Tolley®CPD

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Personal tax

Waivers of remuneration (Lecture P1208 – 5.38 minutes)

A significant number of people have generously announced that they intend to waive some (or all) of their salaries or bonuses in an effort to assist those who have been adversely affected by the COVID-19 crisis or to provide additional funds for the NHS. Naturally, those individuals with a high profile have received plenty of media attention, but there are many others whose unstinted generosity is equally praiseworthy.

However, it is an inevitable feature of modern life that anyone wishing to help in this way must be careful not to expose themselves to some seriously unwelcome tax consequences as a result of their benevolence.

As a general rule, the waiver of any part of a salary or bonus does not relieve the earnings from a liability to tax and NICs, unless it can be said, on a true view of the facts, that the waiver took place before the salary or bonus was paid to, or put at the disposal of, the employee (see S18 ITEPA 2003 and Para EIM42705 of the Employment Income Manual).

In Para EIM42715, HMRC emphasise this point:

> 'Where remuneration waived is given up after it is treated as received for employment income purposes, . . . the employee remains taxable on the remuneration given up. All that is happening is that the employee is applying remuneration in a particular way by giving it back to the employer.'

This principle is borne out by the decision of the Court of Appeal in Parker v Chapman (1928). The waiver will still be valid in these circumstances, but the arrangement will not be treated as the relinquishment of the gross amount which the individual was expecting to receive.

Such an outcome is unlikely to go down well with the donor. In order to avoid an unpleasant surprise, it is necessary for the employee to execute the waiver before the entitlement to the salary or bonus has arisen. Only then will the individual not be chargeable to tax and NICs on the amount waived.

It is of course essential that the relevant documentation has the desired legal effect. In view of the fact that a waiver is a gratuitous disposition without consideration, a deed must be executed in proper form.

And what about the position where an employee repays a bonus which he has recently received in order to assist colleagues who might otherwise be furloughed or made redundant? There are clear indications that this has been going on since the start of the COVID-19 lockdown. At the moment, there is no relief for such selfless behaviour. The repayment would have to be made out of the employee's post-tax income. In other words, the position is very similar to that described above. Will HMRC find a way to help here? What about the possibility of allowing the repayment of a bonus to be treated as 'negative earnings'?

IHT should not be an issue, given that there is a specific exemption for waivers of remuneration in S14 IHTA 1984. That is, a waiver of remuneration is not regarded as a transfer of value. However, the wording in the section indicates that it would still be necessary for the waiver to be executed in advance of any entitlement arising.

It is known that the CIOT are taking up cudgels on behalf of those who have waived remuneration. They have asked HMRC to try and find a way to protect donors from the severity of these consequences. No-one wants such magnanimity to be discouraged by uncertainty over the tax position.

Contributed by Robert Jamieson

COVID-19 tests at work

If Covid-19 tests are provided by employers as part of its national testing scheme, they are not treated as a benefit and so will not be subject to income tax or Class 1A NICs.

HMRC's initial guidance made such tests taxable but following criticism this section of the guidance has been updated, confirming that COVID testing provided to employees will not be taxable.

The updated guidance also states that if employers are providing antigen testing kits to their employees, outside of the government's national testing scheme, either directly or by purchasing tests that are carried out by a third party, no Income Tax or Class 1A National Insurance contributions will be due.

https://www.gov.uk/guidance/how-to-treat-certain-expenses-and-benefits-provided-to-employees-during-coronavirus-covid-19#history

Cycle to work scheme (Lecture B1207 – 13.12 minutes)

Lockdown has released the cyclist. And with the government earmarking funds for projects such as pop-up bike lanes, segregated cycle tracks and pavement widening, now that the cycle-genie is out of the bottle, he probably isn't going back in again. This, coupled with plans to increase Congestion Charges and hike-up tube and bus fares, will mean that in London (and in other towns and cities), cycling to work will for many become a much more viable option.

So, the decision is made. I am going to start cycling to work. The next thing I need is a bike.

I have two choices:

1. I buy one from my after-tax salary; or
2. I use the government's "Cycle to Work" scheme and get tax relief on the cost.

The "Cycle to Work" Scheme

On the back of our new-found bike mania, the government has been promoting its "Cycle to Work" Scheme. This by no means new - it was introduced in 1999 to "promote healthier journeys to work and reduce environmental pollution". But now seems the ideal time to remind everyone that it is still around.

The Cycle to Work scheme is a government initiative that encourages employees, by means of a tax incentive, to commute to and from their workplace by bicycle. According to 2019 figures, the scheme has been used by 40,000 UK employers, and around 1.6 million employees.

The scheme is designed to help employees save money on the costs of a new bike for commuting use and spreads employee payments for the bike over monthly tax-free instalments via payroll.

The scheme is very simple and essentially works as follows:

- The employer registers with a scheme provider (of which there are many on the market). Registration is usually free. The scheme provider will then run the scheme on behalf of the employer;

- The employee chooses the bike (and related equipment) that he wants. Scheme providers have their own network of cycle-providers an employee can use to source a bike;

- The employer pays for the bike and subsequently makes that bike available for the employee to use (effectively via a bike-hire arrangement);

- The employee pays the employer back for the costs of the bike via monthly payroll deduction under a "salary sacrifice" arrangement.

It's the "salary sacrifice" element which offers the tax saving.

Salary sacrifice

Salary sacrifice enables an employee to exchange part of their salary in return for a non-cash benefit. The employee is then taxed on the lower salary, thereby saving tax and (both kinds of) Class 1 NIC on the amount sacrificed. [Salary sacrifice schemes used to be widely used to save NIC on benefits, but their usage was curtailed in 2017. They are now mainly used as a means of making pension contributions.]

There is no reciprocal benefit charge for the employee's use of an employer's asset in this case because S.244 ITEPA 2003 provides an income tax exemption for cycles and cycling equipment provided to employees for qualifying journeys (essentially meaning home to work). So income tax and NIC is being saved via payroll without there being a corresponding charge for the resulting benefit provided by the employer. It's a win-win.

The "hire period"

Once the bike is selected and acquired, the employee will enter a contract to "hire" the bike for an agreed hire period.

The hire period dictates the monthly payroll deductions. Most scheme providers offer 12-month hire periods (as this fits with the HMRC guidelines on salary sacrifice which say that salary sacrifice periods must be for a minimum of 12 months). Some scheme providers offer longer hire periods.

Monthly payments for the new bike (typically 1/12th of the bike costs) are taken from the employee's gross salary. The monthly payments should appear on the payslip as a deduction from earnings (typically alongside occupational pension contributions) before tax and NIC is computed. Tax and NIC is thereby saved at source. This means that at the end of the scheme, a basic rate tax-paying employee would have saved 32% on the cost of the bike, increasing to 42% for higher rate taxpayers and 47% for additional rate taxpayers. This is in addition to the cash-flow benefit of spreading the cost over monthly instalments. Employers save 13.8% secondary NICs on the cost of the bike (and 0.5% Apprenticeship Levy where appropriate as this is based on gross payroll).

What happens at the end of the scheme period?

Because the scheme is set up to promote work journeys rather than cycling in general, the employer remains the owner of the bike once the hire period is over.

Clearly the intention of the scheme is to allow an employee to buy a bike and receive tax & NIC relief on the costs of so doing. However there must be no option (either within the initial hire agreement or alongside it) for the employee to purchase the bike or equipment at the end of the hire agreement. If there is, this is likely to make this a hire-purchase agreement (rather than a hire agreement) in which case different regulatory requirements apply and the arrangement would no longer be eligible for tax exemption under S.244. Therefore, scheme rules should not refer to ownership as an option, and any decision to sell the cycle or equipment to the employee at the end of the hire period should be entirely discretionary at the time. If a scheme provider is used, they will ensure that the paperwork is correct.

Assuming all these particular "i's" have been dotted, at the end of the hire period, the employee has a number of options:

- Return the bike. The bike (and related equipment) is given back to the employer and the employee makes his way home by public transport. That's it. No more payroll deductions. The employer will normally then sell the bike to the scheme provider. The employee may, of course, start the scheme again with a different bike. This is the least popular option because it means that the employee will have paid for the bike but he does not get a bike at the end of it. Which makes no sense.

- Buy the bike. The employee will purchase the bike (and associated equipment) from his employer for its HMRC-approved "Fair Market Value" (FMV). This ensures that no taxable benefit arises on the transfer of the bike.

HMRC's guideline figures re end of scheme valuations are as follows:

Age of cycle	FMV calculated as a percentage of original price (incl. VAT)	
	Original price up to £500	Original price over £500
12 months	18%	25%
18 months	16%	21%
2 years	13%	17%
3 years	8%	12%
4 years	3%	7%
5 years	Negligible	2%
6 years and over	Negligible	Negligible

If the employee is allowed to buy the bike for less than its FMV (or if the employer agrees to simply give the bike to the employee at the end of the hire period), a taxable benefit arises equal to the difference between the FMV and the amount paid. This benefit will be reported on form P11D and will be subject to Class 1A employer only NICs.

A potential 18% or 25% end-of-scheme charge to facilitate the legal transfer of the bike to the employee is somewhat unpalatable and erodes the tax savings the employee has obtained via the salary sacrifice arrangement. Which brings us to Option 3…

Buy later. Most third-party scheme providers offer an option under which the hire period is extended in return for the employee paying a small deposit to re-hire the bike for (say) three more years. This deposit is typically 3% or 7% of the original bike value. After that extended hire period, the bike is transferred to the employee for free (reflecting the fact that the residual value of the bike per HMRC guidelines is covered by the deposit paid by the employee). No taxable benefit arises. This avoids the end-of-scheme charge in option 2).

Qualifying conditions for the scheme

All company employees qualify for the scheme, providing that they over 16 years of age and are UK taxpayers within the PAYE system. Due to Consumer Credit legislation, employees under the age of 18 need a guarantor to be able to participate. Earnings must remain above the level of the national minimum wage after the salary sacrifice. Self-employed individuals are not permitted to participate.

There used to be a £1,000 cost limit for cycles, but this ceiling was lifted in 2019, partly due to the rising prices of bikes but also to accommodate the increased use of electric bikes which are more expensive. As this arrangement is likely to be a regulated consumer hire agreement under the Consumer Credit Act 1974, Financial Conduct Authority (FCA) authorisation may need to be obtained for cycles costing more than £1,000. Scheme providers will help with this.

Although bikes with electric assistance are permitted under the scheme, micro-scooters and motorbikes are not.

Employees can have more than one bike under the scheme. In addition, the scheme also includes the cost of associated safety equipment such as:

- Cycle helmets;
- Security locks and chains;
- Cycle tool kits and puncture repair kits;
- Lights, pumps, bells, bulb horns, mirrors and mudguards;
- Reflective clothing;
- Luggage carriers and child safety seats.

Does the employee have to actually use the bike to commute to work…? The simple answer is yes, but not necessarily every day. The employee should use the bike “mainly” for commuting to and (if relevant) between workplaces.

This means that at least 50% of the bike use should be for work purposes. For example, if an employee uses the bike 100 times in a tax year, at least 50 of those journeys must be work-related. A journey is work-related if at least part of it is commuting or travel between workplaces. For example, if an employee cycles to the station, gets the train to the town / city where his workplace is then cycles at the other end, this is a work-related journey.

The bike and accessories can also be used for non-work purposes without this triggering any taxable benefit.

There is no need for the employee to log his journeys (but it is part of the employee's agreement with his employer that the bike will be used mainly for commuting).

Other points worth noting…

An employee cannot claim business mileage when commuting to and from work on an employer-owned bicycle. Mileage allowances (at 20p per mile) can only be claimed where the employee uses his own bike to make business journeys (of which commuting doesn't count).

Hire Agreements tend to be non-cancellable, so if the employment ends before the end of the hire agreement term, the remaining balance owed to the employer is deducted from the employee's final net pay.

If an employer purchases cycles and safety equipment to hire out to your employees, this will be capital expenditure on which capital allowances can be claimed. For many businesses, this expenditure will qualify for the Annual Investment Allowance giving a 100% write-off in the period in which the expense in incurred. Any sums received for the sale of the cycle or equipment must then be brought in as disposal proceeds in the main capital allowances pool.

