20% = £7,486.

Class 1 NICs payable would be £50,000 less £12,570 x 13.25% = £4,959.48

The net take-home pay would be £37,554.52. Without an increase in the NI threshold, the Class 1 NICs would have been £50,000 less £9,880 x 13.25% = £5,416.20 so take-home pay would have been £37,097.80. The individual is £456.72 better off.

If the limit had remained the same, but the HSL had been removed, then the Class 1 NICs would have been £4,814.40 and the take-home pay would have been £37,699.60. So this individual is worse off with the rise in the threshold.

Company director and shareholder

For an individual who is a company director, taking a salary up to the NI threshold and then taking the balance out as dividends, what is their position?

Let us take an example of a company with profits of £50,000 before deduction of salary.

	£
Profit	50,000.00
Less salary	(12,570.00)
Less Ers NI	(525.70)
Net profit	36,904.30
Corporation tax	(7,011.81)
Net reserves	£29,892.49

If this is all distributed

2,000 x 0%	Nil
27,892.49 x 8.75%	2,440.59

Net take-home pay for the individual would be £40,021.90

Without the Employers National Insurance (ie if the employment allowance was available), the net take-home pay would be £40,410.

Without the increase in NI thresholds, the take-home pay would have been £39,621.35. If the threshold had been left as it was but the HSL removed, the take-home pay would have been £40,009.26. So the individual is very slightly better off by having an increase in the threshold if no employers allowance is available or worse off if it is.

Employment allowance

The Employment Allowance is increased to £5,000 per year for eligible employers to take effect from April 2022. There are no changes to the conditions for this to be available.

Share schemes

A review of EMI was launched in 2020 but the Government have concluded that the current scheme remains effective and appropriately targeted. However, they are looking at the Company Share Option Plan to see if this could be reformed or expanded to make it more useful in recruiting and retaining employees.

Capital allowances

It is acknowledged that there may be scope for increasing the reliefs available for capital expenditure. The following are options which are being considered:

- Increase the permanent level of the Annual Investment Allowance to £500,000;
- Increase writing down allowance from 18% to 20% for main rate expenditure and from 6% to 8% for special rate pools;
- Introduce a first year allowance for main and special rate pools – the given figure I 40% and 13% respectively;
- Introduce an additional first year allowance to bring the actual relief to more than 100% (as has been done with the superdeduction);
- Introduce full expensing to allow businesses to write off the costs of investment in one go. This one is highly unlikely due to cost!

Specific proposals will be announced at the time of the Autumn Budget 2022:

Research and development tax relief reform

At the time of the Autumn 2021 Budget, it was announced that there would be reform of R&D tax reliefs. This included the expansion of the types of costs which would qualify for relief but also a refocussing of support to R&D carried on in the UK only. This has been subject to extensive discussion with HMRC as there were concerns about the impact of the latter proposal.

As regards the costs, it is now confirmed that all cloud computing costs, including storage, will qualify for relief. They will also amend legislation so that pure mathematics is a qualifying cost.

As regards the refocussing, it is now recognised that there are some cases where it is necessary for R&D to take place overseas. Overseas activities will therefore continue to qualify where there are:

- Material factors such as geography, environment, population or other conditions that are not present in the UK and are required for the research;
- Regulatory or other legal requirements that activities must take place outside the UK.

These changes will apply from April 2023.

In addition, they are considering whether to increase the RDEC rate to boost investment in the UK but again this has yet to be decided.

Business rates

The business rates multiplier will be frozen in 2022/23. There will also be a new temporary 50% Business Rates Relief for eligible retail, hospitality and leisure businesses.

In the Budget at the end of 2021, the Government announced the introduction of targeted business rate exemptions for eligible plant and machinery used in onsite renewable energy generation and storage and a 100% relief for eligible low-carbon heat networks with their own rates bill to support the decarbonisation of non-domestic buildings. This was due to take effect from 1 April 2023 but is being brought forward to 1 April 2022. It will last until 31 March 2035.

VAT on energy saving material

There is an extension of VAT relief on the installation of energy saving materials. The Government is to include additional technologies (including wind and water turbines) and remove complex eligibility conditions to allow the relief to be extended. There will also be the introduction of a time-limited zero rate for the installation of such materials. These changes will take effect from April 2022 although they will not be available in Northern Ireland due to the Brexit Northern Ireland Protocol.

Fuel duty

There is to be a temporary 12-month cut in the fuel duty on petrol and diesel of 5p per litre. This has effect from 6pm on 23 March 2022. It is said to be worth £100 over than 12-month period for the average car driver, £200 to the average van driver and £1,500 to the average haulier.

Contributed by Ros Martin

Personal tax

Matalan man (Lecture P1306 – 22.01 minutes)

Summary – Following the Supreme Court's decision in 'Tooth", a discovery was held not to be stale, making the assessment valid.

John Hargreaves was Matalan plc's executive chairman. On 11 March 2000, he started to spend time in Monaco. Initially living in a hotel suite but from 1 September 2000, he obtained the lease of an apartment in Monaco.

On 15 March 2000, he submitted Form P85 to HMRC indicating that had left the UK to live in Monaco and that he expected to spend "no more than two months" per annum in the UK.

However, he continued to work as Matalan's executive chairman and spent a lot of time in the UK. Further, he owned a property in the UK that was available for his use.

In May 2000 he sold shares in Matalan for £231 million. His 2000/01 tax return was filed with:

- no CGT supplementary pages and without these, HMRC had no knowledge of the £80 million gain that arose;

- a white space note stating that he was non-UK resident

John Hargreaves claimed this was consistent with HMRC's guidance where persons claiming not to be resident or ordinarily resident in the UK did not need to fill in these pages. He also stated that he had calculated his liability to income tax without regard to £5.6million of investment and employment income. He considered these items not to be liable to income tax because he was not resident in the UK.

Finally, in January 2007, HMRC raised a discovery assessment to collect £84million of additional tax.

John Hargreaves appealed to the First Tier Tribunal, initially on two grounds:

1. In 2000/01, he had been neither UK resident nor ordinarily resident and so was not liable to income or capital gains tax;

2. HMRC had not been entitled to make the discovery assessment made and so it was invalid.

Prior to the hearing, John Hargreaves accepted that he was in fact UK resident in 2000/01.

The First Tier Tribunal allowed the appeal on the grounds that the discovery on which the assessment was based had become "stale" as a consequence of HMRC's delay in making the assessment. Discussions with John Hargreaves were opened in 2003 following the publication of a newspaper article, but it took HMRC until 2007 to raise the assessment.

However, in case the Tribunal was wrong, it also determined that, had the assessment not been stale, John Hargreaves' appeal would have failed. The return had not been made in

accordance with the practice prevailing at the time, nor had HMRC been given enough information to be aware of the insufficiency of tax prior to the discovery.

HMRC appealed the decision that the assessment had become stale, while John Hargreaves appealed arguing that if the discovery was not stale, the First Tier Tribunal had been wrong in their subsequent determinations.

Decision

Both parties agreed that HMRC's appeal must be allowed given the judgment of the Supreme Court in *HMRC v Tooth* [2021] 3 All ER 711 which was handed down after the First Tier Tribunal's Decision.

The Upper Tribunal agreed with the First Tier Tribunal that even if a hypothetical officer could have realised that John Hargreaves was UK resident, with no CGT pages submitted that officer could not have been aware of an insufficiency in John Hargreaves' return,

John Hargreaves v HMRC [2022] UKUT 00034 (TCC)

The taxation of non-resident individuals **(Lecture P1307 – 14.04 minutes)**

Non-residents are not free of UK tax on their income and (from 2015) their gains. However, the tax situation is not straightforward either. It should be noted that it is always important to check the double tax treaty for the jurisdiction in which the individual is resident (if the UK has such a treaty with that place).

The liability of non-residents to income tax is effectively zero on 'disregarded income' over any amounts already deducted at source. However, the tax on the remaining income is calculated ignoring reliefs such as the personal allowance.

This provisions effectively limits income tax payable to this amount which means that if the 'normal' tax treatment is more beneficial, then this can apply. Tax return software will normally work this out for you.

Not all non-residents will be entitled to the personal allowance (see below) and that may impact which of these options is more favourable.

An additional complication of the calculation is that dividends paid to non-residents are received with the basic rate of dividend tax deemed to have been paid. This should not affect the overall calculation but it does make the calculations produced by tax return software look slightly odd.

Disregarded income is generally investment type income and specifically covers:

- Dividends and stock dividends from UK companies;
- Interest;
- Purchased life annuities;
- Profits from deeply discounted securities;
- Distributions from unauthorised unit trusts;

- Profits from transactions in deposits;
- State retirement pension and widow's pension.

Example 1

Mr Jones, who is resident in France, has income from land and property in the UK of £10,000 and dividends from UK companies of £20,000. Total income is £30,000 which would leave £17,430 of income after personal allowances.

The tax on this would be (2,000 x 0%) plus (15,430 x 7.5%) = £1,157.25.

If we compare this with the disregarded income calculation, the tax on the property would be (10,000 x 20%) = £2,000 plus tax treated as deducted from the dividends which would be (20,000 x 7.5%) = £1,500 so a total of £3,500.

The 'normal' calculation gives a better result, particularly since the actual tax liability is nil, as you would get credit for the basic rate tax on the dividends, although the excess tax would not be repayable. So the actual tax due is nil.

If Mr Jones had been resident in a country where he did not get the personal allowance, then the calculation would alter but the outcome would still be the same.

Tax would be £1,157.25 (as calculated above) plus (10,000 x 20%) = £3,157.25. Still less than under the alternative calculation and actual tax to pay would be £2,000.

Personal allowances

An individual who is not resident will be able to claim personal allowances if they are any one of the following:

- A citizen of a state within the EEA, including British citizens;
- A current or former employee of the British Crown;
- A UK missionary society employee;
- A civil servant in a territory under the protection of the British Crown;
- A resident of the Isle of Man or the Channel Islands;
- A former resident of the UK who lives abroad for the sake of their own health or the health of a member of the family who lives with them;
- A widow, widower or surviving civil partner of an employee of the British Crown;
- A National and/or resident of a country with which the UK has a Double Tax Agreement which allows such a claim.

The notes to the non-resident self-assessment pages (SA109) include a convenient list of all countries which fall within the final category. Commonwealth citizens were only entitled to personal allowances up to 5 April 2010.

Employment income

A person who is not UK resident is taxable on employment income only to the extent that it relates to duties performed in the UK. The applicable earnings are obviously calculated by apportioning the person's salary between that attributable to UK and non-UK work.

Notwithstanding this basic principle, many of the UK's double tax agreements prevent the UK from taxing the UK earnings of a resident of the other country if that person is present in the UK for 183 days or less in any 12-month period commencing or ending in the year of assessment concerned, the employer is not UK resident and the remuneration is not borne by a UK permanent establishment. This exclusion does not normally apply to entertainers and sportsmen.

Trading income

A non-resident who carries on a trade in the UK through a branch or agency is taxable on the profits of that branch or agency. It is unclear whether it is possible for a non-resident to carry on a trade here as a sole trader other than through a branch or agency. This is because a trade is normally carried on at the place from which it is controlled and managed, and it would be fairly unusual for that not to take place where the proprietor is resident.

It used to be thought that a trade could not be carried on in the UK if all of its sales contracts were made outside the UK. However, the courts now tend to look at the overall substance of the trade.

The same applies to partnerships where a non-UK resident individual is a partner is a UK partnership. It is likely to be easier to show that there is taxable income arising in the UK as they can be part of the trade which is being exercised by the wider partnership in the UK. However, there might be argument that the non-resident individual is actually operating through a branch or agency in their home country which would complicate matters.

Property income

The basic rule is that the rental agent (or the last agent in the chain if there is more than one) must deduct tax at 20% from the rent and account for it quarterly to HMRC. He can calculate this deduction on the rents that he receives less any expenses he pays on the landlord's behalf during the quarter that he reasonably believes are deductible in calculating the taxable income of the UK property business. He cannot deduct expenses paid direct by the landlord. In most cases the largest expense is likely to be loan interest and this is normally either paid by the landlord or the rents are paid into a bank account with the lender. It is rare for it to be paid by the agent. Accordingly, where there are borrowings the tax deduction is likely to exceed the tax actually due on the profits of the UK property business. Where there is no agent, the tenant is obliged to deduct tax at 20% from the rent and to account for it to HMRC.

Alternatively, the non-resident can elect to be taxed directly under the Non-Resident Landlord's Scheme. This requires the approval of HMRC. When approved, HMRC will authorise the agent or tenant not to deduct tax from the rents. Until he receives such authorisation the agent must deduct tax. Most non-resident landlords opt to use this scheme. It ensures that only the right amount of tax is paid. The non-resident has to file an annual tax return and must pay tax in accordance with the normal self-assessment rules,

which of course require interim tax payments to be made based on the previous year's income.

A non-resident individual should normally consider holding UK property through a non-UK company. There are two reasons for this. The individual will pay tax on rental income at rates of up to 45% if the income is high enough, whereas an overseas company pays corporation tax at the rate of 19%. However, it should be noted that this rate is to go up to 25% from April 2023 as all foreign companies will pay tax at the main rate of corporation tax even if they have low profits. The second is that as the property is situated in the UK it is within the scope of UK inheritance tax if it is held by the individual but will be outside the scope of IHT if held through an overseas company.

Capital gains tax

An individual is chargeable to CGT only if he is resident in the UK at some time during the tax year in which the gain is realised. Split year treatment is available for CGT.

