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Personal tax

Pool cars (Lecture P1446 – 17.08 minutes)

Summary – Despite an HMRC officer agreeing a company pool car policy with two companies, HMRC's subsequent NIC assessments were valid.

David Walpole was director of both MWL International Ltd and Maywal Ltd, both of which traded in commodities.

In April 2021, having concluded that certain prestige cars leased by the companies and used by various employees were not pool cars, HMRC sought to collect Class 1A National Insurance Contributions as follows:

- Maywal Ltd: £50,072 for the tax years 2015/16 through to 2018/19;
- MWL International Ltd: £7,814 for 2019/20.

The companies appealed HMRC's decisions on the basis that the cars satisfied the statutory conditions, and so were pool cars. Alternatively:

- HMRC was estopped from arguing that the cars were not pool cars during the relevant period; and/or
- The companies had a legitimate expectation that the cars would be treated as such.

The estoppel and the legitimate expectations were said to derive from a meeting held in 1993 between David Walpole and an HM Inspector of Taxes at which it had been agreed that the cars were pool cars.

Decision

Ss.167(3) and 168(3) ITEPA 2003 sets out the statutory requirements for a car to qualify as a pool car and states that a car only qualifies as a pooled car if all the following conditions are satisfied:

1. It is available to, and actually used by, more than one employee.
2. It is made available by reason of their employment.
3. It is not ordinarily used by one of them to the exclusion of the others.
4. Any private use by an employee is merely incidental to their business use of it.
5. It is not normally kept overnight on or near the residence of any of the employees unless it's kept on premises occupied by the provider of the car

The First Tier Tribunal found that:

- one of the cars failed almost all the statutory conditions and so was plainly not a pool car;

- the other cars were available to David Walpole, his son and his wife by reason of their employments and were actually used by them for private use, meaning they too were not pool cars.

On the issue of whether HMRC were estopped from issuing retrospective NIC decisions, the Tribunal found that HMRC were not estopped from retrospectively changing the agreement made at the meeting for two reasons:

1. HMRC could not be estopped from enforcing a statutory provision;

2. the Inspector had no authority to enter into a forward agreement relating to the companies' tax or NIC positions.

The agreement was therefore void as regards the future, and a void agreement cannot be estopped.

Finally, did the companies have a legitimate expectation that HMRC would not retrospectively change their position? Having considered the case law, the Tribunal decided it did not have the jurisdiction to decide that issue.

The companies' appeals were dismissed.

MWL International Ltd and Maywal Ltd v HMRC (TC09169)

HICBC and car benefits (Lecture P1446 – 17.08 minutes)

Summary –A taxpayer's company car benefit took him over the £50,000 threshold, meaning that he was liable to the High Income Child Benefit Charge (HICBC).

David Thompson was an employee, who had a company car.

Since November 2013, his spouse had been claiming child benefit for their first child, and then from the end of February 2016, for their second child as well.

In October 2019, he was sent a nudge letter:

- detailing the circumstances when a taxpayer would be liable to the High Income Child Benefit Charge; and

- requesting that he check whether he needed to pay the charge.

This was followed by a reminder sent a month later, but David Thompson could not remember whether he received either letter. Interestingly, in January 2020, his wife opted out of the child benefit allowance.

In May 2021, HMRC initiated a compliance check which resulted in assessments and penalties being issued for the High Income Child Benefit Charge for 2013/14 through to 2019/20.

David Thompson appealed, claiming that he had believed that he had never earned more than £50,000 in any of the tax years in question. However, he understood that his car benefits were likely to have taken him over the limit but argued that HMRC should have told him that this was the case.

He thought it was unreasonable for HMRC:

- to take four years to tell him that he owed them money;
- to ask him to resubmit his paperwork as HMRC had lost it and it was only when he told them that he had already submitted it and threatened legal action that they suddenly found it.

If he had known about the liability to the assessment and the penalties he could have put money aside to pay it.

Decision

The First Tier Tribunal confirmed that none of David Thompson's submissions amounted to a serious challenge that the assessments had been incorrectly calculated. Indeed, David Thompson now accepted that they were indeed correct.

Moving to the penalties, any ignorance of the law expired once David Thompson received the nudge letter and reminder in 2019. Further, his wife then cancelling the child benefit shortly after, confirmed that he was aware of the issue at that time.

With no reasonable excuse, the appeal was dismissed.

David Thompson v HMRC (TC09160)

Payments using offshore cars and accounts (Lecture P1446 – 17.08 minutes)

Summary – Although the taxpayer did not personally benefit from the remittances made, he was taxable on mixed fund bank transfers and credit card payments effectively 'remitted' to the UK.

In 2006, Afzal Alimahomed's family sold their business and placed the sale proceeds into an account in Guernsey. Afzal Alimahomed and his family then moved to Dubai meaning that he became non-UK resident for the years that followed. Having been non-UK resident for more than five years, the proceeds from the sale of the business were then classed as 'clean capital' for remittance basis purposes.

Inadvertently, some income from overseas sources was added to the Guernsey account making it a mixed fund account (S.809Q(6) ITA 2007). Further, he moved money from this account to a personal account with Barclays in the Isle of Man, making this a mixed fund account as well.

Later, with their old business in administration, the family repurchased it. Afzal Alimahomed returned to the UK in 2014 to help run it and, having fallen foul of the 90-day test, became UK resident for 2015/16 and 2016/17, with the remittance basis of taxation being in point.

Afzal Alimahomed did not hold a UK bank account but rather sums paid in the UK were funded from his offshore accounts and by using his offshore debit/credit cards.

His tax returns for 2015/16 and 2016/17 both included a claim for the remittance basis but with no amounts remitted.

HMRC opened an enquiry which subsequently led to Afzal Alimahomed accepting that certain amounts should have been included in the tax returns under enquiry as well as for some earlier years. Amendments were therefore made.

However, not all items were agreed. Consequently, HMRC issued a discovery assessment for 2015/16 taxing foreign income that had been remitted to the UK but omitted from his tax return. HMRC also issued a closure notice for 2016/17 on the same basis.

The sums under dispute were as follows:

- payments to his son's UK bank account for his son's personal use and direct payments of his son's university-related expenses including rent, using his offshore credit card, and his offshore bank account.

- other transfers from his offshore account into the UK bank accounts of friends and family who were not relevant persons, for their own use;

- jewellery, gifts and flights to the UK for non-relevant persons, using his offshore credit card;

- Jewellery purchased in the UK for him and his wife using his offshore credit card.

Afzal Alimahomed appealed arguing that the payments made were not taxable remittances. As the relevant person (s.809M ITA 2007), he derived no personal benefit from these transactions. The money had not been 'brought to' or 'used in' the UK for his benefit (s.809L).

Decision

The First Tier Tribunal found that, when deciding whether a taxable remittance had been made, personal benefit was not relevant. The Tribunal stated that all that was required was for it to be established that the taxpayer initiated the transfers from his offshore bank account, which he did. Afzal Alimahomed had 'brought money (or other property) to the UK when he initiated bank transfers from his offshore account into the UK bank accounts of non- relevant persons such as his son, his landlord and his university.

Further, by using an offshore credit card in the UK, Afzal Alimahomed had created a 'relevant debt' for the remittance basis (s.809L ITA 2007). Settlement of the credit card balance using a mixed fund offshore bank account amounted to the use of income or chargeable gains outside the UK taxable under the remittance basis in the UK (s.809L(3)(c). ITA 2007). The Tribunal recognised that non-relevant person benefitted from the service/gifts, but it was the taxpayer who made the purchases using his offshore credit card, using foreign income or gains to pay the offshore credit card company.

There was some good news for the taxpayer. HMRC could validly raise a discovery assessment in respect of 2015/16 if the loss of tax had been brought about carelessly or deliberately. Although HMRC's statement of case claimed a deliberate understatement of tax, this was not proved at the hearing, as HMRC did not include this in cross-examination. The discovery assessment was set aside in full.

The appeal was allowed in part.

Afzal Alimahomed v HMRC (TC09178)

Failed gilt strip scheme

Summary - A gilt strip scheme intended to create a substantial income tax loss without an equivalent economic loss failed.

Timothy Watts claimed a tax loss of about £1.35m in connection with his participation in a gilt strip planning scheme (FA 1996, Sch 13 para 14A now ITTOIA 2005, s.427 to s.460).

This involved:

- Timothy Watts buying gilt strips at market value for about £1.5m using borrowed funds;
- An option was then granted to a trust to acquire the strips with an exercise price of £150,400;
- The trustees assigned the unexercised option to a bank for £1.35m;
- The bank exercised the option and paid Timothy Watts £150,400 to buy the strips.

The Timothy Watts’s loss was the difference between the market value of the gilt strips and the exercise price.

The First Tier Tribunal dismissed his appeal and the appeal moved to the Upper Tribunal.

Decision

The key issue for the Upper Tribunal was construction of the phrase 'the amount payable on the transfer'.

The First Tier Tribunal ruled that it included both payments made by the bank, i.e. to the trustee and to the taxpayer.

The Upper Tribunal agreed although it accepted that the First Tier Tribunal's approach contained errors. The judges said, when viewed 'realistically and with regard to its composite whole or commercial unity', the entire £1.5 million was payable on the transfer. This was a 'pre-planned scheme' to transfer the interest in the gilt strips from the taxpayer to the bank which required the bank to accept the assignment of the option and then exercise it.

It was consistent with a purposive interpretation of the legislation to treat all the steps as part of the transfer. 'It would defeat that purpose if a part of the price which it was necessary for Investec to pay to acquire the entire interest in the gilt strips is not taken into account in determining the amount payable on the transfer.'

On the taxpayer's contention that the First Tier Tribunal had not considered the relevance of extra-statutory materials it wished to rely on, the Upper Tribunal disagreed. It said the First Tier Tribunal had 'adequately' taken into account the materials cited.

The appeal was dismissed.

Timothy Watts v HMRC [2024] UKUT 00168 (TCC)

Adapted from the case summary in Taxation (27 June 2024

State pension (Lecture P1447 – 13.38 minutes)

Introduction

The basic state pension increases every year by whichever is the highest of the following:

1. Earnings: average percentage growth in wages in Great Britain;

2. Prices: percentage growth in UK prices as measured by the Consumer Prices Index;

3. 2.5%

This is controversial but no Government has yet decided to overturn these measures, other than a temporary removal of the first option in 2022/23 when the data was skewed by the post-Covid position.

The increase for 2024/25 has been 8.5% so that the full new State pension for this year is £221.20 per week or £11,502 per annum. This is still low compared to other countries.

For those retiring now, the earlier you can get to state pension age is 66 with this in the process of increasing to 67 (to be reached by 2028). It is likely to increase further in future due to the cost of pensions for the Government.

Qualifying years

You will need at least 10 qualifying years on your National Insurance record to get any state pension with a qualifying year being one where you were:

- working and paid NICs at a sufficient rate;

- getting NI credits (e.g. because you were unemployed, ill or a parent/ carer);

- paying voluntary NICs (including in some circumstances where you were abroad).

The rules changed in 2016 and the actual number of years you have can be complicated but the easier way to find out is to get a pension forecast from HMRC. You need 35 qualifying years to get the full state pension and you will get a proportion if you have between 10 and 35 qualifying years.

Voluntary contributions

In some cases, individuals may realise that they have insufficient years to get the maximum state pension and ask whether or not they can make voluntary contributions.

Individuals can pay Class 2 or Class 3 contributions if they meet the relevant conditions. Whether this is worthwhile would need to be considered on a case by case basis. Entitlement to pay voluntary Class 2 NICs is retained for those who meet the conditions even though Class 2 NICs have been abolished for the general self-employed population. Anyone earning more than the small profits threshold (currently £6,725) will be treated as if they have a full year of contributions for pension purposes going forward.

Those who can pay Class 2 voluntary contributions are:

- A UK self-employed individual earning less than the small profits threshold
- An individual who is in employment or self-employment overseas provided that they meet the following conditions

1. Have been resident in the UK for 3 continuous years at any time or
2. Paid full NICs in any 3 years and (in either case), and
3. Was in employment or self-employment immediately before going overseas.

If you are not entitled to pay Class 2 voluntary NICs, then you can potentially pay the (higher rate) Class 3 NICs on a voluntary basis. You cannot pay if you will not benefit from the contributions. You can always pay Class 3 if you are resident in the UK and may be able to pay if you are not resident as long as you meet the first two conditions above in terms of the contributions.

There are time limits for payment of contributions.

The standard time limits are 42 days after the end of the year in respect of which the contribution was paid or before the end of the sixth year following the year in respect of which it was paid.

A longer time limit can be given if the failure to pay contributions is down to ignorance or error or if the contributor falls within the current extended voluntary Class 2 time limits. Those are as follows:

- Voluntary contributions for the tax years 2006/07 to 2015/16 can be made up to 5 April 2025 by individuals who reached state retirement age on or after 6 April 2016;
- Voluntary contributions can be made for 2016/17 and 2017/18 up to 5 April 2025 by any individual.

Is it worth it?

Class 3 voluntary contributions (which is the most expensive way to top-up but is often the way that has to be used) currently cost £17.45 per week which is £907.40 for a whole year. Buying an extra year will give you £6.32 per week (being £221.20 divided by 35) which is a total of £328.64 per year. It would take under 3 years to recoup that additional investment.

