Tolley®CPD

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CONTENTS

Personal tax

PAYE and NIC update for 2023/24 (Lecture B1369 – 22.37 minutes)

Personal Allowance, Tax Rates and Bands for 2023/24

In the Autumn Budget the personal allowance was frozen, until April 2028, at £12,570. The PAYE threshold for 2023/24 remains at £242 a week and £1,048 a month with the emergency code 1257L.

From 6 April 2023 the married couples' allowance will be £10,375 and the blind persons' allowance will rise to £2,870. The married couples' allowance provides relief at 10% and is only available where at least one of the couple was born before 5/4/1935.

Transfer of Personal Allowance - a spouse/civil partner who is not liable to tax, or not liable above the basic rate, has been able to transfer part of their allowance to their spouse/civil partner as long as they only pay tax at basic rate. The allowance that can be transferred will be £1,260 until after 2025/26. The suffix N is used to indicate the transferor and suffix M is used for the recipient.

Loss of Personal Allowances

The basic personal allowance is subject to an income limit of £100,000. Where an individual's "adjusted net income" is below or equal to £100,000 they will be entitled to the full basic personal allowance. Where the "adjusted net income" exceeds £100,000 the allowance is reduced by £1 for every £2 above the income limit. For 2023/24 anyone with income over £125,140 will lose their personal allowance completely (2022/23 - £125,140).

For 2023/24 the additional rate threshold will reduce to £125,140 from 6 April 2023 from the current £150,000.

"Adjusted net income" is a person's total income subject to tax less certain deductions:

- Total income – employment, self-employment, rental, investment, taxable benefits
- Deductions - trading losses, gross pension contributions, grossed up amount of gift aid contributions, grossed up pension contributions which receive tax relief at source
- Add back - tax relief of up to £100 for payments to trade unions or political organisations.

Tax Rates and Earnings Bands 2023/24 and 2022/23 for non-Scottish taxpayers:

2023/24		**2022/23**	
£1 to £37,700	20%	£1 to £37,700	20%
£37,701 to £125,140	40%	£37,701 to £150,000	40%
£125,141 and over	45%	Over £150,001	45%

The higher rate threshold at £37,700 was frozen to 2025/26 and this has been extended to April 2028.

Scottish Taxpayers on Payrolls

The personal allowance for Scottish taxpayers is based on the UK PA of £12,570 for 2023/24 as for 2022/23. Scottish taxpayers have their tax codes prefixed with the letter "S".

Scottish Tax Rates For 2023/24 tax year – set on 15 December 2022:

Starter	£12,571 to £14,732	i.e. £2,161	19%
Basic	£14,733 to £25,688	i.e. next £10,955	20%
Intermediate	£25,689 to £43,662	i.e. next £17,973	21%
Higher	£43,663 to £125,140,	i.e next £81,478	42%
Top	Over £125,140		47%

National Insurance for 2023/24 tax year

From 6 April 2023 all NIC thresholds will remain at the 2022/23 levels - until April 2028. The rates of NIC contributions will revert to the standard percentages – see below – after the withdrawal of the 1.25% HSCL which took effect from pay days on or after 6 November 2022.

NIC Thresholds 2023/24 from 6 April 2023

	Weekly	Monthly	Annual
Lower Earnings Limit			
2023/24	£123	£533	£6,396
2022/23	£123	£533	£6,396
Employee PT			
2023/242	£242	£1,048	£12,570
2022/23 initially	£190	£823	£9,880
BUT from 6 July 2022	£242	£1,048	£12,570
Employer ST:			
2023/24	£175	£758	£9,100
2022/23	£170	£737	£8,840
Freeport Upper Secondary Threshold:			
2023/24 and 2022/23	£481	£2,083	£25,000

<u>Upper Secondary Threshold, Apprentice and Veteran Upper Secondary Threshold:</u>

2023/24	£967	£4,189	£50,270
2022/23	£967	£4,189	£50,270

The lower earnings limit (LEL) is the minimum level of earnings an employee needs to qualify for benefits, such as state pension and jobseekers' allowance. If an employee's earnings reach or exceed the LEL but do not exceed the PT they will not pay NICs but will be treated as having paid them when claiming benefit. In addition employees with earnings equal to or exceeding the LEL will be eligible for statutory payments.

National Insurance Contribution Rates 2023/24

<u>Employees:</u>

12% on earnings between PT and UEL/UST

PLUS

2% on earnings over the UEL/UST

<u>Reduced rate ladies:</u>

5.85% on earnings between PT and UEL/UST

PLUS

2% on earnings over the UEL/UST

<u>Employers:</u>

13.8% on earnings over the ST with no upper limit

13.8% applies for Class 1A & 1B

National Insurance Breaks to encourage Employers to take on New Employees

The NIC reliefs set out below to support employers will apply to the levy so employers will NOT pay the levy for these employees as long as their yearly gross earnings are less than £50,270 or £25,000 for new Freeport employees.

Zero Rate Employer's NIC for Veterans – NI Table Letter V

From 6 April 2021 an employer can apply a zero rate of secondary Class 1 employers NIC on earnings up to the UST on the gross pay of employees who are veterans. This exemption is available only for the first 12 months of from start of employment in civilian life. The table letter used in this tax year would be A. The new table letter V was introduced for 2022/23 and relief comes through RTI submissions.

For 2021/22 employers had to pay the full NIC and reclaim back from April 2022. In order to reclaim the employer NIC for 2021/22 through payroll reporting the employer must submit a revised FPS after 6 April 2022 using the new national insurance letter V.

If the claim has to be made outside of payroll reporting, where NI table letter A has been used, the employer will need to write to HMRC after 6 April 2022 heading the letter "Overpaid National Insurance". The letter must show:

- Employee's name, date of birth and NI number
- Why the employer is reclaiming the veteran's relief
- The period the employer has overpaid NIC
- That the employer is claiming for a qualifying veteran and have evidence to show this
- Bank details for the refund

Qualification - to qualify for this employer NI relief, the veteran must have left the forces and completed at least one day of basic training in Her Majesty's regular armed forces. Employers will be able to claim the relief for a period of 12 months starting on the first day of the veteran's civilian employment since leaving the regular armed forces. Subsequent and concurring employers will be able to claim the relief in this 12-month period.

Records are required to show that the employee is a qualifying veteran and the start date of their first civilian employment. These should be held for at least 4 years. Employers can ask to see:

- Discharge paper from HM Armed Forces
- Employment contract with previous employment to determine their start date
- Identification card showing their time in the forces
- Letter of employment or contract with HM Armed Forces
- P45 from HM Armed Forces

The Office of Veterans Affairs would like to hear from any employers using the scheme who are willing to talk about their experiences.

<u>Zero Rate Employer's NIC for Freeports – NI Table Letter F new from 2022/23</u>

From 6 April 2022 employers can apply a zero rate of secondary Class 1 employers NIC on earnings up to the FUST on the gross pay of employees working in Freeports. The threshold is £25,000p.a. - £481 a week and £2,083 a month. The NI table letter used will be one of F, I, S and L being standard, married women, over state pension age and deferred.

This break for employers will run for 3 years for new employees taken on from 6 April 2022 to 5 April 2026. Certain conditions must be met - the employer must have a physical presence at the site, the employment must be new hiring post 6/4/22 and the employee must spend at least 60% of their time at that site. The employee cannot have been employed by the employer or a connected employer in previous 24 months.

Freeports are – East Midlands airport, Felixstowe & Harwich, Humber, Liverpool City Region, Plymouth and South Devon, Solent, Thames and Teesside.

The 60% rule is that at the time the employment started the employer reasonably expects that 60% or more of the employees working time will be spent in the freeport where the employer has business premises. Working time includes leave, such as maternity, adoption and annual. A temporary change in time spent at the freeport will not affect the claim for the relief, However, if there is a substantial change to the percentage time worked in the freeport due to a change of duties or responsibilities then the relief cannot be claimed after that change takes place.

The policy paper dated 12 May 2021 says that “government intends to make this relief available for up to 9 years from 6 April 2022. The use and effectiveness of the relief will be monitored and reviewed to allow a decision on whether to continue the relief beyond its earliest end date of 5 April 2026. All new eligible hires on or before 5 April 2026 will be eligible for this relief for their full eligibility period (up to 36 months), regardless of the government’s decision on whether to extend access to the relief for new claims beyond this date. Subject to the findings of the review, the government intends to extend this relief for new hires up to a future 5 years to its latest end date of 5 April 2031, after which point employers will no longer be able to access this relief, including for those employees partway through their eligibility period.”

Businesses based in UK Freeport tax sites will also be entitled to enhanced structures and buildings allowance and enhanced capital allowances until 30 September 2026.

The “Employment Allowance “(EA) and The Health and Social Care Levy

The EA is an allowance, currently a maximum of £5,000, which can be offset against employers, secondary, Class 1 NIC contributions. It is claimed via the Employers Payment Summary (EPS).

Employers must check they remain eligible to claim the EA and if “yes” a new claim must be made each tax year. Each claim will be made as before on the EPS.

One of the criteria for claiming the EA is that the employer’s total secondary Class NIC contribution liability is less than £100,000 in the tax year before the claim. At the start of the 2023/24 tax year the employer must refer back to the tax year 2022/23 to see if threshold has been exceeded. Deemed payments, for example to “off payroll workers”, do not count towards the £100,000 and EA cannot be claimed for such workers.

If there are multiple PAYE schemes the employer must add the employers NIC for all payrolls when checking the £100,000. They would then select which payroll will make the claim. The same rules will apply to connected companies and groups – if total secondary NIC is over £100,000 there is no claim for EA. If the NIC is under £100,000 then one company in the group can make the claim.

Following the temporary increase in National Insurance due to the HSCL it could be that in 2023/24 small employers will no longer qualify for the employment allowance because their National Insurance for 2022/23 exceeds the £100,000. But then in 2024/25 we could have those employers who lose out in 2023/24 finding that they are able to claim again in 2024/25, as National Insurance rates drop by 1.25% in April 2023 back to previous levels.

In September 2021 the government announced the introduction of a new Health and Social Care Levy from 6 April 2022. From April 2022 the levy was implemented by an increase of

1.25% applied to all categories of Class 1, Class 1A and Class 1B and Class 4 NICs. The levy did not apply to Class 2 or Class 3 NICs. The levy was collected via the payroll for 2022/23.

BUT on 22 September 2022 the then chancellor announced an in-year reduction to NIC contributions PLUS the cancellation of The Health and Social Care Levy with effect from 6 November 2022. NIC contribution rates returned to their previous levels.

HSCL and recovery of SMP, SAP, OSPP and ShPP – 2023/24 and 2022/23

Large employers can recover 92% of their costs from HMRC. However, where an employer qualifies as a small employer they can recover 100% of SMP, SAP, OSPP and ShPP paid plus an additional 3% being the small employers compensation rate from HMRC.

A "small employer" will be an employer where total gross Class 1 NICs are £45,000 or less in the qualifying tax year. Be careful to check in 2023/24 as HSLC may have increased gross NIC to over £45,000 in 2022/23, the previous qualifying tax year.

Student Loan Changes for 2023/24

Student loan deductions are calculated, on the non-cumulative basis, for each NIC earnings period. Deductions are based on gross NICable earnings, so before the deduction of tax approved occupational pension contributions. The loan repayments are calculated at 9%, in most cases, of earnings above the set threshold – see below.