There are important exceptions to this basic rule. The first is that if a non-UK resident is carrying on a trade, profession or vocation in the UK through a branch or agency he is liable to tax on gains on the disposal of UK assets which are used in (or held for the purpose of) the branch or agency at the time the gain accrues, or were used (or held for) such a purpose at an earlier time or have been acquired for use for such a purpose. For the charge to apply the trade must be carried on at the date of the disposal.

The second is that a taxpayer who is a temporary non-resident is chargeable to CGT in the period of return on some gains realised during his period of non-residence. Where the legislation applies, the individual is treated as realising in the year of return capital gains equal to the aggregate of the gains that arose to him during his period of temporary non- other than if he bought and sold the asset whilst non-resident.

The final exception came in from 6 April 2015 as a new CGT charge was introduced on non-residents relating to disposals of residential property which was then extended in April 2019 to commercial property and indirect holdings of UK property.

Residential property

Residential property is defined as property suitable for use as a dwelling. It does not extend to non-residential property or particular categories of accommodation such as care or nursing homes, purpose built or converted student accommodation (where there are at least 15 bedrooms occupied more than 50% of the time by students) or residential accommodation for school pupils.

The rate of tax for individuals is the same rate as UK individuals i.e. 18% or 28% depending on total UK income and gains. Individuals will benefit from the annual capital gains tax exemption.

The chargeable gain is on the growth from 6 April 2015. The property is rebased to its market value at 6 April 2015 with the growth from that point falling within the charge. Alternatively the taxpayer can elect to apportion the gain.

There are different ways in which the gain can be calculated. The standard approach for calculating the gain is to use the market value at 5 April 2015.

Establish the value of your property as of 5 April 2015 (known as 'rebasing').

Work out the difference between the value on 5 April 2015 and the value when you disposed of the property.

Deduct any costs of improving the property incurred after 5 April 2015 and the legal cost of selling the property.

Example 2

	£
Disposal proceeds	1,250,000
Incidental disposal costs	30,000
Net disposal proceeds	1,220,000
Market value at 5 April 2015	1,000,000
Gain	220,000

Alternatively, you can work out a simple straight-line time apportionment of the whole gain made over the period you owned the property.

Example 3

Total ownership 128 months, period from 6 April 2015 to disposal was 77 months, 60.15% (77/128 x 100) of ownership relates to period from 6 April 2015 to disposal.

	£
Disposal proceeds	1,250,000
Incidental disposal costs	30,000
Net disposal proceeds	1,220,000
Less:	
Acquisition cost	750,000
Incidental costs of acquisition	40,000
Gain over period of ownership	430,000
Time apportioned post 5 April 2015 gain 60.15%	£258,645

The final option is to decide not to make an apportionment, particularly if you want to establish an amount of loss on a property. You can also use further apportionments to reflect any non-residential use of the property.

From April 2015 a person's residence will not be eligible for PPR for a tax year unless:

- The person making the disposal was tax resident in the same country as the property for that tax year; or

- The person spent at least 90 midnights in that property – the "90 day rule".

The new 90 day rule also applies where there is an existing nomination.

Nominations remain unchanged on properties in a country in which you are resident so a UK resident owning two UK residences will not be affected by these changes – they can still nominate their second UK residence. A UK resident owning a UK residence and an overseas residence will however be affected by these changes.

For non-residents PPR nominations are to be made at the time of disposal.

Extension of the provisions in 2019

There was an extension to the type of assets which are subject to capital gains tax or corporation tax on capital gains where the person is not resident in the UK with non-residential property being brought within the remit of the charge as well as indirect holdings of UK property of all types.

The charge is extended to non-residential property and indirect holdings being assets which derive at least 75% of their value from UK land where the person has a substantial indirect interest in the land. There are effectively two questions to be asked:

- Does the asset disposed of derive at least 75% of its value from UK land?
- Does the person making the disposal have a substantial indirect interest in the UK land at the time of the disposal?

An asset derives at least 75% of its value from UK land if the asset consists of a right or an interest in a company and at least 75% of the total market value of the company's qualifying assets derive directly or indirectly from interests in UK land. Market value can be traced through any number of companies, partnerships, trusts or other entities.

A person has a substantial indirect interest in UK land if at any time in the period of 2 years ending with the time of the disposal, the person has a 25% investment in the company.

Other points to note are:

- Any gain will be calculated according to capital gains tax principles;
- A loss is not an allowable loss if it accrues at a time when a gain would not have been a chargeable gain;
- Only losses arising to assets described above are allowable losses to be set off against gains of non-resident persons;
- Allowable losses count for these purposes even if they accrue when the person was tax resident;
- Tax is charged at the normal rate on gains arising under these provisions; and
- If assets of a company are vested in a liquidator, these provisions apply as if the assets were vested in the company and the acts of the liquidator were the acts of the company.

Rebasing, which has been a facet of the non-resident capital gains provisions as they relate to residential property, will also feature in this regime. It should be noted that time apportionment is not an option for non-residential or indirect holdings of land. There are transitional provisions for land which has changed status between 2015 and 2019.

A direct disposal of UK land will not be fully residential before 6 April 2019 if in the period beginning with the day on which the person acquired the interest in land being disposed of or, if later, 6 April 2015, and ending with 5 April 2019, there was no day on which the land to which the disposal relates consisted of or included a dwelling. If the disposal is of an interest in land subsisting under a contract for the acquisition of land that, at any time before 6 April 2019, consisted of or included a building to be constructed or adapted for use as a dwelling, the disposal is taken to be fully residential before that date.

A disposal is made by a person who was not chargeable before 6 April 2019 if, immediately before that date, the person was

- a company which was not a closely-held company (as defined by Schedule C1 TCGA 1992 which means either it is under the control of 5 or fewer participators or 5 or fewer participators together possess or are entitled to acquire such rights as would give the greater part of the assets on a winding up excluding rights as a loan creditor. Care also needs to be taken if any of the participators are diversely-held companies or qualifying institutional investors as this might mean the definition of closely-held is not met);

- a widely-marketed scheme (again defined in Schedule C1 and mainly relating to unit trusts and OEICs);

- a company carrying on life assurance business where the interest in UK land was, immediately before that date, held for the purpose of providing benefits to policyholders in the course of that business.

In calculating the gain or loss accruing on the disposal it is be assumed that the asset was on 5 April 2019 sold by the person, and immediately reacquired by the person, at its market value on that date. It is possible to make an election to calculate the gain as if this has not occurred but if this is an indirect disposal of UK land and a loss accrues then the loss is not an allowable loss.

Where the property is partly residential and partly non-residential then an apportionment will need to be done and different rebasing applying to each portion separately. If the land is mixed use, then the gain is pro-rated for that mixed use or if there has been change in use, pro-rating is also undertaken. If both occur, then both need to be taken into account with the overall computation being done on a just and reasonable basis.

Contributed by Ros Martin

Payroll changes in 2022/23 **(Lecture B1308 – 19.29 minutes)**

National Insurance limits

Let's start by looking at the NIC thresholds for 2022/23.

Until 5 July 2022, these will be as shown overleaf.

	Weekly	Monthly	Annual
Lower Earnings Limit	£123	£533	£6,396
Employee's Primary Threshold	£190	£823	£9,880
Employer's Secondary Threshold	£175	£758	£9,100
Freeport Upper Secondary Threshold	£481	£2,083	£25,000
Upper Earnings Limit + Veterans Upper Secondary Threshold	£967	£4,189	£50,270

Following the Spring Statement, we now know that from 6 July 2022, the Employee's Primary threshold will brought into line with the Personal Allowance, with all of the other thresholds remaining unchanged as follows:

	Weekly	Monthly	Annual
Lower Earnings Limit	£123	£533	£6,396
Employee's Primary Threshold	**£248**	**£1,048**	**£12,570**
Employer's Secondary Threshold	£175	£758	£9,100
Freeport Upper Secondary Threshold	£481	£2,083	£25,000
Upper Earnings Limit + Veterans Upper Secondary Threshold	£967	£4,189	£50,270

Health and Social Care Levy

From April 2022, the Health and Social Care Levy will initially be implemented by charging an additional 1.25% on top of current NIC rates on NIC'able pay. This will include both primary and secondary Class 1 contributions as well as Class 1A and Class 1B

HMRC has requested that employer's highlight this new levy on employee payslips by including a note stating that "The 1.25% uplift in NIC funds the NHS, health and social care"

The new NI rates for 2022/23 are as follows:

- Employees will pay 13.25% on earnings up to the Upper Earning Limit and then 3.25% on any excess;
- The reduced ladies rate will be 7.1%, dropping to 3.25% on earnings over the Upper Earnings Limit;
- Employers will pay 15.05% on earnings over the Secondary Threshold with no upper limit and this will also apply to for Class 1A and Class 1B purpose as well.

Separate levy from 2023/24 onwards

From 6 April 2023, the national insurance rates will return to previous levels and payroll software will be capable of charging the 1.25% Health and Social Care Levy, that will appear as a separate tax that appears on payslips.

From this date, workers who are over state pension age (table letter C) and currently not paying employees national insurance, will pay the 1.25% levy.

For 2023/24 the levy will be payable by:

- Employees on earnings above the Primary Threshold;
- Employers on earnings above Secondary Threshold.

Good news

The Health and Social Care Levy does not affect the Employment Allowance so employers can still claim their Employment Allowance against the employer's NIC, which will include the Health and Social Care Levy element.

The employer "breaks" that exist for veterans, in freeports, for under 21s and apprentices under 25 will continue. In these cases, when national insurance kicks in above the relevant Upper Secondary threshold, it will be payable at the higher rate of 15.05%.

Any payments that are already exempt from National Insurance, such redundancy pay, will continue to be exempt.

The not so good news

There will be a number of areas that will be affected by the Health and Social Care Levy as this is calculated on NIC'able earnings. That means that the levy will be charged on:

- Benefits in kind payrolled for NIC, such as vouchers beyond the trivial benefits limits and an employee's broadband bill that is in the employee's name;
- IR35 deemed payments;
- Termination payments over £30,000 where Class 1 A NIC is due.

Complications in 2023/24 and 2024/25

The Employment Allowance can be used to effectively reclaim employer's NIC paid. In 2021/22, the maximum that can be claimed is £4,000, increasing to £5,000 from 6 April 2022. However, the decoupling of the Health and Social Care Levy from National Insurance in 2023/24 could affect these claims.

In order to claim the Employment Allowance in a year, eligibility must be checked annually against the employer's NIC total in the previous tax year, which must not exceed £100,000.

In 2022/23, the employer's contributions will increase due to the Health and Social Care Levy being included and this could result in the £100,000 limit being exceeded. If that is the case, the Employment Allowance would not be available for 2023/24. (Note that secondary contributions relating to deemed direct payments under IR35 are excluded for this purpose.)

However, rolling forward to 2023/24, the secondary national insurance rate will return to 13.% which may mean that by 2024/25 the business is eligible for the Employment Allowance once more.

Small employer's recovering statutory payments

Statutory payments include:

- Statutory Maternity Pay;
- Statutory Adoption Pay;
- Statutory Parental Pay;
- Shared Parental Pay;
- Statutory Parental Bereavement Pay.

To be able to recover statutory payments at the small employer rate of 103%, total employees and employers NIC must be below the £45,000 limit for the previous year. If that limit is exceeded then the rate drops to 92%.

The inclusion of the Health and Social Care Levy in 2022/23 could result in the limit being exceeded, meaning the lower recovery rate would apply in 2023/24.

By contrast, in 2023/24, NIC will return to the former lower rates, making the employer eligible to the higher 103% rate again by 2024/25.

Employing veterans

Where an employer takes on a qualifying veteran, although the veteran will pay Class 1 primary contributions, the employer is only liable to Class 1 secondary contributions on NIC'able earnings that exceed £967 per week, the Upper Secondary threshold.

A qualifying veteran must:

- Be an ex-regular member of the armed forces;
- Have completed at least I day of basic training.

This scheme runs for 12 months from start of the qualifying individual's first civilian job. The employer must check that they have come straight from the army by looking at their P45 or seeing their discharge papers.

The veteran can have more than one job at the same time, with each employer claiming the allowance.

If the employee changes job during the first 12 month period, to be able to claim any remaining relief due, the new employer will need proof of the start date of the veteran's first job.

For 2021/22, payroll software has been unable to deal with the relief and so the veteran would have been given Table letter A. The employer paid the employer's NIC at the normal rates and will now make a claim by letter, post year end

From 6 April 2022, there is a new table letter V, which will enable the employer to claim the relief available in-year through payroll.

Employers in freeports

Provided that certain conditions are satisfied, from 6 April 2022, employers in one of the nine named freeport sites can claim a similar relief to that available for veterans but this time for employees at freeport sites. This freeport relief will run for 36 months from when each employee is taken on. The Intention is to extend this relief through until 5 April 2031

Qualifying employees will be given the new NI Table letter F which will enable payroll software to calculate employee primary contributions as normal but charge no employer secondary contributions until the Freeport Upper Secondary threshold for 2022/23 is exceeded. This means that secondary contributions are only due when NIC'able earnings exceed £481 per week, £2,083 per month or £25,000 per annum.

To be eligible:

- the employer must have a physical presence at the freeport site;
- the employee must be a new hire post 6 April 2022 who must spend at least 60% of their time at the site.