Contributed by Steve Sanders

Home to client mileage claims (Lecture P1206 – 27.36 minutes)

Summary – Mileage claims for travelling from home to clients was allowable but restricted to 25p per mile for business miles travelled in excess of 10,000 miles.

Amara Akhtar was employed as a mobile care worker during 2013/14 to 2016/17, working long hours from early morning until late evening, seven days a week and for 48 weeks a year.

She drove from her home to care for unwell and elderly clients in their homes. Each day she would visit 14 or so clients travelling from one to the next in her car, often doing client's shopping, going to the post office for them, taking them to doctors' appointments and collecting prescriptions. She returned home most nights, but, when requested, stayed overnight at clients' houses.

Mrs Akhtar had immigrated to the UK from Pakistan many years ago, could only speak basic English but struggled with both reading and writing. She knew little about tax and had relied on an elderly client to prepare her tax returns for the tax years in question. She kept no mileage records of her car journeys for work. She did not check the tax returns prepared by her friend on her behalf before signing them.

Mrs Akhtar received no mileage allowance payments from her employer and so was entitled to claim mileage allowance relief for business miles undertaken at the approved rate of 45p for the first 10,000 business miles and 25p thereafter. Mrs Akhtar had claimed this relief all at a rate of 45p per mile.

HMRC challenged her mileage claims. It was common ground between both parties that Mrs Akhtar's travel between clients was "business travel" and so relief was available. The issue was over the first journey of each day when she travelled from home to her first client and also her last journey each day when she travelled from her last client back home. HMRC argued that this was ordinary commuting and so disallowed. In addition, HMRC challenged the mileage rate used where business miles exceeded 10,000 a year.

In addition, HMRC challenged the amount of tax deducted under PAYE that appeared in her tax returns for 2013/14 to 2016/17. HMRC claimed these should be as reported on her P60s, rather than the lower figures that she had reported.

Decision

The First Tier Tribunal concluded that the first and last journeys each day fell within the definition of a "temporary workplace". The tasks were of limited duration, with regular turnover in her clientele. Her work at a particular client's home did not exceed 24 months. The Tribunal stated that as Mrs Akhtar's employment contract expected her to perform duties at a location within reasonable travelling distance of her home, that area was to be treated as her "permanent workplace" and travel between home and her first and last clients of the day, was travel within the "deemed" permanent workplace and not travel between home and that permanent workplace.

Having agreed the correct mileage to use, the First Tier Tribunal confirmed that it was only the first 10,000 business miles that could be claimed at 45p per mile and that the balance needed to be restricted to 25p per mile.

Further, the First Tier Tribunal agreed that the correct figures for the amount of tax deducted under PAYE were those found in Mrs Akhtar's forms P60 for the relevant tax years.

With errors in her tax returns relating to both mileage allowance relief claims and the amount of tax deducted under PAYE, the Tribunal went on to consider HMRC's penalties. They concluded that the errors were not deliberate, but that she failed to take reasonable care in the preparation of her tax returns, judging her by the standard of a prudent and reasonable taxpayer in her position. Disclosure was prompted rather than unprompted. The percentage used to calculate the penalties were reduced and the Tribunal went further by ordering HMRC to suspend the penalties completely.

Amara Akhtar v HMRC (TC07646)

NIC on private fuel **(Lecture P1206 – 27.36 minutes)**

Summary – With no mileage records or evidence of private fuel being reimbursed, NICs were due on fuel provide for private use to all but one employee.

Contract Services (Millenium) Ltd is part of the Ruttle Group that carries on business in plant hire, the provision of skilled workers to operate the plant, and ancillary activities. Contract Services (Millenium) Ltd supplies workers to the rest of the Ruttle Group.

The company employed travelling salesmen to identify potential hirers from trade magazines, word of mouth and visiting building sites. These salesmen, and selected other employees, were provided with company cars and fuel and were entitled to use these cars for private purposes as well as for work. In addition, employees were given access to the company's fuel pump to fill up their tanks once per week. Company policy required that any fuel taken for private use must either be replaced or paid for in full.

This case concerned whether or not the company was liable to Class 1A NICs on the provision of the fuel benefit to these employees.

The company believed that their employees knew not to use Contract Services' fuel without accounting for it by way of replacement or payment. This was clear company policy and that any employees caught using company fuel for private purposes without reimbursement would be regarded as theft and would be subject to disciplinary action that might include dismissal.

Decision

The First Tier Tribunal stated that there was an obligation on the company to keep, maintain and retain supporting documentation. Without record keeping it was harder for the employer to establish that, on the balance of probabilities, the employee either did not use fuel for private use or made good the expense of such fuel.

One employee did keep records and so the appeal in respect of this employee was allowed. The Tribunal found that on the balance of probabilities, this employee did not use his car for private purposes during the relevant period.

However, the appeal was dismissed in respect of the other employees. With no records kept, the company could not simply rely on the fact that company policy was that employees should not use fuel for private purposes unless they reimbursed the full cost. There was no evidence that private fuel was fully paid for.

Contract Services (Millenium) Ltd v HMRC (TC07662)

Acquiring UK domicile of choice **(Lecture P1206 – 27.36 minutes)**

Summary – The First Tier Tribunal did have jurisdiction to determine a person's domicile and concluded that the taxpayer had acquired a domicile of choice in the UK.

Evert Henkes was born in Venezuela, raised in South America and educated in the USA. He is a Dutch citizen.

In February 1967, he moved to London but has never held (or applied for) UK citizenship. He is married to a British wife and has three children and seven grandchildren, all of who live near him in the UK and he sees them on a regular basis. He appeared to have no plans to leave the UK.

On marrying in 1968, he acquired his first UK property and has since owned, consecutively, three properties in the UK. Although his work took him to Singapore and the Netherlands for about six years in total, he and his wife retained their then UK property.

Following retirement the couple acquired (through a company) a substantial property in Spain. He and his extended family regularly stay there for about 50 days each tax year and keep two cars, some clothes and other personal effects at the property. The rest of the time he lived in his London home.

Evert Henkes considered himself to be domiciled outside the UK. Accordingly, he filed his tax returns on the basis that he was entitled to be taxed, and elected to be taxed, on the remittance basis.

HMRC enquired into Evert Henkes tax returns 2014/15 and 2015/16 and concluded that he had acquired a UK domicile of choice. As a result, HMRC issued information notices regarding his worldwide income and gains.

Evert Henkes applied for closure notices arguing that he was not UK domiciled and appealed against the information notices.

Decision

The First Tier Tribunal found that it had the power to determine Evert Henkes domicile and that it was appropriate to do so, as the information requested was reasonably required, and the question of domicile was key to the enquiry.

It was unclear whether his domicile of origin was in Venezuela or the Netherlands, as no meaningful links had been retained with either country.

The Tribunal noted that Evert Henkes had been UK resident for more than 40 years, with no clear plans for retiring or leaving the UK. Indeed his wife was reluctant to emigrate. With his extended family and main residence clearly in the UK, the Tribunal concluded that he had acquired a domicile of choice in the UK.

The appeal against the information notice was dismissed and HMRC was found to have reasonable grounds for not issuing closure notices.

Mr Evert Henkes v HMRC (TC07645)

Rectification of a contract **(Lecture P1206 – 27.36 minutes)**

Summary – The High Court rejected a claim to rectify a contract for services that was mistakenly entered into with an individual rather than his company. Rectification was not available if the benefit was not originally contemplated.

MV Promotions Ltd is Michael Vaughan's personal service company. In 2008, MV Promotions Ltd and Telegraph Media Group Ltd entered into a contract under which MV Promotions Ltd provided the services of Michael Vaughan to Telegraph Media Group Ltd as a cricket correspondent.

Three years later, both parties agreed to extend the arrangement and a new contract was signed. Unfortunately, the new contract was signed between Telegraph Media Group Ltd and Mr Vaughan, rather than his personal service company.

Concerned about the tax effect of their error, in 2018, both parties entered into a rectification deed clarifying their original intention that the 2011 extension contract was actually between MV Promotions Ltd and Telegraph Media Group Ltd. HMRC argued that the rectification deed did not apply retrospectively and so was entitled to claim tax from Michael Vaughan personally.

The parties sought a declaration that either on its true interpretation the 2011 contract had since its inception been between MV Promotions Ltd and Telegraph Media Group Ltd or, alternatively, rectified as such.

Decision

The High Court held that the contracting parties were Telegraph Media Group Ltd and Michael Vaughan. Any reasonable reader of the contract would not conclude that a mistake had been made.

Although the necessary preconditions for rectification on the basis of common mistake existed, the case decision was at the court's discretion. The High Court concluded that there could be no rectification if all issues between the parties had been resolved and rectification was sought only to achieve a tax saving. The court concluded that this was the case here. HMRC was entitled to claim the higher personal tax due under the contract.

MV Promotions Ltd and another v Telegraph Media Group Ltd and HMRC [2020] EWHC 1357 (Ch)

Capital Taxes

Multiple dwellings relief (Lecture P1206 – 27.36 minutes)

Summary – A house and annex were not suitable to be used as separate dwellings and so multiple dwellings relief was denied.

Keith Fiander and Samantha Brower bought an unoccupied detached property for £575,000 on 27 April 2016. Attached to the main house was a self-contained annex, connected by a corridor with no door, although a door could have been fitted. The properties shared a post box, the utility supplies or there was only one council tax bill. The "Rightmove" website described the property as having three bedrooms with "bedroom 1" being in the annex and two loft rooms. It did not mention the annex. Further there was a restrictive covenant over the land to prevent more than one bungalow being built on it.

The taxpayers argued that the annex was separate from the house and claimed multiple dwelling relief. Under para 7 Sch 6B FA 2003 applies if two properties are each suitable for use as separate dwellings and if so, the SDLT rates can be averaged over the number of properties. The issue here was whether a house and annex were separate dwellings.

HMRC argued that the fact that a door could be installed to separate the annex from the main house was irrelevant. On purchase, this was a singe dwelling.

Decision

The First tier Tribunal stated that the test we were dealing with was a test of "suitability" for use, rather than adaptation for use; and it is a test of use as a "single dwelling," rather than of use as separate living accommodation.

The First Tier Tribunal stated that to be suitable for use as a single dwelling, a property must accommodate all of a person's basic domestic living needs and that was the case here.

However, there must also be a degree of privacy and security. The Tribunal could imagine the annex being occupied by an older relative as a "granny flat", or by one of the owners grown-up children, with this arrangement providing adequate privacy and security to occupants of both parts of the property, given family bonds of trust. However, without such close family ties, the First Tier Tribunal concluded that, with only an open corridor connecting the two, there was insufficient privacy and security for the occupants.

Finally, the decision should be made at the time of completion and on that date, there was nothing that indicated that there had ever been a physical barrier between the annex and the main house. The possibility of erecting a door to separate the properties after purchase was not relevant.

Interestingly, the Tribunal did not put a great deal of weight on the evidence that the annex had no separate utility meters or council tax status. Nor did they consider a single postal address to be a significant factor in this case. Finally, the Tribunal placed no weight on the "restrictive covenant" in the land registry, which they said was unclear in itself and in its implications for the issues in this case.

Keith Fiander and Samantha Brower v HMRC (TC07676)

Family Investment Companies: Holt v Holt (Lecture P1207 – 11.15 minutes)

What is a Family Investment Company*?*

It is common for family members to pass assets (e.g. investments) down the generations. Family investment companies (FICs) are often considered as an alternative to the more traditional family discretionary trust, as a means of passing family wealth down to adult children and remoter generations. Furthermore, a FIC can be a tax-efficient 'wrapper' in which individuals can manage their wealth.

A FIC is simply a company in which its shareholders are family members. For example, parents may wish to apply their wealth for the benefit of offspring (e.g. an adult son and daughter) through a FIC. The FIC might be funded by cash initially. It may subsequently acquire (say) commercial properties in the UK.

