Tolley®CPD

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Personal tax

Coronavirus Job Retention Scheme (Lecture P1228 – 12.17 minutes)

The government has confirmed that the:

- CJRS will be extended until 31 March 2021;
- Job Retention Bonus will be cancelled;
- Job Support Scheme is being postponed.

The extended scheme sees us return to the rules as they were in August 2020 with both full-time and flexible furloughing allowed. As for earlier CJRS grants, all employment rights continue during furlough, and employees can train, volunteer, or work for another employer whilst furloughed.

For hours not worked, employees will receive 80% of their current salary up to a maximum of £2,500 per month, with employers only having to pay Class 1 secondary National Insurance contributions and pensions contributions. As before, employers may choose to top up the employee's wages if they wish but are under no obligation to do so.

The government will review the scheme in January 2021 and decide if employers should contribute more for February and March 2021.

The scheme will be available to employees on any type of contract including full-time, part-time, agency, flexible or zero hour contracts. Foreign nationals are also eligible to be furloughed.

To be eligible for the extended scheme:

- employees do not need to have been furloughed under the CJRS scheme before but must have been on their employer's payroll on 30th October 2020;
- employers do not need to have used the CJRS previously, but must have made a PAYE RTI submission between 20th March 2020 and 30th October 2020 notifying a payment of earnings;
- employers can claim, whether their businesses are open or closed, for any number of employees.

Directors

As before, salaried directors can be furloughed provided they meet the eligibility criteria, but the grant will only cover regular pay and it will not include dividends. Remember, once furloughed, these directors can only carry out statutory duties such a filing the financial statements.

Company directors with an annual pay period are eligible for the scheme from November provided that the company has made an RTI submission between 20 March 2020 and 30 October 2020 notifying HMRC of a payment of earnings for that director.

Employees who have been made redundant

If employees were made redundant after 23 September 2020, employers can choose to re-employ them but are under no obligation to do so. Provided the employee was employed on 23 September 2020 and the employer made a PAYE RTI submission to HMRC between 20 March 2020 and 23 September 2020, notifying a payment of earnings for that employee, they can then be furloughed. This includes fixed term contract employees whose contract expired after 23 September.

For claim periods relating to November, the government has confirmed that employers can continue to claim the grant for a furloughed employee serving a statutory notice period, but the grant cannot be used to substitute redundancy payments. This changes from 1 December 2020 when employers can no longer claim the grant for any days for which the furloughed employee was serving a contractual or statutory notice period. This includes employees serving notice of retirement or resignation. Where an employee subsequently starts a contractual or statutory notice period on a day covered by a previously submitted claim, this will need to be repaid.

If you make an employee redundant, you should base statutory redundancy and statutory notice pay on their normal wage rather than the reduced furlough wage.

Usual hours and pay

As before, to be able to calculate the grant employers will need to confirm the correct wages to use as well as employees' usual and furloughed hours. To do so, it is important to look at the correct reference period.

For many fixed hours employees, this will be the last pay period ending on or before 19 March 2020. However, where employees were employed on or after 20 March 2020, the reference period is the last pay period ending on or before 30 October 2020.

For variable pay employees who were on an employer's payroll on 19 March 2020, the 80% calculation will be based on the higher of the employee's:

- wages earned in the corresponding calendar period in 2019/20;
- average wages payable in 2019/2020.

The same calculation applies for any CJRS claims up to 31 October 2020.

For variable pay or hours employees employed for the first time from 20 March 2020, the 80% calculation is based on the average pay between the later of the start of employment or 6 April 2020, and the day before they are furloughed on or after 1 November 2020.

Claim deadlines

Claims from 1 November 2020 must be submitted by 14 calendar days after the month of claim or the next working day if this time falls on the weekend.