Article created from the seminar by Alexandra Durrant

Gift of shares to charity **(Lecture P1306 – 22.01 minutes)**

Summary – When valuing gifted shares the taxpayers had failed to take into account relevant information that was available to the public. HMRC's valuation of shares was held to reflect the appropriate valuation.

Five individuals (Alfred and Amanda Dwan, Malcolm Hunnisett, Andrew Openshaw-Blower and Richard Parkinson) made gifts of shares in Taskcatch plc to charity.

The gifting dates were 31 March 2003 and 5/6 October 2004 and each claimed tax relief on the value of the gifted shares at these dates. The taxpayers argued that the value used should be based on information publicly available at that time and their expert valuer stated that they would not undertake "any other type of valuation, verification or cross check".

Their valuation was therefore based on four very small trades registered on the AIM market and the values given when new shares were issued.

These values were:

- 32.5p per share as at 31 March 2003 (Mr Dwan);
- 40p as at 5 October 2004 (Mr Dwan and Mrs Dwan); and
- 39.75p on 6 October 2004 (Mr Hunnisett, Mr Openshaw-Blower and Mr Parkinson).

HMRC argued that these values overstated the gift relief claims. Their expert valuer was instructed to "assess the market value by taking into account the documents to which a prudent prospective purchaser of the gifted shares, who made appropriate enquiries, would have had access to, using the most appropriate valuation methods to determine the price that those shares would have reasonably been expected to fetch on a sale in the open market." As a result, they considered other factors, including the much lower value given in other company documents such as when acquiring another company in an arm's length transaction at 7p per share.

The individuals appealed to the First Tier Tribunal.

Decision

The First tier Tribunal noted that a Joint Report was prepared that set out the areas of agreement and disagreements between the parties, in relation to information readily available in the public domain, details of which are given in the case report. It was agreed to disregard internal unpublished Taskcatch Plc financial information, confidential documents produced by Taskcatch Plc's professional advisors and private share sales not reported on a regulated market and not in the public domain.

The report stated that the parties agreed that where shares were thinly traded, the market price may not accurately reflect open market value. However in arriving at their values the individuals' expert valuer did not take into account all of the publicly announced transactions but focused on the most recent AIM trades. The valuer was unable to explain why they had placed significant weight on what were small transactions rather than another transaction which took place at the same time, namely the acquisition of Skylark by the issue of 15,000,000 shares (49.4% of Taskcatch Plc's share capital as at 31 March 2003) at price of 7p per share.

The First Tier Tribunal concluded that a prudent purchaser would inform themself of the relevant facts, which was not the case here. The Tribunal found that the shares values should be taken as the midpoint of the upper and lower limits calculated by the HMRC expert. The market value of the Taskcatch Plc shares was held to be 8.85p per share at 31 March 2003 and 6.25p per share in October 2004.

Alfred Michael Dwan and others v HMRC (TC08388/V)

NOTE: Since 15 December 2009, there is an anti-avoidance provision which means that if the donor has held shares for less than 4 years (which was true in this case as they had only incorporated the company in early 2003) then you use the acquisition cost rather than market value for the value of the gift where it is part of a scheme where the main purpose is to obtain the relief. Although this is not the purpose of the decision in this case it could well apply in other cases.

Generous top slicing relief

Summary – When calculating top slicing relief, the taxpayer was allowed to allocate the personal allowance against the deceased's various sources of income in a way that achieved the lowest liability to income tax. Explanatory amendments made to legislation in FA 2020 could not be applied retrospectively.

Mr R Young died in March 2018. For the tax year 2017/18 up to his death, he received pension income of £49,460, savings income of £185 and dividend income of £52. Further, there was a single chargeable event gain of close to £230,000 that arose in connection with three life insurance policies.

Sally Judges, on behalf of the deceased, completed his 2017/18 tax return using HMRC's Self Assessment calculator, using the white space to appeal the top slicing relief permitted by the calculator.

In Marina Silver v HMRC the Tribunal stated that calculating top slicing relief, we must determine a hypothetical liability on the basis that the chargeable event gain was an annual fraction of the total gain.

Sally Judges sent a letter showing the calculations that she believed reflected the statutory basis for calculating the top slicing relief claimed of £50,939.

She had assumed, based on the legislation in place at the time that Mr Young was:

- entitled to allocate his personal allowance against his various sources of income in a way that achieved the lowest liability to income tax (s.25(2) ITA 2007); and

- not precluded from claiming the personal savings allowance by reference to the annual equivalent of the chargeable event gain.

HMRC treated the letter as the submission of an amended tax return in May 2019 and opened an enquiry into the amended calculations. On 8 September 2020 HMRC issued a closure notice limiting the top slicing relief to £6,176.

HMRC did not accept that the hypothetical calculation should be performed in this way and applied the amendments that had been made since Mr Young's death. With effect from 11 March 2020, s.535/536 ITTOIA 2005 were amended to clarify the position when calculating top slicing relief. These amended sections expressly provide that the beneficial ordering provisions of s.25(2) do not apply to the top slicing relief calculation and that as the chargeable event gain is to be treated as the highest part of the individual's income, reliefs and deductions should be set against other amounts of income for which the reliefs or deductions are available in preference to the being set against the chargeable event gain, such that only those remaining after deduction against those other income amounts may be set against the chargeable gain.

Sally Judges appealed.

Decision

The Tribunal found that HMRC's approach sought to apply the legislation that was amended in 2020 to a calculation that pre-dated this time.

The First Tier Tribunal did not accept that these amended provisions could be applied retrospectively.

Consequently, although 'very generous', Sally Judges' interpretation of the words contained within the legislation at the time of Mr Young's death was correct. There was no basis to exclude the provisions of s.25(2) ITA 2007 when performing the hypothetical calculation at that time. The Tribunal found that had Parliament wished to exclude beneficial reordering and/or personal savings allowance in the same way as gifts were excluded, the legislation would have so provided. As it now does, following the 2020 amendments.

The appeal was allowed.

Sally Judges (as representative for the late R Young) (TC08408)

Capital taxes

Properties not eligible for PPR (Lecture P1306 – 22.01 minutes)

Summary – Buying and selling four properties within five years did not constitute trading activity. However the profits were liable to capital gains tax with no PPR relief available.

In 2017, having discovered that Mark Campbell had disposed of a property, HMRC wrote to Mark Campbell asking him to submit a Self Assessment tax return for 2015/16.

He informed HMRC that he had disposed of a bungalow, the only property that he owned whilst living at his parents' home as his father's carer, and that this was Job-Related Accommodation.

In fact, Mark Campbell had bought and sold four properties over five years. Each property needed to be refurbished and was left empty while this work was undertaken. All four properties were then sold on at a profit.

Mark Campbell argued that he had intended to live in each property as his main residence but gave various reasons as to why he had not done so, including the fact that he was his father's carer and needed to stay in his father's home.

HMRC issued a closure notice for 2015/16 for £131,000 and two discovery assessments for earlier years of £100,000 on the basis the transactions were a trading activity. If not trading, the transactions were subject to CGT, with no principal private residence relief being available.

Decision

The First Tier Tribunal acknowledged that Mark Campbell had been 'very active' in the property market and no evidence had been put forward to support his argument that he intended to live in any of the four properties that he had bought.

However, the Tribunal concluded that he was not a property developer. The property transactions were not linked to an existing trade, and had not occurred over a long period The Tribunal stated:

> "Having considered all of the evidence, cumulatively, while the appellant clearly generated profits from the sale of the properties, and while the length of ownership for all but the very first purchase was relatively short, I find that this does not point towards trading."

These were a capital rather than trading transactions that fell within the CGT regime. The Tribunal concluded that:

- living at home with his parents due to his father's illness did not explain his claim that he was living in job-related accommodation.
- the evidence provided did not indicate 'any degree of permanence, continuity or expectation of continuity in relation to any of the properties'.

Mark Campbell had not intended to live in any of the properties as his main residence, so the gains were taxable in full.

HMRC's penalties for deliberate behaviour totalling some £40,000 were upheld as Mark Campbell had failed to declare the property sales and should have known that his transactions had tax implications.

His appeal was dismissed.

Mark Campbell v HMRC (TC08398)

Artificially large UK gain (Lecture P1306 – 22.01 minutes)

Summary – HMRC had been correct to calculate the gain on the sale of an overseas asset using the rules contained within legislation, despite this resulting in an artificially large UK gain due to exchange rate movements.

Howard and Monique Rawlings were both UK tax resident taxpayers. In August 2006, they jointly bought a property in Switzerland for CHF 563,000. This was partly funded by a Swiss franc mortgage secured on the property, which was let as a holiday let.

In December 2016, the property was sold for CHF 730,000 with the Rawlings each declaring 50% of a total capital gain calculated as £39,433.

HMRC opened an in-time enquiry into Howard Rawlings' return and sought further information as to the basis on which the capital gain had been calculated.

HMRC considered all costs deducted in connection with the mortgages were disallowed and recalculated the gain as £267,000 which was to be allocated 50:50 between the couple.

HMRC's calculation translated the sales proceeds and related fees into sterling using the exchange rate in 2016 and the costs that were deducted in arriving at the gain using the exchange applicable in 2006, when the property was bought.

HMRC issued a closure notice in respect of Howard Rawlings share of the gain and a discovery assessment in respect of Monique' share. Further, HMRC issued carelessness penalties against each of the Rawlings based on 15% of the tax charged, having given full mitigation for the penalty.

The Rawlings argued that the economic gain calculated by HMRC was artificially increased by the currency rate fluctuations affecting their mortgage repayments.

Decision

The First Tier Tribunal confirmed that capital gains are calculated in the "mechanistic way" adopted by HMRC and consequently found that the gain had been correctly calculated.

The Tribunal stated that when the Rawlings bought their Swiss property, they did not share ownership of it with the bank who provided the mortgage, stating:

> "The basis on which the purchase was funded is not taken into account when determining the difference between disposal value and acquisition cost. The fact that their mortgage was a foreign currency mortgage cannot influence the underlying premise that funding decisions carry no consequence in terms of the capital gains tax calculation."

Although sympathetic to the Rawlings position, the Tribunal found that tax is collected by reference to the legislative provisions, even where" the results in some situations appear absurd."

The appeal was dismissed.

NOTE: In Recommendation 11 of the OTS's CGT review (2nd report), the OTS stated that the government should consider whether gains or losses on foreign assets should be calculated in the relevant foreign currency and then converted into sterling. This would bring the position into line with the treatment with foreign currency bank accounts where taxpayers are not taxed on currency gains.

Howard and Monique Rawlings v HMRC (TC08384)

https://www.gov.uk/government/publications/ots-capital-gains-tax-review-simplifying-practical-technical-and-administrative-issues

Thoughts on the decision in Marren v Ingles (Lecture P1308 – 22.08 minutes)

The background to business earn-out deals

One eminent tax commentator has neatly summarised the rationale for business earn-out deals in the following way:

> 'Earn-outs fulfil a useful function by reconciling the so-called "price gap" that often exists between a seller and purchaser. Many sellers believe that they are selling their business ahead of its maximum profit potential. Consequently, they will want to negotiate a price for the business that reflects its future earnings potential. On the other hand, most prudent purchasers will only be willing to agree a deal based on future (increased) profits when they are actually "delivered" by the business. Thus, by incorporating an earn-out arrangement as part of the pricing mechanism for the purchase of the shares, the seller's and purchaser's objectives can be satisfied.
>
> An earn-out deal typically involves the seller receiving a fixed sum on completion, with further sums being paid over the next two or three years, calculated on a formula based on the actual results of the business over this period. The seller usually continues to be employed in the business during the earn-out period in a key management, technical or sales position. Thus, through their efforts during the earn-out period, sellers have the incentive to increase their disposal consideration, thereby ensuring that the purchaser's acquisition is successful.'

The tax consequences

In essence, the tax consequences of an earn-out transaction are based on the House of Lords' decision in *Marren v Ingles (1980)*. Where a taxpayer sells an asset such as shares and there is a right for that person to receive a future unquantifiable sum, the value of the right forms part of the consideration for the sale of the shares. To the extent that business asset disposal relief is available, the gain enhanced by the value of that right will qualify for this important CGT relief (subject, of course, to the availability of the cumulative lifetime limit).

The *Marren* case further held that the taxpayer, in these circumstances, acquires an entirely separate asset, i.e. a right (or *chose in action*). As and when earn-out payments are received, additional CGT disposals take place by virtue of S22 TCGA 1992 in respect of this earn-out right. However, even where the individual still has some of their business asset disposal relief limit available, the transaction involving the earn-out right will not attract the lower CGT rate – it is not a disposal of *shares* and so is typically taxed at 20%.

The problem of losses

One of the problems arising from this treatment is the possibility of being taxed on an unrealised gain. If the taxpayer puts forward an unrealistically high value for the earn-out right or if the situation changes (e.g. because of COVID-19), this could give rise to a capital loss on the disposal of the earn-out right. As has been pointed out:

> 'Before FA 2003 introduced a special relief, any such capital loss could not be carried back to reduce the seller's original capital gain. This meant that the seller would suffer tax on an amount that exceeded his overall economic gain from the earn-out transaction.'

In other words, the taxpayer's loss was – for the time being – stranded.

Prior to FA 2003, the capital gains rules only allowed a capital loss to be carried back to an earlier year in two scenarios:

1. where a loss accrues to an individual in the tax year of his death, in which case it can be carried back and set against gains of the three immediately preceding tax years on a LIFO basis (S62(2) TCGA 1992); and

2. where a loss accrues in respect of a mineral lease, in which case it can be carried back and set against gains of up to 15 years preceding the year of the loss (S202(9) TCGA 1992).