Inheritance tax

The above gift of shares from parents to adult children is a potentially exempt transfer, so no immediate IHT liability arises and the gift generally becomes exempt if the parents survive at least seven years. Furthermore, any subsequent growth in value following an outright gift of the shares will normally fall outside the parents' estates (although care is needed to ensure that the gifts with reservation IHT anti-avoidance provisions do not apply to treat the shares as remaining in the parents' estates).

If the company's shares are spread (say, 25% each) between each parent and adult child, the value of the separate shareholdings are likely to be subject to discounts (e.g. to reflect non-controlling interests in the company), and so may further reduce IHT exposure in the parents' estates.

In some cases, the shares held by the children may carry different types of rights to those held by the parents, possibly resulting in a greater reduction in value in the parents' estates for IHT purposes.

Under attack?

It was reported in Taxation ('Future challenges to family investment companies' by Stephanie Parker, 18 March 2020) that HMRC had set up a 'secret unit' to look at how FICs are being used in IHT planning.

Prior to that, a Shares and Assets Valuation (SAV) Fiscal Forum meeting, which took place on 8 October 2018, discussed (among other things) HMRC's concerns about the use of FICs:

> '[An HMRC representative] explained that SAV has begun to see companies with classes of shares that include a class with all voting rights but no rights to income or capital, plus one or more classes which have no voting rights but all rights to income and capital. It has been proposed by some agents that the voting classes have nil value. Whilst each case should be judged on its own merits, SAV may challenge a case where nil value is proposed for shares in the voting class. TS read aloud an excerpt from the Holt v Holt decision, in which the Court suggested that the fair value of control was 20-25% of the company's value. TS asked if anyone was aware of a more recent decision that discussed the value of these types of shares, though no further cases were offered by those present.'

Holt v Holt

In the case referred to by HMRC in the Fiscal Forum meeting, Holt v Holt [1990] 3 NZLR (a New Zealand case), a divorcing couple's home was owned by a company. The share capital of the company comprised 1,000 shares of $1 each. There were two classes of shares in the company. The husband held one 'A' share; the other 999 shares were 'B' shares, which were held by the trustees of a family trust (i.e. the 'B' shares were not the property of husband or wife).

The rights attaching to the 'A' and 'B' shares were identical in every respect except one; the single 'A' share carried 10,000 votes, while the 999 'B' shares carried one vote each. The husband exercised his voting rights to make himself the company's managing director.

The company's net asset value was agreed to be $800,000. The New Zealand High Court and Court of Appeal both considered that the valuation of the husband's 'A' share for matrimonial property purposes was $150,000. The husband appealed to the Privy Council. He argued that the proper value of the 'A' share was only $10,000.

The Privy Council dismissed the husband's appeal. The rights attaching to the 'A' shares would continue until the 'A' shareholder (i.e. the husband) decided to alter the company's articles. In addition, the 'B' shareholder could obtain nothing without the cooperation of the 'A' shareholder. Thus the value of husband's one 'A' share out of 1,000 shares in total was $150,000, out of an overall value for the company of $800,000.

The future

If HMRC's FIC unit considers that FICs are causing an unacceptable level of tax leakage, it is possible that a targeted anti-avoidance rule will be introduced to counter that leakage; for example, a valuation rule to prevent the dissipation of a company's value as a result of the shares being spread among close family members.

In any event, if Holt v Holt is followed by the UK law courts, then (unless superseded by other litigation) it may transpire that FICs will be less effective to parents for IHT purposes in terms of reducing the value of their estates.

Contributed by Mark McLaughlin

Using Dropbox to submit IHT returns

Agents can now use Dropbox to submit both Forms IHT400 and IHT100 accounts where it's not possible or practical to submit them by post. To do so, agents must send an email to iht.agents@hmrc.gov.uk. A hard copy will not be required at a later date.

https://www.gov.uk/government/publications/hm-revenue-and-customs-trusts-and-estates-newsletters/hmrc-trusts-and-estates-newsletter-june-2020

Fall in value of quoted investments and land (Lecture P1209 – 12.38 minutes)

Unfortunately, where people are acting as personal representatives (PRs) for those who died in the months leading up to the coronavirus shutdown, they are likely to end up realising assets for less than their value at death.

In three specific circumstances, the value of the death estate may be adjusted for losses arising on post death disposals. Here we cover the reliefs for quoted investments and land; in the article that follows, we will cover the relief for property valued under related property rules, together with the relief for fall in value of lifetime gifts.

Quoted investments (Part VI Chapter III IHTA 1984)

When dealing with quoted investments, the PRs must consider all disposals within 12 months of death, both at a profit or loss.

To calculate the fall in value, the PR must compare the probate value with the gross sale proceeds for each disposal within 12 months of death to generate either a profit or loss. All of these results are then added together. Where this produces a net loss, post mortem relief can be claimed and the loss can be deducted from the probate value that is included in the deceased's estate. Note that the loss that can be deducted from the death estate is restricted if the Personal Representative has bought replacement quoted investments in the period that runs from the date of death up until 2 months after last sale within the 12 month period. The restriction is calculated as follows:

$$\frac{\text{Cost of new investments}}{\text{Total gross proceeds from sales}} \times \text{Loss}$$

Example – Dominic

Dominic died on 20th December 2019 leaving the following quoted shares in his estate:

10,000 X plc shares £20,000

5,000 Y plc shares £7,500

On 19th June 2020, the Y plc shares were sold for £8,000 but incurred dealing costs of £220. Later that year on 1 September the X plc shares were all sold for £14,000, with dealing costs of £300.

	Probate value	Proceeds	Profit/ (Loss)
Y plc shares	7,500	8,000	500
X plc shares	20,000	14,000	(6,000)
	27,500	22,000	(5,500)

Revised value in the death estate is £22,000 (27,500 – 5,500). This will result in a repayment of IHT already paid based on probate value.

Finally, if shares are suspended from trading, meaning that they cannot be sold within the 12-month period, they can be deemed to have been sold at their suspended value.

Land and buildings (Part VI Chapter IV IHTA 1984)

These rules work in a similar way to the rules for quoted investments, but Personal Representatives must take into account all sales within 3 years of death whether at a profit or loss, as well as any further sales at a loss in the 4th year after death. Further, a sale is ignored completely where the profit or loss is 'small' (Lower of £1,000 or 5% probate value).

When considering any restriction of the loss, only consider purchases from the date of death until 4 months after the last sale within the 3-year period (even where there has been a loss)

Article created from an Online Tutors seminar produced by Kevin Reed

Fall in value of related property and lifetime gifts (Lecture P1210 – 16.13 minutes)

Property valued with other property (s.176 IHTA 1984)

On death, certain property may be valued using the related property rules e.g. where a husband and wife or civil partners both own shares in the same company. Alternatively, this could apply where assets form part of the deceased's free estate as they own certain shares outright, but they also had a life interest in the same company through a trust also forming part of their settled property on death.

When valuing such assets for inclusion in the death estate, the Personal Representative must compare the unrelated valuation with the related property valuation and use whichever is higher in the death estate. In such a situation 'the whole is greater than the sum of the parts'.

However, where some or all of such property is sold post death at below that related property valuation, relief is available where the sale(s) take place within three years of death and the sale is to an unconnected party. In this case, the original unrelated valuation is used in the death estate, not the actual sale proceeds.

Example – Keir

Keir died on 10 November 2019. Included in his estate was a 10% shareholding in an unquoted investment company. On his death, his wife also owned 40% of the company's shares.

On death, shares in the company were valued as followed:

10% shareholding	£30,000
50% shareholding	£275,000

The shares would be valued for probate in his death estate using the related property rules giving a value of £55,000 (275,000 x 10/50) as clearly the unrelated value of £30,000 is lower.

However, the Personal Representatives sell Keir's holding to an unconnected director for £20,000 on 18th August 2020. As this is within three years of death and the sales proceeds (£20,000) are below the related property valuation (£55,000) the Personal Representatives can restate the value of the shares in the death estate to the original unrelated value of £30,000.

Fall in value relief for lifetime gifts (Part V, Chapter IV IHTA 1984)

Where a donor dies within seven years of making a gift (either potentially exempt transfer (PET) or chargeable lifetime transfer (CLT)) and the gift becomes chargeable to a death IHT charge, the donee can claim relief for any fall in value in either of the following circumstances.

- The asset gifted is worth less at the date of the transferor's death than it was when originally gifted (where the donee, or their spouse or civil partner, still owns the property), or

- The asset gifted has been sold to an unconnected person by the donee before the donor's death and the sale proceeds were less than the value at the time of the original gift.

In either case, you can deduct the "fall in value" from the gross chargeable estate when calculating the death tax.

However, the unadjusted (i.e. original) value of the gift will remain the figure that is cumulated with subsequent gifts for establishing the amount of nil rate band available to those later gifts.

Example – Priti

During her lifetime, Priti made the following gifts:

- 30 September 2012: Chargeable lifetime transfer (net of annual exemptions) of £264,000;

- 30 June 2018: Gift of quoted shares valued at £114,000 into a discretionary trust;

- 30 December 2019: Gift of £240,000 cash to her son.

On 22 January 2020, the trustees sold the quoted share for £84,000.

Priti died on 1 May 2020, entitled to a single nil rate band (NRB) of £325,000.

Let's look at the IHT payable from June 2018 onwards.

The gift of shares into the trust is a chargeable lifetime transfer (CLT) with inheritance payable during lifetime. The gift of cash to her son is a potentially exempt transfer with no tax payable at that time.

Gift in June 2018 (CLT)

	£
Value of shares	114,000
Less annual exemptions	
2018/19	(3,000)
2017/18 brought forward	(3,000)
	108,000
Less NRB remaining (325,000 – 264,000)	(61,000)
	47,000

The IHT payable during lifetime is £11,750 (47,000 x 20/80)

The gross chargeable transfer is £119,750 (108,000 + 11,750)

When we move to calculate the IHT that is due on death, we need to consider CLTs and PETs that have occurred within seven years of death. In Priti's case that means we must look at both the gift to the trust in June 2018 as well as the cash gift to her son in December 2019.

Gift in June 2018 (CLT)

The value chargeable is the £119.750 calculated above but, as the shares had been sold prior to death at a loss, we can adjust this amount to reflect their lower value at sale. The shares had fallen in value from £114,000 to £84,000 and so we reduce the IHT value for the death tax calculation by £30,000. The tax is calculated as follows:

	£
Gross chargeable value of shares	119,750
Less Fall in value relief	(30,000)
	89,750
Less NRB remaining (325,000 – 264,000)	(61,000)
	28,750
IHT (28,750 x 40%)	11,500
Less lifetime tax already paid	(11,750)
IHT due on death (£250 is not repayable)	Nil

Gift in December 2019

Moving on to calculate the IHT due on the £240,000 cash gift to the son:

	£
Cash fit to the son	240,000
Less 2019/20 annual exemption	(3,000)
	237,000
Less NRB remaining (325,000 – 119,750*)	(205,250)
	31,750
IHT (31,750 x 40%)	12,700

* When deciding how much of the £325,000 NRB has been used, firstly we ignore the chargeable lifetime transfer from September 2012 as this occurred more than seven years before the cash of gift in December 2019. Moving on to the cash gift of shares in 2018, this is relevant as it occurred within seven years of the cash gift. However, legislation does not allow us to take account of fall in value of the shares and so £119,750 is used.

Article created from an Online Tutors seminar produced by Kevin Reed

Administration

Reasonable excuse for late payment of tax

Summary – The taxpayer did have reasonable excuse for late payment of tax and the penalties were cancelled.

In December 2015 his 81-year old mother suffered a serious stroke leaving her without both mental and physical capacity and she was placed in a nursing home at a monthly cost of £5,243 against income of £3,300 giving a shortfall of £1,943. Marc Catchpole relocated to help look after her and then lost his job in 2016. In order to meet rental costs and costs of care for his mother, he used some of the money put aside to pay his taxes. He was unable to find equivalent employment and took a reduced salary as a delivery driver. In addition, he had to deal with criminal justice issues relating to his daughter at the same time.

He made efforts to pay his tax, having contacted HMRC on several occasions, reaching and an agreement with the debt management team.