Month of claim	Claim by
November 2020	14 December 2020
December 2020	14 January 2021
January 2021	15 February 2021
February 2021	15 March 2021
March 2021	14 April 2021

https://www.gov.uk/government/collections/coronavirus-job-retention-scheme

Coronavirus support payment penalties (Lecture P1228 – 12.17 minutes)

As reported previously, FA2020 contained provisions to enable HMRC to levy penalties on those who have incorrectly claimed under the Job Retention Scheme, the Self Employed Income Support Scheme and the Eat Out to Help Out scheme. At the time the legislation was published, there was little guidance on how HMRC would apply the provisions. However, they have now issued a new helpsheet, CC/FS11a about the penalties.

The amounts have to be repaid where a recipient was not being entitled to the amount they receive. Not being entitled includes:

- Never being entitled
- Ceasing to be entitled because of change of circumstances or
- Not paying the costs that the scheme was supported to reimburse

It has become clear in recent weeks, that HMRC are going to seek repayment in all cases where there has been an overpayment even if this is not deliberate.

This is causing some concern amongst accountants who made their best attempts at calculating furlough claims when it was not always clear exactly what the guidance meant. It is less likely to be an issue with SEISS since HMRC calculated the amount due so there was no scope for an amount to be inadvertently claimed.

Then we have to consider the penalty regime.

Penalties are 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

Royal Assent was on 21 July 2020 so the initial deadline for notification was 20 October 2020, which has clearly passed.

If chargeability is not notified, then the consequent penalties become due and payable.

The legislation refers to the fact that if a person knew at the point at which the income tax became chargeable that they were not entitled to the amount of the payment, then the offence will be deliberate and concealed. The penalty for a deliberate and concealed offence is 100% of the potential lost revenue being the amount overclaimed.

It was thought by some, the author included, that this meant that HMRC were only going to pursue penalties where this applied ie where there was a deliberate intention to fraudulently claim payments. However, the helpsheet now published makes it clear that any failure to tell HMRC that there is an overpayment of grants will be potentially penalised.

Under the heading 'what is failure to notify' the guidance states 'if you have received a coronavirus support payment that you are not entitled to, you must tell us about this by the end of the notification period. If you do not do this, we call this a failure to notify'. So even if you have innocently received an amount rather than deliberately claiming, you could be penalised.

It is made clear that they will not charge a penalty if all of the following apply:

- There is a reasonable excuse for the failure to notify
- The failure to notify was not deliberate
- You notified without unreasonable delay after the reasonable excuse ended.

The guidance then goes on to explain that a reasonable excuse is 'something that stopped you from meeting a tax obligation on time even though you took reasonable care to make sure that you did so.

So what would constitute a reasonable excuse? This has been considered in the Courts but there are no definitive rules as to what might or might not be a reasonable excuse. It is clear that it depends on a review of all the facts and circumstances with regard to the experience and capacity of the taxpayer. Whilst it is acknowledged that mistakes can be sheltered, it is only if there was a reasonable excuse for making that mistake. Equally, a honest and genuine belief that something is correct is not, in itself, sufficient to demonstrate that you have a reasonable excuse.

At this stage, it is unclear as to what circumstances HMRC are going to take into account and, in particular, whether they will accept that the confusion around the calculation of some of these amounts in the initial phases of the pandemic are sufficient to demonstrate a reasonable excuse.

The penalty if it is going to be applicable will depend on the nature of the behaviour, when the disclosure is made and whether that disclosure is prompted or unprompted.

Behaviour	Unprompted or prompted	Penalty range
Non-deliberate	Unprompted within 12 months of tax being due	0 – 30%
	Unprompted – 12 months or more after tax was due	10 – 30%
	Prompted within 12 months of tax being due	10 – 30%
	Prompted – 12 months or more after tax was due	20 – 30%
Deliberate	Unprompted	20 – 70%
	Prompted	35 – 70%
Deliberate and concealed or treated as deliberate and concealed	Unprompted	30 – 100%
	Prompted	50 – 100%

The actual penalty within those ranges will depend on the quality of disclosure being:

- 30% for telling
- 40% for helping
- 40% for giving access to records.

Contributed by Ros Martin

Virtual party time **(P1226 – 22.13 minutes)**

The ICAEW has reported that HMRC has confirmed that the annual £150 per employee party exemption can apply to virtual events.