However, following the relief brought in by FA 2003, where the right to deferred unascertainable consideration is disposed of, any resulting capital loss can, on election, be carried back and treated as though it arose in the tax year of the original transaction (provided that this gave rise to a chargeable gain). Notice that the length of the carry-back does not matter.

In essence, the legislation under what is now Ss279A – 279D TCGA 1992 has effect where:

- a person within the CGT regime disposes of an asset and incurs a liability to tax on the gain on this disposal;

- some or all of the consideration for the disposal of the original asset consists of a right to a further payment, the amount or value of which cannot be established at the time when the right is conferred;

- the person subsequently disposes of the right at an allowable loss for CGT purposes in a later tax year than the one in which the original transaction took place; and

- the person elects to treat that loss as accruing in the same tax year as that in which the original gain arose.

It should be emphasised that this loss carry-back election is only available to individual and trustee disponors. Companies cannot benefit from the facility.

Illustration 1

On 1 December 2019, Monty, a higher rate taxpayer, sold some land in return for cash of £500,000 and a right to deferred unascertainable consideration valued at £126,000. This disposal gave rise to a gain of £370,000 and so Monty paid CGT at 20% on this amount less the annual CGT exemption for 2019/20.

On 1 July 2023, Monty received £90,000 for his right and, in doing so, realised a capital loss of £36,000.

He therefore elected under S279A TCGA 1992 for his loss of £36,000 to be treated as a loss in 2019/20, reducing his gain for that year to £370,000 – £36,000 = £334,000. He is therefore entitled to a CGT repayment of 20% x £36,000 = £7,200.

The interaction of a S279A TCGA 1992 election with other allowable losses also calls for comment. The basic principle, which is set out in S279C TCGA 1992, is that such losses are deducted in priority to the carry-back loss.

Illustration 2

Mortimer disposed of private investment company shares in 2017/18, making a gain of £68,000. He had allowable losses on sales of other assets in the same tax year amounting to £17,000. In addition, he had unused losses brought forward of £32,000.

After deducting the 2017/18 annual exemption of £11,300, Mortimer had paid CGT on:

		£
Gain on private investment company shares		68,000
Less:	Current year losses	17,000
		51,000
Less:	Losses b/f	32,000
		19,000
Less:	Annual CGT exemption	11,300
		£7,700

In 2022/23, Mortimer disposed of the right to deferred unascertainable consideration which he had received on the sale of the private investment company shares. This gave rise to a loss of £20,500.

Because he had no gains in 2022/23, Mortimer elected under S279A TCGA 1992 to treat his loss of £20,500 as a loss which accrued in 2017/18.

Mortimer's other losses are set off in priority to the loss of £20,500. Consequently, only £19,000 of the loss of £20,500 can be deducted from Mortimer's gains in 2017/18 – note that his annual CGT exemption for that year is wasted – and the balance of £1,500 (£20,500 – £19,000) is carried forward for offset against Mortimer's gains in 2023/24 and later years. He is not permitted to deduct this loss carry-forward from gains in 2018/19 and the other intervening tax years.

A S279A TCGA 1992 election is irrevocable and (*inter alia*) must specify:

- the relevant capital loss;
- the right disposed of;
- the tax year in which the right was disposed of;
- the tax year in which the right was acquired; and
- the nature of the original asset.

The election must be made by the first anniversary of 31 January next following the tax year in which the loss was made (S279D TCGA 1992).

Contributed by Robert Jamieson

Effective management in the UK

Summary – At the time a share disposal took place, the Mauritius trustees were 'passive participants" in a scheme. With effective management being in the UK, the gain on disposal of the shares was taxable in the UK.

The taxpayers appealed against amendments made by HMRC to their 2000/01 tax returns whereby HMRC imposed capital gains tax on the gains which arose on the disposals of shares in TeleWork Group plc made by the trustees of three family trusts.

The trusts were established under an arrangement known as a 'round the world scheme' that was found to have failed by the Court of Appeal in CRC v Smallwood and another [2010] STC 2045.

For a short period, the trusts were resident in Mauritius when, in August 2000, a planned share disposal took place. However, the trusts were also resident in the UK during the same tax year because the Mauritius resident trustees were replaced with UK tax resident trustees in October 2000.

Decision

The First Tier Tribunal found there was a period when each trust was a resident of Mauritius and the UK. The UK-Mauritius double tax treaty tie breaker was therefore in point so that the tribunal had to decide where the place of effective management of the trusts was.

The evidence showed the trusts had a UK place of effective management because 'there was an overall single plan for the sale of the shares in a tax efficient manner which was devised, decided upon, facilitated, orchestrated and superintended in the UK by the settlors and their UK advisers'.

Further, it was 'integral to the plan that the Mauritius trustees would be in place as trustees … for a brief period'. This was 'in the confident expectation that they would implement the plan by taking all the actions considered to be necessary for it to succeed'. However, the decisions in carrying out the plan were taken by the UK settlors and their UK advisers. The Mauritius trustees were the 'day-to-day management of or administration of this plan'.

The Tribunal decided the place of effective management of the trusts was in the UK when both the Mauritius resident trustees were in place and when the share disposal occurred. The disposal was therefore subject to capital gains tax.

The appeal was dismissed.

Geoffrey Haworth, Ian Lenagan, Kleinwort Benson Trustees Limited v HMRC (TC08386)

Adapted from the case summary in Taxation (24 February 2022)

IHT: 'Doubling up' on BPR (Lecture P1309 – 10.03 minutes)

Background

Business property relief (BPR) reduces the value transferred by a transfer of value of certain types of business or business property, at current rates of 100% or 50%.

Certain conditions must be satisfied for BPR to be available (e.g., relating to the type of business carried on, and the length of ownership of the business or business interest).

Where BPR is available, it can apply to lifetime transfers and relevant business property included in an individual's estate on death.

Married couples and civil partners

In the case of married couples (or civil partners), if (say) a spouse leaves relevant business property eligible for BPR at 100% to the surviving spouse on death, this will generally result in BPR being wasted on the first death.

This is because the business property will normally be subject to the IHT spouse exemption, so there is no IHT liability in any event, although the exemption may be subject to restriction if the recipient spouse is non-UK domiciled (IHTA 1984, s 18(2)).

Example 1: BPR wasted

Jamie died in January 2020, having made no lifetime gifts. His death estate was worth £1,950,000, comprising: the family home, valued at £650,000; bank and building society accounts and cash ISAs amounting to £850,000, and 50% of the shares in Famco Ltd, a family company that makes office furniture, valued at £450,000.

In his will, Jamie left cash of £325,000 to a discretionary trust for his UK-domiciled widow Delia, plus his adult children and grandchildren. The remainder of his estate was left to Delia, amounting to £1,625,000. Consequently, there was no IHT liability on Jamie's estate.

However, Delia's estate has increased in value by £1,625,000, so the potential IHT exposure for Delia's estate is higher, even though her estate may be eligible for the residence nil rate band if the family home is left to lineal descendants, and the shares in Famco Ltd may be subject to BPR in the future.

Example 2: BPR used on first death

Now suppose that instead of the Famco Ltd shares being left to Delia, Jamie leaves the shares to the family discretionary trust instead.

There is still no IHT liability on Jamie's death estate, as the shares left to the discretionary trust are subject to BPR at 100%.

The value of assets in the discretionary trust has increased from £325,000 to £775,000, due to the shares in Famco Ltd.

Delia's estate has increased by £1,175,000 following Jamie's death, comprising the family home worth £650,000, and cash deposits of £525,000. So BPR has been claimed on Jamie's death, and there has been a reduction in Delia's estate of £450,000.

The discretionary trust is potentially liable to IHT charges, mainly on 10-year anniversaries and when trust assets are appointed to beneficiaries. The IHT rates for trusts are generally lower than for individuals (i.e., normally a maximum IHT liability of 6% for the trust every ten years, as opposed to 20% for chargeable lifetime transfers by individuals or 40% on death).

However, the shares in Famco Ltd might become eligible for BPR once again if they are held for at least two years. In the meantime, Delia can potentially benefit from the trust assets as a discretionary beneficiary.

A 'double dip'?

In some situations, it may be possible for BPR to be utilised for a second time in respect of the same business property, when looked at in the context of a family unit, such as a married couple. This type of planning is sometimes referred to as BPR recycling, or 'double dipping'.

As with most types of tax planning, it must come with a 'health warning'. BPR recycling isn't one of the examples of abusive planning given by HMRC in its guidance on the general anti-abuse rule (GAAR). However, that does not mean that HMRC will necessarily refrain from challenging a BPR recycling arrangement, particularly if it is considered artificial.

In addition, before undertaking tax planning arrangements, it needs to be considered whether the arrangements must be notified to HMRC under the disclosure of tax avoidance schemes (DOTAS) provisions. Furthermore, members of the main tax and accounting bodies should refer to the guidance from their professional body regarding 'Professional conduct in relation to taxation' (PCRT) in relation to tax advice (tinyurl.com/PCRT-HS-TA). Solicitors and barristers practising tax have their own professional bodies' standards to maintain. Tax advisers who are not affiliated to any professional body will need to refer to HMRC's standard for tax agents (tinyurl.com/HMRC-SFTA), which includes standards for tax planning.

These issues are not considered further here but are mentioned to highlight the importance of due diligence when considering all but the most basic tax planning.

Example 3: The same again?

Following on from Example 2 where Jamie's shares in Famco Ltd were left to a discretionary trust, suppose that following Jamie's death, Delia became keenly involved in the running of the family business.

She bought the shares in Famco Ltd from the trustees of the discretionary trust for £450,000 (which is assumed to still equate to the market value of the shares). No capital gains tax (CGT) is payable by the trustees, as there was a CGT-free uplift in the value of the shares to £450,000 on Jamie's death. However, Delia will be liable to stamp duty at 0.5% of their purchase price, so there is a stamp duty liability for Delia of £2,250.

The cost of the shares for Delia was funded out of the investments inherited from Jamie. So the position after the share purchase is that the discretionary trust holds cash deposits of £775,000 (i.e., £325,000 + £450,000).

Delia's estate includes the family home worth £650,000, the shares in Famco Ltd worth £450,000, and cash deposits of £75,000 (i.e., £525,00 - £450,000), so £1,175,000 in total.

If Delia survives at least two years following the acquisition of the Famco Ltd shares and assuming BPR at 100% is still available in respect of the shares, the IHT on Delia's estate in respect of the assets inherited from Jamie is limited to the family home and remaining cash deposits. In the meantime, as mentioned the trustees of the discretionary trust may decide to allow Delia to benefit from the trust by making distributions to her as a beneficiary.

Future changes?

Because BPR is such a generous IHT relief, there is always a danger that BPR may be restricted or withdrawn in the future.

In July 2019, the office of tax simplification (OTS) published a report entitled 'simplifying the design of inheritance tax', which followed a consultation on the subject. One of the observations made by the OTS was that abolishing business and agricultural property relief would fund a reduction in the main rate of IHT from 40% to around 33.7%. The OTS recommended some significant IHT reforms. Whilst none of those reforms have so far been implemented, the possibility of further IHT reviews and the potential reduction or withdrawal of BPR in the future cannot be ruled out.

Contributed by Mark McLaughlin

Residential, not mixed use property (Lecture P1306 – 22.01 minutes)

Summary –Grounds in these two cases were residential property, liable to the higher SDLT residential rates.

The Court of Appeal considered the decision in two Upper Tribunal cases: Hyman and Goodfellow. As a brief reminder, in the:

- Hyman case, a house was bought along with 3.5 acres of land that included a run-down barn and a meadow which the Hyman's argued were not residential property;

- Goodfellow case, a house and 4.5 acres of land was bought with a garage office, stables and paddocks that the Goodfellow's argued were not residential property.

S.116 FA 2003 states that land forming part of the gardens or grounds of a property is residential property, with SDLT payable at residential rates.

In both the Hyman and Goodfellow cases, the taxpayers argued that the land described above did not form part of the garden or grounds, as it was not needed for the reasonable enjoyment of the dwelling. Consequently, the purchase should be treated as mixed-use property taxable at the lower non-residential rates of SDLT.

The taxpayers relied on HMRC guidance, statements of practice relating to stamp duty relief in disadvantaged areas, produced at the time legislation was introduced. This limited the land that should be viewed as residential property for SDLT purposes, similar to the capital gains tax test for land when considering principal private residence relief.

Both the First Tier and Upper Tribunals disagreed and the cases have now been heard jointly by the Court of Appeal.

Decision

The Court of Appeal turned to the Supreme Court's decision in *R (on the application of O) v Secretary of State for the Home Department [2022] UKSC 3*. This decision found that taxpayers must rely on statute and went on to find that other documents can assist with understanding but played only a secondary role when interpreting the law.

The Court of Appeal pointed out that the guidance being relied upon related to Stamp Duty, not Stamp Duty Land Tax. There was no reason why Parliament would have intended that this guidance also be applied to Stamp Duty Land Tax. The words in the SDLT legislation were 'clear and unambiguous'

The Court of Appeal stated that the permitted gardens and grounds for CGT purposes imposed a limit land qualifying for PPR relief, while s.116 FA 2003 had a different purpose. It sought to classify property as residential or non-residential. Unfortunately, including significant amounts of land did not make the property mixed use.