Until 2014/15, Marc Catchpole had never paid tax late. However, due to unforeseen family circumstances, he incurred late payment penalties for paying his 2014/15 tax bill over 12 months late.

Despite this, HMRC claimed that insufficiency of funds was not a reasonable excuse and that he did not make contact with HMRC until 2019 to deal with penalties arising in 2016.

He appealed against the penalties arguing that he had a reasonable excuse for being late.

Decision

The First Tier Tribunal found that Marc Catchpole had acted reasonably, had tried to contact HMRC on several occasions, and had come to arrangements to pay off the tax debt.

The Tribunal confirmed that insufficiency of funds is not normally a reasonable excuse for late payment of tax. However, it was necessary to look behind the reason for the non-payment or insufficiency of funds. In this case there was a mental health issue and this, on its own, could be a reasonable excuse. The events that unravelled were unforeseeable and unexpected and outside of the taxpayer’s control.

Given these particular circumstances, the penalties were cancelled.

Marc Catchpole v HMRC (TC07698)

Whether tax adviser negligent (Lecture P1206 – 27.36 minutes)

Summary - The Court of Session held that tax advisers had not been negligent in failing to advise a client to transfer shares to his wife before a sale in order to benefit from entrepreneurs' relief.

Hugh McMahon was the sole shareholder in a car dealership, Lomond Motors Ltd, a company with two wholly owned subsidiaries. His wife was an employee of the company and also the company secretary for all three group companies. On 4 July 2012, he sold all the shares in his company to Lookers Motor Group Limited, incurring a substantial liability to CGT on the disposal.

For a number of years, Grant Thornton UK LLP had provided tax and accountancy services to the group and was also engaged to provide personal tax services for the couple. The case considered whether Grant Thornton UK LLP ought to have advised the owner to transfer some of the shares to his wife so as to benefit from her entrepreneurs' relief £10m lifetime limit.

Hugh McMahon argued that his letter of engagement with Grant Thornton included an express term that Grant Thornton UK LLP would advise him on tax planning ideas that might be of assistance to him.

Decision

The Court of Session held that the engagement letter covered tax compliance services and clearly distinguished between those services and ad hoc planning and advice, which would require a separate agreement. The adviser was not obliged to provide tax planning services.

Despite this, in the lead-up to the sale, Grant Thornton UK LLP had provided and discussed a schedule outlining the option to transfer shares to his wife to utilise her Entrepreneurs' Relief allowance.

The skill and care exercised by Grant Thornton UK LLP in the lead-up to the sale had not fallen below the requisite standard of care.

The appeal was dismissed.

Hugh McMahon v Grant Thornton UK LLP [2020] CSOH 50

Adapted from case summary in Tax Journal (12 June 2020)

Deadlines

1 August 2020

- Corporation tax for periods to 31 October 2019 if not paying by instalments
- Outstanding 2018/19 SA tax returns subject to higher of £300 or 5% of tax due

2 August 2020

- Filing date for form P46(Car) for quarter ended 5 July 2020

5 August 2020

- Quarterly report by employment intermediaries for period 6 April to 5 July 2020

7 August 2020

- VAT return and payment due for 30 June 2020 quarter (electronic payment)

14 August 2020

- Quarterly corporation tax instalment payment for large companies
- Monthly EC sales list if paper returns used

17 August 2020

- *SEISS second grant can be claimed from this date*

19 August 2020

- Pay PAYE/CIS for month ended 5 August 2020 if by cheque
- File monthly CIS return

21 August 2020

- Online monthly EC sales list
- Intrastat — supplementary declarations for July 2020

22 August 2020

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

31 August 2020

- Accounts to companies House:
    - Private companies with 30 November 2019 year end
    - Public limited companies with 28 February 2020 year end
- Corporate tax self-assessment returns for accounting periods ended 31 August 2020
- Annual adjustment for VAT partial exemption claims, May year end.

Chancellor's Summer Statement

Job Retention Scheme replacement (Lecture P1206 – 27.36 minutes)

As expected the Coronavirus Job Retention Scheme has not been extended beyond the end of October 2020.

However, the government has introduced a one-off payment of £1,000 to UK employers for each furloughed employee who remains continuously employed through to the end of January 2021. This will be paid from February 2021.

To be eligible, employees must earn above the Lower Earnings Limit (£520 per month) on average between the end of the Coronavirus Job Retention Scheme and the end of January 2021.

Further detail about the scheme will be published in September 2020.

Temporary Stamp Duty Land Tax change (Lecture P1206 – 27.36 minutes)

The Chancellor announced a temporary change to Stamp Duty Land Tax on residential property bought between 8 July 2020 to 31 March 2021, with SDLT by extending the zero rate band to £500,000. So for this period the rates will be as follows:

Property or lease premium or transfer value	SDLT rate
Up to £500,000	Zero
The next £425,000 (the portion from £500,001 to £925,000)	5%
The next £575,000 (the portion from £925,001 to £1.5 million)	10%
The remaining amount (the portion above £1.5 million)	12%

Higher rates for additional properties

The 3% higher rate for purchases of additional dwellings applies on top of revised standard rates above for the period 8 July 2020 to 31 March 2021, so that each of the bands above will have 3% added to that rate.

New leasehold sales and transfers

The nil rate band which applies to the 'net present value' of any rents payable for residential property is also increased to £500,000 from 8 July 2020 until 31 March 2021 with 1% being charged where the net present value exceeds £500,000.

Who will benefit?

Companies as well as individuals buying residential property worth less than £500,000 will benefit from these changes, as will companies that buy residential property of any value where they meet the relief conditions from the corporate 15% SDLT charge.

Temporary change

On the 1 April 2021 the reduced rates shown in the above tables will revert to the rates of SDLT that were in place prior to 8 July 2020.

https://www.gov.uk/guidance/stamp-duty-land-tax-temporary-reduced-rates

Temporary change to LBTT threshold in Scotland

On 10th July, Finance Secretary Kate Forbes announced a temporary increase in the nil rate band residential property transactions from £145,000 to £250,000.

The revised rates and bands will only apply to transactions with an effective date on or after 15 July 2020 and will remain in place until 31 March 2021

Rates for the Additional Dwelling Supplement (ADS) and non-residential LBTT remain unchanged.

Purchase price	LBTT rate
Up to £250,000	0%
Above £250,000 to £325,000	5%
Above £325,000 to £750,000	10%
Over £750,000	12%

https://www.revenue.scot/news/news/lbtt-temporary-increase-nil-rate-band-0

Welsh Land Transaction Tax

The Welsh Government has now also announced a reduction to land transaction tax (LTT), with effect from 27 July 2020.

The starting threshold for LTT main residential rates will be temporarily increased from £180,000 to £250,000 and will run from 27 July 2020 to 31 March 2021.

Autumn Budget

The Chancellor confirmed that there will be a Budget this Autumn but gave no indication as to what his plans might be.

Eat Out to Help Out Scheme (Lecture P1206 – 27.36 minutes)

The Chancellor has introduced this new scheme in attempt to support the hospitality industry. Restaurants that register for the scheme can offer half price meals, up to a maximum of £10 per person, to diners for food and non-alcoholic drinks to eat or drink in every Monday to Wednesday throughout August. The scheme starts on Monday August 3 and runs until Monday August 31. Alcohol and service charges are excluded from the offer.

Businesses will still need to pay VAT based on the full amount of their customers' bills and any money received through the scheme will be treated as taxable income.

Who can register?

A business can register if it:

- sells food for immediate consumption on the premises;
- provides its own dining area or shares a dining area with another establishment for eat-in meals; and
- was registered as a food business with the relevant local authority on or before 7 July.

The scheme does not apply to takeaway food or drink, catering services for private functions, a hotel providing room service only. HMRC guidance states that if a customer purchases a meal with the intention of eating it but then takes it away and leaves the premises, the business can still apply the discount.

How to register

To register, a company will need the:

- Government Gateway ID and password;
- name and address of each establishment to be registered;
- UK bank account details;
- VAT registration number (if applicable);
- employer PAYE scheme reference number (if applicable);
- Corporation Tax or Self Assessment unique taxpayer reference

If a business is registering more than 25 establishments a link to a website must be supplied, containing details of each establishment participating in the scheme including the trading name and address.

Once registered, the business will receive a registration reference number that will be used to claim the reimbursement.

Record keeping

For each day of the scheme and for each registered establishment, the business must keep a record of: the total

- number of people who have used the scheme in your establishment;
- value of transactions under the scheme;
- amount of discounts you've given.

Making a claim

The service to be used for making the claim will be available from 7 August 2020 to 30 September 2020 and HMRC will pay eligible claims within 5 working days.

Business must wait 7 days from registration to make their first claim and are able to submit claims on a weekly basis.

HMRC will provide more guidance on how to make a claim when the registration service is open.

https://www.gov.uk/guidance/register-your-establishment-for-the-eat-out-to-help-out-scheme

Other News

OTS Capital Gains Tax review (Lecture P1206 – 27.36 minutes)

In a letter dated 13 July 2020, the Chancellor asked the Office of Tax Simplification (OTS) to carry out a review of Capital Gains Tax in relation to individuals and smaller businesses. In his letter he states:

> "This review should identify opportunities relating to administrative and technical issues as well as areas where the present rules can distort behaviour or do not meet their policy intent. In particular, I would be interested in any proposals from the OTS on the regime of allowances, exemptions, reliefs and the treatment of losses within CGT, and the interactions of how gains are taxed compared to other types of income. "

It seems that CGT could be one of the ways that the government is going to claw back the billions of pounds spent in supporting the economy through the Coronavirus pandemic.

What this could mean?

It seems that the government could target a number of areas within the current CGT regime and a number of commentators have suggested the following could be affected:

- Aligning CGT rates with income tax rates of 20%, 40% and 45% seems a real possibility as not only will this raise money, it will simplify the existing tax system;

- Revisiting entrepreneurs' relief where currently qualifying gains of up to £1 million (recently reduced from £10 million) are taxed at only 10%. This could be abolished completely;

- The reduction or even abolition of the annual exempt amount of £12,300 is an option. Why keep this when arguably it is the better off who have assets to sell and benefit from the exemption?

- With wealth tied up in our homes, Principal Private Residence relief could be targeted. With many relying on the value tied up their home to fund future care bills, abolition of the relief might be taking things too far, but we could see some kind of restriction on the amount of relief that can be claimed.

OTS review

On 14th July 2020, the OTS published an online survey and a call for evidence to seek views about capital gains tax.

The call for evidence consists of two sections:

> Section 1: This seeks high-level comments on the principles of CGT by 10 August 2020 in order to help shape the balance of the work and could put the OTS in a position to provide an interim update on bigger picture issues;

Section 2: This section invites more detailed comments on the technical detail and practical operation of CGT by 12 October 2020.

The OTS has stated that their review will consider general areas such as:

- the overall scope of the tax and the various rates which can apply;
- reliefs, exemptions and allowances which can apply, and the treatment of losses;
- the annual exempt amount and its interactions with other reliefs;
- the position of individuals, partnerships and estates in administration;
- the position of unincorporated businesses and owner-managed companies, including their setting up, selling or winding up of such entities;
- any distortions to taxpayers' personal or business investment decisions;
- interactions with other taxes including Income Tax, Capital Allowances, Stamp Taxes and IHT.

The review will also more specific areas such as administrative or technical issues relating to:

- clearance and claims procedures
- chargeable gains on shares and securities, including holdings of listed shares;
- the acquisition and disposal of property;
- the practical operation of principal private residence relief;
- consideration of the issues arising from the boundary between income tax and capital gains tax in relation to employees;
- valuations, record-keeping, calculating any tax payable and making returns, including claiming losses;
- the information HMRC have and can use to help them reduce administrative burdens, improve customer experience and ensure compliance.

Focussing in individuals and smaller businesses, this review will not extend to issues specific to corporate groups, such as substantial shareholding exemption, company reorganisations or demergers.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/900225/CGT_Scoping_document_July_2020.pdf

https://www.gov.uk/government/consultations/ots-capital-gains-tax-review-call-for-evidence-and-survey

Government's 10-year plan (Lecture B1206 – 20.20 minutes)

On 21 July the Treasury published 'Building a trusted, modern tax administration system', a ten-year plan to modernise the tax administration system.