Employers need to ensure they know which plan type the employee has to repay. The SL1 form issued by HMRC will show the plan type and this must be actioned on next payday after received.

The current "new starter declaration checklist" now shows all four loan plans. If in doubt plan 1 loan is the default. Should an employee have both types of loan only one can be deducted at any time.

Plan 1 Loan for loans pre-2012 - From 6 April 2023 the loan is repaid only where earnings exceed the threshold being £22,015 p.a. (2022/23 - £20,195) or £1,842.08 per month or £423.36 a week. The repayment threshold rises annually in line with RPI.

Plan 2 Loan for loans post-2012 – From 6 April 2023 the threshold for repaying these loans is earnings above £27,295 p.a. - monthly of £2,274.58 or weekly of £524.90. The repayment threshold rises annually in line with RPI.

Student Loan Type 4 came into effect from 6 April 2021 for students who have taken out a loan in Scotland. In this case the loan repayment threshold is set at £27,660 p.a., so £2,305 per month or £531.92 a week.

Post Graduate Loan - introduced in 2016/17 by the Government for those taking a post graduate masters. The loans are available to anyone under 60 and repayments will start at a salary threshold of £21,000 (£1,750 a month or £403.84 a week) with deductions at a rate of 6%.

<u>National Living Wage (NLW) and National Minimum Wage (NLW)</u>

Paying the National Living Wage (NLW) and the National Minimum Wage (NMW) is compulsory. From 1 April 2021 the age from which workers become eligible for the NLW was lowered. The NLW now applies to workers aged 23 and over, previously this was 25 and over. It is expected that the age for NLW to apply will reduce again in April 2024 to 21. The mandatory NLW and NMW rates will increase from 1 April 2023. The percentage increases range from 9.7% to 10.9%.

National Living Wage

£10.42	aged 23 and over (was 25 and over)	(2022/23 - £9.50)

National Minimum Wage

£10.18	for workers aged 21 to 22 (was 24)	(2022/23 - £9.18)
£7.49	for a young worker aged 18 to 20	(2022/23 - £6.83
£5.28	for workers aged 16 to 17, and over the compulsory school age but under 18	(2022/23 - £4.81)
£5.28	for apprentices who are either under 19 or over 19 & in the 1st year of apprenticeship	(2022/23 - £4.81)

The accommodation offset will be £9.10 a day (currently £8.70) and £63.70 a week (currently £60.90) and increase of 4.6%.

The "voluntary living wage" is calculated based on the basic living cost in the UK by the Centre for Research in Social Policy at Loughborough University and by the Greater London Authority for the London rate. The Living Wage Foundation state on 22 September 2022 the UK living wage for those over 18 year old outside London is £10.90 an hour and in London it is £11.95.

Employers who fail to pay NMW are liable to a financial penalty of up to a maximum 200% of the arrears owed to the workers. This penalty applies to any notice of underpayment relating to a pay reference period beginning on or after 1 April 2016. The maximum penalty is capped at a maximum of £20,000 per worker. The penalty is reduced by 50% if the unpaid wages and penalty are paid within 14 days. Where an employee has been underpaid the NMW the arrears are calculated at the current NMW rate in force at the time the underpayment is calculated.

Contributed by Alexandra Durrant

Update on Statutory Payments for 2023/24 (Lecture B1370 – 26.23 minutes)

Statutory Sick Pay (SSP) Rates

Average Weekly Earnings	SSP Weekly RATE
Less than £123	NIL
£123 or above	£109.40 from 6 April 2023

(2022/23 - £99.35 if earnings equal or exceed £123 a week)

SSP is payable for maximum 28 weeks in one PIW (period of incapacity to work) or linked PIWs.

There is no specified service required except that the employee has to have carried out some work under their contract.

To qualify the employee must be sick for a PIW being 4 or more consecutive calendar days but the first three waiting days, or working days, of PIW are discounted and not paid. SSP is then paid on a daily basis, calculated as the weekly rate divided by the number of qualifying days, for the employee, in the week.

Long term sickness

Employees who are long term sick continue to accrue their holiday entitlement so are entitled to claim their holiday and be paid.

The ECJ say that all workers are entitled to up to four weeks of holiday pay each year they are on sick leave and to take that leave or be paid in lieu. This does not comply with Working Time Regulations which state that employees must use their statutory holiday within a year or lose it.

Statutory Maternity Pay (SMP)

Employees are entitled to unpaid statutory maternity leave from the first day of employment with no qualifying conditions.

SMP will be payable for a maximum 39 weeks if the employee has been continuously employed for 26 weeks into the qualifying week (QW) and has earnings which equal or exceed £123 a week.

From 2 April 2023 SMP is payable, where average weekly earnings equal or exceed £123 at two rates for the 39-week Maternity Pay Period (MPP).

a. Higher Rate, being 90% of average weekly earnings, this is paid for the first 6 weeks of MPP, plus

b. Lower Rate, being the lower of £172.48 (2022/23 - £156.66) or 90% of average weekly earnings for a maximum of 33 weeks.

Statutory Adoption Pay (SAP) Rates

Employees are entitled to unpaid statutory adoption leave from the first day of employment with no qualifying conditions. Parents who meet the criteria to apply for a parental order in surrogacy cases are eligible to apply for statutory adoption pay and leave.

SAP will be payable for a maximum 39 weeks if the employee has been continuously employed for 26 weeks into the matching week (MW), i.e. when the employee has been matched with a child, and has earnings which equal or exceed £123 a week.

From 2 April 2023 SAP is payable, where average weekly earnings equal or exceed £123 at two rates for the 39-week Adoption Pay Period (APP).

a. Higher Rate, being 90% of average weekly earnings, this is paid for the first 6 weeks of APP, plus
b. Lower Rate, being the lower of £172.48 (2022/23 - £156.66) or 90% of average weekly earnings for a maximum of 33 weeks.

Statutory Paternity Pay (SPP) Rates

The employee, if they qualify, will be entitled to 2 weeks leave and 2 weeks pay.

To take the leave the employee must have been employed at least 26 weeks into the qualifying week (QW) or MW. The leave must be taken within 56 days of the birth or placement of the child.

To qualify to receive SPP the employee must be employed at least 26 weeks into the QW or MW and have average weekly earnings which equal or exceed £123.

On birth or adoption of a child - From 2 April 2023 SPP will be payable at the lower of £172.48 (2022/23 - £156.66) or 90% of average weekly earnings, for a maximum of two weeks if the average weekly earnings equal or exceed £123.

Shared Parental Leave (SPL) and Shared Parental Pay (ShPP)

Parents of babies due and adopters of children placed for adoption are entitled to Shared Parental Leave and Pay. It is not available for single parents. SPL and ShPP replace additional statutory paternity leave and pay which was available for babies due or children placed for adoption before 5 April 2015.

Where the mother does not use all her maternity leave she can convert the balance of her leave into shared paternity leave (SPL). The mother has to take the compulsory 2 weeks maternity leave and pay after the birth or 4 weeks if she works in a factory. Then both parents can share the remaining 50 weeks leave and any remaining balance of pay up to 37 weeks. The right to SPL and ShPP also applies to employees who adopt a child on or after 5 April 2015. In this case the adopter must take at least 2 weeks of adoption leave and pay.

The leave and pay can be taken by the mother, the child's father or the mother's partner and must be taken in weekly blocks. Any leave or pay not taken by the child's first birthday or one year after the adoption is lost. The SPL and pay can be stopped and started, with the employee returning to work between periods of leave and employees are entitled to take up to 3 separate blocks of SPL and pay if they wish. Employees are required to give their employers at least 8 weeks' notice before they are absent from work on SPL.

Rate of Pay - ShPP will be paid at the lower of £172.48 (2022/23 - £156.66) a week or 90% of average weekly earnings or the rate applicable from the new tax year.

Amount of Leave - Employees can choose how much of the leave they each take. The employees can suggest a flexible pattern of leave to their employer and they have the right to take SPL in up to 3 blocks – concurrently or consecutively. If the employee's partner is not eligible for SPL then the employee can still book their leave in separate blocks.

Eligibility - To qualify for SPL the employee must have 26 weeks continuous employment at the 15th week before the expected week of childbirth, or placement date for adoptions, and remain in that employment when the leave is taken. The employee's partner must also satisfy minimum employment and earnings criteria to be eligible for SPL. If the partner is not eligible for SPL and ShPP then they cannot share the leave with the employee.

Notice to End SML or SAL - The mother or adopter must either end their SML or SAL by returning to work or have given “binding notice” to their employer of the date they intend to end their SML or SAL. The mother or adopter must give at least 8 weeks’ notice to their employer to end their SMP or SAP. Their partner can start their SPL while they are still on maternity or adoption leave as long as they have given the binding notice to end it.

Leave – An employee must give a separate written notification at least 8 weeks before the start of any period of SPL. The notice must state when the leave will start and end and can request more than one period of leave. The leave must be taken in minimum week blocks. If the employee requests one continuous period of leave they are entitled to take it. If they ask for separate periods of leave the employer can:

1. Agree the requested leave;
2. Refuse the request;
3. Refuse the request but propose alternative dates.

Return to Work - During SPL the employee’s normal terms and conditions of employment continue except those relating to pay. Employees who are on SPL who are at risk of redundancy are entitled to be offered suitable alternative employment if there is such a vacancy. An employee returning to work from SPL is entitled to return to the same job if they are coming back from SPL after 26 weeks or less. If the leave period exceeds this and it is not reasonably practicable to return to the same job then they return to a suitable alternative.

Other Parental Leave Entitlements

Antenatal Appointments – Pregnant mothers have the right to reasonable paid time off work to attend antenatal appointments. This right will be extended to apply to fathers, or the mother’s partner, for attendance at two appointments, 6.5hrs each although this time off will unpaid. Similar provisions will apply for adoptive parents. The adopter will be given paid time off for five appointments and their partner will be able to attend two meetings but this time off will be unpaid.

Surrogacy - Parents who have a child through a surrogacy arrangement will be entitled to take ordinary paternity leave and pay and adoption leave and pay and shared parental leave and pay provided they meet the eligibility criteria. They will be allowed to take time off, unpaid, to attend two ante natal appointments with the mother of the child.

Keeping in Touch Days (KIT)

Employees are to come into work for up to ten KIT days to enable them to retain contact with their workplace. Any payment made to the employee for KIT days should be based on their contracted remuneration, not the SMP/SAP rate and there is no loss of statutory pay. SMP/SAP can be offset against the contractual salary. Whatever amount is paid for the day only the SMP/SAP part can be reclaimed by the employer from HMRC.

Shared Parental Leave in Touch (SPLIT) days - Each employee can work up to 20 SPLIT days during SPL without bringing the leave to an end. These days are in addition to the 10 KIT days available to employees on maternity or adoption leave.

Statutory Parental Bereavement Leave and Pay (SPBL and SPBP)

From 6 April 2020 employed parents who lose a child under the age of 18, or suffer a still birth from 24 weeks, have been entitled to 2 weeks of parental bereavement leave as a day one right. With effect from April 2022 the same rights have applied in Northern Ireland.

Those with 26 weeks service at their child's death and earnings above the LEL, £123 a week, will also be entitled to parental bereavement pay (SPBP) at the statutory flat weekly rate of £172.48 (2022/23 - £156.66) or 90% of average weekly earnings, if lower.