The appeals were dismissed.

David and Sally Hyman and Craig and Julie Goodfellow v HMRC [2022] EWCA Civ 185

NOTE: We are waiting to hear the outcome of a consultation on the definition of residential/non-residential which could change things going forward.

Practical issues relating to ATED (Lecture B310 – 16.42 minutes)

The Annual Tax on Enveloped Dwellings (ATED) is an annual tax charge which is levied on owners of residential properties valued in excess of the threshold amount which are 'enveloped' ie held by non-natural persons. There is an associated 15% SDLT charge on the same properties.

It is important to acknowledge that these are anti-avoidance provisions which often work in a very punitive way but this was in response to widespread avoidance of tax, particularly SDLT, by use of overseas property holding structures and HMRC are unapologetic about the way the provisions work. We are also seeing an increase in the compliance work being done by HMRC on ATED, mainly in relation to SDLT.

Here we are going to look at some practical issues, including areas which HMRC are challenging. However, we will first look at the basic principles.

The basic principles of ATED

ATED is charged where the following conditions are met:

- There is a chargeable interest which is a single-dwelling interest;
- The asset is beneficially held by a company, partnership with a company member or collective investment vehicle;
- The asset has a taxable value over the threshold.

It is payable for each year, or part year, for which the conditions are met. The current threshold value is £500,000.

This value is applied to each individual dwelling or property which is in the process of being constructed or adapted for use as a dwelling. Land occupied as part of the dwelling as garden or grounds is also taken into account in the valuation. Valuation issues are discussed below.

Some properties are specifically excluded from being treated as dwellings such as residential accommodation for school pupils, care homes, hospitals (and others).

ATED is levied according to a banding system based on the value of the dwelling. The current charges are as follows:

Value of property	2022/23	2021/22
£500,001 to £1m	3,800	3,700
£1,000,001 to £2m	7,700	7,500
£2,000,001 to £5m	26,050	25,300
£5,000,001 to £10m	60,900	59,100
£10,000,001 to £20m	122,250	118,600
Over £20m	244,750	237,400

These charges apply for the whole year but can be pro-rated where the charge applies for only part of the year. So if a property is only acquired part way through the year, the charge will only apply for the period when the property is held.

Since this is an anti-avoidance provision, HMRC acknowledged that there must be reliefs and exemptions from the charge in (what they consider to be) genuine commercial scenarios and so genuine businesses should be exempt from ATED.

The following are exempted from the charge:

- Property rental businesses;
- Rental property being prepared for sale;
- Dwellings opened to the public;
- Property developers;
- Property traders;
- Financial institutions acquiring dwellings in the course of lending;
- Regulated home reversion plans (from 2016);
- Occupation by certain employees or partners (changed in 2016);
- Caretaker flats owned by management company (from 2016);
- Farmhouses;
- Providers of social housing;

Each of these have their own conditions and it is important to be aware of the pitfalls, some of which are discussed below.

Returns

Where tax is charged on a person for a chargeable period will respect to a single-dwelling interest, the person must deliver a return for the period. A claim for relief must be made in the return or by amending the return, although there is a simple claim form for reliefs.

A return must be made within 30 days of purchase and then each year, even if no liability arises because there is a relief being claimed. For new builds the return has to be made within 90 days of completion (being completion for local authority purposes so when adopted for council tax purposes) or the date occupied if earlier.

Not surprisingly, many returns are filed late and normal penalties apply even if no tax is due. The Tribunal have been reluctant to allow appeals against penalties for failure to submit returns in those cases which have reached the First Tier Tribunal other than cases where there had been a procedural failure by HMRC (Heacham Holidays Ltd [2020] TC07883 being the most recent). Several appeals on the basis that penalties were disproportionate (because no tax was due) have been dismissed and arguments of ignorance of the law have not succeeded here as they would be unlikely to in relation to other compliance obligations.

Identifying the 'high value interest'

Mixed use property will need to be separated out. If a dwelling is part of a larger property, only the residential part is subject to ATED and the ATED-linked SDLT charge. This may be easy in some cases. For example, a shop with a flat over can be easily separated out into its constituent parts. However, a large residential property which is part of an agricultural holding might be more difficult as it could be problematic to work out where dwelling starts or finishes.

If there is more than one dwelling in a property (ie a main dwelling and an associated dwelling standing within the garden or grounds of the main dwelling) and they are owned by a person connected with the chargeable person, they are added together and looked at as a single dwelling where there is no separate access. Two dwellings in the same dwelling are treated as one dwelling for ATED purposes where there is private access between them. This would apply to property in a terrace, semi-detached houses or flats in a single building.

Valuations

The valuation of land for ATED purposes is not very logical. At the point at which ATED was introduced, being 1 April 2013, any existing dwellings had to be valued as at 1 April 2012. The value then has to be re-evaluated every 5 years from that initial date. The value that we are looking at in all cases is the market value, being the price that could be expected to be achieved between a willing buyer and a willing seller.

Property was therefore revalued at 1 April 2017 and there will need to be another revaluation of property at 1 April 2022 which will impact rates of ATED from 1 April 2023. If the property is acquired after any of these dates, then it is valued at the acquisition value at the time of purchase and then revalued at the same dates.

Those to whom the charge applies will need to self-assess the value of the property. There is no obligation for the value to be established by a professional valuer but, of course, HMRC can challenge any ATED return and this includes being able to challenge the valuation.

It is possible for a taxpayer to ask HMRC to agree the valuation before the return is submitted by asking for a Pre-Return Banding Check. However, this is only available for those who believe that their property valuation falls within a 10% variance of a banding threshold. In fact, HMRC will only agree to the banding proposed and not comment on any formal valuation. It is also stressed by HMRC that this confirmation cannot be used for any other purpose by the taxpayer. HMRC can still also enquire into a return which is based on the PRBC.

Use of property

The reliefs from ATED focus on the use of the property. However, the SDLT provisions look at the purpose for which the property is purchased. If the conditions for relief are breached in the first three years of ownership, then there may be additional SDLT to pay on the purchase.

Use of property issues were discussed in Hopscotch Ltd v R&C Commrs [2020] BTC562. The company, resident in the BVI, had acquired a property in London in 1993 for £1.25m but then did nothing with it. They tried to sell it for £13.5m in 2011 but then decided to renovate it so as to improve the chances that a sale could be achieved. It was remarketed in 2017 at £15.9m but was unsold at the date of the hearing even though the price had again

been reduced. Relief had been claimed from 2016/17 year from ATED (even though it had been paid in previous years) on the basis that it was carrying on the trade of property development.

HMRC dismissed this argument having considered the badges of trade and this view was confirmed by the FTT and then the UT. There was simply insufficient evidence to support a view other than the work was being done to facilitate a sale and this was not a trading activity.

Another case which addressed this point was Pensfold [2020] TC07609.

Pensfold was a company registered in the Cayman Islands. On 12 January 2017 the company acquired Pensfold Farm, including 27 acres of land previously used for grazing for £2,825,000. The plan was to develop the property at Pensfold Farm into an eco/agritourism venture. The intention was to add a tennis court and changing facilities in an existing barn, to create a new lake, introduce alpacas as well as rare breeds of sheep, pigs and cattle and provide facilities for ponies and an entertainment barn. The project was delayed after purchase while the state, and possible uses, of the land considered. The return was made on the basis that this was non-residential property but HMRC believed it was residential and that the 15% rate was due.

Relief is available if the property was acquired "with the intention that it will be exploited as a source of income in the course of a qualifying trade" with "reasonable commercial plans" in place to carry out that intention without delay, "except so far as delay may be justified by commercial considerations or cannot be avoided". HMRC had challenged the extent of realistic plans for the site.

The First Tier Tribunal was satisfied that the trade exemption was in point as there was a clear intention to carry out their trade; the law only required 'reasonable commercial' plans to be in place, rather than the detailed plans suggested by HMRC. There was no requirement for the trade to actually be carried on for the relief to apply. Further, The Tribunal confirmed that the delays, to draw up detailed plans and to await the outcome of HMRC's enquiry, were clearly for commercial reasons.

The most problematic of the reliefs is that which relates to property which will be used in a qualifying property rental business. This is because the relief is not available if there is occupation of the property by a 'non-qualifying individual' although it is important to note that the definition of this term includes non-individuals. It is a very wide definition.

In the case of Fish Homes Ltd [2020] TC07666 the company acquired a two-bedroom flat in a block in Greenwich to add to an existing property portfolio. However, it transpired that the flat was in a block with cladding similar to that used in Grenfell meaning that the property could not be let out on a formal tenancy agreement. Whilst work was going on to rectify the problem, the property was occupied by the shareholders' eldest daughter and a friend of hers. The initial SDLT return had been completed without payment of the 15% charge because the property was intended to be used in a property rental business but HMRC opened an enquiry on the basis that either that was not the intention at the time of purchase or that the daughter's occupation within 3 years meant that the relief claimed was clawed back. The appellants tried to argue that the property was not a dwelling (following a judgement in the case of P N Bewley Ltd [2019] TC06951 which related to the 3% supplement but which hinged on the status of the property) because of the failure of the building to comply with building regulations due to the cladding. However, the FTT found

that this in itself does not render a building being incapable or unsuitable to be used as a dwelling since many people live in houses built under earlier regimes which would not comply with current regulations. On that basis the claw-back of the relief was correct.

This was reinforced in the case of Waterside Escapes Ltd [2020] TC07881.

Waterside Escapes Ltd ran a holiday property rental business.

In June 2015, the company bought a property from Bewl Holiday Homes LLP for £1,250,000 and paid SDLT totalling £68,750 on the basis that it had acquired the property exclusively for the purposes of its holiday letting business. The LLP's members were a married couple, each holding a 50% interest in the partnership. The wife also held 50% of the shares in Waterside Escapes Ltd, with the remaining shares being held by a trust whose shares were acquired on the day that the property was bought.

The First Tier Tribunal rejected Waterside Escapes Ltd's argument that the 15% rate did not apply, as the property was not acquired exclusively for use in a rental business. The Shareholders' Agreement allowed shareholders to use the property for up to five days per annum. The Tribunal concluded that the 15% rate should have been paid as a non-qualifying individual was permitted to occupy the property for up to five days a year.

There was a partial victory relating to the chargeable consideration but the principle was established that the small entitlement to occupation brought the ATED provisions into play.

The very prescriptive nature of the reliefs was highlighted in the case of Sequence Care Group Holdings Ltd [2018] TC06475 which purchased a large residential property which was to be converted into a care home. Relief from the ATED linked SDLT charge is only available where it is intended that the residential property is to be exploited as a source of income in the course of a qualifying trade. A care home is not a residential property for these purposes so the intention to convert denied the relief although the legislation has now been amended to allow this to occur.

Contributed by Ros Martin

Administration

Bulk appeals against late filing penalties

HMRC has confirmed that agents will be allowed to submit bulk appeals for late filing penalties for up to 25 appeals, but only where the reasonable excuse is due to COVID-19.

Each bulk appeal must be made using HMRC's template form which should be post to:

Bulk Agent Appeals
HM Revenue and Customs
BX9 1ZH

Where more than 25 appeals are being made, the agent must submit a second bulk appeal in a separate envelope.

This facility will be available for appeals made up until 6 May 2022.

https://www.gov.uk/guidance/bulk-filing-of-self-assessment-appeals-for-multiple-clients

Claiming National Insurance relief in Freeport tax sites

On 28 February 2022, HMRC published new guidance on claiming relief from employer Class 1 National Insurance contributions (NICs) when taxpayers employ someone in a Freeport tax site. This relief is only available where the relevant Freeport tax site has been designated.

Employers with a business premises in a designated Freeport tax site can claim the national insurance relief for 36 months provided that all employees:

- spend 60% of their working time in the Freeport tax site, or as adjusted to accommodate disability, pregnancy or maternity;
- are new employees between 6 April 2022, and 5 April 2026;
- have not been employed by the current or connected employer in the last 24 months.

Secondary Class 1 National Insurance contributions will only be payable where the employee earns more than the Freeport Upper Secondary Threshold of £25,000 per year, £2,083 per month or £481 per week.

https://www.gov.uk/guidance/check-if-you-can-claim-national-insurance-relief-in-freeport-tax-sites

Penalty mitigation – errors **(Lecture P1310 – 16.08 minutes)**

This article considers the mitigation, or the reduction for disclosure, that may be available in relation to the penalties that may be charged when a taxpayer has submitted a return or document containing an error to HMRC. It will not cover the mechanics of the penalty

calculation but will consider some of the practical considerations for advisers dealing with a case where these penalties are, or may be, charged by HMRC.

Overview

The relevant penalty rules, at Schedule 24, Finance Act 2007, apply to Capital Gains Tax, Construction Industry Scheme, Corporation Tax, Income Tax (including Self-Assessment), NIC (Classes 1 and 4), Pay As You Earn, and VAT, for returns or documents that were due to be sent to HMRC on or after 1 April 2009, and relate to a tax period beginning on or after 1 April 2008. The rules were extended to cover other taxes administered by HMRC for returns or documents that were due to be sent to HMRC on or after 1 April 2010 and relate to a tax period beginning on or after 1 April 2009.

For earlier periods, a different set of rules apply, but they are not considered in this session. In addition, this session does not consider the increased penalties that can apply where the penalty relates to income or an asset that is held outside of the UK, or the special rules relating to documents connected to avoidance arrangements.