At the centre of this system is real-time information with all taxpayers having a single digital account that is easily accessible and secure. HMRC will introduce increasingly integrated processes, drawing on information from business systems and validated third parties. They argue that this approach will minimise the opportunities for error and avoid the problems faced by both taxpayers and HMRC in seeking to assemble tax records long after the original business transactions.

The Making Tax Digital (MTD) programme returns to the spotlight, having previously been silenced in the face of Brexit and Covid-19.

MTD for VAT

The Treasury believes that this system is working well for those who are required to register as their taxable turnover is over £85,000. Around 30% of smaller VAT-registered businesses, who are not yet required to use Making Tax Digital, have chosen to do so voluntarily.

What next?

The government believes that now is the right time to plan the extension of Making Tax Digital, as follows:

- From April 2022 Making Tax Digital will apply to all VAT-registered business for their VAT obligations;
- From April 2023, businesses and landlords with business income over £10,000 per annum which are liable for Income Tax will need to keep digital records and use software to update HMRC quarterly through Making Tax Digital.

To ensure that the Making Tax Digital approach also evolves for those businesses that have incorporated to become companies, the government will be consulting later this year on the design of what the system should look like for Corporation Tax.

Timely and accurate tax payments

Although real time tax reporting under MTD can be introduced without changing tax payments, the government is exploring the appropriate timings and frequency for the payment of different taxes. Should the use of real-time information be used to bring tax payment dates in to line real-time reporting.

Modernising tax administration

The document highlights opportunities to modernise tax administration which could include:

- simplified registration processes, so that businesses need only register once with HMRC for all taxes, rather than navigating different rules, processes and deadlines for different taxes;

- smarter use of data on taxpayers and their activities – pre-population of tax returns, including with data from third-parties – would reduce the need for taxpayers and agents to submit additional information that HMRC either already holds or could verify itself.

The 10 year plan says that “Taxpayers should be able to view their tax position and tell HMRC anything it needs to know through a single online account.” To achieve this, it would make sense for a taxpayer’s personal and business tax account to be merged.

Incremental reform

The plan concludes by saying “Modernisation of the UK’s tax system cannot and should not happen overnight.” The government is keen to debate long term reforms and is well aware of the need to ensure that its services continue to be accessible by those who are digitally excluded.

https://www.gov.uk/government/publications/tax-administration-strategy/building-a-trusted-modern-tax-administration-system

Draft legislation for Finance Bill 2021

On 21 July 2020, HMRC published draft legislation for the next Finance Bill (which will eventually become Finance Act 2021). An outline of the provisions is given below.

Termination payments

A new calculation of post-employment notice pay (PENP) for employees paid in equal monthly instalments whose post-employment notice period is not a whole number of months, and bringing PENP into the charge to UK tax for individuals who are non-resident in the year of termination of their UK employment. The provisions will apply to those individuals who both have their employment terminated and receive a termination payment on or after 6 April 2021.

Zero-emission vans

From 2021–22 the cash equivalent of the van benefit charge for zero-emission vans will be nil.

Enterprise management incentives

An extension to the time-limited exception for EMI share options granted on or after 19 March 2020 to ensure participants do not suffer a disqualifying event as a result of taking unpaid leave, being furloughed or working reduced hours because of coronavirus. The change will initially apply from 19 March 2020 until 5 April 2021.

Corporate interest restriction

Clarification of the way certain provisions in the corporate interest restriction rules apply in the context of a real estate investment trust, to take into account that UK property businesses of non-resident companies are within the charge to corporation tax rather than income tax (this will apply from 21 July 2020); and

New provision to ensure no penalties arise for the late filing of an interest restriction return if there is a reasonable excuse for the failure, bringing the administrative rules in line with those for corporation tax self-assessment (this will apply from 1 April 2017).

SDLT surcharge for non-residents

A 2% surcharge will apply on purchases of dwellings by non-residents, including certain UK-resident companies controlled by non-residents. It will apply to purchases in England and Northern Ireland with an effective date on or after 1 April 2021.

SDLT higher rate relief for housing co-operatives

A new relief from the 15% higher rate of SDLT will apply where the purchase of a residential property valued in excess of £500,000 is made by a company which is a housing co-operative that has no transferable share capital. The change is expected to apply for transactions completing on or after the date of the autumn 2020 Budget.

Annual tax on enveloped dwellings relief for housing co-operatives

Relief will also be available from ATED where an interest valued in excess of £500,000 is held in UK residential property exclusively by non-publicly funded, non-social housing co-operatives which have no transferable share capital. The change is expected to apply retrospectively from 1 April 2020.

VAT – public body refunds

The public body refund scheme in VATA 1994 s 33 will be expanded to include Sianel Pedwar Cymru (S4C – broadcaster of Pobol y Cwm), to allow the channel to recover VAT relating to its non-business activities.

Anti-avoidance

A range of new measures will be introduced to strengthen existing rules around promoters and enablers of tax avoidance schemes.

Tax checks on licence applications

A new requirement for public authorities, making the granting of certain licences (e.g. taxi businesses) conditional on providing information to HMRC.

HMRC information powers

A new financial institution notice will be introduced to require financial institutions to provide information to HMRC when requested about a specific taxpayer, without the need for Tribunal approval.

Consultation on the draft legislation will close on 15 September 2020.

https://www.gov.uk/government/collections/finance-bill-2020-21

Business Taxation

New parents and SEISS

Self-employed parents whose trading profits dipped in 2018/19 because they took time out to have children will be able to claim for a payment under the self-employed income support scheme (SEISS).

Mothers, fathers and those who have adopted, and taken time out away from trading to care for their children within the first 12 months of birth of the child or within 12 months of an adoption placement, are able to use either their 2017/18 or both their 2016/17 and 2017/18 self-assessment returns as the basis for their eligibility for the SEISS.

However, they will also need to meet the other standard eligibility criteria for support under the SEISS.

https://www.gov.uk/government/news/self-employed-new-parents-can-claim-support-grant

Taxation of Coronavirus support payments (Lecture B1208 – 15.37 minutes)

Finance Bill 2020 includes provisions relating to the taxation of coronavirus support payments and the potential penalty regime. There was a short period of consultation following publication of the draft clauses and some significant changes made.

Establishing taxability

The first part of the legislation establishes that all payments under the relevant schemes are taxable.

The term 'coronavirus support payment' covers any payment made at any time under any of the following schemes:

- The coronavirus job retention scheme;
- The self-employment income support scheme;
- Any scheme that is subject to a direction under s76 Coronavirus Act 2020 (which is a very short piece of legislation which basically says that HMRC will have whatever functions relating to coronavirus are given to it by HM Treasury). This means any new scheme of support that HMRC are administering will automatically come within these provisions;
- The coronavirus statutory sick pay rebate scheme;
- A coronavirus business support grant scheme – meaning any arrangement under which a public authority makes grants to businesses to support them during the pandemic. The legislation gives examples of the small business grant fund, the retail, hospitality and leisure grant fund and local authority discretion grants fund as well as their equivalents in Scotland, Wales and Northern Ireland;
- Any scheme specified as being included within subsequent secondary legislation.

All such payments made which are referable to a business will be treated as a revenue receipt of income tax or corporation tax purposes in calculating the profits of the business. If the payment is referable to more than one business, it is allocated on a just and reasonable basis. Business can mean trade, UK or overseas property business and business consisting wholly or partly of making investments.

If the business has ceased the receipt can be treated as a post-cessation receipt. Relevant expenses (i.e. those that would have been deductible against business income) can be deducted from those amounts but the legislation specifically precludes the deduction of costs arising directly or indirectly from the person ceasing to carry on the business.

If no business is carried on, then the whole amount of the support payment is taxable as other income. It seems unlikely that this would apply but it is included to cover all bases from HMRC's perspective.

For payments under an employment-related scheme, the person who is taxable is the person who is entitled to the payment as an employer even if they are not the employer of the relevant employees for any other purpose. For example, if an agency has furloughed staff and received payments under the job retention scheme, they are the deemed employer of those staff even if they are not actually an employer from an employment law perspective. Other workers such as those caught by the public sector IR35 rules were also eligible to be furloughed and would fall into the same category.

For payments under the SEISS, the payment is referable to the business of the individual to whom the payment relates. The whole amount will be treated as profits of 2020/21 regardless of whether it falls within the relevant accounts. This will be relevant for businesses with accounting periods ending early in the tax year since the receipt might fall into the 2021/22 basis period. You cannot deduct the trading allowance or property allowance from a support payment.

Where a payment is made to a partner in a partnership and retained in full by that partner, then it is not treated as a receipt of the partnership but is just added as a separate exercise the partner's share for 2020/21. Effectively you prepare accounts within inclusion of the SEISS, allocate the profits and then add the SEISS to the individual partner. This is likely to be relevant where partnerships have some individuals who qualify and some who do not.

Payments relating to mutual activities of a business carrying on a mutual trade will not be taxable.

Support payments are also to be ignored when calculating:

- Incoming resources limits for charitable exemptions and charitable companies;
- Income conditions for community amateur sports clubs.

No deduction can be made for the trading allowance from support payments.

If an employment-related support payment is not bought into account by the person entitled to the payment as employer (presumably because they do not relate to their business) but another person is claiming a deduction for those costs, the employer will be subject to tax on those payments.

Penalising those who have claimed incorrectly

There have been reports in the press over the last couple of days of the first arrest for fraudulent claims associated with the job retention scheme so it is clear that HMRC will be pursuing the most serious cases with criminal charges. However, there is a secondary financial regime for others.

There is a tax charge if the recipient is not entitled to the amount they have received. This does not apply to the business support grant scheme or the SSP rebate scheme so it is primarily relating to the job retention scheme and the self-employed income support scheme.

The legislation states that a recipient not being entitled to the amount they receive includes someone ceasing to be entitled because of change of circumstances or because they do not pay the costs that the scheme was supported to reimburse i.e. they do not pay the money over to the employee. It is hard to think of examples of situations where a change of circumstances might demonstrate that you are no longer eligible for the grant. The most obvious example might be for the SEISS. You claim the second payment on the assumption that your business is going to be suppressed during the period from 14 July but then you have an outstanding trading period. The SEISS are really the only grants that have been claimed in advance.

The tax charge is 100% of the support payment the person is not entitled to and has not yet been repaid. It arises at the point at which the person ceases to be entitled to the payment where they did have eligibility when the claimed or when they receive it in all other cases.

It is an income tax charge, even where it arises to a company.

If this tax charge arises, the receipt is not taxable under the provisions outlined above. No expenses or other deductions are allowed from the amount which is subject to income tax.

If a partner in a partnership has received the payment personally and it has not been distributed amongst the partners, then it is the individual partner who is liable and not the firm. If it is the liability of the firm, then all partners are joint and severally liable for the charge.

HMRC can issue an assessment to collect any tax due with normal time limits applying (so 4/6/20 years depending on offence).

The normal compliance regime provisions in terms of the use of information and inspection powers can be used to check an SEISS or CJRS claim to ensure it has not been overpaid.

Penalties are also levied under the failure to notify chargeability provisions. HMRC must be notified of the incorrect claim on the later of:

- 90 days after Royal Assent;
- 90 days after the day on which the income tax became chargeable.

This is treated as met by a partnership if any partner complies with this.

If chargeability is not notified, then the consequent penalties become due and payable. However, the penalty provisions are amended so that they only apply if the person knew at the point at which the income tax became chargeable that they were not entitled to the amount of the payment. If that is the case, then the offence will be deliberate and concealed. Effectively the penalty regime is only going to apply to someone who makes the initial claim knowing they do not qualify. The penalty for a deliberate and concealed offence is 100% of the potential lost revenue.

The potential lost revenue is the amount of income tax that is due and payable.

Where partnerships are involved, the basic provisions are amended to make sure that the penalty can be levied. In particular, anything that one partner knows is treated as known by all partners.