Average weekly earnings are calculated as for SMP/SAP but with a difference:

> "relevant week" is the week ending with a Saturday before the week in which the child dies
>
> "relevant period" is the period of 8 weeks ending with the relevant week.

Bereaved parents are those who are the primary carers of the child, so legal parents, adoptive parents, parents who foster to adopt, parents of a child born to a surrogate, individuals with a court order giving them day to day responsibility for caring for the child and kinship carers, being primary carers without legal status.

The employee will not be required to given written notice for the parental bereavement leave. The length of notice required for the leave depends on whether the employee is taking the leave within 8 weeks following the death (period A) or later (period B).

Period A - notification before they would be due to start work on the first day of absence

Period B – notice of at least one week before starting the leave period

The leave can be taken as a single block, or one or two weeks or as two separate weeks taken at different times. The leave must be taken within 56 weeks from the child's death, so allowing for anniversaries and other important dates.

The employee must provide written notice for SPBP within 28 days beginning with the 1st day of the week in which SPBP is being claimed, stating the dates of the period(s) to which the claim relates. The employee must provide in writing their name, the date of the child's death and a declaration they meet the conditions of eligibility.

Recovery of SMP, SAP, SPP, ShPP and SPBP – 2023/24

Large employers can recover 92% of their costs from HMRC. However where an employer qualifies as a small employer they can recover 100% of SMP, SAP, SPP, ShPP and SPBP paid plus an additional 3% being the small employers compensation rate from HMRC.

A "small employer" will be an employer where total gross Class 1 NICs are £45,000 or less in the qualifying tax year. Be careful to check in 2023/24 as HSLC may have increased gross NIC to over £45,000 in 2022/23, the previous qualifying tax year.

The Carers Leave Bill - New Right for Unpaid Leave for Carers

Following the "Carer's Leave Consultation" there was clear support for the introduction of a leave right for unpaid carers. The Carers Bill has passed its second reading in Parliament so will become law in due course. Carers leave will be a right, from day one of employment, for unpaid carers to take up to one week, 5 working days, unpaid leave each year to look after the person for whom they care. Employees, where eligible, will be able to take the leave either individual day or half days up to a block of one week. The employee will be required to give notice of the leave the same as for annual leave being twice the length of the leave required plus one day. It is likely the employer will have limited scope for rejecting requests for the leave.

The entitlement to statutory carer's leave will:

- Be available to employees regardless of length of service – so from day one
- Depend on the carer's relationship with the person being cared for – using the definition of dependant as in right to time off for dependants – spouse, civil partner, child, parent
- Depend in the person being cared for having a long term care need – long term illness or injury (mental or physical), a disability as defined by Equality Act 2010 or issues related to old age. There would be limited exemptions from the "long term care" requirement such as re a terminal illness

Extension of Redundancy Protection for New Parents and Pregnant Employees

The Protection from Redundancy (Pregnancy and Family Leave) Bill will enable redundancy protection to apply to all pregnant women as well as new parents returning to work after leave. The "protection period" will be extended to run from the date the employee notifies her employer she is pregnant to 18 months after the birth. This means that a new mother returning to work after a year of maternity leave has a further 6 months redundancy protection. The extended protection will also be available to parents returning from adoption or shared parental leave.

Currently employees on maternity leave who are at risk of redundancy must be offered suitable alternative roles before making them redundant. This special protection ends when the maternity leave ends or two weeks after pregnancy ends for women not entitled to maternity leave.

Extended Leave for Neonatal Care

On 15 July 2022 the Neonatal Care (Leave and Pay) Bill received government backing and it is anticipated that this could be introduced from 2023. This Bill will allow parents, from day one of employments, to take up to 12 weeks of paid leave in addition to the usual statutory maternity and statutory paternity leave and pay periods. This will be an employment right from day one of employment.

The criteria are:

- the admission to hospital lasts for a continuous period of 7 days or more
- the baby is neonate - aged 28 days or less

Contributed by Alexandra Durrant

Cars “made available” (Lecture P1366 – 19.31 minutes)

Summary – Despite being untaxed and with the company possessing a declared statutory off-road notification (SORN), a company’s cars were found to be made available to its director making them taxable benefits in kind.

Tim Norton Motor Services Limited operated a Ford car dealership selling new cars, buying and selling second-hand cars and undertaking some repair work.

The dealership owned a Maserati and Ford GT40. When the director, Tim Norton, desired to use either car, vehicle excise duty would be paid before it was used and then after use a SORN (statutory off-road notification) would be made.

In 2016, following a PAYE audit, HMRC concluded that these cars had been ‘made available’ to its director, Tim Norton, and issued:

- NIC determinations for the years 2010 to 2017;
- income tax assessments for the years 2012/13 to 2014/15 and 2016/17, and a closure notice for 2015/16.

The First Tier Tribunal found that, as a result of the relative ease of removing SORN status, the cars were still available to Tim Norton, even when no Vehicle Excise Duty (VED) had been paid. The Tribunal dismissed the taxpayers appeals in relation to the years 2013/14 onwards and allowed them for earlier years in respect of one of the cars.

On appeal to the Upper Tribunal, the taxpayers argued that the First Tier Tribunal had erred when it considered that the cars were available for private use at times when no VED was in place. Further, Tim Norton argued that the 2016/17 discovery assessment had not been validly issued.

Decision

The Upper Tribunal confirmed that the First Tier Tribunal had been entitled to find that, despite the existence of a SORN and no VED, this was not ‘an effective restraint upon their use and the cars were thus available for private use'. As director of the company with sole access to the car keys, Tim Norton could easily revoke the SORN, pay the VED and gain legal access to drive the cars.

However, the Upper Tribunal agreed with the taxpayers that the discovery assessment for 2016/17 was invalid. The assessment had been made during the enquiry period, meaning that it could not satisfy s.29(5) TMA 1970. This requires that when a tax return has been submitted, HMRC cannot to be aware of an insufficiency of tax before the enquiry window closes as they might become aware of an insufficiency after the assessment was issued but before the enquiry window had closed.

Timothy Norton and Tim Norton Motor Services Limited [2023] UKUT 48 (TCC)

Domicile of origin, dependence and choice **(Lecture P1366 – 19.31 minutes)**

Summary – Born to an Austrian father and Irish mother, the taxpayer's domicile of both origin and dependence was the UK. Further, his domicile of choice would also have been the UK.

Jeremy Coller submitted his tax returns on the basis that he was non-UK domiciled and so eligible for the remittance basis.

HMRC disagreed and, following an enquiry, issued closure notices for the tax years ended 5 April 2013 to 5 April 2016 on the basis that he was domiciled in England during this time and so taxable on the arising basis.

This appeal provides us with a useful refresher of how an individual's domicile is determined. In reaching their decision, the First Tier Tribunal considered his domicile, as well as that of his father and his mother.

In summary:

- His father was an Austrian Jew who fled Austria during WW2 and came to England where he spent the rest of his life;
- His mother was born in Ireland but lived in England from 1953;
- Jeremy was born in England and lived here all his life.

The First Tier Tribunal had four issues to determine and stated that if HMRC succeeded with any one of those issues, the appeal would be dismissed.

Issue 1 - When Jeremy was born on 17 May 1958, had his father acquired an English domicile of choice, making Jeremy's domicile of origin England?

Issue 2 - Alternatively, when his father died in August 1968 had he acquired an English domicile of choice, meaning that Jeremy had an English domicile of dependency, which became an English domicile of choice when he ceased to be a minor on 17 May 1974?

Issue 3 – Alternatively, if his father had not obtained an English domicile of choice by his death, had his mother acquired an English domicile of choice after his death in August 1968, so that Jeremy had an English domicile of dependency, which became an English domicile of choice when he ceased to be a minor on 17 May 1974?

Issue 4 – Alternatively, if Jeremy had an Austrian domicile of origin that remained unchanged until he turned 16, had he later acquired an English domicile of choice before his claims for the remittance basis in April 2012?

Decision

The First Tier Tribunal found that by the time that Jeremy was born, his father had acquired a domicile of choice in England which continued to his death. He had severed all ties with Austria and lived in England with his wife and children. Although he enjoyed holidaying in France, there was no evidence of his intention to move overseas. This was a 'pipe dream'. On issues 1 and 2, Jeremy's domicile of origin was England.

Although not necessary, the Tribunal moved on to consider issue 3. By the time that Jeremy was 16, his mother's domicile of choice was in England where she raised her children, married again in her fifties and later died. Had the Tribunal not already concluded that he had and English domicile of origin, Jeremy would have acquired an English domicile of dependency from his mother.

The First Tier Tribunal did also consider issue 4. Jeremy Coller owned property in the UK where he had lived all his life. He had married in England and raised his family there. Having applied for Israeli citizenship, he claimed that he was domiciled in Israel. However, this intention was only planned after his divorce in 2012. Properties outside the UK were only bought from 2013. The Tribunal concluded that, if prior to April 2012 he had acquired a domicile of origin outside the UK, Jeremy Coller would have acquired a domicile of choice in the UK.

Jeremy Coller v HMRC (TC08738)

No EIS certificates (Lecture P1366 – 19.31 minutes)

Summary – EIS claims by the taxpayer were denied as the taxpayer's adviser had been careless by not checking that the required EIS3 certificates had been received.

Dr Rizvi had subscribed for shares in five companies, claiming EIS relief in 2014/15 to 2016/17 but without holding the required EIS3 compliance certificates (s.203(1) ITA 2007). Dr Rizvi did not dispute that he was not entitled to make the claims for EIS relief.

On 12 March 2021, HMRC raised discovery assessments but Dr Rizvi argued that these were out of time, making them invalid.

HMRC argued that the assessments were in time on the basis that Dr Rizvi, <u>or someone acting on his behalf</u>, had been careless.

Decision

The First Tier Tribunal found that the taxpayer had not acted carelessly. It was reasonable for him to rely on his long term, well-qualified adviser who had acted in the role of his adviser since 2003, without issue.

However, the First Tier Tribunal found that his tax adviser, acting on his behalf, had acted carelessly by not checking that the correct certificates had been obtained. The Tribunal stated:

> "To allow a client to make a claim for EIS relief without making sure that the client held a valid EIS3 is carelessness of a high order".

The appeal was dismissed and discovery assessments for almost £255,000 were upheld.

Dr Syed Akhlaq Rizvi v HMRC (TC08731)

Film rights' Minimum Annual Payments (Lecture P1366 – 19.31 minutes)

Summary – The taxpayer was entitled to the minimum annual payments *which were taxable income from the film business in which the taxpayer was participating.*

Thomas Good entered into a tax avoidance scheme whereby a 'trade' was set up and he entered into a series of transactions to purchase, enhance, exploit and sell film distribution rights worldwide. He bought the rights using £300,000 of his own money, with the remaining investment funded by a six-year loan from Scion Structured Products Ltd, the scheme operators.

Under the scheme, investors were entitled to a minimum annual payment (MAP) which was intended to cover the interest payable on the loan. Under the scheme, Thomas Good assigned his rights to the MAP income to the lender. The scheme provider claimed that the MAP income and interest payable would be netted off for tax purposes.