It is not sufficient for there to be an error in a return or document submitted to HMRC for a penalty to be charged. There must also be an underpayment of tax or a misrepresentation of the tax liability arising from the error (this can include an excessive over-repayment claim, or excessive loss claim). When there has been an underpayment of tax, etc, you need to determine the appropriate penalty, if any, by considering the relevant culpability.

HMRC have produced a factsheet, CC/FS7a, which covers penalties for inaccuracies in returns and documents. The factsheet can be accessed from the link on the following page, https://www.gov.uk/government/publications/compliance-checks-penalties-for-inaccuracies-in-returns-or-documents-ccfs7a

The categories of behaviour

There are four categories to consider:

1. Reasonable care - not defined, and the words take their ordinary meaning. Each case must be determined by the facts, and the client's circumstances. What is accepted as being reasonable care for one taxpayer may not apply to another.

2. Careless – where the inaccuracy is due to failure by the taxpayer to "take reasonable care".

3. Deliberate but not concealed –where the inaccuracy is deliberate on the taxpayer's part but the taxpayer does not make arrangements to conceal it.

4. Deliberate and concealed –where the inaccuracy is deliberate on the taxpayer's part and the taxpayer makes arrangements to conceal it. This includes by submitting false evidence in support of an inaccurate figure.

Advisers should note that, absent an admission by the client, the onus is on HMRC to demonstrate, on the balance of probabilities, that the client's behaviour was deliberate.

In addition, advisers need to be aware that an inaccuracy in a document given by the client to HMRC, which was not careless or deliberate on the client's part when given to HMRC, will

be treated as careless if the client discovers the inaccuracy at a later time and did not take reasonable steps to inform HMRC.

Where HMRC accepts that a client has taken reasonable care, they do not charge a penalty. Thereafter, the level of penalty that HMRC can charge increases as you progress to the more serious categories of culpability. In addition, non-financial sanctions may also apply where the client falls in either of the deliberate categories.

When considering the appropriate category of behaviour for an inaccuracy, advisers need to establish all material facts – this can include consideration of any health (physical or mental) issues that impacted on the client, any relevant personal circumstances, what records the client has maintained, and what advice was obtained.

Unprompted v prompted

The next consideration, where appropriate, is to establish whether the disclosure was unprompted or prompted. This determines the minimum penalty percentage that HMRC can charge. There is a statutory definition (Para 9(2), Schedule 24, Finance Act 2007) of when a disclosure is unprompted. The legislation states that a disclosure will be "unprompted" if it is "made a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy…". Otherwise, the disclosure is "prompted".

Advisers need to establish the facts, to determine whether their client's disclosure is unprompted, including copies of any correspondence from HMRC. It is an important position to determine, because of the impact on the penalty that HMRC can charge. Can you establish that the client has made an earlier notification to HMRC of the problem, for example?

Where HMRC have started an enquiry into a client's affairs, it may still be possible to argue that a client has made an unprompted disclosure, although this would usually need to be where the disclosure area is unrelated to the purpose of the enquiry.

HMRC officers are told to reserve judgment as to whether a disclosure is unprompted or prompted until the end of their compliance check. This is because new evidence can emerge over the course of the investigation. Advisers should take a similarly cautious approach, until all available documentation, and information, has been obtained.

The quality of disclosure

The level of co-operation demonstrated by the client, deemed the quality of disclosure, determines the amount of reduction that applies to the penalty. The greater the co-operation given by the client, the greater will be the reduction applied to the penalty. This breaks down to three areas – telling, helping and giving. Each of these areas is considered in relation to their respective timing, nature and extent.

Practical considerations

The right time to consider penalties is at the start of an enquiry, not at the end. Advisers should inform the client about the potential penalties that can be charged and give appropriate advice. The actions of the adviser can impact on the level of penalty that is charged, so they should avoid any delay in their communications with HMRC.

The penalty is applied to the potential lost revenue ("PLR"), usually this is the amount of tax that has been underpaid. Advisers should consider whether the PLR has been correctly calculated, and whether there is any justification for its reduction.

Advisers should ensure that they, and HMRC, consider each inaccuracy separately. Different categories of behaviour may apply, with the relevant penalties applied. There can be a tendency for inaccuracies to be treated as one, and this should be avoided. A key part of this is the need, and ability, to make an objective assessment of the client's culpability, and to issue appropriate advice to the client. This is a scenario that I often come across in practice, with an acceptance by the adviser that they are too close to the client to make the necessary assessment.

When considering penalties, it is important to establish all relevant facts, and gather supporting documents, which will help the adviser to make the objective assessment noted above.

Advisers should consider obtaining specialist advice (ideally before approaching HMRC) where they have any concerns, either about the client's case, or their ability to make an objective assessment. The adviser should establish whether there are any special circumstances, such that a special reduction can be applied to the penalty. Where the adviser and client cannot agree the penalty with HMRC, the client can use the appeal process (covered in other sessions).

Contributed by Phil Berwick (Director, Berwick Tax)

Deadlines

1 April 2022

- Corporation tax due for periods to 30 June 2021 for SMEs not paying by instalments
- Multiple contractors to advise they wish to be a single contractor for 2022/23

5 April 2022

- Deadline to pay unpaid class 3 National Insurance for 2015-16

7 April 2022

- VAT returns and payment for 28 February 2022 quarter (electronic payment)

14 April 2022

- Quarterly corporation tax instalment for large companies
- Forms CT61 and tax paid for the quarter ended 31 March 2022

19 April 2022

- PAYE, NIC, CIS and student loan liabilities for month to 5 April 2022 (non- electronic)
- PAYE liability for quarter to 5 April 2022 if average monthly liability is less than £1,500

21 April 2022

- File online monthly EC sales list – only business in Northern Ireland selling goods
- Supplementary intrastat declarations for March 2022
  - arrivals only for a GB business
  - arrivals and despatch for a business in Northern Ireland

22 April 2022

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

30 April 2022

- Companies House should have received accounts of:
  - private companies with 31 July 2021 year end
  - public limited companies with 31 October 2021 year end
- Corporation tax Self Assessment returns for companies with periods 30 April 2021

News

Online sales tax consultation

The government is seeking to rebalance taxation in the retail sector between online and in-store facilities. Shops pay business rates but online businesses do not. Following the recommendation from its business rates review report, in the Autumn Budget 2021, the Government stated that they planned to consult on introducing an Online Sales Tax. If the introduction went ahead, the money raised would be used to reduce business rates in the retail sector.

The consultation:

- looks at potential designs and impacts on consumers and businesses of implementing such a tax;
- sets out various options together with the likely impacts on businesses and their customers;
- includes questions asking what goods and services it should apply to and possible exemptions from the tax.

The consultation closes on 20 May 2022.

https://www.gov.uk/government/consultations/online-sales-tax-policy-consultation

Business Taxation

Leisure complex (Lecture B1306 – 17.33 minutes)

Summary – Claims for capital allowances, loss relief and VAT input tax recovery on expenditure incurred when constructing a sports and leisure complex adjacent to the taxpayer's home were denied. No trade was being carried on.

Graham Wildin was the principal partner of an accountancy firm known as Wildin & Co, which provided a range of services and employed 30 members of staff.

In addition to his main residence, known as Altea, Graham Wildin owned two terraced cottages which backed onto Altea. Over the years, he had constructed various buildings at these properties including a vintage car showroom, an Oriental Garden with a number of related outbuildings, a large outdoor play area, an amusement arcade, an 8-person hot-tub and sauna, and an indoor swimming pool that was under construction.

In 2013, he started work on the construction of a substantial sports and leisure complex on his estate that included a sports hall, squash court and fully equipped gym, a bowling alley, a 16-seater cinema, a small casino and a kitchen with X-Box games to play as well as board games like chess and Monopoly. When interviewed by, among others, the Daily Mail, he explained that the complex was to be used by his family.

On 13 August 2013, Graham Wildin registered for VAT by submitting Form VAT1, ticking the boxes for 'Voluntary Registration' and 'Intend to make taxable supplies in the future'. He stated that he was registering as sole-proprietor with the trading name as 'Forest of Dean Luxury Holidays'.

He submitted tax returns for his business showing nominal turnover figures and large losses, created as a result of capital allowances claimed. Further he sought to reclaim input tax on the construction costs of the complex.

As a result of HMRC enquiries, Graham Wildin confirmed that he:

- had deliberately stressed to the newspapers that his new Complex was for private use in an attempt to gain planning permission
- intended to let out one of the properties as a holiday let with access to the Complex for £3,000 to £4,000 a week, and his own private residence occasionally;
- confirmed that all capital allowances claim related to the Complex;

HMRC took the view that as an accountant, he would understand the difference between private and business expenditure; his actions appeared fraudulent, and the case was referred for Criminal Investigation.

HMRC raised closure notices, discovery assessments, penalties and VAT surcharges totalling £297,630.65 (not including interest),

Graham Wildin appealed to the First Tier Tribunal

Decision

The First tier Tribunal found that Graham Wildin had made it clear to the Press that his new Leisure Complex was intended for his family's use.

The First Tier Tribunal found that there was no evidence of any trade being carried on. HMRC had been correct to deny Graham Wildin's claims for capital allowance and loss relief claims and with no economic activity, input VAT was not recoverable.

The appeal was dismissed.

Graham Michael Wildin v HMRC (TC08394/V)

Windfarm studies and project management (Lecture B1306 – 17.33 minutes)

Summary – Environmental studies and project management costs relating to the construction of windfarms partly qualified for capital allowances

The four companies in this case were all members of the same group, whose parent company was Orsted A/S, a Danish company. Each company owned and operated an offshore windfarm used to generate and sell electricity.

Between them, they claimed capital allowances on £48million of expenditure, incurred prior to the construction of the windfarms. Broadly, the expenditure fell into the following four categories:

1. Environmental impact studies and assessments;

2. Metocean studies on water level, wave regime, currents and wind conditions;

3. Geophysical and geotechnical studies; and

4. Project management, design and procurement.

HMRC accepted that each company was entitled to capital allowances on the costs incurred on the construction and installation of the wind turbines as well as the electrical array cables which connected them. However, HMRC argued that the expenditure on environmental studies and project management put the companies in the position to incur expenditure on the provision of plant, but the expenditure itself was not plant. The expenditure was "too remote from" and "was not on the provision of" the windfarm or the wind turbines themselves. Consequently, this expenditure did not qualify for allowances.

The companies appealed, arguing that they were entitled to capital allowances. The taxpayers believed that the term 'on the provision of' extended to expenditure directly relating to the plant's design and installation. To function effectively, the plant needed to be appropriately designed.

Alternatively, the companies argued that the expenditure qualified as deductible pre-trading revenue expenditure.

Decision

The First Tier Tribunal confirmed that each windfarm was a separately identifiable item of plant used to generate and facilitate the sale of electricity. The issue to decide was whether the 'provision of plant' extended to plant design.

The Tribunal identified two types of design:

1. 'Necessary design' without which the windfarms could not function, expenditure on which did qualify for capital allowances;

2. 'Unnecessary design' without which the windfarms could continue to generate electricity and so capital allowances were not available.

Reviewing the various environmental studies, the First Tier Tribunal identified which studies were necessary (qualifying for capital allowances) and which were unnecessary (not qualifying for capital allowances). Where costs did not qualify, the Tribunal found that they also did not qualify as deductible pre-trading revenue expenditure as the expenditure was capital in nature.

The Tribunal used a similar approach for the project management expenditure, concluding that this qualified for capital allowances to the extent that it related to:

- studies where capital allowances were available;

- negotiating contracts with manufacturers and installation vessel providers; and

- overseeing construction and installation.

The appeal was allowed in part.

Gunfleet Sands Ltd and others v HMRC (TC08387)

Disposal of super-deduction assets **(Lecture B1307 – 26.13 minutes)**

The 130% and 50% super-deductions

S.9 FA 2021 introduced two temporary forms of first year allowance (FYA) for capital expenditure on plant or machinery known as:

1. the 130% super-deduction; and

2. the 50% super-deduction.

There are five conditions which must be satisfied in order for expenditure on plant or machinery to qualify for the 130% FYA:

1. The expenditure must be incurred on or after 1 April 2021 but before 1 April 2023;

2. The expenditure must be incurred by a company. The relief is not available for unincorporated businesses;

3. The expenditure must relate to plant or machinery which is unused and not second-hand;

4. The expenditure must not fall within any of the general exclusions in S46(2) CAA 2001. For example, it must not be incurred:

   – in the accounting period in which the company's activities are permanently discontinued; or

   – on the provision of a car

5. The expenditure must not be special rate expenditure. This category covers expenditure on:

   – thermal insulation;

   – integral features;

   – long-life assets; and

   – solar panels

The second super-deduction – given at 50% – is available for expenditure on plant or machinery which normally attracts writing down allowances (WDAs) at 6% on a reducing balance basis, i.e. the items referred to in 5. above. The remaining conditions for this 50% FYA mirror those in 1. To 4. above.

No relief for pre-3 March 2021 contracts

Where a contract for the provision of plant or machinery was entered into before the date of last year's Budget (3 March 2021), any expenditure incurred as a result of this contract is specifically excluded from qualifying for the 130% and 50% reliefs.

A reduced super-deduction

Where a company incurs super-deduction expenditure in an accounting period which ends on or after 1 April 2023, the 130% relief is substituted by a lower figure (S11 FA 2021). The determination of the relevant percentage is illustrated below.

Illustration 1

Russell Industries Ltd has a 12-month accounting period to 31 December 2023.