An extra year of contributions if you can pay at Class 2 rate would be £179.40 for a year which is less than the extra state pension you would obtain which would seem to be a less difficult decision.

Retiring overseas

You can claim the state pension even if you are going to retire overseas. However, the state pension will only increase each year if you live in the EEA, Gibraltar, Switzerland and some countries which the UK has a social security agreement with (being Barbados, Bermuda, Bosnia-Herzegovina, Guernsey, IOM, Israel, Jamaica, Jersey, Kosovo, Mauritius, Montenegro, North Macedonia, Philippines, Serbia, Turkey and USA).

Deferring the state pension

If you reach the state pension age, you can get an increase in weekly pension rates if you defer the date at which you receive the state pension. You have to defer for at least 9 weeks. It increases by around 1% for every nine weeks that you defer, so around 5.8% for every 52 weeks.

If you are entitled to the full state pension of £221.20 per week, you would get an extra £12.83 per week or £667 a year if you deferred for 52 weeks (assuming no increase in the state pension which is not going to happen). However, the pension foregone for a full year was £11,502 (assuming he is retiring now at the age of 66), and he would have to live for a further 17 years to make this worthwhile.

Contributed by Ros Martin

Pension planning - Miscellaneous issues (Lecture P1448 – 13.02 minutes)

Pension fund recycling

Pension recycling occurs when you take a tax-free lump sum and reinvest it into another pension plan. If you did that, you would get the tax relief twice as you have got tax relief on the original contribution and then you get it again on the subsequent contribution.

There are anti-avoidance provisions to stop recycling of pension fund lump sums. This applies where all of the following conditions are met:

- The individual receives a pension commencement lump sum;
- Because of the lump sum, the amount of contributions paid into a registered pension scheme in respect of the individual is significantly greater than it would otherwise be;
- Additional contributions are made by the individual or someone else (such as the employer);
- Recycling is pre-planned;
- The amount of the pension commencement lump sum, taken together with any other such lump sums taken in the previous 12-month period, exceeds £7,500 and

the cumulative amount of the additional contributions exceeds 30% of the pension commencement lump sum.

If caught, the lump sum becomes an unauthorised payment from the pension fund and will be taxed at a minimum of 40%.

It is important that the conditions are met and there are various issues to consider.

Pre-planning requires an individual to make a conscious decision to use a lump sum as way of paying greater contributions. If they decide to make the payment only after the lump sum has been received, then there is no pre-planning. The onus would be on HMRC to prove this although they could make inferences from the known facts.

It is important to realise that the cumulative period over which the additional contributions are measured is the tax year in which an individual takes the lump sum with the intention of using it to increase contributions, the two years before that and the two years after that.

All arrangements need to be critically examined. The following example comes from PTM133850 and shows why the involvement of an employer can trigger these rules:

> *An employee intends to receive a pension commencement lump sum of £100,000 with the intention of using it to pay a contribution of the same amount into a registered pension scheme. However, rather than taking the lump sum and then using it to make the contribution, the employee instead arranges a salary sacrifice in respect of a bonus of £100,000 that would otherwise have been paid to the employee. As part of that salary sacrifice arrangement, the employer pays a contribution of £100,000 into a registered pension scheme in respect of the employee. That contribution of £100,000 is a significant increase.*
>
> *The recycling rule is triggered because:*
>
> - *the employee intended to use the pension commencement lump sum as a means to pay a contribution to a registered pension scheme*
> - *that objective has been achieved through the salary sacrifice arrangement – taking the lump sum instead of the bonus foregone has allowed the individual to place the same £100,000 into a pension scheme that would have been paid had the employee taken the lump sum and then used it to pay a contribution of the same amount into the scheme*
> - *there has been a significant increase in contributions and that increase represents more than 30% of the amount of the lump sum.*

Third party contributions

Third party contributions may be something which have not been encountered before but can give some interesting planning opportunities.

A contribution made by a third party into a pension fund do not count towards the donor's annual allowance. The limits which apply are based on the donee's allowances so they must have sufficient net relevant earnings and annual allowances to allow the payments to be made.

Sometimes, we see pension payments of the minimum value of £3,600 (or £2,880 net) being made for minor children or non-working spouses or civil partners. This is basic planning and can be a useful way for grandparents to pass value on to grandchildren. This would be a gift for IHT purposes although this can often be covered by normal expenditure out of income exemptions. It would also be a way for a parent to pass value to their children although a larger gift might be a PET rather than immediately exempt.

If one spouse's contributions are being limited by (tapered) annual allowance issues, they could make contributions for the other spouse which might be useful to increase retirement income for the couple generally.

As an example, say we have an individual who cannot make further contributions due to tapered annual allowance issues but has a wife who earns £12,000. She has very little pension provision and so he could make a contribution of £9,600 (gross £12,000) to her pension fund. No further tax relief would be obtained but it would enable a pension fund to be established for the wife which might utilise lower tax rate bands in retirement.

If the donee is a higher rate taxpayer, they could reclaim any additional income tax relief in the normal way.

Lifetime ISAs

The lifetime ISA were introduced from 6 April 2017 for adults under 40. The idea was that they could contribute up to £4,000 each year and receive a 25% bonus from HMRC at the end of each year. The savings can be kept in cash or investments and grow tax free within the LISA. The LISA contributions have to be taken into account as part of the overall annual ISA investment limit of (currently) £20,000. Only one LISA can be held in each tax year. Contributions can continue to be made with the bonus paid up to the age of 50.

Funds can be used to buy a first home at any time from 12 months after opening the account and can be withdrawn from age 60 for use in retirement. The limit for property purchases is £450,000.

Whilst these were supposed to be the future of pension planning, there is little evidence that they are being used widely, or indeed at all! The Help to Buy ISA which preceded this was very popular to help saving towards a first home and it is suspected that the LISA is being used for this purpose rather than for pension planning.

In reality, it might be a good IHT planning vehicle for the older generation. A LISA funded by a grandparent for two grandchildren could move £80,000 out of an estate over a ten-year period, hopefully covered by normal expenditure out of income. This would save £32,000 of IHT and bonuses of £20,000 would be received from HMRC to top up the fund. The fund would be worth £50,000 for each grandchild even without investment growth but any growth would be tax free. The downside – can't access it very easily!

Company pension contributions

An employer can make pension contributions for their employees or former employees.

Such contributions are not a benefit in kind and so are exempt from income tax in the hands of the employees. Such contributions are not subject to a NICs charge.

If an employer pays pension contributions into a scheme for a family member, this would be taxable as a benefit for the employee and subject to tax and Class 1A NICs.

The employer would be able to claim a deduction for any contributions assuming that the contributions are made wholly and exclusively for the purposes of their trade or business. Pension contributions are a cost of employing staff and HMRC accept that there is only going to be a limited number of situations where the wholly and exclusively test might not be met. However, they do highlight that contributions made in respect of a controlling director or shareholder of a company might be seen to be excessive.

The guidance at BIM46035 states:

> *A pension contribution by an employer to a registered pension scheme in respect of any director or employee will be an allowable expense unless there is a non-trade purpose for the payment.*
>
> *In cases where the contribution is part of a remuneration package paid wholly and exclusively for the purposes of the trade, then the contribution is an allowable expense. General guidance on deductions for remuneration paid to close relatives of directors can be found at BIM47105.*
>
> *Whether there was a non-trade purpose for the payment will depend upon the facts of the individual case. The case of Samuel Dracup & Sons Ltd v Dakin [1957] 37TC377 (see BIM37745) was decided on its own particular facts. It confirms that, where there is a non-trade purpose for the payment, then the payment is disallowable, but you should not read more into it than that.*
>
> *One situation where all or part of a contribution may not have been paid wholly and exclusively for the purposes of the trade is where the level of the remuneration package is excessive for the value of the work undertaken by that individual for the employer. In this situation, you should consider whether the amount of the overall remuneration package, not simply the amount of the pension contribution, was paid wholly and exclusively for the purposes of the employer's trade.*
>
> *On occasion an employer may make an increased pension contribution on the basis that a scheme is underfunded. It is important when comparing contributions between periods to consider the full facts, including the history of remuneration and contributions, before challenging a deduction based solely on annual comparatives.*
>
> *You should accept that the contributions are paid wholly and exclusively for the purposes of the trade where the remuneration package paid in respect of a director of a close company, or an employee who is a close relative or friend of the director or proprietor (where the business is unincorporated) is comparable with that paid to unconnected employees performing duties of similar value. When there are no employees with whom duties are genuinely comparable, you should follow the general guidance at BIM47105.*
>
> *Where the facts show that a definite part or proportion of an expense is not wholly and exclusively incurred for the purposes of the trade, only disallow that part or proportion.*

The deduction can be claimed (subject to comments above on wholly and exclusively) in the year that they are paid although there are some provisions for spreading of pension contributions where there is an increase of over 210% from one period to another but the increase has to be more than £500,000 for the spreading to apply. This is only going to be a problem for very large businesses.

The reduction in the annual allowance does make it more difficult to extract significant sums from a company as pension contributions but it is still an efficient way of extracting profits from OMBs.

Practical issues

There are often questions asked about making significant pension contributions – it is one of those areas where there is a high degree of uncertainty about the true position.

There are risks, as highlighted above in situations where the pension contributions are out of line with general levels of remuneration but the figures have to be high before they can be argued to be excessive in the context of the overall package. Clearly there will be a greater vulnerability where losses are generated by excessive contributions.

Another area of risk is in relative to spouses who are on the payroll but are not really making any real work contribution to the business. Arguably the payment of a significant pension contribution would follow general principles but there is a risk that it will attract a general enquiry which would see HMRC scrutinising whether any of their remuneration meets the wholly and exclusively test.

One question that does come up quite often is where a company has ceased trading, perhaps because it has sold its business but sometimes that it has just ceased trading, and the shareholders want contributions to be made from the surplus funds. It is unlikely that there will be any profits for CT purposes against which the payment can be deducted but even if that is the case, there would still be no employment tax issues for the directors. So, it might still be a reasonable idea.

It should be noted that any payment made post-cessation pursuant to an obligation which existed when the trade existed (such as in relation to the wider employee pool) would be capable of being deducted from profits in the final period of trading.

Use of SIPPs or SSASs by OMBs

Is there any difference between using a Small Self-Administered Scheme (SSAS) rather than the more popular Self-Invested Personal Pension (SIPPs)?

SSASs were very popular under previous regimes and were typically used by small companies. The advantage of a SSAS over a SIPP is the ability to make loans back to the sponsoring employer although there is a limit in this now to 50% of the fund assets. There is no limitation on the use of the funds by the employing company.

Example

A company with two brothers aged 55 and 40 has significant reserves. It is likely that the older brother will want to retire earlier than the younger brother and that the latter will not be able to afford to buy out the former.

The company makes profits in excess of £250,000 and is now paying tax at 25% which is annoying the directors. There is no company pension fund.

Money is being accumulated in the company as the brothers are thinking it could be used to buy back the older brother's shares. However, they could make a contribution to a SSAS over the next, say, 5-year period. Corporation tax could be saved on the contributions. The fund would build up and that money could be lent back to the company in due course to fund the buy back of the shares.

In specie pension contributions

The legislation gives tax relief for contributions paid in a tax year and so it is HMRC's view that such contributions must be a monetary amount, for example in cash, cheque, direct debit and bank transfers as other assets cannot be 'paid'. It should be noted that there are specific rules about transfer of certain tax incentivised shares to a registered pension scheme counting as a relievable transaction.

This point was argued in the Courts in 2020 and this highlighted inconsistencies in HMRC's approach. It is clear that HMRC now considers that it is only possible to structure a transaction so that a monetary contribution can be achieved without the need for cash to pass between the contributor and the pension scheme where there is a separate agreement to offset the consideration for the asset sale against the contribution obligation.

HMRC's previous view was that it may be possible for a member to agree to pay a monetary contribution and then to give effect to the cash contribution by way of a transfer of an asset or assets:

''[For this to be acceptable, there had to] be:

- a clear obligation on the member to pay a contribution of a specified monetary sum, say, £10,000. This needs to create a recoverable debt obligation;

- a separate agreement between the scheme trustees and the member to pass an asset to the scheme for consideration.

If the scheme agree[d], the cash contribution debt may be paid by offset against the consideration payable for the asset. This is the scheme effectively agreeing to acquire the asset for its market value.''

Following HMRC's statement in *Pension Schemes Newsletter* No 126 (December 2020), HMRC has now 'clarified' its guidance by adding the further condition mentioned above that an in-specie arrangement must meet for the contribution to be relievable.

The revised guidance now makes it clear that the practice of accepting in specie contributions as relievable is limited to a set-off arrangement where there is a pre-existing obligation to contribute a defined monetary amount and a separate agreement between the contributor and the scheme trustees to sell an asset to the scheme at market value.