The provisions within FB2020 that extend liability to officers of insolvent companies in certain circumstances can also apply to these payments.

Contributed by Ros Martin

Football referees **(Lecture B1206 – 20.20 minutes)**

Summary – Although control may have existed, a lack of mutuality of obligation meant that the referees were self-employed and not employees.

Professional Game Match Officials Limited engages the services of "National Group" referees to officiate at matches primarily in Leagues 1 and 2 of the Football League, but also in the Championship and the FA Cup, and by way of "Fourth Official", in the Premier League. These referees undertake refereeing duties in their spare time, typically alongside other full-time employment. This appeal related to the tax treatment of payments for match fees and expenses and whether they be taxed as if they were employees or self-employed?

Professional Game Match Officials Limited argued there was no contract at all with the National Group referees. However the First Tier Tribunal disagreed concluding that there was both an overarching annual contract as well as a series of individual contracts for each match that the referee was engaged. Under the overarching annual contract there was no obligation on Professional Game Match Officials Limited to provide work or on the referee to accept work offered. However, under each individual match contract, the referee would agree to officiate and Professional Game Match Officials Limited would agree to pay fees and expenses at the specified rates. There was no penalty if the referee, having accepted an appointment, was unable to get to the match. Equally, Professional Game Match Officials Limited was free, to cancel a particular appointment and replace the referee with another person, without breach of contract. The First Tier Tribunal concluded that there was "insufficient mutuality of obligation" to give rise to a relationship of employment.

HMRC agreed that the First Tier Tribunal was correct to consider the right of control but argued that the Tribunal had erred in law in equating the right of control as the right to "step in" during the performance of the referee's duties under the contract. HMRC did not agree that there was an absence of control as the referee was "undoubtedly the person in charge on match day". Professional Game Match Officials Limited could not step in during a match. HMRC argued that the Tribunal focussed too narrowly on the period between the first and final whistle of the match.

HMRC argued that the tribunal should have taken into account the elements of control contained within the pre-season documentation, including the Match Day Procedures and the Code of Conduct, and the control exercised by Professional Game Match Officials Limited through its continuous assessment, training and coaching.

HMRC appealed to the Upper Tribunal.

Decision

The Upper Tribunal neatly summed up the minimum requirements for mutuality of obligation to exist for both 'employee' and 'employer' such that an employment relationship exists:

- The employee must have an obligation to perform at least some work personally. The employee can in some circumstances refuse to work, but cannot decide to never turn up for work;

- The employer must have an obligation to provide work or, in the alternative, a retainer or some form of consideration in the absence of work.

The Upper Tribunal agreed with the First Tier Tribunal that mutuality of obligation was not satisfied. However, they disagreed when it came to control.

The Upper Tribunal confirmed that a practical limitation on the ability to interfere in the real-time performance of a task by a specialist did not necessarily mean there was not sufficient control to create an employment relationship. They stated that for control to exist, the employer must have the right to give directions relating to the performance of the employee's obligations during the subsistence of the contract and not just during the performance of the obligations. The First Tier Tribunal had erred in their decision. Further, the First Tier Tribunal had concluded that Professional Game Match Officials Limited was unable to impose any sanction during an individual contract for breach by a referee, as their only remedy was to terminate the contract altogether. The Upper Tribunal disagreed and concluded that such termination would constitute "stepping in during the period of the contract", even though it was at the contract's end.

The Upper Tribunal concluded that, although the First Tier Tribunal had erred in their decision on control, this did not necessarily mean that Professional Game Match Officials Limited did exercise sufficient control over the referees in the context of each Individual Contract to render them employees. However, given the lack of mutuality of obligation decision already reached, and that only one of the tests needs to be satisfied, the matter was taken no further.

The appealed was dismissed.

HMRC v Professional Game Match Officials Limited [2020] UKUT 0147 (TCC)

Investment company management expenses (Lecture B1206 – 20.20 minutes)

Summary - Management expenses linked to the sale of a subsidiary were disallowed as the decision to sell had been made by the company's parent company who had recharged the expenses to the holding company.

Centrica Overseas Holdings Limited is an investment holding company. It is a subsidiary of BG Gas Holdings Limited, which is itself a subsidiary of Centrica, the biggest supplier of energy to the UK domestic market.

The disputed expenditure of £2,529,697 related to fees paid to three professional firms in connection with the disposal of certain subsidiary companies owning gas and power businesses. Were these expenses disallowed direct costs of the disposal or part of the general management of the group's strategic investments making them allowable?

Centrica Overseas Holdings Limited had a Dutch subsidiary, Oxxio BV that in turn owned four different subsidiaries. In 2009 Centrica decided to sell Oxxio BV and its subsidiaries, incurring £3.8 million of fees between 2009 to 2011. The money was spent on financial advice, finding a buyer, vendor due diligence and advice on Dutch law relating to a complex restructuring that resulted in the sale of the assets of some of the subsidiaries via a partial de-merger. This sum was recharged to Centrica Overseas Holdings Limited, who claimed £2.5 million as deductible management expenses.

On 19 December 2016, HMRC issued a closure notice amending Centrica Overseas Holdings Limited 's company tax return on the basis that none of the disputed expenditure was allowable..

The company appealed on 11 May 2017.

Decision

The First Tier Tribunal found that the expenditure did not qualify as management expenses for activities carried out by Centrica Overseas Holdings Limited. It was Centrica Overseas Holdings Limited's parent that had made all of the decisions. There was no evidence to show that Centrica Overseas Holdings Limited's directors had taken any key decisions.

The appeal was dismissed.

Centrica Overseas Holdings Limited v HMRC (TC07683)

Share buy back **(Lecture B1206 – 20.20 minutes)**

Summary – The £1.95 million received by the taxpayer as a result of the share buy back was a distribution subject to income tax.

Computer Aided Design Limited was an employment bureau for consultants. Bostan Khan had prepared the management accounts of the company since the mid-1990s and the company rented space in his offices.

The company's three shareholders no longer wished to work together and so in 2013 they approached Bostan Khan to see if he was interested in buying the company with a view to winding it up. To avoid a pre-sale dividend and the resultant tax on this distribution, the original shareholders sold the company complete with significant reserves to Bostan Khan for £1.95 million. Their aim was to achieve a capital gain and claim entrepreneurs' relief.

On the same day Computer Aided Design Limited immediately bought back 98 of the 99 shares for consideration of £1.95m leaving Mr Khan with one share in the Company.

HMRC argued that the buy back should be treated as a distribution of £1.95 million, with Bostan Khan being liable to income tax. If correct, the original shareholders had avoided the pre-sale dividend distribution, with Bostan Khan effectively paying their tax!

The First Tier Tribunal agreed with HMRC and Bostan Khan appealed to the Upper Tribunal. He argued that the First Tier Tribunal had erred in failing to recognise the true substance of the share sale agreement and should not be taxed separately. This was a composite transaction whereby Bostan Khan received the remaining share in the Company without £1.95m of distributable reserves. His liability to tax should have been on his net receipt of the single share.

Decision

The Upper Tribunal decided that the First Tier Tribunal had erred in law because it had failed to consider the purpose of the relevant legislation.

The tribunal went on to conclude that the share sale and subsequent purchase were separate agreements, advised on separately. It was not relevant that the transactions were linked, nor that it was pretty certain that both transactions would take place.

Considering the share buy back, the Upper Tribunal stated that the purpose of s385 ITTOIA 2005 was to tax the recipient of the distribution or the person entitled to that distribution. Only the shareowner, Bostan Khan, could receive this distribution and so HMRC were correct to tax Bostan Khan on that distribution. The appeal was dismissed.

Bostan Khan [2020] UKUT 0168 (TCC)

Instalment payment repayment

HMRC has updated its guidance *Pay corporation tax if you're a large company* to note that, in exceptional circumstances, a repayment claim for instalment payments can be made where the company's revised calculation of liability includes anticipated significant losses from a current accounting period that has not yet ended.

HMRC will require supporting evidence to verify the losses and support the claim for repayment. HMRC has also updated its Company Taxation Manual (CTM92650) accordingly.

Tax Journal (26 June 2020)

Apple - EU court quashes European Commission's state aid ruling

Summary -The General Court of the European Union annulled the decision of the European Commission that Ireland had granted Apple €13bn in unlawful tax advantages.

Two members of the Apple group were incorporated in Ireland but not tax-resident there. In 1991 and 2007, the Irish tax authorities entered into advance tax rulings with the two companies which determined the basis on which the company's Irish branches were to be taxed in future years, according to formulae based in part on their operating costs. In a decision published in 2016, the Commission held that the tax rulings gave rise to a reduction in the tax charges that the companies would normally have been required to bear and so had to be regarded as granting the companies, and the Apple group as a whole, operating

aid. That aid was incompatible with the internal market and constituted unlawful state aid. As a result, Ireland was required to recover the aid from the companies. Ireland and the companies sought annulment of this decision from the court.

Decision

The Commission's main line of reasoning was that profits deriving from the use of intellectual property licences held by the two companies for the manufacture, sale and distribution of Apple products outside North and South America should, on an arm's length basis, have been allocated to the Irish branches rather than to the companies' head offices because the head offices had no physical presence or employees. The court held that this line of reasoning was based on erroneous assessments of normal taxation under Irish law. In particular, the Commission had not attempted to show that income deriving from the licenses was representative of the value of the activities actually carried out by the branches themselves. It had simply identified the functions performed by the company as a whole and presumed that they had been performed by the branches when they could not be allocated to the head offices.

The Commission also concluded, even if it was wrong on the main line of reasoning, that the rulings departed from a reliable approximation of a market-based outcome in line with the arm's length principle as a result of inappropriate methodological choices. Those choices conferred a selective economic advantage on the companies. The court held that, although the rulings were incomplete and occasionally inconsistent, the Commission had not succeeded in demonstrating that the methodological errors to which it had referred had resulted in a reduction in the chargeable profits of the companies in Ireland.

Commentary

This is the landmark case about whether the agreement between the Irish government and various companies in the Apple Group constituted illegal state aid. In a complex judgment, the General Court annulled the earlier decision of the Commission. Had the decision gone the other way the Irish government would have been in for a tax windfall, but it supported Apple's position, presumably because it wanted to ensure that the Irish tax system remained attractive for international businesses.

Commenting on the judgment, Mike Lane and Isobel Taylor (partners at Slaughter and May), said:

> 'Time and again the General Court brought the Commission back to the fact that to show unlawful state aid it had to demonstrate that [the profits in question] should have been subject to Irish tax, because they derived from assets and activities of their Irish branches, which were not so taxed because of the rulings.'

Alfonso Lamadrid de Pablo, competition partner at Garrigues, observed: 'This ruling, like those in Fiat and Starbucks, confirms that it is possible for the Commission to target tax rulings under state aid rules. All three cases bypassed the thorny issue of selectivity and focused the debate on the existence of an advantage. All three cases recognise that the Commission is entitled to rely on the arm's length principle and on the OECD's work to determine the existence of an advantage by reference to ordinary taxation. The three judgments send a consistent message that the Commission's policy is not wrong as a matter of principle, but that the devil lies in the details, and that it is for the Commission to assess those details.'

Ireland v European Commission (Apple Sales International) (Cases T-778/16 and T-892/16)

Adapted from case summary in Tax Journal 23 July 2020

VAT

Ultrasound scans for pregnant women (Lecture B1206 – 20.20 minutes)

Summary – The supply of each of the various ultrasound packages was an exempt supply of medical care.

Window To The Womb (Franchise) Limited operated a franchise model for businesses that supply various packages of ultrasound scans for pregnant women. D I Harries Limited and DJC Studios Limited are franchisees. There are nine other franchisees making the same or similar supplies and their appeals are stayed pending the result of this appeal.

While the appellants believed that they were supplying medical care in the form of diagnostic scanning, HMRC argued that they were supplying a "bonding experience" or a "reassurance scan" for pregnant women based on viewing the foetus and being provided with images.

Both parties agreed that the:

- supplies were not intended to replace NHS services (12 and 20 week scans);
- radiographers who carried out the scans were persons registered under the Health Professions Order 2001.