The company's modified rate of FYA relief for plant or machinery purchased prior to 1 April 2023 is calculated as follows:

1. Take the total number of days in the period prior to 1 April 2023 (90) and divide this by the total number of days in the accounting period (365); then

2. Multiply 90/365 by 30 (this produces 7.397); and

3. Add 100 to the result, giving a relief of 107.397% for qualifying expenditure incurred during the first three months of the company's accounting period.

Disposal of assets attracting 130% FYA

S12 FA 2021 is in point where:

1. a company incurred expenditure on plant or machinery in respect of which a 130% FYA was claimed; and

2. there is subsequently a disposal of all or part of that plant or machinery.

In these circumstances, the company making the disposal is liable to a balancing charge in the accounting period in which the disposal event took place (regardless of whether or not the company is also liable to any other balancing charge for that period).

The rationale for this rule is straightforward. If A Ltd bought an asset for £60,000 on 1 March 2022 and claimed a 130% FYA for its year ended 31 March 2022, this would have the effect of reducing the company's taxable profits by 130% x £60,000 = £78,000 for that accounting period. However, if A Ltd then sold the piece of equipment two months later for the same price, sale proceeds of £60,000 would normally be deducted from the tax written down value of the capital allowances pool for the year ended 31 March 2023 so that the company would have ended up obtaining tax relief of £18,000 at no economic cost. Clearly, this was never going to be permitted.

Accordingly, the asset's sale proceeds are treated as a separate taxable receipt (i.e. they are not deducted from the capital allowances pool) and, in order to ensure a proper symmetry, they must be multiplied by what S12(6) FA 2021 calls a 'relevant factor'. This is 1.3 if the accounting period in which the disposal takes place ends on or before 31 March 2023. If this period straddles 31 March 2023 (but only up to 30 March 2024 at the latest), the tapered rate illustrated above is used. For subsequent accounting periods, the sale proceeds are brought in without any uplift.

Illustration 2

Arthur Antiques Ltd has an accounting date of 31 December. The company incurred expenditure of £1,600 on a new computer on 1 September 2022 and therefore claimed a super-deduction of 130% x £1,600 = £2,080 in respect of its accounting period ended 31 December 2022.

The computer is sold for £750 on 1 July 2025. This disposal event is liable to a balancing charge. The amount of the balancing charge to be brought into account for the accounting period ended 31 December 2025 is £750.

The tax relief retained by the company is £2,080 – £750 = £1,330. Even if Arthur Antiques Ltd has a substantial tax written down balance in its main capital allowances pool, this will not be available to shelter the balancing charge.

Alternatively, if the computer had been sold for £750 on 1 July 2023, the balancing charge would have been 107.397% x £750 = £805.

An important consequence of this regime is that assets which benefit from the 130% super-deduction are not added to the main pool for capital allowances purposes. They must be tracked individually. Companies have to maintain detailed records of the various assets acquired over the qualifying two-year period so that they can be identified when they are disposed of. Commercial corporation tax software will facilitate this.

The next aspect to consider is a disposal which follows a partial 130% FYA claim. This is illustrated below.

Illustration 3

Edward Engraving Ltd has an accounting date of 31 December. The company incurred expenditure of £100,000 on a new machine for its engraving factory on 1 October 2022.

The company claimed a 130% FYA on £75,000 of this expenditure (130% x £75,000 = £97,500) in respect of its accounting period ended 31 December 2022. The remaining balance of the expenditure (£100,000 – £75,000 = £25,000) was added to the main capital allowances pool.

The machine was sold for £62,000 on 1 November 2025. This disposal event gives rise to a balancing charge. However, before the taxable credit can be determined, it is necessary to establish what S12(3) FA 2021 calls the 'relevant proportion'.

The relevant proportion is calculated by dividing the amount of the 'relevant super-deduction expenditure' incurred in respect of the plant or machinery by the amount of the 'total relevant expenditure' in relation to that plant or machinery (S12(4) FA 2021).

By virtue of S12(5) FA 2021, the relevant super-deduction expenditure is the amount of expenditure in respect of which a super-deduction has been claimed (i.e. £75,000). And the total relevant expenditure is the amount of expenditure incurred on the provision of the plant or machinery covering the following categories:

- the relevant super-deduction expenditure (£75,000);
- expenditure in respect of which any other FYA was made (£0); and
- expenditure which was allocated to a capital allowances pool for any accounting period, including the period in which the disposal event occurs (£25,000).

The relevant proportion is therefore 75,000/75,000 + 25,000 = 0.75.

The relevant proportion is multiplied by the disposal value of £62,000 which results in a balancing charge of 0.75 x £62,000 = £46,500.

The remaining £15,500 of the disposal value of £62,000 is deducted from the main capital allowances pool in the normal way (and may of course give rise to a further balancing charge).

Disposal of special rate assets attracting 50% FYA

A similar treatment applies to the disposal of special rate assets which have qualified for the 50% relief (S13 FA 2021). In such cases, the standalone balancing charge is the relevant proportion (i.e. normally 50%) of the disposal value of the plant or machinery. For example, let us assume that a company with a 31 March year end purchased new solar panels in February 2022 for £240,000 and claimed a 50% FYA. This would come to £120,000. The balance of the company's expenditure will be included in the special rate pool. If the solar panels were sold for £44,000 in September 2025, this would give rise to a balancing charge of 50% x £44,000 = £22,000 for the year ended 31 March 2026. The remaining disposal proceeds of £22,000 would be deducted from the balance in the special rate pool before the calculation of the WDA for the year ended 31 March 2026.

Contributed by Robert Jamieson

R&D consultation – further details (Lecture B1309 – 16.06 minutes)

Data and cloud computing costs

The proposals are to extend the R&D incentives for acquisition of datasets used in R&D via a licence payment. However, this is restricted to datasets used only for R&D purposes. If the claimant can sell the dataset or if the use/ commercial exploitation of data extends beyond the R&D project then these costs would not be eligible.

In addition, cloud computing costs may be eligible if they directly relate to R&D and this would include the computation, analysis, and processing of data for R&D. However, some large costs linked to servers and storage would be excluded from the R&D incentives claims.

HMRC also clarify that staff costs for employees engaged in the collecting, cleansing and analysis of data for R&D purposes may be included in the claims.

Refocusing R&D Incentives on UK Activities

The proposed changes will severely restrict UK R&D tax incentives for overseas R&D. The key changes proposed are as follows:

- Subcontracted out R&D will only qualify for R&D incentives where the third party undertakes the R&D in the UK;

- Under the research and development expenditure credit (RDEC) regime, payments to qualifying bodies (e.g. universities or health bodies) to undertake independent research will only qualify if the activities are undertaken in the UK; and

- Payment to externally provided workers will only qualify where the workers' salaries are paid through a UK payroll.

Tackling abuse and compliance

In 2019, UK businesses claimed R&D tax relief of £47.5 billion whilst the Office of National Statistics estimates businesses only carried on R&D costing £25.9 billion that was privately financed in the UK by private businesses. Some but not all of this perceived gap may be explained by overseas R&D but clearly HMRC have concerns over the cost driven by spurious or excessive R&D claims. The changes aiming to tackle this are:

- All claims will have to be made digitally;
- Digital claims will require more details to substantiate the claims (unclear precisely what this will mean and in what format);
- Each claim will be endorsed by a named senior officer of the company;
- Companies will need to inform HMRC in advance that they plan to make a claim (unclear if this is at a project or company level, or what the time frames will be); and
- Claims will need to include details of any agent who has advised the company on compiling the claim.

Changes to address anomalies in the R&D Legislation

Several changes are being introduced including:

1. ensuring the time limits for R&D claims are two years after the end of the claim period;
2. that companies do not fail the going concern test for technical reasons (i.e. there is a transfer of a trade); and
3. that R&D tax relief can be claimed provided the expenditure will be paid within two years of the claim period.

Contributed by Malcolm Greenbaum

Intangibles transferred (Lecture B1306 – 17.33 minutes)

Summary - The market value of assets transferred between group entities was £1 and so no CGT was payable. No intangibles relief was available on the consideration paid and the sum could not be treated as a distribution.

In 2008, Jasper Conran Optical LLP incorporated its design, manufacture and marketing of optical products business by transferring it to JC Vision Ltd for £8.25 million with:

- Jasper Conran, the majority partner in the LLP, reporting a capital gain and CGT payable of £1.4million;
- JC Vision Ltd treating the consideration paid as an expense amortised in its accounts and claiming relief for these amounts under the intangibles regime.

HMRC disagreed with the treatment, arguing that the market value of the intangible assets transferred was £1 and so:

- no amortisation relief was available for the company
- the £8.25 million payment from the company to LLP should be taxed on Jason Conran as a distribution and not as a capital gain.

Decision

All parties agreed that this disposal between connected parties should be deemed to take place at market value.

Central to the valuation decision, was whether the trademarks that were required for the business to be able to operate successfully were transferred as part of the deal.

The transfer agreement stated:

> "For the avoidance of doubt, no part of the consideration is attributable to the grant of any licence by Mr Conran to use or sub-licence any of his trademarks. The Purchaser, by virtue of being a wholly-owned Subsidiary of Jasper Conran Holdings Limited (which is entitled to use the trademarks under licence from Mr Conran and make them available to its subsidiaries) is already entitled to use or sub-licence such trademarks."

The First Tier Tribunal agreed with HMRC's £1 valuation, finding that in arriving at the market value, they must look only at the assets transferred under the agreement. This did not include the trademarks and the Tribunal could not assume that the purchaser "held their own right to use the trademark".

Given that the market value of the transfer was £1:

- the company was not entitled to intangibles relief on the £8.25 m paid;
- no CGT was payable.

Finally, the First Tier Tribunal concluded that the payment was not taxable on Jason Conran as a distribution. Jason Conran received the £8.25 million as he was the majority partner in the LLP. The Tribunal did not accept HMRC's submission that the payment was made to him as "the (indirect) holder of the shares" in the company. The payment was made out of the assets of the company, and not in respect of shares. The Tribunal concluded that if it had been a distribution, HMRC would need to explain why that distribution was not treated as being made at the £1 market value.

Jasper Conran and JC Vision Ltd v HMRC (TC8391/V)

Adapted from the case summary in Tax journal (18 February 2022)

Theatre tax relief denied (Lecture B1306 – 17.33 minutes)

Summary - A company putting on shows at a theme park and zoos was not entitled to theatre tax relief. The customers did not pay specifically for the shows meaning that were not paying members of the public and the commercial purpose condition was not met.

SGA Productions Limited is an events production company and at various times had contracted to provide live performance shows at the Legoland Windsor park site and at Whipsnade Zoo.

The company believed that each show constituted a theatrical production and so claimed Theatre Tax Relief of £60,506 in respect of the live performances.

HMRC disagreed, arguing that the 'commercial purpose" condition under S.1217GA CTA 2009 had not been met and performances were not made 'paying members of the general public'. The entry fee covered all of theme park and zoo facilities and could not be apportioned.

SGA Productions Limited appealed to the First Tier Tribunal arguing that the price paid for entry into the theme park and zoo was a fee allowing them to watch the shows. Consequently, this meant that paying members of the general public did watch the shows.

Decision

The First Tier Tribunal found that 'paying members of the general public' meant that each individual had made a payment that was 'referable specifically to the theatrical production in respect of which a claim for relief is made'. In other words, the payment must be for the specific purpose of gain entry to the theatrical performance.

The Tribunal found that, on admission, customers paid their fee to gain entry to the theme park or zoo. At that time, they did not consider themselves to be paying to attend a show. It was up to them whether they decided to spend time watching the show or to spend time elsewhere at the park and zoo.

Further, the Tribunal concluded that it was not possible to apportion the admission cost to cover the live shows. If the show had been called, they would not have been entitled to a refund.

The customers were not paying members of the public and the commercial purpose condition was not met.

The appeal was dismissed.

SGA Productions Limited v HMRC (TC08397)

Oil payments

Summary – The Royal Bank of Canada's receipts of oil royalties were held to be chargeable to corporation tax in the UK.

The Royal Bank of Canada had lent money from its Canadian operations (not from its UK permanent establishment) to an oil exploration company to fund exploration in the UK continental shelf. Following the sale of the oil exploration business and the insolvency of the borrower, the rights of the borrower to receive payments in respect of oil extracted from an oil field in the UK sector of the continental shelf were assigned to Royal Bank of Canada. The bank had written off the original loan in the accounts of its banking business in Canada and treated the payments as recoveries of that loan.

HMRC considered that the payments were taxable in the UK as profits of a ring-fence trade.

The bank appealed but its appeal was dismissed by the First tier Tribunal.

Decision

Before the Upper Tribunal, the appeal raised three broad issues.

1. Were the payments in dispute consideration for the right to work the Buchan field, so that, under article 6(2) of the UK/Canada double tax treaty (DTT), the UK had the right to tax the payments as income from immovable property.

2. Were the payments taxable under s.1313(2)(b) CTA as arising from rights to 'the benefit of oil' won from the field?

3. If the payments were so taxable, was Royal Bank of Canada entitled to a deduction for its loss on the original loan to the oil exploration company?

The Upper Tribunal rejected the company's argument that article 6(2) applied only where the income derived from an original grant of the right to work an oil field and not, as here, where the right had been transferred. The company relied on the French language version of the DTT which had equal authority to the English version. The Upper Tribunal found that the materials relied on were 'ambiguous' at best and did not establish that the article was restricted to the original grant.