The guidance in *Pensions Tax Manual*, para. PTM042100 now reads:

> *''Where an asset is transferred to a registered pension scheme in satisfaction of an earlier obligation to contribute money, the resulting contribution is not a monetary amount and therefore the requirements for relief under [s. 188(1)] or [s. 196(1)] (as applicable) are not met.*
>
> *Where a contribution obligation exists and the registered pension scheme has separately agreed to purchase an asset from the member or employer for consideration, the parties may enter into a contractual offset agreement in relation to the payment of the contribution and the asset-sale consideration. HMRC recognises that, in certain circumstances, it is possible for a contribution effected in this way to retain its monetary form for the purposes of sections [s. 188(1)] and [s. 196(1)].*
>
> *For a contribution to retain its monetary form, there must be:*
>
> - *a clear obligation on the contributing party to pay a contribution of a specified monetary sum, say, £10,000. This needs to create a recoverable debt obligation;*
> - *a separate agreement between the scheme trustees and the contributing party to sell an asset to the scheme for market-value consideration; and*
> - *a separate agreement whereby the scheme trustees and the contributing party agree that the cash-contribution debt may be offset against the consideration payable for the asset.*
>
> *HMRC would expect there to be contemporaneous documentary evidence of each of the above.*
>
> *If the asset's market value is lower than the contribution debt the balance must be paid in cash in order for the entire contribution to qualify for relief.*
>
> *If the contribution is being made to a registered pension scheme that operates relief at source (RAS) the amount of cash contribution specified would, if applicable, be the net amount after the individual exercises his [or her] right to deduct from the payment the relevant rate of tax (see PTM044220). The relief at the relevant rate [may] be claimed by the scheme administrator in the normal way from HMRC and if appropriate the individual [may] claim higher-rate relief via [the] self-assessment return.''*

In a further case in 2022, the First Tier Tribunal ruled that the acceptance of a member's IOU to pay a fixed sum by way of contribution to the scheme was not a monetary payment and therefore did not constitute a relievable contribution.

Contributed by Ros Martin

Capital taxes

Trading had now begun (Lecture P1446 – 17.08 minutes)

Summary – Having lost his claim for Entrepreneurs' Relief on an earlier disposal, the taxpayer was successful when he appealed his second disposal as by then the partnership had been trading for the required period.

John Wardle owned 14.65% of a Limited Liability Partnership (LLP) that was established in 2015 to acquire, construct, and operate a power plant using wood waste biomass.

In November 2016, he disposed of just under half of his interest in the LLP, claiming Entrepreneurs' Relief against the gain. He reported the gain in his 2016/17 tax return but HMRC denied the relief on the basis that the LLP has not started to trade. Despite a number of contracts existing relating to the construction, operation, and financing of the plant, including a contract to purchase feedstock from a supplier, the First Tier Tribunal found in HMRC's favour that trading had not commenced as no electricity was being produced and the case was dismissed (John Douglas Wardle v HMRC (TC08485)).

The Environment Agency's permit to operate the power plant was granted in May 2017 and by December 2017, the plant could import electricity under the Power Purchase Agreement. In March 2018, testing of the power plant took place and by the end of the month Ofgem accreditation was granted, back dated to 31 December 2017. Between April 2018 and May 2019 commissioning and final construction took place but no electricity was generated in this period.

It was not until June 2019 that electricity was generated commercially for the first time, with accounts to 31 December reporting turnover of £173,528 and a total loss of £11,177,548.

On 28 February 2020, John Wardle disposed of his remaining interest in the LLP, reporting the gain in his 2019/20 tax return where he claimed Entrepreneurs' Relief.

HMRC opened an enquiry into the return, concluding once again that Entrepreneurs' Relief was not available as the partnership had not been trading for the required time. A closure notice was issued to that effect in March 2023.

John Wardle appealed to the First tier Tribunal.

Decision

S.169I(3) TCGA 1992 provides that a business is a material disposal for Entrepreneurs' Relief purposes *"...if the business is owned by the individual throughout the period of 2 years ending with the date of the disposal..."*

The parties agreed that for the appeal to succeed John Wardle needed to establish that the LLP was trading on a commercial basis with a view to the realisation of profit for the 2 years ending with the date of disposal so from 28 February 2018.

The key issue in this case was, once again, had the LLP started to trade and if so, from what date. In deciding when the LLP started trading, the First Tier Tribunal stated that the test to be applied was the three-step test in *Mansell v HMRC* (2006):

1. There must be a specific idea in mind of the type of profit-making activities to be carried on.

2. The business must be set up, in terms of “business structure to undertake the essential preliminaries, getting ready to face your customers, purchasing plant, and organising the decision-making structures, the management, and the financing.”

3. Operational activity must have commenced. This includes “dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk”.

Both parties agreed step 1 had been satisfied, so the Tribunal moved on to consider steps 2 and 3.

Relying on the Mansell decision, the Tribunal found that 'set-up' did not require 100% completion, with electricity being generated:

- The existence of the partnership agreement meant the decision-making structure and management were in place;

- The finance was in place with funds being drawn down regularly from 24 August 2015;

- Contracts had been agreed, with the First Tier Tribunal believing it was unlikely that the contracts would be terminated as all parties were committed to a common goal.

The Tribunal did scrutinise the fact that as at 28 February 2018 the Ofgem certificate had not been obtained and a clause in the Power Purchase Agreement was not satisfied. However, they concluded that this did not preclude Step 2 (or indeed step 3) from being satisfied. In this case, while not complete, the business had been set up and 'the train was on the tracks travelling to its destination.’

The Power Purchasing Agreement was the LLP's agreement to sell and the purchaser's agreement to buy all metered output. This constituted operational activity. The First Tier Tribunal stated that HMRC had conceded at the hearing that, if the second step was satisfied, then the Power Purchase Agreement would satisfy the third step as “this was operational activity, being dealings with a third party that were immediately and directly related to the supplies to be made which it is hoped will give rise to expected profit and which involved the LLP putting money at risk.”

Having satisfied all three steps, the Tribunal concluded that the LLP had been trading for the required two-year period and the appeal was allowed.

Mr John Douglas Wardle v HMRC (TC09213)

Agreement did not constitute grant of an option

Summary – An 'option agreement' did not result in a chargeable event for capital gains tax as no option had been granted.

Mahadevan and Thanusha Krishnamohan ran a newsagents and general convenience store and sought to develop a rental property portfolio that would generate sufficient income to support their family.

Historically, the property portfolio had been built up by using equity in earlier purchases to obtain loans from high street lenders to fund subsequent purchases.

However, in late 2013, the couple decided to buy Cliveden Stud Farm for £5.8 million, a working stud farm including a number of commercial and residential properties, stables and barns on land comprising 130 acres.

The cost was significantly more than any property previously bought but the selling agent convinced them that this was a good purchase. Existing agricultural covenants could be easily removed and the property could then be sold on to a prospective buyer quickly, at a 'generous profit'.

This was a short-term venture, funded through an 'option' agreement with a British Virgin Islands registered company whereby the lender took a charge over some other rental properties as security. If the loan and interest were not repaid on time, the lender had the right to buy certain properties at a specified price, below market value.

When the prospective buyer pulled out, and it became clear that the covenants could not be removed, an onward sale seemed unlikely. Consequently, the couple arranged further financing to ensure that the 'option' agreement was not breached by:

- selling two other properties they owned;
- re-mortgaging two other properties; and
- borrowing £1.6 million from Lloyds Bank.

Later, HMRC issued a closure seeking to tax the agreement as if it was the grant of an option, and as the option had not been exercised, it was a disposal of an asset creating a chargeable event chargeable to capital gains tax under s.144 TCGA 1992.

The couple disagreed claiming that the transactions were loan agreements and that they had simply provided security for various amounts advanced by way of loan. No option was granted under the agreements as at no time did the grantee have a chance to exercise the option.

Decision

The First Tier Tribunal found that this was not an 'option' that had been granted. The name given to the option agreement was 'unfortunate'.

The Tribunal stated that the couple's control was critical to their decision. An option could only have been granted if the couple could not control the events that needed to occur to enable the lender to buy their property.

In this case:

- the couple had control and could avoid having to sell the properties to the lender by paying the agreed amount, which they did;
- the lender was never in a position to be able to choose whether or not to exercise the 'option' as by the end of the arrangement, the loan and interest had been repaid, removing the opportunity for the lender to exercise any option.

With no option granted, there was no chargeable event.

The appeal was allowed.

Mahadevan Krishnamohan and Thanusha Krishnamohan v HMRC (TC09145)

A variation using trusts (Lecture P1449 – 14.13 minutes)

While it has always been tempting for married couples to rely on the spouse exemption in s.18 IHTA 1984 and leave everything (including relevant business property) to their other half on the first death, this strategy wastes a serious IHT planning opportunity which can result in the estates of both spouses being able to take advantage of 100% business relief on each of their deaths.

The potential for this double relief in the context of what some tax advisers call a 'two-fund will trust' is explained in the example which follows.

Example

Chris (62) and Sarah (50) are a married couple. Chris has two children, a daughter, Chloë, from a previous marriage and a son, Andrew, with Sarah. Both children are unmarried – Chloë is aged 31 and Andrew is 25.

Chris owns all the shares in a successful trading company which he runs with Sarah and Andrew. As Chris' tax adviser, you have recently valued the company at £4,800,000 and your analysis of the business confirmed that the shares should be eligible for full relief.

In addition, Chris holds a substantial portfolio of quoted investments which are managed by his stockbroker and are worth another £4,800,000. The family home in Weybridge, which is in Chris' name, is worth £3,000,000.

Andrew still lives with his parents, but Chloë, who works in London, owns a flat of her own in Battersea.

Chris is keen to maximise the benefits of the various IHT reliefs, but, given the age differential, he wants to ensure that Sarah is well provided for after his death (should he die first). Eventually, he would like Chloë and Andrew to share his estate equally.

Our advice to Chris, when he rewrites his will, is to put in place a two-fund will trust in order to achieve these aims.

The will should leave the assets qualifying for 100% business relief (i.e. the shares in the trading company) into a fund of the trust which will be fully discretionary (Fund 1). The assets in Fund 1 will be held for the benefit of Sarah, Chloë and Andrew. Chris' personal representatives will of course be able to claim full IHT relief on these assets.

Chris' remaining assets should pass into a separate fund (Fund 2), in which Sarah has a life interest. As the sole life tenant, Sarah will be entitled to all the income arising in Fund 2 as well as the right to remain living in the family home. As mentioned above, she will also be a discretionary beneficiary of Fund 1.

One tax expert has described the benefits of this arrangement in these words:

> 'A key part of this (form of) planning is that the relievable and non-relievable assets are held within two funds of the same trust. This means (that), if appropriate to do so, the trustees can choose to exchange assets of equivalent value between the funds, without incurring a CGT or SDLT liability. If these assets were swapped, the shares would subsequently be held of life interest trusts and the investments would be held on discretionary trusts.'

On the assumption that Sarah lives for at least two years after this rearrangement, the shares in Fund 2 will again qualify for 100% business relief. They can then either be held in that fund until Sarah's death or she might choose to make a gift of the shares. This gift would be free of tax as a PET if she survived a further seven years or, if she died sooner, the shares would presumably still qualify for the IHT relief. Regardless of whether the shares are retained or are gifted, there would be an IHT saving of £1,920,000 (40% x £4,800,000), compared to the fund holding the quoted shares (Fund 1).

There will be no charge on Sarah's death on these investments, given that they will be held under the relevant property charging regime involving what is essentially a maximum tax charge of 0.6% for every 12-month period during which the investments stay in the trust.

After Sarah's death, the trustees may choose to keep the assets in the trust or alternatively to distribute them to Chloë and Andrew (or any grandchildren) in accordance with Chris' wishes. Flexibility has been built into the structure at every step of the way so that Chloë and Andrew can benefit from an equal share in each asset or the business assets could go to, say, Andrew, with the rest of the investments ending up with Chloë.

Note that there are no residence nil rate band considerations to think about here in view of the size of Chris' and Sarah's estates.

Contributed By Robert Jamieson

Property transfer to company **(Lecture P1446 – 17.08 minutes)**

Summary - Transferring his residential property to a company while still living in it resulted in 15% SDLT being payable, despite him being unaware of the charge.

Mr Ali's family had lived in 94 Mayfair Avenue for over a decade but decided they needed to move to a larger property.

Having exchanged contracts on both the house they were selling and the house they were buying, at the last minute, the vendor of the new home pulled out and the chain collapsed.

A mortgage advisor advised him that by transferring his Mayfair Avenue property into a company, he could take out a mortgage in the company's name and so avoid having to find a buyer.

Consequently, in 2021, he transferred the Mayfair Avenue property into his newly formed company for the sum of £650,000. The SDLT return was submitted on the same day and £27,000 of SDLT was paid on that day using normal rates.

In February 2022, he bought a new property which needed some work and so he remained living with his family in his old home until May 2022.

In March 2022, HMRC opened a compliance check into the SDLT return, later issuing a closure notice, resulting in additional SDLT of £70,500. With the property transferred to a company and a non-qualifying person being allowed to live in that property, the higher rate of SDLT was payable.

Mr Ali argued that he would never have lived in the property after transfer if he had known about the 15% charge. Neither the mortgage adviser nor solicitor had mentioned this. While living in the property, he had paid full market rent and moved out as soon as his new property was ready to live in. He argued that the law was unfair and should have provided a 'grace period'.