HMRC has confirmed that their guidance will shortly be updated to reflect this but according to the ICAEW has stated:

> "Therefore, the cost of providing food, entertainment, equipment and other expenses which may be incurred in hosting a virtual event, will be exempt, subject to the normal conditions of the exemption being met.
>
> "It is important to note that the intention of the exemption is to allow for costs of provision which are generally incurred for the purposes of the event itself, and that the event, along with any associated provision, is available to employees generally. ”

https://www.icaew.com/insights/tax-news/2020/nov-2020/hmrc-clarifies-treatment-of-virtual-christmas-parties?utm_campaign=Members%20-
%20ICAEW&utm_medium=email&utm_source=1618817_Faculties_TAXnewswire_25Nov20_PO&utm_content=HMRC%20clarifies%20treatment%20of%20virtual%20Christmas%20parties&dm_i=47WY,YP35,6FC2II,4BSMY,1

Personal Liability Notice to cover unpaid NICs (P1226 – 22.13 minutes)

Summary – A company's unpaid Class 1 NICs was attributable to the neglect of the taxpayer, the officer who was fully responsible for the company's financial affairs. A Personal Liability Notice assessing the full £233,000 was correctly issued for 2010/11.

David Unwin was a director at HCL Equipment Contracts Limited, a failed company that had gone into administration in 2014. He was chairman and managing director; he alone was responsible for the strategic and financial matters of the company, authorising the payroll costs, setting up and signatory to the company bank account, managing creditor payments. Management accounts were prepared for him only. He was clearly an officer of the company throughout 2010/11.

HCL Equipment Contracts Limited's accounts for the two years to 31 December 2011 showed 55 employees, and a large tax creditor. Wages and salaries were in excess of £1,500,000 for both years. No corporation tax was due as the company had used brought forward losses.

In 2010/11, the employees had been paid net of PAYE and NIC. However, the company had made no payments of PAYE or NIC to HMRC and filed a nil employer return (Form P35). HMRC's payroll analysis for the period showed Class 1 NICs totalling £213,822, all of which was outstanding.

HMRC became aware of the unpaid NIC as a result of an investigation into Caledonian Mining Ltd. David Unwin argued that the company had transferred its employees to a related party, Caledonian Mining Ltd and that this company had subsequently provided agency staff for its projects. The administrator supplied a bank statement, which showed payments made to the related party in February and March 2011 for amounts related to PAYE and NIC. However, for each payment made, there was a contra payment back the same day, less what seemed to HMRC to be an administration charge.

David Unwin argued that the payment back related to equipment sold, but he provided no evidence to support this claim. Consequently, he argued that any NIC liability was Caledonian Mining Ltd's responsibility. He claimed that the employment details in the company's accounts were for agency staff, and that the tax creditor related to VAT, not NIC.

HMRC considered him an experienced company director, but one who had since been disqualified as a result of an insolvency service investigation into a company called Wrekin Construction Company Limited and a similar payroll set up where Unwin stated:

> I intended that there would be a default in the payment of Wrekin's liability to HMRC for PAYE/NIC in that any monies paid by Wrekin to BMS (the 3rd party company) in respect of Wrekin's PAYE/NIC liability would not be paid by BMS to HMRC as and when payment fell due, but rather the said monies … would be utilised amongst other companies of which I was a director and ultimate controlling party."

As a result of that investigation, in 2013, Unwin was disqualified from acting as a company director for 10 years.

Decision

The First Tier Tribunal concluded that David Unwin was not a reliable witness. No evidence was produced to support his claims. The Tribunal concluded that the audited accounts correctly showed a creditor of almost £700,000 in respect of unpaid PAYE and NIC.

The First Tier Tribunal found that that David Unwin was reinventing the wheel. He was simply substituting HCL Equipment Contracts Limited for Wrekin and Caledonian Mining Ltd for BMS, but in this case almost all the payment to Caledonian Mining Ltd was immediately paid straight back to HCL Equipment Contracts Limited.