The Upper Tribunal also held that the phrase 'the benefit of the oil' in s.1313 did not require any proprietary interest in the oil, as Royal Bank of Canada argued, but could include a wide range of arrangement, proprietary, contractual or otherwise, giving rise to a benefit. Here the obligation to make the payments depended on the price realised from the extracted oil and so the link between the oil and the payments was 'direct and obvious'.

Finally, the Upper Tribunal found that the loss on the original loan could not be set off against the income. The loan was made in the ordinary course of Royal Bank of Canada's banking business and so was outside the ring fence and could not be set off against the ring fence income.

The appeal was dismissed.

Royal Bank of Canada v HMRC [2022] UKUT 00045 (TCC)

Adapted from the case summary in Tax Journal (4 March 2022)

VAT and indirect taxes

Dog grooming courses (Lecture B1306 – 17.33 minutes)

Summary – Dog grooming is not a subject ordinarily taught in schools or universities and so the provision of dog grooming courses was standard rated, not exempt.

Julie Lalou ran a business providing dog grooming and dog grooming courses and this appeal concerned the courses that she ran. Having originally treated the supplies as standard rated, she later believed that her dog grooming courses were exempt from VAT. In December 2017, she submitted a VAT de-registration application on the grounds that her only taxable supplies of dog grooming, fell below the VAT registration threshold. HMRC later agreed. However, in October 2018, she submitted an error correction notice claiming £102,000 of VAT previously accounted for. In July 2019, HMRC advised that the supply of dog grooming courses was in fact standard rated and reinstated her registration. HMRC stated:

> "When an individual teacher supplies education or training in a personal capacity or as a member of a partnership, on their own account and at their own risk, the supply is exempt under item 2, Group 6, Schedule 9 VATA 1994."

HMRC went on to say:

> "However, this is only providing that the instruction is in a subject ordinarily taught in a school or university."

On the basis that this was not the case, HMRC raised an assessment of £12,203 in relation to the VAT quarter ended September 2019 for which a return had not been made.

Julie Lalou appealed to the First Tier Tribunal.

Decision

The First Tier Tribunal agreed that the dog grooming courses involved the supply of tuition whereby Julie Lalou transferred skills and knowledge to her students on her own account and at her own risk. The Tribunal accepted that dog grooming courses were educational and ordinarily taught in a good number of further education colleges in England that led to a qualification of some kind.

However, the Tribunal confirmed that the test was whether dog grooming was ordinarily taught in a schools or universities in the EU. The Tribunal stated that they were provided with no evidence that dog grooming was taught in the UK anywhere other than certain Further Education Colleges in England; nor were they provided with any evidence at all about the position in other EU member states.

As a result, the Tribunal found that Julie Lalou had not met the burden of proving that dog grooming was taught in a wide number of schools or universities in the EU. Some evidence of the position in other EU member states (and other parts of the UK) was necessary.

The appeal against the assessment to VAT and HMRC's decision to reinstate her VAT registration were dismissed. The Tribunal recognised that it may seem unfair that HMRC were able to change their mind over the deregistration but stated that it had no general "fairness" jurisdiction.

Julie Lalou T/A Dogs Delight v HMRC (TC08380)

Car boot sale pitches (Lecture B1306 – 17.33 minutes)

Summary – The provision of car boot sale pitches with basic onsite facilities was a licence to occupy land *and not the provision of a standard rated service.*

Rufforth Park Limited had run car boot sales every Sunday morning for 40 years. The sellers included both members of the public selling second hand goods and traders. Most of the pitches were in the open but there were some covered pitches in a disused building. No advance booking was possible and spaces were allocated on a first come first served basis. Anyone who turned up and pays their fee was given a space, their website made clear that no electricity, lighting or tables were provided for sellers. The park did have toilet facilities and a café selling some refreshments but these facilities were basic and the minimum one would expect at any venue or event.

Based on VAT office advice, the company initially charged VAT on the supply of pitches. However, the company believed that it was not providing a service but rather, a licence to occupy land for the day to sell goods under Item 1, Group 1, Schedule 9 VATA 1994

After a few years, the company demonstrated to the VAT office that other car boot sale businesses were not charging VAT and subsequently, all of the VAT previously paid was refunded with interest.

However, later HMRC changed their mind arguing that the advertising promoting the events on the internet and social media, as well as the toilet and café facilities meant that the company was granting the right to occupy land together with other goods and services such that the overarching supply was of a service. The supply of pitches was standard rated and in December 2019 issued an assessment for £82,995.00 for the VAT periods 12/16 to 3/19 inclusive. Although not the subject of this appeal, there was a further assessment for £53,000, which would be payable if the First Tier found in HMRC's favour.

Decision

The First Tier Tribunal concluded that it was not appropriate to compare the provision of pitches at a car boot sale to a pitch provided at a trade fair (*CRC v Zombory-Moldovan (t/a Craft Carnival* [2016] UKUT 433 (TCC).

Rufforth Park Limited ran 'an ordinary car boot' in a field with very basic facilities. This was a relatively passive activity with limited added value. The company was not providing "a service to the sellers giving them the opportunity to participate in an expertly organised and run event." The company had no obligation to put on the events at all.

Further, the First Tier Tribunal considered HMRC's VAT *Notice 742*, which at the time of the hearing, referred to 'granting traders a pitch in a market or at a car boot sale' including the use of shared toilets, kitchen and other facilities.

The First Tier Tribunal found that there was a single land supply and no VAT was payable.

Rufforth Park Limited v HMRC (TC08395/V)

Delivery charges

Summary – A company was not able to recover VAT on delivery charges as its suppliers were not supplying services for consideration.

Y4 Express Limited arranged for the importation of goods from companies based in China and Hong Kong. This involved it collecting the goods from the airport, storing them if required and arranging onward delivery to the final customer. The company used Royal Mail's Printed Postage Impressions service, which gave the company preferential rates provided that the company made daily declarations using an online business account

However, in June 2013, Royal Mail became concerned that the company's declarations were not accurate and eventually suspended its access to service.

To be able to continue using the service for their deliveries, and with the help of two friends, Y4 Express Limited created two new Royal Mail accounts; one in the name of Mr Man and the second in Colemead Limited.

Y4 Express Limited prepared invoices to be issued by Mr Man and Colemead Limited and sought to recover the input VAT on these amounts.

HMRC disallowed the claims and so Y4 Express Limited appealed.

The First Tier Tribunal dismissed the appeal on the basis that neither Mr Man nor Colemead Limited were making taxable supplies.

The company appealed to the Upper Tribunal.

Decision

The Upper Tribunal agreed with the First Tier Tribunal that neither Mr Man nor Colemead Limited were supplying services for consideration. They were not carrying on any economic activity. Indeed, had Royal Mail been aware of the arrangement that Y4 Express Limited was the effective user, Royal Mail would be very likely to have withdrawn their services from Mr Man and Colemead Limited

The company's appeal was dismissed.

Y4 Express Limited v HMRC [2022] UKUT 00040 (TCC)

Preliminary issues relating to a VAT group

This case considered a number of preliminary issues the Upper Tribunal was asked to address in relation to appeals to the First Tier Tribunal by HSBC Bank plc and five global service companies.

The appeals relate to decisions by HMRC to remove the global service companies from the HSBC VAT group. HMRC made the decisions on the basis that:

- the global service companies have not been established or had a fixed establishment in the UK since at least 1 October 2013, and therefore do not meet the 'established' or 'fixed establishment' condition in s.43A VATA 1994; and

- the decisions were 'necessary for the protection of the revenue' in the context of s.43C VATA 1994 (termination of VAT group membership).

Decision

The Upper Tribunal (UT) confirmed that:

- the interpretation of the terms 'established' or 'fixed establishment' should be informed by CJEU case law;

- no part of s.43C VATA1994 is ultra vires;

- the term 'necessary for the protection of the revenue' does not restrict the HMRC power to exclude a person from a VAT group to situations that are considered abusive on the principles of Halifax plc and others v Commrs of Customs & Excise (Case C-255/02); and

- in relation to the date of removal from a VAT group, the reasonableness test in s.84(4D) VATA 1994 focuses exclusively on the reasonableness of the decision reached by HMRC, rather than whether the HMRC decision-making process was reasonable.

When considering the terms 'established' and 'fixed establishment', the Upper Tribunal referred to how the CJEU used the terms in the context of VAT cases generally. For example, it referred to Berkholz v Finanzamt Hamburg-Mitte-Altstadt (Case C-168/84), ARO Lease BV v Inspecteur der Belastingdienst Grote Ondernemingen (C-190/95), Titanium Ltd v Finanzamt Osterreich (Case C-931/19) and Planzer Luxembourg Sarl v Bundeszentralamt fur Steuern (Case C-3/06). The first three of these cases concern the place of supply rules and the fourth case concerns the eligibility to be reimbursed VAT in a member state where the claimant was not registered.

This indicates that the Upper Tribunal did not regard the terms 'established' and 'fixed establishment' as having a special meaning in the context of the legislation relating to VAT groups, but that the terms should be interpreted in a way that is consistent with how they have been used in the context of CJEU VAT cases generally.

HSBC Electronic Data Processing (Guangdong) Ltd and others v HMRC [2022] UKUT 00041 (TCC)

Adapted from the case summary in Tax Journal (25 February 2022)

R&C Brief 3/2022: Postponed VAT accounting and the flat rate scheme

Postponed VAT accounting was introduced on 1 January 2021, allowing UK VAT registered businesses to declare and recover import VAT on the same return. This avoids avoiding having to pay VAT on import and then recover it later.

For VAT returns beginning on or after 1 June 2022, businesses operating the VAT flat rate scheme should no longer include imports accounted for under postponed VAT accounting within their flat rate turnover. HMRC guidance has been updated accordingly.

The full amount of import VAT should be added to Box 1 of the VAT return after the flat rate calculation has been completed.

https://www.gov.uk/government/publications/revenue-and-customs-brief-3-2022-postponed-vat-accounting-and-businesses-registered-under-the-flat-rate-scheme

R&C Brief 4 (2022): End-customer refund claims of VAT overpaid

Prior to Brexit, where a customer was unable to obtain a refund of overpaid VAT from a supplier, they could make a claim in court (rather than in the Tax Tribunal) for a refund direct from HMRC. This provision resulted from the Supreme Court's decision in Investment Trust Companies [2017] UKSC 29 applying general principles of EU law.

This made clear the circumstances that a third-party customer could make a claim directly against HMRC were extremely limited, but that anyone who believed they had a claim that was not precluded by the Supreme Court's judgment must bring their claim in court. This was clarified in R&C Brief 4 (2017).

However, this only applied in limited circumstances, where it was impossible or excessively difficult for a customer to obtain reimbursement from the supplier, then that customer may have been able to bring a claim against HMRC. The court offered no definition of 'impossible or excessively difficult', although it referred to a supplier's insolvency as a possible example.

With effect from 1 January 2021, EUWA 2018, Schedule 1, para 3 ended any right of action based on a failure to comply with any of the general principles of EU law. This included the right to bring a claim in the exceptional circumstances identified by the UK Supreme Court in Investment Trust Companies (claims brought in court before 1 January 2021, remain unaffected). This is now confirmed in R&C Brief 4 (2022)

Any claims brought in court before 1 January 2021 are unaffected.

https://www.gov.uk/government/publications/revenue-and-customs-brief-4-2022-end-customer-claim-refunds-of-vat-wrongly-charged

R&C Brief 5 (2022): VAT grouping registration

This Brief updates HMRC's previous guidance on how to file VAT returns whilst waiting for confirmation of a VAT grouping application.

Treating the application as provisionally accepted, businesses should treat the application as provisionally accepted from the date it is submitted online or the date it should be received by HMRC if submitted by post, and account for VAT accordingly.

The guidance explains that automated letters and assessments should be ignored, and these will be cancelled once the application has been processed.

If businesses followed the previous guidance and submitted VAT returns to HMRC using previous registration numbers, they do not need to take any steps to change this.

https://www.gov.uk/government/publications/revenue-and-customs-brief-5-2022-revised-guidance-on-dealing-with-vat-grouping-registration

R&C Brief 6 (2022): Lennartz mechanism and VAT accounting

Businesses that qualify to use the Lennartz mechanism are entitled to recover the full VAT incurred on the purchase of goods (subject to any partial exemption restrictions). They can then account for output tax on the private use of the goods.

In R&C Brief February 2010, HMRC announced that from 22 January 2010, the Lennartz mechanism would no longer be available where purchased goods would be used for business and non-business purposes. Any VAT incurred must therefore be apportioned and only VAT relating to business activities could be recovered. Businesses who were using the Lennartz mechanism were required to unravel the mechanism and adjust the input tax claimed and output tax accounted for accordingly

To ease the burden on businesses, HMRC allowed them the choice to continue using the Lennartz mechanism under the rules before 22 January 2010. These businesses had to continue to account for output tax on the non-business use for the economic life of the asset. This was to ensure that output tax was accounted for fully on the private use element.

The Brief highlights that the increase in VAT rate in 2011 from 17.5% to 20% may mean that the output tax charged for the remaining economic life may exceed the input tax originally claimed. The Brief confirms that, where the output tax has matched the input tax originally claimed before the end of the asset's economic life, businesses are not required to continue to account for the output tax on the private use of the asset.

https://www.gov.uk/government/publications/revenue-and-customs-brief-6-2022-lennartz-mechanism-and-vat-accounting