It was anticipated that in the early years of the scheme, trade losses would be incurred and that these losses would be available for sideways loss relief. However, HMRC stated that the scheme did not work as the losses were not trading losses. HMRC issued discovery assessments, disallowing the deductions for loan interest payments and so collecting the income tax due on the MAPs sums received.

By the time of the Court of Appeal hearing, it was accepted that the scheme did not work. The losses generated were not trading losses and so were not available for sideways relief. The interest payments were not tax deductible.

However, Thomas Good argued that as he had assigned the MAPs payments to the scheme provider, the right to receive that income was not his, he derived no benefit from the payments and the sum was not taxable on him.

Decision

The issue to be decided was whether the MAPs represented income from the non-trade business of exploiting films taxable under s.611 ITTOIA 2005. The Court of Appeal confirmed that s.611 ITTOIA 2005 states that a liability to tax will arise on any person 'receiving or entitled to the [film] income'.

The Court of Appeal found that the person who received and the person entitled to the income could be two different parties, with the anti-avoidance legislation designed to catch those involved in film scheme arrangements.

Thomas Good was entitled to the MAP payments but benefitted by assigning the MAPs to settle the loan interest that was due. Further, once the loan was paid off, Thomas Good had a right to redeem his rights to the MAPs-related income. Based on the economic and commercial reality of the scheme, the appeal was dismissed.

In concluding, the judge stated:

> "The rejection of this appeal will be very bitter for the taxpayer. Not only has he lost his initial investment of £300,000 in the scheme, but in addition he is liable to income tax on income which he never himself received; the tax bill is around £180,000 for the three years of the scheme so far considered by HMRC, with enquiries into two other years remaining open. Financially, the taxpayer's investment in the scheme has been disastrous. But that cannot affect the interpretation and application of the statute.'

Thomas William Good v HMRC [2023] EWCA Civ 114

Interest relief on residential property **(Lecture P1368 – 13.53 minutes)**

Since the start of 2020/21, residential property landlords have been unable to deduct finance costs (including interest) from their property rental profits for income tax purposes. Tax relief is instead granted as a basic rate tax credit which is set against the individual's total income tax liability for the tax year in question.

The amount of this tax credit is calculated as 20% of the lowest of three alternative figures:

1. Individual's interest and other finance costs;

2. Profits of the property letting business (after deducting any losses brought forward);

3. Individual's 'adjusted total income' defined by S274AA(6) ITTOIA 2005 as total income minus any savings and dividend income and after deducting the personal allowance.

Any unrelieved amount can be carried forward to the next following tax year (and so on).

Example

For 2021/22, Thomas had trading profits of £22,600 and gross rental income of £6,100. His allowable property expenses were £8,700, which included a large repair bill, and his interest charges amounted to £5,500. Thomas therefore suffered a property loss for 2021/22:

	£
Gross rental income	6,100
Less: Allowable expenses	8,700
	£(2,600)

Thomas claims this in Box 41 of SA105. The loss of £2,600 can only be carried forward to 2022/23 (see Box 43) – it cannot be offset against his trading profits.

Thomas' tax credit for his interest charges is calculated as 20% of the lowest of:

1. his interest charges (£5,500);

2. his property profits (£nil); or

3. his adjusted total income (£22,600 – £12,570 = £10,030).

Given that Thomas' property profits are nil, he has no tax credit available to set against his 2021/22 income tax liability. The unrelieved amount of Thomas' interest payments can be carried forward to 2022/23 – this must be reflected in his SA105. Note that there is no time limit on the number of years for which unrelieved interest charges can be carried forward.

For 2022/23, Thomas' trading profits are £30,500 and his gross rental income has improved to £8,950. His deductible property expenses are £1,750 and his interest payments are £5,800. He has also received dividends for the first time totalling £1,200.

Thomas' property profits for 2022/23 (after deduction of his loss for the previous year) are:

	£
Gross rental income	8,950
Less: Allowable expenses	1,750
	7,200
Less: Loss b/f	2,600
	£4,600

The amount of Thomas' tax credit for his interest charges is calculated as 20% of the lowest of:

1. his interest charges (£5,500 + £5,800 = £11,300);
2. his property profits (£4,600); or
3. his adjusted total income (£30,500 + £4,600 – £12,570 = £22,530).

Thomas' tax credit for 2022/23 is 20% x £4,600 = £920. The unrelieved amounts of Thomas' interest payments are carried forward to 2023/24. Thus:

	£
Interest charges for 2022/23	11,300
Less: Used in 2022/23	4,600
	£6,700

Thomas' income tax liability for 2022/23 is:

	£
Trading profits	30,500
Property profits	4,600
Dividends (covered by dividend allowance)	-
	35,100
Less: PA	(12,570)
Taxable income	£22,530

Income tax @ 20%	4,506
Less: Tax credit for interest charges (20% x 4,600)	(920)
	£3,586

Contributed by Robert Jamieson

Capital taxes

Goodwill and S165 TCGA 1992 relief (Lecture P1369 – 22.22)

S165 TCGA 1992 deals with holdover relief for gifts of business assets. A gift is not an arm's length transaction and so the donor is treated for tax purposes as having sold the asset for its market value. If this produces a gain, a CGT charge will arise in the absence of a specific relief. However, this is where S165 TCGA 1992 comes in: the section provides that, on a claim, the relevant gain can be held over and deducted from the asset's acquisition cost in the hands of the donee. This prevents what is often referred to as a 'dry' tax charge. Thus, there is no CGT for the donor to pay. The donee will then use the reduced base cost when calculating the gain on any future sale of the asset.

The most common types of asset to benefit from holdover relief are shares or securities. By virtue of S165(2)(b) TCGA 1992, they must be part of the capital of a trading company or the holding company of a trading group where:

- the shares (or securities) are not listed on a recognised stock exchange; or
- the trading company or holding company is the donor's 'personal company'.

A personal company is one where the individual has at least 5% of the company's votes. Holdings in most privately owned trading companies will fall under one (or both) of these headings.

However, it is important to appreciate that there is a key restriction which can catch shares covered by S165 TCGA 1992. This restriction does not apply to the alternative holdover facility under S260 TCGA 1992 for transfers into and out of a trust. This sometimes means that trusts need to be considered as part of a taxpayer's planning strategy where holdover relief might otherwise be curtailed.

The particular feature of the holdover regime of which advisers are too often unaware is the restriction to the quantum of the relief where there is a gift of shares and the company owns chargeable assets which are not chargeable business assets. Confusingly, this legislation does not appear in S165 TCGA 1992 but rather is set out in Para 7 Sch 7 TCGA 1992 (which may explain why this quirk can easily be overlooked).

Where a company owns non-business chargeable assets (such as a quoted share portfolio) on the date of a gift transaction, the qualifying gain on that gift is calculated as follows:

$$\text{Gain} \quad \text{X} \quad \frac{\text{Chargeable business assets}}{\text{Total chargeable assets}}$$

with the chargeable business assets and the total chargeable assets being valued at their market values on the date of the gift.

Illustration 1

On 1 May 2023, Eric gave his son, Francis, shares in the family trading company (Eric Enterprises Ltd). These shares had cost Eric £20,000 when he acquired them on 24 June 1990 and their market value was £340,000 on 1 May 2023.

Eric Enterprises Ltd owned assets with the following values on 1 May 2023:

Goodwill (pre-2002)	300,000
Freehold offices	645,000
Plant and machinery (cost £180,000)	55,000
Shares held as investments	250,000
Trade debtors	80,000
Cash	130,000
Sundry net assets	25,000

The company's chargeable business assets (CBA) and chargeable assets (CA) are:

	CBA	**CA**
Goodwill	300,000	300,000
Freehold offices	645,000	645,000
Plant and machinery	55,000	55,000
Investment shares	–	250,000
	£1,000,000	£1,250,000

Eric's gain on the gift of the shares to Francis is:

Market value as at 1 May 2023	340,000
Less: Cost	20,000
GAIN	£320,000

The gain which is eligible for holdover relief is:

$$£320,000 \times \frac{1,000,000}{1,250,000} \quad £256,000$$

The balance of Eric's gain (£320,000 – £256,000), £64,000 is immediately chargeable to CGT.

In this context, a business asset is an asset used for the purposes of the company's trade. A chargeable asset is one which, if it was sold for a profit, would give rise to a chargeable gain. Assets currently standing at a loss may still be chargeable assets, given that the test is whether, if sold at a profit, this would crystallise a gain. Items such as plant and machinery which, in practice, seldom produce a profit are nonetheless normally regarded as chargeable business assets (unless both the cost and current market value are below £6,000). When making these calculations, it is important to appreciate that the values used are those at the date of the gift rather than cost or book value.

It is worth pointing out that, if the company in Illustration 1 had sold its investments for cash immediately prior to Eric's gift, there would have been no restriction to the held over gain, given that cash is not a chargeable asset. The relevant fraction would then have become:

$$\frac{1,000,000}{1,000,000}$$

Eric’s entire gain would have been eligible for deferral.

The critical issue these days is increasingly the position of goodwill. In Illustration 1, the pre-2002 goodwill was a chargeable asset (and therefore a chargeable business asset). However, if a company owns goodwill which was created or acquired on or after 1 April 2002, it has an intangible fixed asset which is dealt with under Part 8 CTA 2009 and is not a chargeable asset. This can bring about some surprising results. For example, if a company has post-2002 goodwill of £2,000,000 and non-business chargeable assets of £10,000 (but no other chargeable assets), the percentage to be used for any prospective held over gain is:

$$\frac{0}{10{,}000} = 0\%$$

The fundamental point, as the CIOT have highlighted, is that the relief for gifts of shares in trading companies ‘is intended to be restricted to the extent that the company has assets that are not related to the trade’. Because the restriction in TCGA 1992 is couched in terms of chargeable assets (i.e., assets which fall within the CGT regime), this has the unintended impact of denying holdover relief where companies have substantial goodwill and other intangible fixed assets which were created or acquired on or after 1 April 2002. Any resulting gain on a gift of such shares is caught by the restriction, even though goodwill is manifestly not a non-trading asset.

The problem is that the rules in S165 TCGA 1992, which date back nearly 35 years, were drafted long before the concept of the intangible fixed assets regime was invented in 2002. It seems clear that all this was never the intended result of FA 2002, given that it disadvantages owners of more recently created businesses. In the words of the CIOT:

> ‘There seems to be no policy reason why the legislation operates in this way. It can only be concluded that this is an inadvertent oversight from when the intangible fixed assets (provisions were) introduced in 2002 which has never been rectified.’

They continue:

> ‘It is a problem that is likely to become more prevalent going forward when shareholders consider ownership succession of companies which have been established or have purchased valuable “new” goodwill (on or) after 1 April 2002.’

Two further examples are set out below. They cover:

1. a gift of shares where the company owns ‘new’ goodwill; and

2. a gift of shares where the company owns ‘new’ goodwill and chargeable business assets.

Illustration 2

Jonathan Logistics Ltd is a successful unquoted trading company which was incorporated in 2010. Over the years, profits have been reinvested in purchasing investment property so that the company now holds a substantial rental portfolio.

The company owns investment property worth £3,000,000 and the goodwill associated with its trade has been valued at £6,000,000. The company has no other chargeable assets and it is considered to be a trading company for CGT purposes.