Having concluded that the unpaid NIC liability properly belonged to HCL Equipment Contracts Limited, the Tribunal went on to conclude that the failure to pay that liability was attributable David Unwin's neglect. He was an experienced company director, aware of his responsibilities. A company director taking reasonable precautions would have ensured that the NIC liabilities were paid to HMRC in the correct amounts on the due dates. As the officer fully responsible for the financial affairs of HCL Equipment Contracts Limited, the Personal Liability Notice was correctly issued for the assessed amount.

The appeal was dismissed.

Mr David J Unwin v HMRC (TC07837)

No PAYE credit

Summary - Sums received under offshore partnership and trust arrangements were earnings but the Transfer of Assets Abroad provisions applied and so no PAYE credit could arise.

This case considered a complex marketed scheme intended to enable the taxpayers to receive the majority of the income generated by the provision of their services to UK clients without attracting income tax and NICs. The arrangements were notified to HMRC by Montpelier (the promoter) under "DOTAS".

Under the scheme, each taxpayer established a settlement in the Isle of Man of which they were the life tenant, entitled to the income of the Trust as it arose. The trustee of each settlement became a member of a partnership with the trustees of similar settlements. The partnership contracted with a UK company, who contracted with a recruitment agent, to allow the taxpayers to work for end clients.

The partnership then entered into a services agreement with each taxpayer under which they agreed to provide services to UK third parties in return for a modest fee payable by the partnership. As life tenant of their settlement, they also received their trustee's share of the profits of the partnership. The profit share equated to the sum that the individual expected to receive in return for the services provided to the end client less the arrangement fee that was due. The individuals declared only the contract fee as being liable to income tax, not the profit share, relying on a provision of the double tax treaty to exclude these profits.

HMRC considered that both the fees and profit shares were earnings from employment. Following Huitson v HMRC [2015] UKFTT 448 (TC) concerning the same scheme, the appellants accepted this contention but argued that they should be entitled to a PAYE credit in respect of the amounts that should have been, but were not, deducted.

As this was the responsibility of the employer, the taxpayers were still entitled to claim a PAYE credit as though the tax had been deducted. HMRC was now out of time to open a claim against the employers for failure to withhold tax.

HMRC, however, argued that the First Tier Tribunal did not have jurisdiction to deal with any failure by them to take any tax credit into account (following the UT decision in Walker v HMRC [2016] UKUT 32), but it also argued that, in any event, the partnership profit shares were taxable under the transfer of assets abroad (TOAA) provisions

Decision

The First Tier Tribunal held that, disregarding the TOAA provisions, it had jurisdiction to consider if HMRC should have taken into account the PAYE credit. The tax chargeable on the sums in dispute gave rise to a tax credit that HMRC was required to take into account.

However, the First Tier Tribunal concluded that the TOAA provisions applied to the profit shares. The taxpayers had transferred assets to the IoM trusts when entering into contract with the partnership, creating rights. The creation of rights under the services agreement constituted a transfer of assets to the partners in the partnership. The TOAA provisions took priority over the charge to tax on employment earnings and required the income of the overseas person to be treated as the income of the appellants, namely the trading income arising to the partners in the partnership. As the appellants were not therefore deemed to receive any employment earnings, no PAYE credits could arise.

John Lancashire, Timothy Lee, Mark Johnson v HMRC (TC07884)

Adapted from the case summary in Tax Journal (30 October 2020)

High Income Child Benefit Charge (P1226 – 22.13 minutes)

Summary – The taxpayer had a reasonable excuse for failing to notify his liability to the Higher Income Child Benefit Charge and the penalties were cancelled.

Andrew O'Connor, his wife and young children lived in Australia for ten years, returning to the UK in July 2015.

Shortly after their return to the UK, his wife completed a child benefit application form. The form contained information about the Higher Income Child Benefit Charge (HICBC) and the £50,000 income threshold that applied.

Andrew O'Connor did not notify HMRC that he was chargeable to income tax for the tax year in question, within six months of the end of those tax years. Nor did he receive notice to file a tax return from HMRC.