Decision

The First Tier Tribunal found that it was clear that the conditions for the 15% SDLT rate had been met, meaning that HMRC's assessment was correct. This was a 'high-value residential transaction' as it was an interest in a single dwelling for which chargeable consideration was in excess of £500,000 (Para. 1 Sch. 4A to FA 2003).

This higher charge could be avoided if the property was acquired exclusively for the purpose of "exploitation as a source of rents ...in the course of a qualifying property rental business" (Para. 5 Sch. 4A FA 2003).

However, the First Tier Tribunal agreed with HMRC that the transfer fell foul of the statutory carve out, that a property remains chargeable at the 15% rate if "it is intended that a non-qualifying individual will be permitted to occupy a dwelling on the land". A non-qualifying individual includes a person connected to the purchaser. As Mr Ali controlled the company, he was a non-qualifying individual.

Finally, legislation did not include a 'grace period' and with the First Tier Tribunal having no powers to consider its fairness, the tribunal stuck with the strict letter of the law and HMRC's assessment was upheld.

Mayfair Avenue Limited v HMRC (TC09176)

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Administration

Taxpayer notices (Lecture P1450 – 12.26 minutes)

This article considers taxpayer notices, issued by HMRC under the provisions of Paragraph 1, Schedule 36, Finance Act 2008. Advisers should note that there are certain provisions relating to the issue of taxpayer notices following the submission of a land transaction return, or returns relating to annual tax on enveloped dwellings, which are outside the scope of this session.

What is a taxpayer notice?

An HMRC officer may, by notice in writing, require a taxpayer to provide information or produce a document to HMRC, that is 'reasonably required by the officer for the purpose of checking the taxpayer's tax position or for the purpose of collecting a tax debt of the taxpayer', (Paragraph 1, Schedule 36, Finance Act 2008). A notice issued in accordance with this provision is called a 'taxpayer notice'.

The provision is widely drafted, and enables HMRC to obtain information and documents regarding a taxpayer's "past, present and future liability to pay any tax", (Paragraph 64(1), Schedule 36, Finance Act 2008).

Paragraph 21, Schedule 18, Finance Act 2008, imposes certain restrictions on the issue of a taxpayer notice where a person has made a return (under Section 8, 8A or 12AA of TMA 1970 (tax returns for the purpose of income tax and capital gains tax), or under Paragraph 3, Schedule 18, Finance Act 1998 (company tax returns)). Where a tax return has been made in respect of a chargeable period under one of the above provisions, a taxpayer notice may not be given for the purpose of checking that person's tax position in relation to the chargeable period unless any of certain conditions are met.

The relevant conditions are:

- Where there is an open enquiry into the tax return (or claim or election);
- Where an HMRC officer has a "reason to suspect" an under-assessment, an insufficient assessment, or excessive tax relief, in relation to the relevant period;
- Where the information or document is required so HMRC can check the taxpayer's position in relation to a tax other than income tax, CGT, or corporation tax;
- Where the information is required to check the taxpayer's position in relation to deductions or repayments of tax or withholding of certain income;
- Where the information is required for the purpose of obtaining specified transfer pricing information or documents.

The provisions of Paragraph 21, Schedule 18, Finance Act 2008, also cover the submission of a return under Schedule 2, Finance Act 2019 (return for disposals of UK land, etc), by virtue of paragraph 21ZA, Schedule 18, Finance Act 2008.

An HMRC officer can issue the notice directly to the taxpayer, without the need for the approval of the tribunal, or other judicial authority. However, the officer can choose to seek the approval of the tribunal before issuing the taxpayer notice, under the provisions of Paragraph 3 (3), Schedule 36, Finance Act 2008.

The relevant provision states that the tribunal may not approve the giving of a taxpayer notice “unless

a) an application is made by, or with the agreement of, an authorised officer of Revenue and Customs,

b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,

c) the person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs,

d) the tribunal has been given a summary of any representations made by that person”.

The requirements at paragraphs c) to d) of sub-paragraph (3) do not apply where the tribunal is satisfied that taking the action specified in those paragraphs might prejudice the assessment or collection of tax.

Advisers should note that, crucially, where the tribunal gives approval for the issue of a taxpayer notice, the taxpayer does not have the right to appeal against the notice.

When do HMRC issue taxpayer notices?

In the context of a Self-Assessment enquiry, an HMRC officer will, typically, issue an information request at the start of that process. The request will, usually, be an informal one, although there is nothing to stop the officer issuing a formal notice at the outset (this would likely be where there is a history of poor co-operation from the taxpayer).

If the items are not provided to the officer in response to the informal request, they can be expected to issue a taxpayer notice, and this typically happens shortly after the deadline in the informal request has expired. Officers are instructed to ensure that progress is made in an enquiry, and the issuing of a formal notice is a part of that process.

Advisers should note that there is not a restriction on the number of notices that can be issued to a taxpayer. Where a taxpayer has responded to, and complied with, a taxpayer notice, the officer may issue a further such notice to obtain other documents which may be referred to in the taxpayer’s response. Alternatively, the officer may issue a further notice later in the enquiry process.

What can be requested in a taxpayer notice?

An officer can request any information or document that they consider to be “reasonably required”, as noted above, as well as meeting the other relevant criteria. Schedule 36, Finance Act 2008, does not contain a statutory definition of “reasonably required”, so those words have their everyday meaning. It is not possible to provide a definitive list of what is “reasonably required”, as that will not only differ from case-to-case, but also at different stages during the course of an enquiry.

Various First Tier Tribunal cases have determined that the burden of proof for establishing that information or documents are “reasonably required” under a taxpayer notice lies with HMRC.

A taxpayer notice can include an extensive list of information to provided or documents to be produced, and can be expected to cover all items that the HMRC officer is seeking at that stage of their enquiry. The tribunal has been critical of HMRC where broad information requests have been included in a taxpayer notice, and advisers should consider whether a notice extends beyond what might be reasonable, and what has become a “fishing expedition”.

The general restrictions on the use of information notices, at, Part 4, Schedule 36, Finance Act 2008, apply to taxpayer notices. These restrictions will be covered in a separate session, but include the requirement that a person is only required to produce something which is in their power or possession, and cannot, generally, require the production of old documents.

Appeals and penalties

The taxpayer may appeal against the taxpayer notice “or any requirement in the notice”, (Paragraph 29, Schedule 18, Finance Act 2008). However, the taxpayer is prevented from appealing against a requirement in the notice to provide any information, or produce any document, that forms part of the taxpayer’s statutory records. As noted earlier, the taxpayer is also unable to appeal against the notice, or any requirement in the notice, if the tribunal has approved the issue of the notice.

Statutory records are records that a taxpayer is required by a statute to maintain. There may be a dispute with HMRC as to whether records requested by an officer are part of a taxpayer's statutory records. Where agreement cannot be reached, the matter will, potentially, have to be resolved by appeal to the tribunal. Where the tribunal has approved the issue of the taxpayer notice containing the request, the taxpayer’s remedy is by judicial review, or, potentially, by an appeal against a resulting penalty assessment for failure to comply.

Practical considerations

My view, generally, is that, where there is a valid enquiry into a Self-Assessment tax return, and information or documents have been reasonably requested by an HMRC officer, and they are relevant, those items should be provided voluntarily, without the need for the officer to issue a formal notice. In other circumstances, care should be taken before providing information or documents to HMRC, and specialist advice taken, as necessary, to protect you and your client.

Where a formal notice has been issued to the taxpayer, it is important to review the document in detail, including the items requested, the time to comply with the notice, and any requirements in relation to the place at which documents are to be produced.

The adviser should check each piece of information that has been requested, and each document that must be produced, and consider whether they meet the relevant statutory criteria. Where any requirements are considered to fall short of the statutory position, they should be discussed with the officer. In such circumstances, the officer may agree to put on hold part of the request, or may, for example, grant further time for the provision of the items requested, where that is the adviser's concern. It is important that any such exchanges, or at least the outcome of such discussions, are noted, whether by email or in other written correspondence. In any event, it is important that an appeal is made, to protect the taxpayer's position. It is essential that an appeal is made within the time limit for making an appeal, being 30 days from the date of issue of the taxpayer notice. I have seen numerous instances where an adviser has either not made an appeal, or has miscalculated the relevant 30-day deadline.

Where a taxpayer receives notification that an officer is seeking the approval of the tribunal for the issue of a taxpayer notice, it is important that any appropriate representations are made. This includes where there is a dispute about whether a document requested is a statutory record. Advisers should note that they, or their client, do not have the right to attend the tribunal hearing at which the approval is sought by HMRC. Also, HMRC are only required to provide the tribunal with a summary of any representations made.

Contributed by Phil Berwick

Financial institution notices (Lecture B1450 – 14.25 minutes)

This article considers financial institution notices issued by HMRC under the provisions of Schedule 36, Paragraph 4A, Finance Act 2008. Although advisers may not act for "financial institutions", as defined in the legislation, it is important to be aware of this potent information power in HMRC's armoury.

What is a financial institution notice?

A financial institution notice is a notice that may be given, in writing, to a financial institution (as defined, see below) requiring it to provide information or produce documents to HMRC, that is reasonably required, either to check a taxpayer's position, or for the purpose of collecting a tax debt of the taxpayer. The notice must name the taxpayer to which it relates.

The notice can only be used where the information or document is, in the reasonable opinion of the officer giving the notice, of a kind that it would not be onerous for the institution to provide or produce.

HMRC must give a copy of the financial information notice to the taxpayer, together with a summary of the reasons why the information is required. This requirement can be disapplied by the tribunal, if it agrees that notifying the taxpayer might prejudice the assessment or collection of tax. The tribunal can also disapply the requirement to name the taxpayer on the notice, if it is satisfied that that the HMRC officer has reasonable grounds for believing that naming the taxpayer might seriously prejudice the assessment of collection of tax. However, the identity of the taxpayer must be known to the officer issuing the notice (so that HMRC cannot use a notice to, for example, find out which taxpayers hold a particular type of account).

The context for introducing financial institution notices was that they would help HMRC to fulfil its obligations in relation to the exchange of information with other jurisdictions for tax purposes. The relevant international minimum standard was that HMRC, and other tax authorities, were required to provide information requested under international treaties within 180 days, and HMRC were not meeting that standard (at the time, it was taking

HMRC, on average, 12 months to provide information). The financial institution notice was introduced by the Finance Act 2021, and the notices were issued from July 2021.

What is a financial institution?

The term “financial institution” is widely defined in the legislation, at FA 2008, Schedule 36, Paragraph 61ZA(1). In relation to Schedule 36, the term means a financial institution under the Common Reporting Standards (which includes “depository institutions”, “custodial institutions”, “investment entities” (with some exceptions, including family trusts and charities) and “specified insurance companies”), and a person who issues credit cards.

When do HMRC use financial institution notices?

Where HMRC are seeking information or documents from a taxpayer, they can issue an information notice to the taxpayer for information or documents in their power or possession.

HMRC can also request information and documents from a third-party, with the taxpayer’s permission (or that of the tribunal), which could include a bank or other financial institution. HMRC’s Compliance Handbook (see CH232100) indicates that when seeking information from a bank, etc, the officer should use either of the above two methods before issuing a financial institution notice. However, there isn’t anything in the legislation that obliges HMRC to use the taxpayer or third-party notice over a financial institution notice.

HMRC’s factsheet covering financial institution notices (CC/FS60) indicates the circumstances in which they will use those documents. When HMRC are checking a person’s tax position, or taking steps to collect a tax debt, they may need to obtain information from a financial institution. HMRC note that this could be because:

- the first party *(the taxpayer)* has not been able to give us information that we need or has refused to;
- HMRC need to independently check business or financial transactions that have taken place, or
- HMRC have been asked by an overseas tax authority to gather the information in line with exchange of information rules.

As noted above, the financial institution notice was introduced to enable HMRC to meet its obligations in relation to other tax authorities. The reality, nearly two years on from their introduction, is different. At the time of their introduction, many advisers noted that the use of financial institution notices was not restricted to assisting overseas tax authorities. There wasn’t anything in the legislation to prevent HMRC from using the notices in the context of, for example, domestic tax investigations.

In a report published earlier this year, HMRC released the following data relating to the number of financial institution notices (“FIN”) issued:

	1 July 2021 to 31 March 2022	1 April 2022 to 31 March 2023
Total number of FINs issued	355	647

Total number of domestic FINs issued	214 (60.3%)	516 (79.8%)
Total number of FINs issued for international information requests	141 (39.7%)	131 (20.2%)
Number of applications for FINs formally rejected by authorised officers*	31 (8.73%)	88 (13.6%)
The average time taken to respond to international requests received from the first use of the FIN	197 days	175 days

*The report notes that this figure includes applications that may have been rejected and then resubmitted and approved.

There are lots of points that can be taken from the above data. The two key take-aways, for me, are, firstly, that the number of notices issued has increased significantly (albeit from a relatively low base). Secondly, that the number of financial institution notices issued by HMRC for their initial intended purpose (in relation to international information requests) is being dwarfed by the number of such notices issued in relation to HMRC's domestic enquiries. I suspect that future years will see an increase in the overall number of notices issued, and that the number of domestic notices issued will continue to greatly exceed those issued in relation to international information requests.