On 1 June 2023, Jonathan gave his 10% shareholding, which was worth £400,000, to his son. The base cost of these shares was £10, resulting in a gain for Jonathan of £399,990.

When considering the restriction in Para 7 Sch 7 TCGA 1992, the holdover relief available is:

$$\text{£}399{,}990 \quad \times \quad \frac{0}{3{,}000{,}000} \quad \text{£}0$$

Jonathan and his son are not entitled to make a holdover relief claim under S165 TCGA 1992 and so the 2023/24 gain of £399,990 will be assessed in full.

Illustration 3

The facts are the same as in Illustration 2, but, instead of the £3,000,000 investment property portfolio, the company owns freehold property assets used in the trade which are worth £3,000,000.

The holdover relief available to Jonathan under S165 TCGA 1992 is now:

$$\text{£}399{,}990 \quad \times \quad \frac{3{,}000{,}000}{3{,}000{,}000} \quad \text{£}399{,}990$$

In this case, full holdover relief can be claimed by the parties, reducing Jonathan's gain to nil, and the restriction in Para 7 Sch 7 TCGA 1992 does not apply.

The absurdity of the situation is that the restriction is the same whether the company has £1 of chargeable assets which are not chargeable business assets or £3,000,000 of such assets.

This whole issue was discussed at a meeting of the Capital Taxes Liaison Group on 23 March 2022. Minutes of this meeting are available at:

www.gov.uk/government/groups/capital-taxes-liaison-group

Interestingly, HMRC confirmed their agreement that there was a problem, but noted that there had been no live cases brought up to demonstrate the point at issue. They needed to gather, they said, evidence on the extent of the predicament before any changes to the legislation could be justified.

With respect, it is hard to see the real need to obtain live examples when a clear legislative deficiency has arisen without an obvious policy intention being identified and when what the CIOT call 'perverse outcomes' are being produced.

The suggested amendment is that, in Para 7 Sch 7 TCGA 1992, the word 'chargeable' should simply be removed, thereby restricting relief by reference to the ratio of a company's business assets to its total assets. Let us hope that this is implemented sooner rather than later.

Contributed by Robert Jamieson

Assignment of a reversionary interest

Summary – When the reversionary interest of a trust was assigned to a second trust, this was a transfer of value for Inheritance Tax, meaning that it was not excluded property.

The appeal concerned a widely used inheritance tax scheme involving the acquisition of a pre-existing excluded property trust in the Isle of Man.

In this instance, the arrangements, which took place in 2010, involved the assignment of the reversionary interest in an Isle of Man trust to Peter Linington who was then granted an option to become the income beneficiary of the trust. Before exercising the option, Peter Linington transferred his reversionary interest to the Kent Trust of which the taxpayers were trustees.

Decision

It was accepted that the arrangements were broadly the same as those considered by the First Tier Tribunal in *Salinger* (TC5407). In that case, the taxpayer was successful, but the tribunal in this case found the scheme had failed.

Here, the tribunal said that Peter Linington had acquired the reversionary interest in the trust for a consideration which covered 'the full package of rights and interests under the arrangements which included the granting of the option'. The judge concluded that it was not excluded property.

Further, the transfer of the reversionary interest to the Kent Trust was a transfer of value. The value of the option interest at the point at which the reversionary interest was transferred was nil. As a result, the transfer of the reversionary interest, 'although itself commercially unsaleable and valued at nil', diminished Peter Linington's estate by the value of the combined interest, being the reversionary interest combined with the option.

The appeal was dismissed.

Executors of the Estate of Peter John Linington and Trustees of the Kent Trust v HMRC (TC08717)

Adapted from the case summary in taxation (9 March 2013)

Property occupied for 10 days (Lecture P1366 – 19.31 minutes)

Summary – A property that was lived in for just ten days was not the taxpayer's only or main residence as prior to moving in, he had already decided that his long-term home was a flat located in a different area.

Benjamin Cohen, an osteopath, had invested in several properties with his father. He lived with his parents in Essex.

In July 2018, he bought a London property in need of renovation. He moved into the property on 29 August 2018, the day after work was completed and remained living there for ten days. During this time, he moved his clothes into the property, slept there and entertained friends.

Having decided that he would prefer to live in a new build flat in a different area, on 25 October 2018 he sold this first property to his parents and completed his purchase of the new flat on 30 October 2018 for £501,500.

He submitted a Stamp Duty Land Tax return which did not include any charge to higher rate tax as he was treated the flat as a replacement for the property that he had lived in for the ten days as his only or main residence.

HMRC opened an enquiry, and later concluded that the higher rate of SDLT was due.

Decision

The First Tier Tribunal found in HMRC's favour concluding that Benjamin Cohen had decided to buy the new flat before moving into the first property. Correspondence confirmed that he paid a holding deposit on the flat in mid-August and that he "had made a mistake" and did not want to live in the first property. As a result, when he moved in to the first property, the property was never his only or main residence and living there temporarily for just 10 days supported this finding. The first property was not his permanent home.

The higher rate of SDLT was therefore due on the purchase of the flat as it was not the replacement of an only or main residence.

The appeal was dismissed.

Benjamin Cohen v HMRC (TC08718)

Ineffective sub-sale scheme

Summary – With no realistic prospect of the second contract completing, the sub-sale scheme failed. The taxpayer was liable to SDLT on the original purchase price of £325,000.

In 2011, Olu Olufote entered into a contract to buy a residential property for £325,000. He then contracted to sub-sell the property for £10,000 to a trust of which he was the settlor and a beneficiary. This sub-sale contract was to complete in 124 years but the £10,000 was made to Olu Olufote at the same time as the original contract was completed. As a result, the sub-sale contract was substantially performed.

The aim of the arrangement was to take advantage of sub-sale relief under s.45 FA 2003 which would have disregarded the original contract so that SDLT would have been payable only on the £10,000 consideration relating to the sub-sale contract.

HMRC said the scheme was ineffective, stating that s.45 did not apply, meaning that sub-sale relief was not available.

Olu Olufote appealed.

Decision

The First Tier Tribunal stated that the scheme was 'clearly an anti-avoidance scheme, designed to exploit perceived shortcomings in the drafting of s 45".

Viewing the facts realistically, there was never any possibility that, while Olu Olufote occupied the property, the second contract would be completed. It would only go as far as the substantial performance of the contract, by dint of the payment of £10,000.

On the basis that there was never any intention that the second contract would be completed, sub-sale relief did not apply and Olu Olufote was liable for SDLT on the consideration of £325,000 under the original contract.

The appeal was dismissed.

Mr Olu Olufote v HMRC (TC08735)

Administration

Negligent tax advice not time-barred (Lecture P1366 – 19.31 minutes)

Summary – A claim arising from negligent advice was not time-barred despite being brought some 12 years after the advice was given.

In 2009, following advice given by Speechly Bircham LLP, RBC Trust Company established a Non-resident trust on behalf of Stephane Etroy, a UK resident, non-domiciled Individual.

In September 2018, following an investigation by PwC, the advice that had been given was found to be wrong, leading to additional IHT liabilities of more than £1million.

Stephane Etroy instructed lawyers and in May 2021 a claim was made against the LLP.

Both parties agreed that the advice had been wrong but, as the advice was provided more than six years before the claim was made, Speechly Bircham LLP argued that the claim was time-barred.

Decision

The High Court confirmed that ordinarily the six-year time limit applied but for a negligence claim, there is an additional three-year period.

This additional period starts from when the claimant obtains both the knowledge:

- of the material facts relating to the damage;
- that the damage was attributable to the negligence.

The High Court confirmed that the required knowledge only arose in September 2018 when PwC reported their findings (at the end of their 18-month investigation). It was only at that time that Stephane Etroy knew that a claim was serious enough to pursue.

With the three-year period starting in September 2018, the claim raised in May 2021 was in time.

Stephane Etroy and RBC Trust Company (Jersey) Limited v Speechly Bircham LLP [2023] EWHC 386 (Ch)

Conduct of HMRC enquiries (Lecture B1370 – 17.23 minutes)

This article covers various points for advisers relating to the conduct of enquiries by HMRC.

Overview of an enquiry

The notes in this session relate to full enquiries started by HMRC within the statutory framework for SA and CTSA tax returns. They are not intended to cover HMRC investigations under Codes of Practice 8 or 9, “nudge” letters, or any non-statutory compliance activity.

There are, typically, three phases to an enquiry, although they are not always distinct, and the timing for each part will vary from case to case. An enquiry will typically last a couple of years, although they can be settled quicker, or last longer, depending, in part, on the complexity of the case.

The beginning

An enquiry will start with the issue of a formal enquiry notice. Advisers should ensure that the enquiry notice is valid and has been issued within the relevant statutory enquiry window. Advisers should liaise with their client when an enquiry letter is received, to establish whether there is a disclosure to make. If the client indicates that there is a disclosure, advisers should refer to my session on making a voluntary disclosure.

In most instances, the opening letter will include a request for information and documents. Advisers need to consider whether the request is reasonable, and be prepared to challenge the inspector, where necessary. I know from experience that some advisers can be reluctant to challenge the inspector, but it is important to do so, where appropriate. It is important to ensure that you reply within the HMRC deadline for the provision of information (providing that is a reasonable one) or agree an extension to the deadline. HMRC will, typically, give a month for the provision of information, but advisers will not necessarily get a response within the same timeframe.

The opening letter may also include a request for a meeting with the client, and/or a request to visit the business premises to check the business records. HMRC cannot compel a taxpayer to attend a meeting under the provisions being considered here. My view is that a client should only attend a meeting if it is going to be in their best interests to do so. There are always better options than the client's business premises for the HMRC review of records.

The middle

This phase of the enquiry will involve HMRC's consideration of your response to the opening information request, and questions arising from the officer's review of your response. This is likely to include a request for a meeting with the client, if one has not already been held, or there may be a request for a further meeting. In my experience, good progress can usually be made by meeting the inspector without the client present. One decent meeting can, potentially, take the place of months of correspondence.

The end

There will come a point at which you will have answered all the inspector's questions. The inspector will have to form a view as to whether there are any additional tax liabilities. The adviser should also form a view, and, where appropriate, agree the level of those liabilities with the inspector (in consultation with the client). Advisers need to be aware that, where it is established that there is an additional tax liability for the year under enquiry, the inspector will consider whether the same position arises in other years (both prior to, and after, the enquiry year). This issue may have been discussed in the earlier stages of the enquiry, depending on the facts.

There will, usually, be consideration as to whether a penalty should be charged, and the adviser should be mindful of this at the start of the enquiry. The case will, usually, be concluded either by the issue of a closure notice, and assessments for earlier years, or by a contract settlement. Where assessments are issued, formal penalty determinations will be issued, as necessary.

It will not always be possible to reach agreement with HMRC in every case. In those circumstances, the adviser will need to consider the various options. These will include a statutory review of the HMRC decision, or assessments, the use of Alternative Dispute Resolution (HMRC's mediation process) or appealing to the tax tribunal. Advisers might want to consider obtaining a second opinion on the strength of the client's case before dismissing a negotiated settlement with HMRC.