The principal issue was whether the services provided consisted of the provision of medical care making them exempt under Group 7 Schedule 9 VATA 1994. Both parties agreed that the ultrasound scans offered were not clinically justified, in the sense that there was no clinical reason for pregnant women to have the scans. But did this prevent the supplies from being VAT exempt?

Decision

The First Tier Tribunal confirmed that they needed to decide what was the principal purpose of the supply. If a typical customer bought a scan package for the diagnosis, monitoring, treatment or prevention of illness, it was an exempt supply.

The Tribunal acknowledged that scans do provide a bonding experience but they also provide reassurance to customers that may reduce anxiety. However, simply providing reassurance was not sufficient to characterise the supply as a supply of medical care.

The Tribunal considered each of the scan packages in turn, concluding that each was indeed an exempt supply. So for example:

- "Reassurance scans" provided reassurance but also provided an obstetrics report including information about a known pregnancy, with the woman choosing to monitor her own medical condition. The fact that such scans were available through the NHS did not affect that conclusion;

- "Well-being scans" resulted in a Well-being report confirming a single or multiple pregnancy and a heartbeat; it detected certain abnormalities, provided a growth check and confirmed the position of the baby and the placenta. This was all information that diagnosed or monitored a medical condition in the woman or the foetus;

- "Well-being + gender scans" resulted a 'well-being report' and it was unlikely that this scan would be purchased with the sole purpose of confirming the gender of the baby when this information is likely to be provided at the 20-week scan offered by the NHS. The principal purpose was the report and so this scan is an exempt supply of medical care

- The appeal was allowed.

Window To The Womb (Franchise) Limited, D I Harries Limited, DJC Studios Limited v HMRC (TC07687)

Time limit for DIY housebuilders scheme (Lecture B1206 – 20.20 minutes)

Summary – The taxpayers has submitted their refund claim within the relevant three months as stated in HMRC guidance notes.

John and Monica McGarry reside at 36A Ballynagarve Road, Magherafelt, the property that was the subject matter of the refund claim received by HMRC on 2 February 2018. HMRC refused the application stating that most of the invoices were dated between 2013 and 2014 and their records confirmed that the couple had been occupying the property from April 2014.

On the refund application form the couple stated that they occupied the property from 1 February 2017 and prior to that they had purchased a mobile home and placed it on the site to live in. There was a delay in obtaining the completion certificate as Building Control required particular works to be carried out before they would provide it. This was finally issued and was dated 3 November 2017.

So this issue in this case was when does the time limit for making a claim for repayment of VAT under the DIY housebuilders scheme need to be made by?

- John and Monica McGarry relied on the guidance notes on HMRC's claim form, which stated that the time limit was 3 months after the issue of completion certificate by a local government official. In this case they used the Building Regulation Completion Certificate;

- HMRC argued that that was only one of the tests and that where the building had been occupied at an earlier date that was the date from which the 3 months period commenced.

Decision

The Tribunal agreed with the McGarrys stating that they had relied on the local council's Completion Certificate and the fact that paragraph 14 states that the three months will usually run from the date of the document you are using as your completion evidence.

The appeal was allowed and McGarrys were instructed to resubmit the original invoices to enable HMRC to consider the correctness of the other elements of the claim.

John Mcgarry and Monica Mcgarry v HMRC (TC07659)

Input tax claim disallowed

Summary – Input tax claims where a property had been opted to tax was denied as the taxpayers were not letting the property as the occupants had no an obligation to pay rent.

In 2008 Colin And Susan Slaymark bought an industrial unit/warehouse in Eastbourne, which they opted to tax.

During ownership, the property was occupied by four companies: Fender Limited Adkat Distributions Limited, Hotel Leisure Limited and South East Refurbs Limited. None of these companies paid any rent.

Some seven years later, the property was sold for £1.5 million plus VAT of £300,000. Colin and Susan Slaymark's final VAT return included the £300,000 of output VAT less input tax of £68,541.

HMRC disallowed most of the input tax, allowing only the amount relating to the solicitors and estate agents fees on the sale of the property.

The couple appealed.

Decision

The First Tier Tribunal considered whether the corporate tenants were required to pay rent, and, if not, whether Colin and Susan Slaymark expected the them to pay rent. The Tribunal found that there was no obligation for any of the four companies to pay rent, nor did the couple expect that rent would be paid. They were not carrying on the economic activity of letting the property.

As for the expenses, the Tribunal agreed with HMRC. The fees relating to the property sale were allowed (legal and estate agent fees). However, the majority of fees were disallowed as some of the expenses were unrelated to the property, while other expenses could not be proved.

The First Tier Tribunal dismissed the appeal.

Colin And Susan Slaymark v HMRC (TC07709)

MTIC fraud revisited

Summary – Following several errors in law by the First Tier Tribunal, this case concerning missing trader intra-community fraud was remitted back for a rehearing by a differently constituted First Tier Tribunal.

Beigebell Ltd carried on a business that included the supply of promotional merchandise, such as stickers, bags, T shirts, note books and mouse mats to companies. It made six purchases of memory cards from Online Distribution Limited and sold them in five transactions to Hi View Trading SL, a company incorporated in Spain.

HMRC disallowed the company's claim for input tax arguing that the purchase of the memory cards was connected with fraudulent evasion of VAT and that Beigebell Ltd either knew, or should have known, of that connection.

The First Tier Tribunal allowed the appeal, holding that the director did not know and should not have known that the transactions were connected with fraud. HMRC appealed.

HMRC appealed to the Upper Tribunal.

Decision

The Upper Tribunal agreed with HMRC's first ground of appeal — that the First-tier Tribunal's reasoning was inadequate. No one reading the decision would realise that HMRC's case was that aspects of the transactions gave rise to an inference that the taxpayer must have known the transactions were connected with VAT evasion. The First Tier Tribunal had given no reasons for rejecting HMRC's entire case.

The Upper Tribunal agreed with HMRC, saying the First Tier Tribunal appeared to consider that, because the director was 'a reasonable person', it followed that his beliefs that the transactions were also reasonable because of the channel model which prevented distributers selling directly to end users. The First Tier Tribunal appeared to have taken a subjective, rather than an objective, view.

Finally, HMRC said the First-tier Tribunal had made a factual error in concluding HMRC was not challenging the existence of the 'channel model'. The director had failed to explain what this model was, so HMRC could not be required to prove that it did not exist. Had it realised HMRC did not accept the channel model 'even existed [it] might well have reached a different conclusion on whether the explanation based on the channel model was reasonable'.

HMRC's appeal was allowed and the case was remitted back to a differently constituted First Tier Tribunal.

HMRC v Beigebell Ltd [2020] UKUT 0176 (TCC)

Adapted form the case summary in Taxation (25 June 2020)

Temporary 5% VAT rate (Lecture B1209 – 16.52 minutes)

Chancellor statement

The VAT reduction from 20% to 5% was announced by the Chancellor on 8 July and will cost the Exchequer an estimated £4 billion. It relates to the period between 15 July 2020 and 12 January 2021. It is intended to promote business for the tourist and hospitality industry – hotels, B&Bs, restaurants, cafes, take away fast food outlets, pubs and wine bars, caravan parks, tourist attractions that charge an admission fee, such as museums, galleries, cinemas, theatres, zoos etc.

Three categories

The best way of looking at the changes is to divide them into three different categories:

1. Food and drink sales: pubs, cafes, restaurants, members clubs, fast food take-aways;

2. Overnight accommodation: hotels and similar establishments, caravan parks, camp sites, holiday accommodation/cottages;

3. Admission fees to tourist attractions: the Chancellor's initial speech referred to "cinemas, theme parks and zoos" but the 5% rate is much wider than this.

Note – the changes have been legislated by The Value Added Tax (Reduced Rate) (Hospitality and Tourism) (Coronavirus) Order SI2020/728, which introduces new Groups 14 to 16 in Sch 7A, VATA1994 i.e. the reduced rated schedule.

Forget alcohol

The 15% VAT saving will not apply to sales of any alcoholic drinks, hot or cold. So, alcohol sales before and after 15 July are all subject to 20% VAT. This will disappoint many pub owners who mainly sell alcoholic drinks and not much food and soft drinks e.g. many real ale establishments.

The main changes are as follows:

- All on premises sales of food and drink will benefit from the 5% rate, apart from alcoholic drinks;

- Hot take away sales of food and hot take away sales of drink will also benefit from the reduced rate, unless the hot drinks contain alcohol e.g. mulled wine.

The VAT rate for take away sales of cold food and drink is unchanged.

Three rates of VAT

The end result is that many outlets must deal with three rates of VAT for the first time. See Examples 1 and 2.

The best way of dealing with the rate reduction is to look at the categories that are affected, and ignore everything else. For example, take away sales of cold rolls and sandwiches have always been zero-rated and the status quo applies here because the rate reduction does not apply to cold take-away food.

Example 1 – food and drink - on premises sales

John visits his local restaurant and enjoys the following food and drink: a pint of beer and packet of crisps; cheese roll; fish and chips; a cup of coffee. All sales will be subject to 5% VAT, apart from the beer which is specifically excluded as an alcoholic drink.

Example 2 - food and drink – take away sales

John visits his local take-away café and orders the following: a bottle of beer and packet of crisps; cheese roll; fish and chips; a cup of coffee. The beer will be subject to 20% VAT because it is alcoholic; the cheese roll will be zero-rated as cold take-away food, as has always been the case. The crisps will be subject to 20% VAT because they are not 'hot food'; however, the fish and chips and coffee will benefit from the 5% VAT rate because they are 'hot food and drink' (and not alcoholic).

Accounting changes

There is no doubt that VAT accounting issues will be easier for a business with a sophisticated till system, compared to those which require the cashier to enter, say, button 1 for standard rated sales and button 2 for zero-rated sales each time a supply is made. These tills will need a new button 3 to deal with the 5% rate. It should be straightforward to reset most till systems:

All on premises sales are reduced from 20% to 5% VAT apart from alcoholic drinks which remain at 20%;

Hot food and hot drink take-away sales are reduced from 20% to 5% VAT apart from alcoholic hot drinks such as mulled wine. All other sales are unchanged.

Overnight accommodation

The VAT reduction for overnight accommodation is more straightforward. It applies to hotels, B&Bs, similar establishments, holiday accommodation, camp sites and caravan parks.

An important issue concerns advance payments made by customers before the reduced rate took effect but where the stays are in a period when 5% VAT applies. There is good news and the issue is covered in HMRC's guidance:

> https://www.gov.uk/guidance/vat-reduced-rate-for-hospitality-holiday-accommodation-and-attractions

Here is how it works:

The 'actual tax point' for VAT purposes is usually the invoice or payment date, whichever happens first; in this situation it is the advance payment date.

The 'basic tax point' occurs when a supply is made to the customer - the dates of the booking.

When a VAT rate reduces, the supplier has the option of using the basic tax point for the entire supply, including the earlier deposit or advance invoice. It cannot be demanded by the customer.

VAT Notice 700, para 30.7.4 to 30.9.2 gives details.

Let us consider a seaside guest house that is VAT registered but never issues invoices to customers because they never request them. Prices are calculated on a VAT inclusive basis. The hotel always takes a £50 advance non-refundable deposit from customers, with the balance payable when the guest arrives. If it received a £50 deposit in January 2020, it would have accounted for output tax of £8.33 on its VAT return based on 20% VAT. If the guest stay is in August 2020 when the temporary 5% rate applies, and the guest pays the balance of money owed, let's say £400, the guest house will account for output tax of £13.10 on the VAT return that includes August i.e. £450 x 1/21 = £21.43 based on 5% VAT for the entire booking less £8.33 already paid.

Contrast this to a business that issues invoices and adds VAT to its fees. Let's say hotel owner Jim invoiced a customer and received an advanced 50% payment of £500 + £100 VAT in January for ten nights B&B and the stay will take place in August. If he wants, Jim can raise a credit note for £75 to reduce the VAT from 20% to 5% but he must refund this VAT to the customer otherwise he will be unjustly enriched. The credit note must be raised within 45 days of the VAT rate change i.e. before 28 August (VAT Notice 700, para 30.7.5). However, he could let sleeping dogs lie and just charge the 5% VAT rate on the balancing payment i.e. £500 plus £25 VAT in August. If he raises the credit note, the customer will pay £450 to settle his account rather than £525.