Safeguards on the use of financial institution notices

The reality is that there are relatively few safeguards in relation to HMRC's financial institution notices. The key point is that the financial institution notice does not require the approval of the taxpayer or the tribunal before an officer can issue a notice, which makes it easier, and quicker, for HMRC to issue the notice, rather than, for example, a taxpayer notice, or third-party notice.

The notice must be issued by, or with the agreement of, an authorised HMRC officer, but there is a lack of independent (non-HMRC) review prior to the issue of the notice.

There is a requirement that the information or document requested is, in the reasonable opinion of the HMRC officer giving the notice, of a kind that it would not be onerous for the financial institution to provide or produce. Even if there was a right of appeal, it would be difficult to show that the officer did not hold a reasonable opinion. The HMRC officer is likely to have a different view from the taxpayer and the financial institution, as to what is onerous.

As noted above, the notice must relate to a known taxpayer's tax position, or for the purpose of collecting a tax debt. The taxpayer is provided with a copy of the notice, and a summary of the reasons why the information is required, although this may be of limited use, given the absence of a right of appeal. This provision can be disapplied in certain circumstances.

In addition, the usual restrictions on the use of information notices, at FA2008, Schedule 26, Part 4, apply to financial institution notices. These include the requirement that a person is only required to produce something which is in their power or possession, and cannot, generally, require the production of old documents.

HMRC are required to report to the UK Parliament on an annual basis about their use of this information power. Whether there will be an appetite to change the law in this area as a consequence of such an annual report, whatever the findings, will remain to be seen.

Miscellaneous points

The recipient of a financial institution notice cannot appeal against the notice (and neither can the taxpayer). If the notice, or a requirement in the notice, is likely to be onerous to comply with, or more time is needed to comply with the notice, the recipient is advised to contact the issuing officer. Further time may be granted by HMRC to comply with the notice.

Failure to comply with the notice may result in the imposition of a penalty (an initial penalty of £300, and subsequent daily penalties if the failure continues).

Penalties can also be charged for concealing, destroying or otherwise disposing of a document requested in a financial institution notice, giving information or documents that the recipient knows are wrong (without telling HMRC what is wrong), and, in the most serious cases, the imposition of a tax-based penalty by the Upper Tribunal.

Where the tribunal has agreed that HMRC can disapply the legal requirement to name the taxpayer in the notice and provide a summary of reasons for issuing the notice to the person it relates to, the notice will state that the notice, or anything relating to it, must not be disclosed to the taxpayer, or any person except for a purpose relating to compliance with the notice. Failure to comply with this requirement may result in a penalty of £1,000 being charged.

A reasonable excuse defence is available for not giving HMRC information or documents, in which case HMRC will not charge a penalty. However, the information or documents will still need to be provided to HMRC.

The report notes that, going forward, HMRC may use a financial information notice to obtain location data about a taxpayer (for example, to establish a taxpayer's location when they accessed their digital online or mobile banking account). Such information could assist HMRC in determining a person's residence status. The report also clarifies that, following a request after the previous report, HMRC can use a financial institution notice to request information relating to an employee or contractor of a financial institution.

Practical considerations

A taxpayer has limited redress in relation to a financial institution notice, with the only practical option being to bring proceedings for judicial review in the High Court. Such proceedings are likely to be complicated, and expensive, and specialist legal advice should be obtained.

The financial institution also has limited redress, although it has the option of not complying with a notice and appealing any penalties levied by HMRC in the First-tier tribunal. An issue for the taxpayer is that their interests will differ from those of the financial institution. Whereas a taxpayer might challenge HMRC's requests, and appeal a taxpayer notice, the financial institution might be less inclined to resist a financial institution notice, and provide the information or documents requested by HMRC.

A further consideration, and significant concern, must be that HMRC will attempt to replace standard third-party information notices with financial institution notices when seeking information that can be obtained in that way for a domestic tax enquiry. Such an approach will help HMRC avoid judicial scrutiny. It will be interesting to see the numbers in HMRC's future reports to the UK Parliament, and the response if the current trend continues.

Contributed by Phil Berwick

Anonymity in tribunal hearings (Lecture B1448 – 12.36 minutes)

Background

Tax hearings before the First Tier Tribunal are normally held in public. In *Scott v Scott* [1913] AC 417, the Court made the following observation about the principle of open justice:

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating or deterrent both to the parties and witnesses, and in many cases…the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in a public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."

However, in some cases taxpayers might not wish information about them and their tax affairs to be published and made available to the general public.

Applications for hearings in private

Hence, in certain circumstances, the tribunal may give a direction that all or part of a hearing be held in private, if the tribunal considers that restricting access to the hearing is justified (*Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273, rule 32*). Restricted access can apply in any of the following circumstances:

> '(*a*) in the interests of public order or national security;
>
> (*b*) in order to protect a person's right to respect for their private and family life;
>
> (*c*) in order to maintain the confidentiality of sensitive information;
>
> (*d*) in order to avoid serious harm to the public interest; or
>
> (*e*) because not to do so would prejudice the interests of justice.'

In addition, because of the Coronavirus pandemic, the tribunal rules were expanded to allow for remote tribunal hearings, and for their recording. Consequently, a tribunal can direct that all or part of a hearing be held in private and recorded if practicable, in certain circumstances (*SI 2009/273, rules 32(2A), 32A*)). The provisions for remote hearings were originally intended to be temporary but continue to be available.

Anonymised decisions

As well as providing for the possibility of private hearings, the Tribunal Rules (SI 2009/273, rule 32(6)) allow for decisions to be anonymised. If the tribunal publishes a report of a decision resulting from a hearing which was held wholly or partly in private, the tribunal must (as far as practicable) ensure that the report does not disclose information relating to a part of the hearing that was held in private.

This includes information which enables the identification of any person whose affairs were dealt with in private, if to do so would undermine the purpose of holding the hearing in private.

Celebrities and public figures

In general, the taxpayer's wish to conceal their private affairs from others is unlikely to be a sufficient reason in itself (*Reddleman Properties v Revenue and Customs* [2011] UKFTT 395 (TC)).

In *HMRC v Banerjee* [2009] EWHC 1229 (Ch), Henderson J commented on the balance between privacy and the public interest.

He said:

> "In my opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principle should not be whittled away. However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment, it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform."
>
> "taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason, there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."

Several cases have established that being a public figure does not of itself warrant anonymity. Cases involving high-profile figures have included the radio and TV presenter Chris Moyles (*A v Revenue and Customs* [2012] UKFTT 541 (TC)), singer and TV personality

Peter Andre (*Andrea v Revenue and Customs* [2016] UKFTT 850 (TC)]), and actor Martin Clunes (*Clunes v Revenue and Customs* [2017] UKFTT 204 (TC)).

In the Chris Moyles case, Judge Bishop commented on applications for anonymity in high-profile cases:

> "The fact that a taxpayer is rich, or that he is in the public eye, do not seem to me to dictate a different approach; on the contrary, it may be that hearing the appeal of such a person in private would give rise to the suspicion, if no more, that riches or fame can buy anonymity, and protection from scrutiny which others cannot avoid. That plainly cannot be right."

Welfare applications

Issues surrounding the health or safety of taxpayers or their families may sometimes constitute sufficient grounds for their case to be held anonymously. For example, in *LD v Revenue and Customs* [2019] UKFTT 526 (TC) it was held that to identify the appellant (an entertainer on an adult TV channel) would potentially lead to the identification of their children. This was relevant because some of the evidence in that case concerned the wellbeing and circumstances of the children. It was considered in the best interests of the children not to allow them to be identified.

In addition, anonymity was ordered in a case where the taxpayer was a paranoid schizophrenic (*The Appellant v Revenue and Customs* [2016] UKFTT 839 (TC)). By contrast, in *JK v Revenue and Customs* [2019] UKFTT 411 (TC), the appellant was a tax and accounting professional with his own practice. He made an application for the case to be heard 'anonymously on the advice of the appellant's police safeguarding team'. The taxpayer's application for anonymity was apparently on the basis that discussion of his mental health would result in references to his previous criminal behaviour, and thus have 'safeguarding' issues for him. He also argued that publication of details about his mental health might cause reputational damage to his business. He suffered from ADHD, but the tribunal noted that he was still able to run a successful business. The tribunal also considered that reputational damage would not usually justify anonymity. However, although dismissing the appellant's application, the tribunal did at least agree to withhold the appellant's contact details.

Privacy hearing and anonymity allowed

On the other hand, in *L v Revenue and Customs* [2024] UKFTT 401 (TC)], the appellant had been employed in the financial services sector. That employment ended and was followed by a claim for discrimination. A settlement agreement was made between the parties for an amount believed to be less than the sum that might have been awarded by an employment tribunal, because the appellant wanted to avoid a public hearing. The appellant suffered a psychotic episode in 2010, followed by a prolonged period of depression and anxiety lasting more than 12 months, which was triggered by workplace stress and represented what the appellant considered was the foundation for the discriminatory treatment experienced. During periods when the appellant was unwell, the risk of suicide was considered high. A formal diagnosis of bipolar disorder was given some years later.

The First-tier Tribunal accepted that the appellant was at serious risk of harm to health and possibly even life if the tribunal refused an application for a private hearing and anonymity. The tribunal accepted that the appellant was at serious risk of harm to his health. This was considered a factual conclusion. The appellant's application for a private hearing and anonymity was therefore allowed.

How to apply

If making an application for anonymity, First-tier Tribunal Tax Chamber Explanatory Leaflet T243 (‘At your hearing’) advises that taxpayers (or advisers) seeking to have a tax case heard in private should write as soon as possible to the First-tier Tribunal Tax Chamber explaining the reasons why. The guidance emphasises that there must be a special reason for seeking privacy, such as being in the interests of public order or national security, or because not to do so would prejudice the interests of justice.

Contributed by Mark McLaughlin

Deadlines

1 August 2024

- Corporation tax for periods ended 31 October 2023 if not liable to pay by instalments.

2 August 2024

- Filing date for form P46(Car) for quarter ended 5 July 2024.

5 August 2024

- Quarterly report by employment intermediaries for period 6 April to 5 July 2024.

7 August 2024

- Due date for VAT return and payment for 30 June 2024 quarter (electronic).

14 August 2024

- Quarterly corporation tax instalment payment for large companies.
- File paper monthly EC sales list – businesses based in Northern Ireland selling goods.

19 August 2024

- Pay PAYE/construction industry scheme for month ended 5 August 2024 if by cheque.
- File monthly CIS return.

21 August 2024

- File online monthly EC sales list – businesses based in Northern Ireland selling goods.
- Supplementary intrastat declarations for July 2024
  - arrivals only for a GB business;
  - arrivals and despatch for a business in Northern Ireland.

22 August 2024

- PAYE/National Insurance/student loan payments if paid online.

31 August 2024

- Accounts to Companies House:
  - private companies with 30 November 2023 year-end;
  - public limited companies with 28 February 2024 year end.
- Corporate tax self-assessment returns for periods ended 31 August 2023.

Business taxes

Revenue versus capital (Lecture B1447 – 18.45 minutes)

This difference between treatment of revenue and capital has become more of an issue for landlords; particularly with the forthcoming abolition of the furnished holiday scheme regime. This will mean that furnished holiday lets will not be able to claim capital allowances and will need to look at the much more restrictive replacement of domestic items relief (IDIR). This will align them with other buy-to lets.

Historic context

The reason for the capital revenue split is a historic one and dates back to the origins of income tax which was introduced as a temporary tax measure to fund the Napoleonic wars. The governments of the day promised that when the wars ended that income tax would be abolished. Indeed, it was after the Treaty of Amiens (peace lasted only 16 months 1802/3). When war broke out again, it was reintroduced and was abolished again after the final victory at Waterloo (1815).

Because income tax was always intended to be a temporary measure it was felt wrong that somebody should get a deduction from a capital item when they would get the benefit for a long time after income tax was abolished. The concept still holds good. If you construct a barn that would be capital. The hay that you use in the barn would be revenue.

Classic case Law

In the 20th century the classic examples of revenue versus capital are Law Shipping and Odean Associated Theatres versus Jones. In the Law Shipping case a ship needed to be brought back into use and the works to do so were treated as capital. By contrast the repairs which were done on a gradual basis to cinemas after the Second World War were treated as revenue. This was partly because of the accountancy treatment. However, this was not determinative merely helpful. The fact that the cinemas could be used without the repairs was a critical factor.

Replacement or repair

Another element in determining capital versus revenue is whether you are replacing the whole of the item or just a part. This came to the fore in the Auckland Gas Case where 23% of the network was replaced over a 5-year period. There was also a material improvement in that higher pressure gas could be used.

By contrast, in the Transco v Dyall case there was the same insertion of polythene gas pipes into old iron ones; however crucially there was no material improvement as there was no higher gas pressure achieved. Also, they were only replacing 1% of the network each year.

This was therefore ruled as being revenue expenditure.

Areas of Difficulty in Practice

Delineating the difference becomes more difficult when looking at property. For example, where one does a building project that obviates the need for repairs one cannot take a notional revenue deduction for the repairs that would have had to have been done. For example, if I have a leaky roof and instead of repairing it, I do a loft extension, I do not get a notional revenue deduction for the costs that I would otherwise have incurred on repairing the roof.