Managing the client's expectations

Many clients will, when they receive an enquiry notice from HMRC, ask you why. It is unlikely that you will know the answer, and HMRC are unlikely to tell you. However, it can be a distraction to try and answer that question. It is much better to focus on the enquiry, which HMRC are entitled to open, and establish with the client if there is anything about their tax affairs that they have not told you previously – is their tax return correct and complete? This is a sensitive issue, as you do not want to be accusatory, but it will help the client to make a voluntary disclosure (albeit that it will not necessarily be treated as unprompted by HMRC), where one is appropriate, because that will help with any penalty considerations.

Another question that is frequently asked by clients relates to the duration of the enquiry – how long will it last? Most cases will take in the region of two years to conclude, although sometimes cases can be settled sooner than this, depending on the circumstances. It is also possible that the case will take longer to settle. The client should be advised that they can impact on the duration of the enquiry by, for example, responding quickly to your requests for information, to enable you to reply to the inspector's queries in a timely manner.

The client is likely to ask about the likely level of professional fees. Dealing with an enquiry is labour-intensive, and costs can quickly escalate. Not all clients will be covered by fee protection insurance, and advisers might want to consider billing on a monthly basis to ensure that fees do not get out of hand. Advisers should also be aware that, depending on the actions of the client, the fee protection insurance may not provide cover.

As you progress though the enquiry, different options may be available, and these should be explained to the client. This may occur in relation to information requests, and whether to provide certain information to HMRC, or when discussing additional liabilities.

Practical points for advisers

It is important for the adviser to review any information that has been sent to HMRC. The adviser should also review any documents provided by the client in response to the inspector's queries, where those items have not previously been seen by the adviser.

Liaison with the client throughout the enquiry process is essential, and, as noted earlier, any options available to the client should be explained.

Where the client has indicated that there is a disclosure to make, a different approach to that outlined above should be taken. Advisers should refer to my session on making a voluntary disclosure for guidance in those circumstances.

Advisers should be mindful of the end phase of an enquiry as soon as they receive the opening letter. Action taken at that stage can impact on the outcome, particularly where penalties are in point. There is little advantage in only mentioning the advantages of co-operating with HMRC to the client shortly before the inspector issues the closure notice (or assessment).

Advisers should consider seeking external help where there is any gap in their knowledge when it comes to handling HMRC enquiries. This may extend to a discrete part of the process or handing the handling of the enquiry to a specialist. Another aspect to bear in mind is for the adviser to ensure that they have satisfactory internal procedures for dealing with, and monitoring, HMRC enquiries.

Phil Berwick, Director at Berwick Tax

Deadlines

1 April 2023

- Corporation tax due for periods to 30 June 2022 for SMEs not paying by instalments

7 April 2023

- VAT returns and payment for 28 February 2023 quarter (electronic payment)

14 April 2023

- Quarterly corporation tax instalment for large companies
- Forms CT61 and tax paid for the quarter ended 31 March 2023

19 April 2023

- PAYE, NIC, CIS and student loan liabilities for month to 5 April 2023 (non- electronic)
- PAYE liability for quarter to 5 April 2023 if average monthly liability is less than £1,500

21 April 2023

- File online monthly EC sales list – only business in Northern Ireland selling goods
- Supplementary intrastat declarations for March 2023
    - arrivals only for a GB business
    - arrivals and despatch for a business in Northern Ireland

22 April 2023

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

30 April 2023

- Companies House should have received accounts of:
    - private companies with 31 July 2022 year end
    - public limited companies with 31 October 2022 year end
- Corporation tax Self Assessment returns for companies with periods 30 April 2022

News

Payrolling benefits from April 2023 (Lecture P1366 – 19.31 minutes)

From 6 April 2023, HMRC will no longer accept new informal payrolling benefits arrangements. Employers must register now to payroll benefits for the next tax year.

Where an employer already has an informal agreement for 2022/23, they can continue to submit P11Ds marked 'Payrolled' but must formalise this agreement as soon as possible.

https://www.gov.uk/government/publications/employer-bulletin-february-2023

Official rate of interest (Lecture P1366 – 19.31 minutes)

The official rate of interest (ORI) is increasing to 2.25% per annum from 6 April 2023.

www.legislation.gov.uk/uksi/2023/216/made

Extension to the NIC top up window (Lecture P1366 – 19.31 minutes)

Entitlement to the state pension, and other benefits can be detrimentally affected where a taxpayer does not have enough full years of NICs to their name.

To fill those gaps, it is normally possible to make voluntary contributions in the current tax year to top up gaps for the past six tax years.

With the introduction of the new State Pension, the Government introduced a transitional arrangement, extending the six-year period, and allowing individuals to fill up any gaps in their NIC record between April 2006 to April 2016 by 5 April 2023.

Apparently, HMRC and DWP have experienced a surge in customer contact and so to ensure that people do not miss out, the government has now announced that this deadline has been extended until 31 July 2023. Contributions during this extended period can be made at the 2022/23 voluntary NI rates of £15.85 per week.

https://questions-statements.parliament.uk/written-statements/detail/2023-03-07/hcws608

Reporting property disposals – paper form

UK residents must report residential property gains within 60 days of the completion and non-UK residents must report any UK land or property disposal within 60 days, irrespective of whether a gain is made.

Where possible, taxpayers should use HMRC's online service to report these gains. However, those who cannot submit their return online, may use a paper return. Previously, this had to be requested from HMRC but now this form is available for download on a trial basis.

HMRC’s capital gains manual states that paper returns should be made only in the following circumstances, where the person reporting the disposal is:

- Digitally excluded or unable to pass HMRC’s online verification process;
- An agent who has been engaged only to deal with a return;
- A personal representative who wants a different agent to deal with the deceased estate to the one who deals with their individual tax affairs;
- A personal representative who wants to amend a return which has already been sent online;
- A Capacitor (such as Power of Attorney) who wants an agent to file the UK property return;
- A Capacitor who wants to amend a return which has already been sent online;
- A corporate trustee;
- A non-resident trustee who needs to report the disposal of UK property or land but doesn’t have any non-resident Capital Gains Tax liability to pay;
- A secure or Public Department 1 customer who doesn’t file returns online with HMRC;
- A person that has already submitted a Self Assessment return prior to the UK property return.

https://www.gov.uk/government/publications/report-capital-gains-tax-on-uk-property

https://www.gov.uk/hmrc-internal-manuals/capital-gains-manual/cg-app18-110

Off-payroll working – new guidance

HMRC has recently published three new sets of guidance notes which are designed to help understand when the IR35 rules apply:

- www.gov.uk/guidance/off-payroll-working-for-clients
- www.gov.uk/guidance/off-payroll-working-for-intermediaries-and-contractors-providing-services-to-the-public-sector-or-medium-and-large-clients-in-the-private-sector
- www.gov.uk/guidance/off-payroll-working-for-intermediaries-and-contractors-providing-services-to-small-clients-in-the-private-sector

Business Taxation

Partnership finder's fee (Lecture B1366 – 18.59 minutes)

Summary – The taxpayer failed to challenge the Supreme Court's previously stated position that a discovery assessment could not become "stale".

Paul Harrison was in partnership with his wife trading initially as forensic accountants and then later as property developers.

The couple agreed to buy a property using partnership litigation monies but the settlement never materialised. Instead, Paul Harrison's son and daughter-in-law bought the property. They sold it in November 2007 at a profit, with the partnership receiving £200,000 from the proceeds. HMRC were not notified of this sum or and nothing was reported on the Self Assessment return.

Sometime later, his son's affairs were investigated and in 2013 he was convicted of fraud and sentenced. During that investigation Paul Harrison informed HMRC of the £200,000 received.

On 25 September 2015, HMRC raised a discovery assessment in respect of what was described as a £200,000 "finder's fee". Paul Harrison appealed, accepting that £200,000 had been received but arguing that it was received by the partnership and that there were partnership trading losses and expenses to be set against it. HMRC revised its assessment on Paul Harrison to reflect that the £200,000 was received by the partnership and assessed him on a profit of £100,000.

The First Tier Tribunal had found that earlier losses and expenses of the partnership's trade as forensic accountants could not be set against the £200,000, as a partnership cannot carry forward a loss from one trade to set against the profits of another. Further, the Tribunal was not satisfied that any such expenses or losses existed.

Permission was granted to appeal to the Upper Tribunal on the grounds of whether the discovery assessment was valid. Paul Harrison argued that the discovery had become stale when the assessment was made. He claimed that the Supreme Court's decision in *Tooth v HMRC* [2021] UKSC 17 was not binding as the staleness issue in that case was not part of the reasoning for the Supreme Court's decision; it was 'obiter dicta'. He argued that the Upper Tribunal should be bound to follow the Court of Appeal's decision in that case where the assessment was found to have become stale.

Decision

The Upper Tribunal acknowledged that the Supreme Court's statement about staleness was obiter dicta. However, the judges noted that in *R v Barton and another* [202] EWCA Crim 575 the Court of Appeal had confirmed that obiter dicta could form a binding precedent.

The Upper Tribunal stated that the Supreme Court's decision was "clearly given in order to provide general guidance on the important question of staleness." The Court in the Tooth case explained that it was setting out its reasoning precisely because the points had "wider significance" than the case they were looking at.

The Upper Tribunal went on to say:

> "The (Supreme Court's) decision was exhaustive in its analysis; was given on the basis of full argument by leading counsel and took into account and dealt with a number of competing arguments, encompassing statutory interpretation, policy objectives and practicalities."

In concluding, the Upper Tribunal found that the Supreme Court had clearly set out "definitive general guidance which it intended should be followed, by all courts and tribunals". It would be wrong to ignore this guidance.

The Tribunal concluded that "the doctrine of staleness is, like Monty Python's parrot, "not dead, only sleeping". It is deceased."

As the assessment was valid, the partnership was liable to tax on the fee.

The appeal was dismissed.

Paul Harrison v HMRC [2023] UKUT 00038 (TCC)

Intellectual property amortisation **(Lecture B1366 – 18.59 minutes)**

Summary – Despite not being a company, the LLP was related to its corporate members meaning that the amortisation of Intellectual Property acquired from those companies was denied.

On 1 July 2013, shortly after Muller UK & Ireland Group LLP was incorporated, three UK companies transferred their trade and assets to the LLP in return for membership units. The assets transferred included brands, licences and software, together with goodwill, all of which fell within definition of "intangible fixed assets."

In computing the LLP's profits to be included in each corporate member's company tax return for the periods ended 31 December 2013 to 2018, a deduction was taken for the amortisation of the assets acquired.

Since 1 April 2002, only internally generated intellectual property or intellectual property acquired from third parties is an allowable deduction for tax purposes. HMRC denied the deducted amortisation, arguing that the corporate members were related parties of the notional company,

The LLP and three companies appealed arguing that legislation defines 'related party' in terms of companies and control. There was no mention of partnerships until changes were made by FA 2016, widening the definition with a participation condition to effectively include partnerships.

Decision

The First Tier Tribunal found that it was illogical to conclude that the corporate members could not be 'related parties' simply because their notional profit allocation was coming from an LLP. The profit calculations were made on the basis that a UK company was undertaking the trade, which meant that the relationship between the LLP and its corporate members should be viewed as if the LLP were a company. On this basis, the appeal was dismissed.

Although not needed, the Tribunal went on to consider the impact of the FA 2016 changes to the definition of a related party. It was common ground that the LLP and its corporate members were related parties under the extended definition. The question was from when this applied. The Tribunal found that the deduction of any relief for amortisation claimed after the effective date of the change in law, 25 November 2015, would be denied.