No anti-forestalling legislation

Another surprise was the absence of anti-forestalling legislation to prevent advance payments being made or invoices raised before 12 January but where the actual supply relates to a period after this date when we are back to 20% VAT again. I asked HMRC the reason for this decision and a spokesperson said: "The new temporary reduced rate of VAT for tourism and hospitality was introduced to help businesses in these sectors who have been severely impacted by Covid-19 and social distancing measures. As no anti-forestalling legislation was introduced to accompany this relief, normal tax point rules will apply. This will result in all supplies of affected services which are paid for, or take place, in the 6 months in which the relief is operation being covered by it. Allowing businesses to obtain the relief on bookings which are pre-paid during the 6 months but take place in the future will aid in the recovery of these sectors which should also support employment as lock down restrictions are lifted."

Tourist attractions

The list of attractions where the admission fee qualifies for the reduced rate is bigger than perhaps expected – see Tourist attractions that will benefit from the VAT cut.

There is a sentence in the HMRC guidance which I think is very important: "It is the responsibility of each taxpayer to demonstrate that its supplies are eligible for the temporary reduced rate."

Tourist attractions will benefit from the VAT cut. Admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions, similar cultural events and facilities.

Note – admission to some facilities is already exempt from VAT under the cultural exemption, mainly relevant to public bodies and not-for-profit organisations. The exemption takes priority over the 5% rate. VATA1994, Sch 9, Group 13.

Example

An admission fee to botanical gardens would be subject to 5% VAT as a cultural facility.

Example – what about piers?

I recently visited a seaside and paid a £1 entry fee to go on the pier. Will my £1 fee benefit from the VAT rate cut as a 'tourist attraction'? The answer I feel is 'yes.' Our piers were mainly built in Victorian times and are a 'must see' venue for many visitors. And the pier's website describes it as a "major tourist attraction that guarantees a fun-filled day for all the family." In my view, I have justified the 5% rate as a venue offering 'similar cultural events and facilities'.

Mixed supplies

This topic will be relevant for some supplies affected by the temporary VAT reduction.

Here are the three key principles to consider when a customer buys a bundle of goods or services that are subject to different rates of VAT:

1. Is there one main supply and the other supplies are incidental – i.e. the incidental supplies are a way of enhancing the enjoyment of the main supply rather than being an aim in their own right. If so, VAT is charged according to the rate for the main supply;

2. Consider the viewpoint of a typical customer: what does he or she expect to receive when they part with their hard-earned cash;

3. If there is a mixed supply, output tax can be apportioned in any fair and reasonable way. There is no specific method prescribed in law.

Example - spirit drink and mixer

Think of a pub selling a gin and tonic: is this a single supply of an alcoholic drink, subject to 20% VAT, or a mixed supply that also includes a 5% non-alcoholic drink? My thinking is as follows:

If a 'splash' of tonic is added to the gin by the barperson, this is a way of improving the taste of the drink and is therefore a single supply of an alcoholic drink, even if a bit more money is charged for the 'splash.'

If a customer buys the gin and also a separate mixer bottle of tonic, this is a mixed supply of two different products. The customer usually adds the tonic when he returns to his seat, observing social distancing of course.

If the mixed supply outcome in the second situation was not correct, a customer could simply order the two drinks separately, which is a waste of time.

Reduce prices or increase profits?

The dilemma for any business will be whether to pass on the VAT rate cut to customers or keep prices the same and therefore increase profits. The reality is that this is an opportunity to support businesses who have suffered increased costs and lost income because of the coronavirus crisis. It will be very time consuming to alter prices and menus to reduce a cup of coffee from, say, £3.60 to £3.15 to reflect the VAT cut.

Flat rate scheme

Finally, for SMEs who use the flat rate scheme, the percentages have been reduced for those sectors where the rate cuts are relevant. The changes are as follows:

- Catering services including restaurants and takeaways 12.5% to 4.5%;
- Hotel or accommodation 10.5% to 0%;
- Pubs 6.5% to 1%.

There will be winners and losers with the new rates, the winners being those businesses with less sales subject to 5% VAT. Withdrawal from the scheme might be the best option for some users but once you leave, you cannot join again for 12 months. You must also notify HMRC in writing of your decision to leave. The new rates might make it worthwhile for some businesses to join for just the six-month period covered by the reduced rate and then leave again. To quote the old saying: “It’s all about the numbers.”

HMRC VAT Notice 733, section 12 gives details about leaving the scheme.

Contributed by Neil Warren

Covid 19 - Where are we now? (Lecture B1210 – 16.41 minutes)

Background

There have been a number of important VAT changes announced by HMRC and the government in recent months. These changes have not been as extensive as for other taxes but are still very important for many businesses. This session reviews some of the changes and addresses areas of uncertainty.

E-publications – zero-rating brought forward by seven months

The March budget announced that e-publications would be zero-rated from 1 December 2020, deliberately timed to coincide with the Christmas buying period. The change in law means that they will be taxed at the same rate as printed publications. But the financial pressures on publishers caused by the Covid-19 crisis encouraged the Chancellor to bring forward the start date by seven months to 1 May. This was very welcome to both publishers and customers. The zero-rating applies to e-sales of books, booklets, newspapers, brochures, pamphlets, leaflets, journals and periodicals (which include magazines), children’s picture and painting books.

HMRC's initial guidance on the new zero-rating rules, dated 30 April 2020, included the following sentence: "The extension only applies to the supply of electronic versions of books already zero-rated in UK law". The word 'version' invites the question: Does zero-rating therefore only apply to, say, a kindle book, if there is an equivalent print version available to purchase as well? This seemed an unnecessary and worrying complication but it was consistent with the decision in the Upper Tribunal case of News Corp Ltd [2019] UKUT 0404, which zero-rated fees for online newspapers that had the same content as the printed versions.

The Statutory Instrument that became law on 1 May did not mention the word 'version' which was reassuring. SI2020/459. The SI amended the zero-rating schedule for printed matter by adding the list of e-publication products to Group 3, Sch 8, VATA1994. But the Treasury press office has provided important clarification with the following reply:

"The guidelines quoted refer to the nature of the e-book, not the specific book in question. The extension of the zero rate applies to kindle books irrespective of whether that specific book is published in a physical format, as long as they fulfil the criteria outlines in HMRC's guidance e.g. they are not supplies of intellectual property and not more than half of the e-publication is devoted to advertising, audio or video content."

Temporary VAT reduction for supply of personal protection equipment (PPE)

Supplies of PPE will be temporarily zero-rated between 1 May and 31 October 2020. VAT collected from sales in earlier months have been donated by the government to charity.

In some cases, customers (e.g. care homes) might have paid for PPE in April and received the goods after 1 May. The advance payment creates an 'actual tax point' – when VAT is due according to invoice or payment date, whichever happens first. The goods were still standard rated in April 2020 VAT Notice 700, para 14.2.2.

However, a supplier can opt to choose the 'basic tax point' as relevant for VAT purposes in accordance with VAT Notice 700, section 30. The basic tax point depends on when the goods are supplied to the customer i.e. May rather than April in this situation. So, zero-rating is again available when the goods are supplied - see VAT Notice 700, para 30.7.4. However, any VAT credit note raised to adjust an earlier VAT charge must have been raised within 45 days of 1 May as per para 30.7.5 of the VAT Notice 700.

Care is needed for PPE suppliers that use the cash accounting scheme. Assuming the special provisions considered above are not utilised, standard rated invoices raised before 1 May will not be included on a VAT return until they are paid, which is likely to be May or later in some cases. Output tax is obviously payable on these sales, whereas other receipts in May might be zero-rated. Extra care is needed to make sure that the cash accounting scheme calculations are correct.

Construction industry reverse charge delayed by five months

In contrast to the publishing trade, the construction industry welcomed a delay being put backwards rather than forwards as a result of Covid-19. The new reverse charge rules for most supplies between VAT registered builders will take effect on 1 March 2021 rather than 1 October 2020. This is the second time delay, the first being from 1 October 2019 to 1 October 2020 due to the impact of Brexit and also because the construction industry was

not properly prepared for the changes. The latest five-month delay is welcome but there are two issues that it is worth thinking about now rather than later:

Cash flow – VAT deferred in the holiday payment window of 20 March to 30 June 2020 must be paid by 31 March 2021. The problem here is that the new reverse charge rules effective from 1 March will take away important working capital from many builders at a time when they need it most, i.e. near the 31 March payment date. See Subcontractor Steve – impact of reverse charge. The double cash flow hit is a ticking time bomb that needs to be considered sooner rather than later. Perhaps an overdraft extension will be needed, or clients should be encouraged to pay the holiday window VAT ahead of schedule, i.e. to ease the blow so to speak.

Training time – a lesson that building companies learned in 2009 is that preparing for the new rules requires time and effort from many different parties involved in the business e.g. to amend accounting systems and be clear about which transactions are covered by the new rules. What is the best date to start getting ready for 1 March 2021? The reply of 'now' is unrealistic because there are bigger issues to worry about. Early January gives a two-month lead time but is the month when accountants and business owners are focusing on self-assessment tax returns. The beginning of February will be too late so, in reality, the best date is probably 1 December 2020. Consider making a note in your diary now and stick to an action plan!

Subcontractor Steve – impact of reverse charge

Steve is a plumber and invoices the contractors he works for about £40,000 plus VAT at the end of each month on average. He is paid on the 10th day of the following month and uses the cash accounting scheme for his VAT returns. So, for example, the £8,000 VAT he is paid on his December 2020 invoice on 10 January 2021 will not be paid to HMRC until 7 May 2021, i.e. the due payment date for his March 2021 return. This is a useful source of working capital. But his March 2021 and later invoices will be for £40,000 and no VAT because his customer will deal with the VAT instead with the reverse charge calculation. Steve will lose working capital of £8,000 from 10 April 2021 to 7 August 2021.

Online fundraising events

Can an online fundraising still qualify for VAT exemption on the proceeds in the same way as a live event? To summarise the legislation, income from a fundraising event organised by a charity and most not-for-profit organisations is exempt from VAT as long as it is promoted as a fundraiser and there are less than 15 events of the same type of event and in the same location held during its financial year. The aim of the event must be to make a surplus.

Example – a live event was cancelled by Covid 19 but will instead take place online. There will be a 20-minute talk given by a celebrity followed by an auction of various items that would have been sold at the live event.

The good news is that HMRC recognises the scope for VAT exemption here – see VCHAR9300 in its VAT and Charity Manual. The key requirement for it to be classed as a 'single event' is that there must be a specific closing date for the auction bidding and no sales are made before this date. The charity's website address is classed as the 'location.'

Option to tax notifications - extension to 90 days

HMRC has announced a temporary extension from 30 to 90 days for notifying it about an option to tax election. How will this work in practice?

Two stages. If a person or business decides to opt to tax a property in which they have an interest, there are two stages in the process:

1. they decide to do it;

2. they tell HMRC about the decision.

There has always been a 30-day window after the decision stage to tell HMRC's Option to Tax Unit in Glasgow about it. But due to the Covid-19 crisis, and the problems with employees being furloughed plus social distancing rules, HMRC has temporarily extended that period to 90-days. It applies to decisions taken between 15 February and 30 June 2020. So, if a business decided to opt to tax a property on 31 May, it has until 29 August to notify HMRC rather than 30 June.

You can email notifications to optiontotaxnationalunit@hmrc.gov.uk

Electronic signatures

An option to tax form can be submitted to HMRC with an electronic signature but HMRC will need evidence that the signature is from a person authorised to make the option on behalf of the business, i.e. a business owner or director etc. Examples of supplementary evidence include emailing the form:

- with an email from the authorised signatory to the sender within the business, giving authority to use the electronic signature;

- from the authorised signatory with their sign off in the email and the form;

- with an email chain or scan or correspondence showing the authority given by an authorised signatory.

Contributed by Neil Warren