By contrast, if as a landlord I am forced to do repairs to maintain the property or bring it up to a legal standard, this would normally be allowable as repairs. For example, if I replaced single glazed windows with double glazed or upgraded the wiring to current legal standards, this would count as revenue expenditure.

More Modern Cases

Two cases have been decided in recent times in favour of the taxpayer. Both involved the resurfacing of areas and whether this constituted revenue or capital. In the Steadfast Manufacturing & Storage Limited v HMRC (TC07770).

The appellant leased a factory and yard. The latter had not been resurfaced since before the site was acquired and was in poor condition. Some areas were unstable and unsuitable for use by forklift trucks, although they were used when necessary to turn the trailers for articulated lorries. As these areas were used less often than other areas of the yard, weeds grew through the surface area such that in overhead photographs the areas appear green rather than paved.

Historically, the yard was repaired twice a year by patching with gravel. The forklift trucks would quickly dig into this material with their tyres. As this patching was becoming less effective it gave rise to health and safety concerns and the company decided that the yard should be resurfaced.

The work was undertaken as a single project. As well as resurfacing, a drainage channel was added between the factory and the re-surfaced area, to stop water from running across the yard and to allow an expansion joint for the concrete. The cost of this channel was only £740. Overall, there was no increase in size of the useable area and no increase in the loadbearing capacity of the yard. The total cost of the works was approximately £74,000.

Was the expenditure capital or revenue in nature? There was no improvement in the yard compared to its original condition and the works only returned the yard to its previous standard. There was no increase in the useable area compared to the original. There was no evidence of any increase in the load-bearing capacity of the yard. HMRC had argued that the expenditure was capital because there would be no need for further repairs for up to 20 years. But prevention of the need for future repairs simply meant that the job had been done well in the first place.

If HMRC were correct, most repairs would be treated as capital, which is clearly not the case. The additional drainage channel did not alter the outcome. It was a minor addition to the works and there was no evidence that it made a substantial difference to the yard or the factory.

The First Tier Tribunal ruled in favour of the taxpayer. In a similar case G Pratt & Son v HMRC the court also ruled in favour of the taxpayer that the repair of a driveway constituted revenue expenditure. The driveway had deteriorated so much that the milk lorry and waste collection lorry could not use it. The repair was designed to last 20 years. The court rejected HMRC's argument that this was the whole of the asset being replaced and allowed the revenue expenditure.

Back to Property

For landlords this becomes a significant issue when analysing the expenditure on property in disrepair. There is a split in the approach between property that was habitable when the tenants left even if not in great condition. This contrasts with property that is uninhabitable (even for students!).

Under the Law Shipping precedent, bringing a property that is uninhabitable back into use would be capital whereas carrying out dilapidations work at the end of a tenancy would normally be considered as stored up repairs and therefore revenue. By contrast, structural improvements would normally be seen as capital. Again, if the works are seen as materially improving the capital value of the property, they would normally be seen as capital.

Income

Income received by a landlord for damages to property should also be viewed in the same light. If it is income to put a property back into use that has been uninhabitable, that would be viewed as capital. Whereas income to do normal repairs to a habitable property would be seen as revenue.

This will remain a major issue for landlords, who are very restricted in terms of capital allowance claims.

Contributed by Jeremy Mindell

Partnership using the cash basis (Lecture B1446 – 19.24 minutes)

Summary – The partnership was not eligible to use the cash basis of accounting and deductible expenses had been overclaimed.

Patrick and Carole Boden traded in partnership under the name Point Four, preparing accounts each year to 30 April and sharing profits 70:30. They acted as sales agents selling third party software to small, independent shops and petrol stations for which they earned commission.

A number of family companies, owned wholly or partly by the Bodens, were developing EPOS technologies. During 2011/12 to 2014/15, the partnership provided consultancy services to these companies, charging £500 day plus expenses for their services. As the family companies' businesses were in development, proforma invoices were raised but no payment was made. The couple expected these to be paid once the family companies' businesses became profitable.

The couple believed they could adopt the cash basis of accounting. With the proforma invoices unpaid and not expected to be paid for some time, they were excluded from turnover. For the years in question, excluding the proforma invoices of between £153,000 and £217,000, partnership profits ranged from £7,300 to £16,000.

Further the 'partnership rules' meant that the couple had been claiming round sum expenses consisting of mileage at a rate of 45p per mile, breakfast and lunch at £14 per day and dinner if working after 6pm of £27. Hotels were claimed at £125 per night plus out of pocket expenses when staying away of £10 per day. No receipts were kept at all.

The couple did not file tax returns for 2011/12 to 2014/15.

Having investigated the partnerships business and from the little evidence supplied, HMRC raised discovery assessments denying the cash basis of accounting and amending the expense claims as follows:

- all claims for "*out of pocket expenses*" were disallowed as there was no evidence that any such expenditure had been incurred;
- the mileage claimed was reduced, with the revised figures calculated using the AA planner for each trip plus 25% for deviations in routes; mileage over 10,000 miles was reduced by using the rate of 25p per mile;
- the hotel expenditure claim was reduced, using the HMRC staff allowances for overnight stays to determine the allowance;
- the claims for two hotel rooms for trips to London and Edinburgh were denied as the couple would have used the same hotel room;
- claims for breakfast, lunch and dinner were reduced to £5, £5, and £10 respectively and disallowed where claims were made for more than two people.

The couple appealed to the First Tier Tribunal.

Decision

S.25A(1) ITTOIA 2005 allows anyone carrying on a trade to make an election for the profits to be calculated on a cash basis. However, the First Tier Tribunal found that in this case, the cash basis of accounting could not be used.

- The section was introduced by Finance Act 2013 and only applies to the tax year 2013/14 and subsequent years. It does not apply to 2011/12 and 2012/13;
- The cash basis can be used if the aggregate value of cash basis receipts does not exceed the maximum permitted, being the VAT threshold amount for the tax years in question. The partnership's cash receipts from third parties in 2013/14 (£96,609) and 2014/15 (££96,607) exceeded the thresholds.

Even if the partnership had been eligible to use the cash basis, an election must have been made by the partnership to do so. No such election had been made.

As the cash basis was not available to the partnership, the value of proforma invoices should have been accrued in the partnership's accounts for each year. The partnership had failed to notify chargeability and HMRC had discovered a loss of tax caused by that failure.

The issue of bad debt relief was raised by the Tribunal at the application hearing on 13 February 2024. There was no evidence provided that in 2016 when the accounts were prepared that any sum would not be paid in due course. Consequently, no claim for bad debt relief could be made to reduce the profits of the partnership calculated on the accruals basis in any of the years concerned.

Finally, the Tribunal found that HMRC's approach to restricting allowable expenses was reasonable. Overall, the adjustments made reduced the 2014/15 expense claim to 63% of the original claim and this percentage was then applied to reduce the claims submitted for the earlier years.

The First Tier Tribunal found that the discovery assessments were all validly made and the appeal was dismissed.

Patrick Rodney Boden and Carole Anne Boden v HMRC (TC09181)

Self-employment payment (Lecture B1446 – 19.24 minutes)

Summary – A single payment of £250,000 was found to be self-employment income but the taxpayer's behaviour was not deliberate, meaning the discovery assessment was out of time.

Chee Whye Yip was born in Malaysia but lived in the UK since 1961. Trading through a family partnership, Archers Meat or Archers Supplies, he operated a food delivery business serving Chinese restaurants and takeaway businesses.

The partnership was incorporated and the business moved between various companies in which at different points in time either he, his nephew or his niece were the director and 100% shareholder.

At the time of this appeal, his nephew was the director and sole shareholder of Archers Meat Supplies Ltd (between 2006 and November 2013) and then Archers Foods Distribution Ltd, which ceased trading in 2019.

In 2012, just under £250,000 was paid in two deposits into a bank account in the name of Archers Meat Supplies Ltd.

Shortly after the second deposit, a payment of £250,000 was made from a second Archers Meat Supplies Ltd bank account to Mr Yip.

Two months later, Mr Yip transferred £295,000 to a law firm in connection with the purchase of a property in London.

Mr Yip's 2012/13 tax return included total income of £24,332, made up of dividends, interest and pensions. It did not include the £250,000 paid to him.

Although he continued to work in this business, he had not formally been paid a salary for his work since 2004/05. Since then, he had continued to work in a management capacity and was responsible for paying suppliers but received no salary.

In 2017, during the course of another investigation, HMRC became aware of the £250,000 payment, which at that time was referred to as “Mr Chee Whye Yip's return from the business”. Having established that this sum was not included on Mr Yip’s tax return, HMRC investigated whether the sum was a repayment of a loan to this business.

Mr Yip’s agent stated that it was a part repayment of a £400,000 loan, originally made in 2000; £150,000 was still outstanding. There was no formal documentation to support this claim and based on the various company’s accounts and tax returns, this seemed unlikely.

On 8 March 2021, HMRC wrote to Mr Yip stating that it was their belief that the £250,000 sum was a payment to him for his work in a self-employed "consultancy" capacity, and that this should have been charged to income tax. HMRC had considered various alternative categorisations for the £250,000 including a dividend or employment income, ultimately concluding that self-employment income was the most appropriate.

In HMRC’s view, Mr Yip had acted deliberately when omitting the disputed amount from his return; a discovery assessment could be validly raised within the extended 20-year time limit. Consequently, in May 2021, HMRC issued a discovery assessment to collect income tax of £120,145 as well as a penalty assessment for £55,567, on the basis that Mr Yip's tax return for the year 2012/13 contained an inaccuracy that was "deliberate but not concealed", and that the disclosure was prompted.

Mr Yip appealed both the discovery assessment and penalty.

Decision

The First Tier Tribunal concluded that in the absence of a credible alternative explanation, it was more likely than not that the payment was “a reward for, or in recognition of, his services to the business.”

Having submitted a tax return for 2012/13, HMRC needed to prove that the insufficiency in his tax return by not reporting the £250,000 sum was brought about deliberately by him, or a person acting on his behalf. This would extend the time limit to 20 years, making the assessment valid.

However, the First Tier Tribunal found that this was not the case, and the discovery assessment was out of time. HMRC did not demonstrate that when Mr Yip submitted his tax return for 2012/13, he knew that it contained an error, and intended to mislead HMRC. Although HMRC had concluded and the Tribunal accepted that the £250,000 was taxable as a payment for consultancy or management services, this did not mean that Mr Yip would have automatically viewed it in the same way. HMRC needed to prove that Mr Yip knew it was taxable. Based on the evidence provided, HMRC had failed to do so. The Tribunal noted that Mr Yip had said that “he left all business matters to his accountant, paid taxes every year, and was shocked to learn that they had defrauded HMRC.” He was old, had health issues and a poor memory. There was no indication that this was “someone intending to mislead HMRC.” The discovery assessment was found to be invalid.

Finally, the penalty assessment which was raised by HMRC on the basis that there was a deliberate inaccuracy was discharged.

Chee Whye Yip v HMRC (TC09180)

Transfer of trade and capital allowances in context of ring fence trade

Summary – The First Tier Tribunal considered the interaction between corporation tax oil and gas ring fence provisions, transfer of trade without change of ownership provisions at Chapter 1 Part 22 CTA 2010 (the transfer of trade provisions) and capital allowance provisions relating to disposal events at s.61 CAA 2001 in the context of a hive-down of an oil and gas pipeline.

CATS North Sea Limited was the transferee in a hive-down of an interest in a North Sea oil and gas pipeline within the group of companies headed by BP plc. For the transferor in the hive-down, the activities in respect of the pipeline were wholly inside the oil and gas ring fence, however, for CATS North Sea Limited only the transport of group hydrocarbons were treated as being inside the oil and gas ring fence whereas the transport of non-group hydrocarbons via the pipeline was outside the oil and gas ring fence. Following the hive-down there was a subsequent sale of CATS North Sea Limited to a third-party purchaser.

Decision

The key issues for the First Tier Tribunal to determine were:

- did the transfer of trade provisions apply to the hive-down notwithstanding the fact that the transferor's activities in respect of the pipeline were wholly inside the ring fence whereas CATS North Sea Limited could not at any time carry on the same activities wholly inside the ring fence (and under s.279 CTA would be deemed to carry on both inside and outside ring fence trades ab initio on the hive-down)?; and

- what were the capital allowances consequences of the hive-down and subsequent sale once determination of the issue as to whether the transfer of trade provisions applied had been made?

On the first key issue, the First Tier Tribunal concluded that the transfer of trade provisions did apply to the hive-down despite CATS North Sea Limited not being able to carry on a wholly inside ring fence trade on the basis the 'activities' in respect of the pipeline carried on by the transferor and CATS North Sea Limited were the same. The First Tier Tribunal noted that such activities should then 'be viewed through the s.279 prism for the purpose of applying the specific charging regime to which s.279 is directed' but remarked that such exercise 'is a separate process to consideration of whether Part 22 applies'.

On the second key issue, the First Tier Tribunal concluded that CATS North Sea Limited starting to use the pipeline for activities which were not wholly inside the ring fence (as had been the case with the transferor) triggered a disposal event under s.61(1)(e) CAA 2001. This was on the basis that inside and outside ring fence trades are treated for capital allowance purposes respectively as separate 'qualifying activities'.