Muller UK & Ireland Group LLP and Others v HMRC(TC08742)

Tax Advantaged Share Schemes (Lecture B1368 – 27.09 minutes)

This article talks about share advantaged share plans.

How did this get its name?

Originally, the tax advantaged share plans were called "approved share plans". This is because the share plans, needed approval by HMRC to achieve some significant tax advantages. The approval process could be quite lengthy, including HMRC reviewing the scheme rules, the communication and the communication documents. This would be potentially followed by audits to ensure that the scheme was operating as intended.

This was replaced by a system of registration whereby the schemes are registered and a number is given. But HMRC do not give approval to the plan but rely on the taxpayer and their advisors to declare that the share schemes comply with the conditions to achieve their favourable tax status.

Which schemes are tax advantaged schemes?

The four schemes which currently enjoy tax advantaged status are the

1. Share Incentive Plan (SIP)
2. Share Save Plan (SAYE)
3. Company Share Option Plan (CSOP)
4. Enterprise Management Incentive Scheme (EMI)

Comparisons of the schemes is included in the table below:

Scheme	Options or shares?	Tax relief on Contribution	All Employee Plan?	Limit on the size of company?
SIP	Shares	Yes	Yes	No
Share Save	Options	No	Yes	No
CSOP	Options	No	No	No

EMI	Options	No	No	£30m assets

Scheme	IT on Exit	CGT	Max. Contributions	Value of Shares Purchased
SIP	No	No	£9k p.a. exc. div shares	Full MV
Share save	No	Yes	£500 p.m.	Max 20% discount
CSOP	No	Yes	£60k unvested shares	Full MV
EMI	No	Yes	£250k of options	Full MV

Share Incentive Plan (SIP)

The SIP plan is the only one which offers shares rather than options. It has four facets to it;

1. Partnership shares which can be bought from gross salary and individuals can obtain both the tax and NI deduction;

2. Matching shares – any ratio of matching shares can be given up to any 2 matching shares for every 1 partnership share;

3. Free shares – an amount of free shares can be given up to £3,600;

4. Dividend shares – where the shares are invested in the SIP trust and dividends are paid, those dividends can be reinvested in new shares.

What are the tax advantages?

The partnership shares not only achieve a tax and NI advantage for the employee but they also reduce the employer NI liability.

The free, matching and dividend shares are also awarded free of tax leading to potential tax and NI savings for both employer and employee when compared to any cash alternative.

Shares can grow in the SIP trust tax free and if they are kept in the trust for the minimum period of 5 years for a partnership, matching and free shares they will be completely free of both Income Tax and Capital Gains Tax. The dividend shares only need to be kept for 3 years in the trust before being free of tax.

If the shares exit the trust before the relevant three- and five- year periods there may be a tax and NI charge. The size of the charge is dependent on how long the shares have been in the trust (the tax charge is usually less if the shares have been retained for 3 years in the trust). There are also good leaver provisions for death, redundancy or TUPE transfer which can eliminate the tax charge.

Share Save (SAYE)

This scheme allows for options to be granted at up to 20% discount to the current market value. They can be for a three- or five- year term assuming the options remain qualifying. They can be exercised free of NI and Income Tax. Share Save used to be very popular amongst institutions until interest rates collapsed to below 1% because the amounts invested provided a steady stream of capital for the institutions who received the funds and as a result would not necessarily charge for the administration of the plans.

Generally, Share Save is used by larger companies but if interest rates continue to rise, the opportunity for Share Save may open up to more companies.

The individuals save amounts from their net salary each month for the vesting period of the options.

CSOP

This is similar to Share Save except it is on a discretionary basis and there is no compulsory saving towards the option. Here a term of the vesting period could be between three and ten years but is typically three years. Because there is no Income Tax or National insurance on the paper gain of the options, it is very attractive for both employees and employers.

Kirsty is granted 10,000 options on 6th February 2019 when the market value of the shares was £1. This was the strike price.

The vesting period was three years and the options needed to be exercised within ten years of their grant.

On 6th February 2022 the share price was 90p and therefore underwater. Kirsty did not exercise her options at that point.

On 6th February 2023 the share price had risen to £2 and therefore Kirsty exercised her option to purchase the shares. The shares are 'readily convertible assets' (RCAs) as the company provides a market for the employee to sell them.

She made a gain of £10,000.

Exercise price £2 x 10,000 = £20,000

Strike price £1 x 10,000 = £10,000

Tax Advantaged	Non tax advantaged
Kirsty makes a paper gain of £10,000. This becomes a capital gain when she sells the shares. If she has no other gains in the tax year, she can sell the shares CGT free No NI for either employer or employee	Kirsty makes a paper gain of £10,000. Assuming she is a higher rate taxpayer, she will pay £4,200 in tax and NI (the latter because the shares are RCAs). Leaving £5,800 proceeds. The company will pay 13.8% NI - £1,380 as

	the shares are RCAs.

Even with the reduction of the Annual Exemption to £6,000 in 2023/24, the tax would only be £800 if she has no other chargeable gains in the year.

CSOPs are due to be increased to allow for the maximum grant of £60,000 worth of unvested options. This will make them more attractive.

EMI schemes

EMI schemes have the most generous tax reliefs, allowing options to be granted of up to £250,000 per employee (valued at grant date) and an overall cap of £3 million worth of options by the company. As you might expect, there are significant conditions regarding EMI schemes in terms of restricting the type of company that can participate. Only trading companies with gross assets below £30m can participate. There are also a substantial number of excluded activities.

EMI schemes are targeted at small and medium sized companies but the rules are somewhat onerous and the challenge is not implementing the scheme so much as ensuring the scheme remains qualifying.

What are the effects of recent tax changes?

The doubling of the CSOP limit to £60,000 is likely to make it more attractive. The SIP plan is the only one whose gains are not subject to CGT and therefore by comparison has become more attractive as the annual exemption for CGT is due to fall to £6,000 for 23/24 and £3,000 for 24/25.

Shares which arose out of the exercise of an EMI option plan can qualify for business asset disposal relief (BADR) and therefore a rate of CGT of 10%. It should be noted however that the BADR only applies to the first £1m of lifetime gains and therefore is much less generous than the Entrepreneurs Relief which preceded it and allowed for £10m of gains tax free.

Conclusion

As more employees are pushed by fiscal drag into higher rates of tax, the comparative advantages of tax advantaged plans will become a more important factor in remuneration planning.

Contributed by Jeremy Mindell

Group relief

Summary – UK resident group members were not entitled to group relief for losses made by the UK branch of a Dutch group member and that the legislation restricting relief for such losses (as it was in force at the relevant time) was not incompatible with EU law.

The taxpayers were all UK resident companies which were members of an international group. In the years 2004 to 2008, the UK branch (VSCE UK) of a Dutch group member (VSCE) made substantial losses. Under Dutch law, VSCE was part of a fiscal unity so that it was treated as a single taxpayer together with other Dutch group members. As a result, VSCE's losses were set off against the profits of the fiscal unity, subject to a recapture mechanism which applied when VSCE UK subsequently made profits.

The UK companies claimed group relief in respect of the losses, but HMRC disallowed the claims based on s.403D(1)(c) ICTA 1988 which denied group relief for any loss deductible from or otherwise allowable against non-UK profits of any person. The companies appealed, arguing that the legislation contravened EU law.

The Upper Tribunal had found that s.403D(1)(c) imposed a restriction on freedom of establishment, but that this was justified by the need to prevent double use of losses. However, the Upper Tribunal held that the restriction was disproportionate. The legislation did not, however, need to be disapplied but could be 'read down' by applying a conforming interpretation.

Decision

Before the Court of Appeal, it was not in dispute that there was a restriction on freedom of establishment, so that the main issues were whether the restriction was justified and, if so, whether it was nonetheless disproportionate.

On the first issue, the companies relied on the CJEU decision in *Philips Electronics UK Ltd* [2013] STC 41 that a restriction on freedom of establishment could not be justified by the objective of preventing double use of losses. However, a subsequent decision in *NN A/S* (Case C-28/17) held that preventing double use of losses could be an independent justification for a restriction and the Court of Appeal held that this should be regarded as 'part of the settled case law of the EU'. It rejected the companies' argument that the *Philips* decision should be applied because it was the only case dealing with a 'host state' situation (where group relief was claimed in the state hosting the branch).

Having therefore concluded that the restriction imposed by s 403D(1)(c) was justified, the Court of Appeal went on to consider whether the restriction was disproportionate. It held that the legislation was within the margin of discretion of a member state to pursue the justified objective of preventing double use of losses. It was not necessary, as the companies had argued, for the legislation to deal with the possibility that relief for losses against non-UK profits might be subsequently clawed back under a recapture mechanism.

VolkerRail Plant Ltd and others v HMRC [2023] EWHC Civ 210

Adapted from the case summary in Tax Journal (17 March 2023)

VAT and indirect taxes

Evidence to zero rate sales overseas sales (Lecture B1366 – 18.59 minutes)

Summary – The taxpayer was in possession of all the evidence required to be able to zero rate sales made to the US.

Pavan Trading Limited ran a sub post-office with a retail outlet and made wholesale supplies of derma fillers, beauty products and orthopaedic products. The company submitted monthly VAT returns.

This case concerned the VAT returns for December 2018 and January 2019 that included the sale of medical syringes. These were acquired from a Birmingham-based pharmaceuticals company. Prior to exporting to the US, Pavin Trading Limited unpacked the goods, and replaced the supplied EU information sheets with US information sheet. Each package included an invoice and the CP72 customs declaration document required when exporting to the US. The packages were sent from the Post Office, with a certificate of postings, and packages could be tracked using the Post Office tracking system.

Following an enquiry, HMRC raised a VAT Assessment for £70,652.00 treating the sales as standard-rated and not zero rated. HMRC identified a number of areas where the documentary evidence supplied by the company to prove that the goods had been exported was unsatisfactory. However, the main reason given was that the company was required by law to physically give that paperwork to HMRC within three months of each supply, which had not happened. HMRC clearly stated that had this deadline been met, HMRC would have accepted the export evidence for zero rating purposes.

The company appealed.

Decision

The First Tier Tribunal stated that:

> "Paragraph 3.5 of Notice 703 (which has force of law) specifies that the time limit for exporting the goods and for <u>obtaining</u> the relevant evidence is in each case three months from the time of the supply."

This meant that the company just needed to have obtained the evidence within 3 months from the time of supply. There was no requirement to disclose the evidence to HMRC within that period. With a complete audit trail from the acquisition of the goods through to their receipt by the US customers and evidence of payment, the company had satisfied this requirement. The Tribunal stated that "If there was ever a counsel of perfection for the provision of export documentation, then this appellant has achieved it."

In summing up, the First Tier Tribunal was extremely critical of HMRC stating that the only reason that the company had to bring the appeal was due to on "an erroneous view of the law set out in HMRC's own Notice 703," further compounded "by the nonsense written by the review officer", and finally "by HMRC's statement of case and skeleton argument."

Pavan Trading Limited v HMRC (TC8712)

CBD product sales

Summary – HMRC's late application to challenge the legality of cannabinoid product sales was blocked as it would have prejudiced the taxpayer's case.