Accordingly, CATS North Sea Limited beginning to use the pipeline for outside ring fence activities resulted in the imposition of a balancing charge for capital allowances purposes with an amount equal to the market value of the relevant plant and machinery (capped at historic cost) being taken into account.

The First Tier Tribunal concluded that the subsequent sale of CATS North Sea Limited to a third-party purchaser did not in the circumstances give rise to any further charge.

Furthermore, the First Tier Tribunal concluded that a petroleum revenue tax election made by the transferor's parent did not affect its analysis of the above issues and that the effects of such were restricted to the application of the petroleum revenue tax.

Accordingly, the First Tier Tribunal dismissed the appeal.

CATS North Sea Limited v HMRC (TC09200)

Adapted from the case summary in Tax Journal (28 June 2024)

Anti-abuse provision in UK/Ireland treaty

Summary - The Upper Tribunal dismissed HMRC's appeal, finding that the First Tier Tribunal was entitled to come to the decision that the anti-abuse provision (employing a principal purpose test) in the UK/ Ireland double tax treaty did not apply.

Although Burlington, an Irish tax resident company, had (through an intermediary) purchased the debt claim from the liquidators of SICL (a Cayman Islands company which did not benefit from any exemption from UK withholding tax), the Upper Tribunal dismissed HMRC's appeal, deciding that the First Tier Tribunal had not made an error of law in deciding that neither party had a main purpose of taking advantage of the withholding tax exemption provided by the UK/Ireland double tax treaty. Consequently, Burlington benefited from the exemption in the double tax treaty and was entitled to a repayment of the UK income tax withheld from the payment of UK source yearly interest made by Lehman Brothers International (Europe), a UK tax resident company.

In determining the meaning of the anti-abuse provision in article 12(5) of the UK/Ireland double tax treaty (which, as it then stood, required that no person concerned with the assignment of the debt claim had a main purpose of taking advantage of article 12(1), by means of that assignment) and in the context of commentary on the 2015 version of the OECD model double tax convention (the version in force at the relevant time in this case) and based on other relevant material, such as the OECD's Conduit Report, the Upper Tribunal:

- started by considering the object and purpose of the double tax treaty and, specifically, article 12(1), the exemption which operates by allocating taxing rights over interest exclusively to the state in which the recipient is resident (in this case, Ireland) rather than the source state (in this case, the UK); and

- provided its view that unless there is an abusive arrangement (i.e. unless article 12(5) applies), the exemption in article 12(1) should apply.

Given this context, the Upper Tribunal rejected HMRC's submission, which 'turns the provision into something fundamentally different' by seeking 'always to apply Article 12(5) ... in a case where the person assigning the interest on a debt claim (in this case, SICL) knew that the purchaser would not suffer UK withholding tax and consequently sought to obtain an economic advantage for itself by sharing in the saving of UK withholding tax in circumstances where the purchaser had an exemption from UK withholding tax'. The Upper Tribunal rejected this argument because the double tax treaty anti-abuse provision cannot be read as if it were a UK provision (concerned solely with UK tax) which is engaged if UK withholding tax is being avoided because an exemption in the double tax treaty applies.

Consequently, it is not sufficient for the anti-abuse provision to apply just because a payment of UK source yearly interest to the seller would have been subject to UK withholding tax but the payment is actually made to the buyer who benefits from an exemption in the relevant double tax treaty.

The Upper Tribunal also rejected Burlington's attempt to limit the scope of article 12(5), deciding that the First Tier Tribunal had not erred in failing to limit article 12(5) to transactions involving artificial steps or arrangements because article 12(5):

- does not refer to such concepts; and
- even on a purposive construction, is not limited in that way.

HMRC had various other grounds of appeal, which essentially argued that the First Tier Tribunal failed to take into account, or to give sufficient weight to, the fact that the only economic basis for the actual transaction was the UK withholding tax arbitrage resulting from Burlington's reliance on the exemption in the double tax treaty. However, the Upper Tribunal decided that the First Tier Tribunal had shown a 'clear awareness' of this economic effect and was right to focus on whether the parties' subjective purposes in entering into the assignment of the debt claim constituted an abuse of the double tax treaty. Furthermore, in evaluating these purposes, the Upper Tribunal held that it was appropriate for the First Tier Tribunal to consider various factors (and also correct for the First Tier Tribunal to determine the weight to be given to those factors), including:

- the existence of the arbitrage;
- the existence of other potential buyers for whom UK withholding tax would also not have been an absolute cost, whether because of an exemption in UK domestic law or a double tax treaty or for another reason; and
- fact that the parties transacted as third parties acting at arm's length with a view to getting the best price.

HMRC v Burlington Loan Management DAC [2024] UKUT 152 (TCC)

Adapted from the case summary in Tax journal (14 June 2024)

Loan relationships unallowable purpose test

Summary - The Court of Appeal dismissed the taxpayer's appeal against the disallowance for corporation tax purposes of debits in respect of interest payable on loan notes. The Court of Appeal agreed with the First Tier Tribunal and the Upper Tribunal that the taxpayer was party to the loan notes for an unallowable tax avoidance purpose under the loan relationships rules and not for any commercial purpose.

JTI Acquisition Company (2011) Ltd was a UK-resident company newly incorporated by a US group for use as an acquisition vehicle. The US group had entered into a commercial agreement to acquire another US-headed group (LTT) for $1.1bn. JTI Acquisition Company (2011) Ltd raised half of the purchase price through debt pushed down from the US effected by JTI Acquisition Company (2011) Ltd issuing interest-bearing loan notes to a US member of its group.

After completing the acquisition, JTI Acquisition Company (2011) Ltd claimed c.£40million of corporation tax deductions over time for the loan note interest, which it surrendered to profitable members of the UK group. A check-the-box election was made for US tax purposes, with the result that there would be no taxable receipt in the US to match the claimed UK tax deductions.

Considering the loan relationships unallowable purpose rule, the company argued that it can be legitimate for a company making an acquisition to elect to fund it by means of debt rather than equity because of the deductibility of loan interest for tax purposes.

Decision

The Court of Appeal said that the focus should be on the intentions of JTI Acquisition Company (2011) Ltd's decision-makers in the specific circumstances. In this case, the taxpayer's directors went along with the scheme which, to their knowledge, the group had adopted for tax reasons. JTI Acquisition Company (2011) Ltd's purpose was to play the part that had been devised for it, so as to obtain a tax advantage. As such, the taxpayer had a main tax avoidance purpose.

The Court of Appeal also decided not to interfere with the First Tier Tribunal's conclusion that the taxpayer had no commercial purpose in being party to the loan notes. The Court of Appeal highlighted that the First Tier Tribunal was not required to adopt a 'tunnel-visioned' approach looking simply at how the company was proposing to use the loan.

Based on that conclusion, all JTI Acquisition Company (2011) Ltd's debits in respect of the loan note interest were attributable to the unallowable purpose and so all were disallowed.

The Court of Appeal went on to say that, following Fidex [2024] EWCA Civ 385, even if there had been a commercial purpose for issuing the loan notes, the debits in question would still have been wholly attributable to the unallowable purpose. It stated that 'but for the scheme to secure a tax advantage which was "bolted on" to the purchase of LTT, there would have been no loan relationship and so no debit'.

JTI Acquisition Company (2011) Ltd v HMRC [2024] EWCA Civ 652

Adapted from the case summary in Tax journal (21 June 2024)

Pillar 2– Definitions, administration, penalties (Lecture B1449 – 15.33 minutes)

Minority-owned members (s.228)

Where the ultimate parent holds no more than 30% of the ownership interests in a member and the member is not an investment entity, the member ('M') is 'minority owned'.

If M holds (directly or indirectly) ownership interests in another minority owned member ('N') and no other minority owned member holds (directly or indirectly) ownership interests in M, then M is treated as a minority owned parent of a minority sub-group which includes all minority owned members in which M has ownership interests.

In determining the effective tax rate and top-up amounts of members of a minority subgroup, the legislation applies as if references to standard members of an MNG were instead to members of the minority subgroup.

In determining the effective tax rate and top-up amounts of a minority owned member that is not a member of a minority subgroup, the legislation applies as if references to standard members of a multinational group were instead to that member (i.e. it is deemed to be a standard member).

Ownership interest (s.242)

An entity or an individual (A) has a direct ownership interest in an entity (B) if A has an interest (whether by way of shares, other security or otherwise) that gives rise to a share of the profits, capital or reserves of B or of a PE of B (whether on the making of a distribution of profits, winding up or otherwise), and that interest would, ignoring any requirement to consolidate the assets, liabilities, income, expenses and cash flows of B in the consolidated financial statements of A, be accounted for as equity in those statements.

An entity or an individual (C) has an indirect ownership interest in an entity (D) if C has a direct ownership interest in an entity that has a direct ownership interest in D, or an entity that has (as a result of the single or repeated application of this subsection) an indirect ownership interest in D.

An entity (R) has a controlling interest in another entity (S) if R is required to consolidate the assets, liabilities, income, expenses and cash flows of S on a line-by-line basis in accordance with an acceptable financial accounting standard, or would have been required to do so if R had prepared consolidated financial statements, or S is a permanent establishment of R.

Consolidated financial statements (s.249)

If no consolidated financial statements are required to be prepared, the consolidated financial statements must be hypothesised.

If the actual, or hypothetical financial statements have not been prepared using an acceptable accounting standard (see below), they must be adjusted for if the treatment of items under an acceptable accounting standard would have been materially different. Material means exceeding €75 million.

Acceptable accounting standards (s.250)

UK GAAP (FRS 102 but not FRS 105), IFRS and certain overseas GAAP are acceptable. Acceptable overseas GAAP are the generally accepted accounting principles of:

Australia	New Zealand
Brazil	China
Canada	India
An EEA state	Korea
Hong Kong	Singapore
Japan	Switzerland
Mexico	US GAAP

The Treasury can regulate to amend, add or remove countries from the list.

Administration and penalties

Registration requirement (Sch 14, part 3)

The filing member must register with HMRC if the group becomes a qualifying MNG - this is the first day of the accounting period when it becomes so ('trigger day').

It must, within 6 months of the end of the accounting period in which the trigger date falls, provide HMRC with:

1. The name of the filing member and, if different, the ultimate parent company
2. The trigger day
3. The date on which the accounting period containing the trigger day will end
4. Any other information specified in an HMRC published notice

The filing member must notify HMRC within 6 months of any information above changing

Information return (Sch 14, part 4)

The filing member must submit an information return for each accounting period in which the group is a qualifying MNG, containing:

1. The members of the group
2. Information on the overall corporate structure of the group
3. Information relevant to determining effective tax rates, top-up amounts or allocation of top-up amounts
4. Any other information specified in an HMRC notice relevant to the sharing of information between IIR territories in connection with these rules

An information return or an overseas information return must be filed within 15 months of the end of the accounting period to which it relates (this is extended to 18 months for the first accounting period to which it applies).

Returns can be amended within 12 months of the due date of submission

Self-assessment returns (Sch 14, part 5)

The filing member must submit an SAR containing an assessment as to which members of the group are chargeable to multinational top-up tax and the amount of tax chargeable to each, as well as other information specified by HMRC in a notice.

No return needs to be filed if the filing member has submitted a 'below-threshold' notification that the group was not a qualifying MNG for the period and is unlikely to be for the next 2 accounting periods.

Both SAR and a 'below-threshold' notifications must be submitted within 18 months of the end of the accounting period.

Returns can be amended within 12 months of the due submission dates.

HMRC has normal enquiry, assessment and discovery powers.

Payment of top-up tax (Sch 14, part 10)

Tax due must be paid within 15 months of the end of the accounting period (this is extended to 18 months for the first accounting period in which the group is liable).

Interest will accrue on amounts not paid by the due date and any member of the multinational group can discharge the liability.

Group payment notice

HMRC can issue a group payment notice to any member of the group (or that was a member at the time the liability arose) if an amount payable by a member is not paid within 3 months of the 'relevant date', apart from a 'ring-fenced entity' under FSMA 2000.

Penalties (Sch 14, part 11)

For failure to submit information return or overseas information return without a reasonable excuse:

- £100 if submitted less than 3 months late (£500 for a 3rd successive failure)
- £200 if submitted less than 6 months late (£1,000 for a 3rd successive failure)
- £200 (£1,000 for a 3rd successive failure) plus £60 per day from 6 months late to the day before the return is filed

For failure to submit a self-assessment return or 'below-threshold notification' without reasonable excuse:

- £100 (£500 for a 3rd successive failure) if submitted less than 3 months late
- £200 (£1,000 for a 3rd successive failure) if submitted less than 6 months late
- The higher of £200 (£1,000) and 10% of the unpaid tax, if submitted less than 12 months late
- The higher of £200 (£1,000) and 20% of the unpaid tax in any other case

The penalty for failing to keep proper records is £3,000.

All penalties can be reduced if HMRC considers it right because of special circumstances.

Contributed by Malcolm Greenbaum

VAT and other indirect taxes

KFC dip pots as part of a meal deal (Lecture B1446 – 19.24 minutes)

Summary – Dip pots supplied as part of a meal deal formed part of a single standard-rated supply of hot takeaway food. HMRC's recovery assessment was validly made and was not affected by either legitimate expectation or estoppel.

Queenscourt Limited is a member of the QFM Group of companies that operates a number of different restaurant franchises. Queenscourt Limited only operates KFC franchises.

This case concerned the VAT treatment of the supply of a dip pot as part of a KFC takeaway meal deal and whether it was part of a single, standard rated supply of hot food or should it be treated as a separate zero-rated supply.

Dip pots could be purchased on their own, as part of a meal deal or as part of an order comprising a number of individual menu items.

When purchased as part of a meal deal, its price was included in the meal deal price, even if the customer requested not to receive it. There was no reduction in the purchase price of the meal deal if the dip pot was declined.

Until 2019, Queenscourt Limited had accounted for VAT on the basis that the dip pots formed part of a single standard rated supply. Having changed its view, the company submitted an error correction notice to reclaim the VAT it considered it had wrongly accounted for between October 2015 and September 2018. HMRC agreed to repay the VAT of £75,502 related to dip pots, with the balance relating to other items such as cookies, yoghurts and milkshakes.

The company submitted a further error correction notice to reclaim VAT which it had accounted for between October 2018 and September 2019. HMRC accepted the claim in relation to items that could be consumed on their own, i.e. cookies and yoghurts. However, HMRC refused the claim in respect of the dip pots on the basis they formed part of a single standard-rated supply. Consequently, HMRC issued 'recovery' assessment to claw back the earlier repayment.

Queenscourt Limited appealed both decisions on the basis that the supply of the dip pots in these circumstances was a separate zero-rated supply.

Alternatively:

- if the company was wrong it claimed that the recovery assessments were invalid as there had been no change in circumstances and no new facts had come to light HMRC's repayment; or

- HMRC are prevented from recovering the tax, either on the basis of legitimate expectation or estoppel by convention, in each case arising as a result of HMRC's original agreement that that tax should be repaid.

Decision

The First Tier Tribunal found that the dip pots included as a part of a meal deal were an ancillary part of a single supply of hot takeaway food taxable at the standard-rate. The typical meal deal consumer would consider the dip pot to be an accompaniment enabling the better enjoyment of the hot food. Unlike coleslaw, cookies or yoghurt, its purchase was not an aim in itself, which could be eaten on their own.

On the validity issue, it did not matter that the law was unchanged, no new factual evidence had come to light or that HMRC's assessment resulted from a mistake made by a previous HMRC officer. The assessment was made within two years of the end of the accounting period in which the amount had been credited, making it a valid assessment.

The company could not rely on legitimate expectation as it did not show there was, or would be, any serious loss to the company as a result of HMRC making the assessments. It would not be 'outrageously unfair' on the company for HMRC to reverse its earlier decision.

With no subsequent detriment arising from reliance on the original position taken by HMRC, HMRC were not estopped from making, or relying on, their recovery assessment.

Queenscourt Limited v HMRC (TC09184)

Healthcare in prisons **(Lecture B1446 – 19.24 minutes)**

Summary – The company's supplies of healthcare services, including prescription drugs and contraceptive products, to prisoners in England were a single composite supply, exempt from VAT.

Spectrum Community Healthcare CIC provided or sub-contracted the provision of various healthcare services in prisons in England through a contract with NHS England.

It was agreed that the medical care provided to prisoners was exempt for VAT purposes.

However:

- the company argued that its supplies of prescription drugs (zero-rated) and non-prescribed contraceptives (reduced rated) were separate supplies, and sought to recover the input tax attributable to these taxable supplies;

- HMRC disagreed, arguing that the company was making a single exempt supply of "primary healthcare or health and social care", meaning that input tax was irrecoverable.

The First Tier Tribunal had found that, by looking at the contractual position and, then considering whether that was consistent with economic and commercial reality, there was a single composite exempt supply of primary healthcare or health and social care to NHS England. The supply was not made to the prisoners.

Spectrum Community Healthcare CIC appealed to the Upper Tribunal on four grounds.

Decision

The Upper Tribunal found that the First Tier Tribunal had been correct to consider the single/ multiple supply issue before moving on to the consider whether the supply fell within the medical exemption.

Secondly, the Upper Tribunal found that neither European Commission v UK (Case 353/85), nor Finanzamt Dortmund-West v Klinikum Dortmund GmbH (Case C-366/12) suggested that "it is impossible for elements of a single supply which would not be exempt if viewed as a separate supply to be exempt when they form part of a single complex supply."

The third ground of appeal considered whether NHS England was the recipient of the medical supplies. Spectrum Community Healthcare CIC argued that the First Tier Tribunal ought to "have taken the patient's perspective" as they were the "legally relevant consumers". The `Upper Tribunal confirmed that it was correct to consider the contractual position. Although ultimately the prisoners received the goods and services, the recipient of the supply in this case was NHS England, who contracted and paid for the supplies. For VAT purposes we are interested in the customer and not the beneficiary of the services.

The final ground of appeal was an argument under *Edwards v Bairstow* [1955] 3 WLR 410 that there was only one conclusion available to the First Tier Tribunal which was that, based on the evidence, Spectrum Community Healthcare CIC made multiple supplies. The company put forward nine indicators which included the fact that:

- Prisoners did not always take up all services and indeed had the choice as to whether to take up the services/use the products;

- The services were provided to prisoners by different personnel with different specialist functions in different physical locations;

- There were distinct service specifications for each element of the NHS England contract and the cost of each service was easily identifiable within the single headline price invoiced;

- Contraceptive products may ordinarily be provided separately to medical care;

The Upper Tribunal found that these points did not show that the "*only* conclusion open" to the First Tier Tribunal on the evidence was that there were multiple supplies.

The appeal was dismissed.

Spectrum Community Health CIC v HMRC, [2024] UKUT 00162 (TCC)

Lack of due diligence checks

Summary – The taxpayer, acting as sole director, had failed to undertake sufficient due diligence checks about the company's suppliers background or standing, in an industry where he knew the fraudulent evasion of VAT took place.

Loy Commodities Limited was incorporated on 3 March 2008 and traded as a scrap metal dealer, all suppliers and customers being businesses rather than members of the general public.

Gary Turner was the company's sole director, responsible for all of its commercial decisions.

HMRC visited the company on several occasions during 2018 and 2019:

- providing Gary Turner with information about the risks of fraudulent traders in the scrap metal industry;
- informing Gary Turner that the company had been included in a project known as the Supply Chain Investigation Project;
- questioning Gary Turner about the company's due diligence procedures;
- highlighting that they were aware that significant tax losses had been found within its supply chains with various traders.

In March 2020, having disallowed the company's input tax claim for the periods 03/18 to 03/19 totalling £367,000, HMRC raised corresponding assessments. The vast majority was disallowed on the basis that the company knew or should have known that the related transactions were connected with the fraudulent evasion of VAT (Kittel principle); the balance was due to an insufficiency of supporting invoices. At the same time, HMRC cancelled the company's VAT registration on the basis that the principle aim of the registration was to abuse the VAT system by facilitating fraud.

In July 2020, HMRC issued a penalty assessment against the company for £110,000, being 30% of the input tax denied. On 3 December 2020, HMRC issued an assessment transferring the liability to Gary Turner on the basis that the company's actions were to be wholly attributed to his actions. This sum was subsequently reduced to £107,000 to take into account the fact that the penalty could only be based upon the denial of input tax upon *Kittel* grounds rather than in respect of the element of the original assessment which related to an insufficiency of invoices.

Gary Turner appealed.

Decision

The First Tier Tribunal considered each of the relevant suppliers, concluding in each case that, on the balance of probabilities, "there were tax losses as alleged by HMRC and that these were fraudulent".

The Tribunal found that, acting on the company's behalf, he knew that the disputed transactions in this case were connected with the fraudulent evasion of VAT for the following reasons:

- Gary Turner confirmed that he well aware of VAT fraud in the industry and gave examples of suppliers that he stopped working with due to concerns that he had. However, he did not give a satisfactory explanation as to why he continued to trade with suppliers that HMRC had highlighted to him as being involved in fraudulent activity resulting in a loss of tax.
- Gary Turner did not investigate the commercial backgrounds or commercial standing of his suppliers. He merely checked the suppliers' identity, location, and the validity

of their VAT registration and for a number of suppliers, he did not carry out the VAT check until after the supplies had started.

- For the checks that were undertaken, he ignored various "red flags" that were present. For example, "he did not question why various of the suppliers had different registered offices to their yards and, in the case of Metal Room, why there was a discrepancy between their main jewellery business and metal trading." This was not an isolated case.

The Tribunal concluded that Gary Turner was "only paying lip service to his investigations into his suppliers and was not interested in assessing the commercial risk involved in dealing with them."

The Tribunal inferred from this that the inadequacies in the due diligence were because "he knew there was no need for due diligence as he knew that the transactions were connected with the fraudulent evasion of VAT."

Further pointers included the following:

- There were no price negotiations with suppliers, which would have been normal with commercial deals.

- There was no commercial risk as the company was not under any obligation to pay its suppliers until it had been paid by its customers.

- It is as important to know how much a supplier provides as it is to know how much a customer obtains. It made no commercial sense when Gary Turner claimed that the weight of the material when delivered to them from suppliers did not matter. It was the weight on the invoice to the customer that was important. Both were equally important and needed to be evidenced.

As director, controlling the company, Gary Turner was responsible for, and conducted, all the transactions relevant to this appeal. On balance, the Tribunal found that he knew about that absence of commerciality, absence of risk and absence of price negotiation. He knew or should have known that company's transactions were connected with the fraudulent evasion of VAT.

The Tribunal's findings were based on Gary Turner's knowledge alone. The Tribunal stated that it did not need to make any findings "as to whether Mr Turner was acting dishonestly or as to whether he committed a criminal offence.".

Gary Turner v HMRC (TC09193)

VAT and fixed establishments

Summary - The CJEU held that a company cannot be deemed to have a fixed establishment for VAT purposes solely due to a group relationship or exclusive service contract with another company.

The case concerned toll manufacturing arrangements in a corporate group. The group included a German company (Adient DE) and a Romanian company (Adient RO) and specialised in the manufacture and sale of seats and other components for motor vehicles.

Adient RO supplied manufacturing services and some ancillary services (such as the management and storage of raw materials and finished components) to Adient DE. Throughout the manufacturing process Adient DE remained the owner of the raw materials and components.

Adient RO treated the services supplied to Adient DE as outside the scope of Romanian VAT on the basis that they fell within the general B2B place of supply rule (in article 44 of the VAT Directive) and were therefore subject to the reverse charge procedure by Adient DE in Germany.

This position was challenged by the Romanian tax authorities who argued that Adient DE had a fixed establishment in Romania which was created by Adient RO. As a result, the manufacturing services should have been regarded as a domestic supply in Romania on which Adient RO should have accounted for Romanian VAT.

Decision

The central issue was one that the CJEU has recently considered in similar circumstances in Dong Yang Electronics (Case C-547/18), Berlin Chemie A (Case C-333/20) and Cabot Plastics (Case C-232/22): under what circumstances might a subsidiary or group company represent a fixed establishment of another group company?

The CJEU held, inter alia, that a company cannot be deemed to have a fixed establishment solely due to a group relationship or exclusive service contract with another company. Although it was evident from the judgment that it is, in principle, possible for a group company to create a fixed establishment for another group company, the CJEU suggested this would only be the case if it were established that the company receiving the services had the technical and human resources of its service provider at its disposal 'as if they were its own'.

While it was for the referring court to make this assessment, the CJEU gave some additional guidance on how it might go about this with reference to some of the facts of the case. The CJEU suggested that the sharing of IT and accounting systems between the two companies for recording raw materials and finished products did not mean that Adient DE had the necessary infrastructure in Romania to create a fixed establishment. Similarly, the fact that Adient DE was provided with a storage facility by Adient RO for the raw materials and components did not appear to be determinative of a fixed establishment. As to whether a fixed establishment was created by the activities of some employees of Adient RO, the CJEU advised the referring court to look at whether those employees were removed from the hierarchical subordination of Adient RO and placed at the disposal and under the authority of Adient DE.

SC Adient Ltd & Co. KG (Case C-533/22)

Adapted from the case summary in Tax Journal (21 June 2024)

Changes to the use of VAT 484

On 11 July 2024, the CIOT reported that HMRC has contacted by both taxpayers and their agents stating that where changes need to be made to a taxpayer's VAT registration, changes are being introduced.

With effect from 5 August 2024:

- For agents, any request to change VAT registration details must be made using the Agent Service Account, and not by using the VAT484 form or any other postal or electronic means.

- Similarly, for changes that must be made by taxpayers, these must be made through their digital VAT account.

Where an individual is digitally excluded or needs help with digital services, HMRC will continue to provide support through non-digital channels.

From August, HMRC state that updated guidance will be available on their website at https://www.gov.uk/guidance/change-your-vat-registration-details

https://www.tax.org.uk/changes-to-the-use-of-paper-form-vat-484

STOP PRESS: Pre-paid private schools fees

HMRC has now confirmed that from 1 January 20125, all education services and vocational training supplied by a private school will be subject to VAT at the standard rate of 20%.

We will cover this in detail next month.