The CBD Flower Shop Limited sells cannabinoid (CBD) products, mainly in the form of tea. The company's view is that CBD is listed in the EU Novel Food catalogue and, as such, could be regarded as a food for zero-rating purposes. HMRC argued that the sales were standard rated and have raised VAT assessments for £430,000.

The CBD Flower Shop Limited has appealed the assessments, but prior to that appeal being listed, HMRC applied to change its case on the basis that the taxpayer was making illegal supplies of cannabis which do not attract a zero rating. It is this late application to change its case that was the subject of this appeal.

Decision

Rule 5 of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 gives the First Tier Tribunal the power to grant HMRC permission to amend the statement of case if it would be fair and just to do so and has a real prospect of success. The application must have a realistic, as opposed to "fanciful", prospect of success and be better than merely arguable.

HMRC's argument was that the Misuse of Drugs Act 1971 provides that "all parts of the cannabis plant, save for the mature stalk, fibre produced from the mature stalk, and seed, are treated as a controlled drug." Without a licence issued by the Secretary of State for the Home Department or a relevant medical exemption to supply such products, the sales were unlawful and could not be zero rated. The First Tier Tribunal believed that the new argument was "more than fanciful and better than merely arguable" so suggesting that HMRC's application had some merit.

However, the First Tier Tribunal stated that it was also necessary to consider the timing of the application and whether this unfairly prejudiced HMRC or the taxpayer.

HMRC's new argument was presented after reaching their decision and issuing the assessments to the taxpayer. The Tribunal rejected the argument that HMRC needed advice from the Home Office on the legality. This should have been carried out before the original statement of case was submitted.

The Tribunal acknowledged that:

- denying the application would prejudice HMRC as the legality of the products would not be considered;

- if the application was allowed the company would have a new case to answer at this late stage in the process.

The Tribunal referred to observations made by Coulson J in the CIP Properties case. Weighing up the prejudice to both parties is a balancing act but HMRC's case is not as important where
HMRC has failed "to obtain advice in relation to the illegality issue sooner." The Tribunal rejected the application due to its timing and the resulting prejudice to the company.

The CBD Flower Shop Limited v HMRC (TC08724)

Insulated roof panels (Lecture B1366 – 18.59 minutes)

Summary – Providing insulation and protection from the outside elements, roof panels did not qualify for the reduced rate of VAT as energy-saving materials.

Greenspace (UK) Ltd supplied and fitted insulated conservatory roof panels onto the pre-existing roof structure.

The company charged VAT at the reduced rate of 5%, arguing that it was supplying insulation for roofs that qualified as energy savings materials under Note 1(a), Group 2, Schedule 7A VATA 1994.

HMRC disagreed and raised a £2.5 million VAT assessment on the basis that the supplies should have been standard rated.

Greenspace (UK) Ltd lost their appeal at both the First Tier and the Upper Tribunals. The case moved to the Court of Appeal.

Decision

The Court of Appeal found that when the First Tier Tribunal had decided that the company supplied a roof, rather than insulation, they had made an error of law. This was not the correct approach.

The issue to decide was whether the supply made by Greenspace (UK) Ltd was something more than insulation for roofs as "Note 1 cannot be extended beyond its plain words." If the company supplied more than insulation for roofs, the reduced rate would not apply as it would fall outside of note 1(a), making it a standard rated supply.

The Court of Appeal found that Greenspace (UK) Ltd supplied and fitted panels that insulated the conservatory, but these panels also protected the conservatory from the outside elements. Without the waterproof aluminium casing with protective powder coating, rain would be let in. The supply was more than a supply of insulation for roofs as the panels also protected the conservatory from the outside elements.

The appeal was dismissed.

Greenspace (UK) Ltd v HMRC [2023] EWCA Civ 106

DIY housebuilder claim (Lecture B1366 – 18.59 minutes)

Summary – A DIY housebuilder VAT reclaim was denied as the building created was an extension to an existing building and not a new separate dwelling.

In April 2016, Daniel Dunne submitted a planning application for a "two storey side extension and single storey rear extension to a residential property in Northern Ireland. This case concerned only the rear extension which consisted of a bathroom, kitchen and sleeping accommodation.

In September 2019, Daniel Dunne submitted a DIY Housebuilders VAT reclaim. He argued that although the initial plan had been for the rear extension to be attached to the existing property, the property built was a 'detached bungalow' so a separate dwelling.

He stated that planning permission was amended informally due to time constraints. His wife was terminally ill and died six months after completion. The building was created to make sure that his wife could stay at home rather than go into a hospice. Resubmitting the application would have taken two more years which she did not have, so he discussed the changes informally with the local authority building control, who agreed that he did not need to build the corridor connecting the building to the existing property.

HMRC rejected the claim on the basis that the works were not considered to be a new dwelling for VAT purposes.

Daniel Dunne appealed.

Decision

The First Tier Tribunal accepted that there was an informal amendment to the planning permission to remove the proposed connecting corridor between the existing property and the building.

However, the Tribunal stated that to be able to make a DIY housebuilders' claim under s35 VATA 1994, "the planning permission must be for a dwelling". The Tribunal found that, although informally amended, the permission granted was still not for a new dwelling.

Correspondence with the council confirmed that the removal of the connecting corridor from construction was not considered to create a separate dwelling for planning purposes. Indeed, post-completion local authority correspondence continued to refer throughout to the works as "an extension … not attached to your main house". No correspondence confirmed that approval was given for a new dwelling.

As Neil Warren, independent VAT consultant, stated:

> 'The commercial reality of the project was that it produced a "granny flat" rather than a new dwelling and therefore a DIY claim was incorrect.

As an extension of a dwelling is specifically excluded from qualifying for a claim under s35 VATA 1994, the appeal was dismissed.

Daniel Dunne v HMRC (TC08716)

Digital newspapers (Lecture B1366 – 18.59 minutes)

Summary – Digital editions of newspapers were not zero-rated under Item 2, Group 3, Schedule 8 VATA 1994.

This case concerned whether zero-rating of print newspapers extended to the digital editions of The Times, The Sunday Times, The Sun and The Sun on Sunday for the period between 30 August 2010 and 4 December 2016.

It was common ground that the decision in relation to the period in question would also be applicable to the period up to 1 May 2020. However, as from 1 May 2020, there was no dispute as the VAT (Extension of Zero-Rating to Electronically Supplied Books etc)

(Coronavirus) Order 2020, (SI No 2020/459) (the "2020 Order") extends the zero-rating to newspapers "when supplied electronically".

The Court of Appeal had found in favour of HMRC and so the matter progressed to the Supreme Court.

News Corp UK & Ireland Ltd argued that, by applying the 'always speaking' principle, 'newspapers' under Item 2, Group 3, Schedule 8 VATA 1994 covered the digital versions of newspapers now available online. Statute should be interpreted taking into account changes that have occurred since it became law, even if those changes could not have been reasonably foreseen at the time the law was enacted.

Decision

The Supreme Court stated that they needed to consider both the "always speaking" principle of UK statutory interpretation as well as the EU law requirement to interpret exemptions from VAT strictly using the "standstill" provision. This provision prevents extending zero-rating categories beyond those that existed when the Sixth VAT Directive was enacted in 1975.

The Court stated that the always speaking principle was significantly limited in this case as it should "not conflict with the requirement for zero-rating for newspapers to be strictly construed and not extended." The digital version of newspapers needed to meet the definition of 'newspapers' under the standstill provision back in 1975. At that time, newspapers were goods acquired giving customers immediate access to the news on paper, without the need for a device or connectivity to read it. By contrast, digital or online newspapers were services that required the use of a device connected to the internet. Such devices did not exist when the law was introduced and so zero rating could not apply.

The appeal was dismissed.

News Corp UK & Ireland Ltd [2023] UKSC 7

Wildlife Park construction (Lecture B1366 – 18.59 minutes)

Summary – Construction services provided to a charity should not have been zero-rated under the relevant charitable purpose provisions.

The Zoological Society of Hertfordshire, a charity, engaged Paradise Wildlife Park Limited to construct a lion enclosure, an external dinosaur exhibition and a shop called the "Dino Store".

On the basis that the buildings were to be used solely for a relevant charitable purpose, the charity had issued a certificate confirming non-business use, with Paradise Wildlife Park Limited then treating the work as zero-rated construction services.

HMRC disagreed and raised an assessment on Paradise Wildlife Park Limited for £411,641, charging VAT at the standard rate.

Subsequently, Paradise Wildlife Park Limited agreed that the work on the shop should not have been zero-rated but appealed the VAT charged on both the lion enclosure and "World of Dinosaurs" external exhibit.

Decision

The First Tier Tribunal referred to Note 6(a) Group 5, Schedule 8, VATA 1994 which states that use for a relevant charitable purpose means use by a charity otherwise than in the course or furtherance of a business.

The Tribunal acknowledged that the lions' enclosure had a conservation function and the dinosaur exhibit an educational purpose. However, both also made the wildlife park a more attractive place to visit, meaning there was also a business purpose. Customers pay for admission to the park and under s.94(2)(b) VATA 1994, a business activity includes consideration charged for admission to any premises.

The Zoological Society of Hertfordshire runs the wildlife park as a commercial attraction to raise funds for its charitable activities. The First Tier Tribunal found that both the lion enclosure and outside dinosaur exhibit formed part of the charity's business of running and charging admission to the wildlife park.

As a result, the Tribunal concluded The Zoological Society of Hertfordshire had incorrectly issued the certificate as what was built did not consist of buildings intended for 'use solely' for a relevant charitable purpose. HMRC were correct that the construction services should have been standard rated.

The Tribunal also considered whether the external, walk-through dinosaur exhibit was even a building. It concluded that it was not as, although it was a permanent structure, it had no walls, and could not be considered a building.

The appeal was dismissed.

Paradise Wildlife Park Limited v HMRC (TC08729)

Revenue and Customs Brief 2 (2023)

HMRC has published Revenue and Customs Brief 2 (2023): VAT and value shifting consultation update which explains HMRC's conclusions and actions taken following the VAT and value shifting consultation and subsequent evidence gathering exercise.

HMRC has concluded that the most effective way to address valuation concerns is to provide businesses with practical guidance on apportionment methods, meaning there will be no legislative changes and HMRC has:

- Published 'GFC2 (2023): Help with VAT apportionment of consideration';
- Amended section 31 of VAT Notice 700;
- Updated the VAT manual at VATVAL03000.

https://www.gov.uk/government/publications/revenue-and-customs-brief-2-2023-vat-and-value-shifting-consultation-update

Revenue and Customs Brief 3 (2023)

HMRC has published Revenue and Customs Brief 3 (2023): changes to VAT treatment of local authority leisure services.

Previously, such services provided to members of the public were required to treat these supplies as business activities for VAT purposes and either charge their customers VAT at the standard rate or apply the exemption.

However, following a number of appeals, the courts have found that local authorities' leisure services are provided under a statutory framework and can be treated as non-business for VAT purposes. HMRC has now concluded that allowing local authorities to treat their supplies of leisure services as non-business would not significantly affect competition. Claims for overpaid output VAT may be submitted to HMRC.

This change only affects the supply of leisure services and does not change the treatment of other sources of income such as catering, clothing, sports' goods or car parking.

https://www.gov.uk/government/publications/revenue-and-customs-brief-3-2023-changes-to-vat-treatment-of-local-authority-leisure-services/changes-to-vat-treatment-of-local-authority-leisure-services