However, in October 2019, HMRC wrote to him informing him that he might be liable to the HICBC. Shortly after this, Andrew O'Connor provided information to HMRC and paid the amount owing for the tax year in question as well as the subsequent tax year; and his wife cancelled the child benefit claim.

HMRC raised a “failure to notify” penalty assessment for 2016/17 only, calculated as 10% of potential lost revenue. HMRC did not raise such a penalty for the 2017/18 tax year because they regarded his disclosure for that year as “unprompted” and made less than 12 months after the tax in question first became unpaid by reason of the failure to notify.

Andrew O’Connor appealed against the penalty, saying he had a reasonable excuse because he had been in Australia when the charge was introduced.

Decision

The First Tier Tribunal accepted Andrew O’Connor’s argument as reasonable. He did not become aware of the charge until HMRC wrote to him about it because his wife did not pass on the information.

Although his wife may not have acted as a reasonably conscientious taxpayer, he was not his wife.

The Tribunal stated that:

> “It cannot be said that because Mr O’Connor left the claiming of child benefit to his wife, and did not enquire actively with her as to what information was on the child benefit form, that he fell short of what would be expected of a reasonably conscientious taxpayer.”

Andrew O’Connor therefore had a reasonable excuse for 2016-17 and no penalty was due.

Andrew O'Connor v HMRC (TC07833)

Studying in the UK – no tax to pay (P1226 – 22.13 minutes)

Summary – A student’s appeal, against a reduced repayment claim resulting from what HMRC claim was underpaid tax from an earlier year of tax, has not been struck out and the case will be heard at a later date.

Mohammed Uddin is a Bangladeshi national who studied in the UK between 10 August 2009 and July 2014, returning to Bangladesh in October of that year. While in the UK he worked on a part-time basis, and income tax was deducted from his earnings.

Under Article 19 of the UK-Bangladesh Double Tax Convention 1980 a student in Mr Uddin’s position was not liable to UK tax on his earnings. In February 2018, solicitors acting on his behalf submitted a claim for the repayment of tax paid in 2012/13 through to 2016/17.

HMRC made a repayment for 2013/14 and 2014/15, but not for 2012/13 because that claim was outside the four-year time limit (s43 TMA1970). However, before making the repayment for 2013/14 and 2014/15, HMRC deducted an underpayment of tax, which they said had arisen in relation to his work during 2012/13.

Mohammed Uddin’s solicitors appealed against HMRC’s decision, on the basis that HMRC had no right to refuse to repay the 2012/13 tax, or to deduct tax underpayments from subsequent years, because the Double Tax Convention gave Mr Uddin an exemption from tax for five years, and this took priority over the TMA.

Two issues were raised by the appeal:

1. Was HMRC correct to refuse to repay the tax deducted from his earnings in 2012/13 on the basis that the claim was made outside the four-year time limit? and

2. Was HMRC correct to reduce the tax repayment in relation to 2013/14 and 2014/15 to recover tax Mohammed Uddin's underpaid in 2012/13?

In January 2020, HMRC applied to strike out this appeal on the basis that the Tribunal had no jurisdiction to hear a claim made outside the statutory time limits.

Decision

The First Tier Tribunal concluded that HMRC were correct that a claim for repayment had to be made within the four years and that the Tribunal had no jurisdiction to consider Mohammed Uddin's appeal to the extent that it concerned the claim to repay the tax deducted from his earnings in 2012/13.

However, the appeal was also about HMRC's reduction of the amount repaid for 2013/14 and 2014/15, by deducting what they said was a tax underpayment from 2012/13. The Tribunal does have the jurisdiction to consider this issue. The Tribunal were not clear what this underpayment of tax related to as under the Double Tax Convention Mohammed Uddin was not liable for tax in 2012/13, so there could well be a case here.

His appeal will in due course be determined by the Tribunal, but only in relation to whether HMRC were correct to reduce the repayment made for 2013/14 and 2014/15 by making an offset relating to 2012/13.

Mohammed Masbah Uddin v HMRC (TC07918)

Capital Taxes

The future of CGT (P1226 – 22.13 minutes)

In July 2020, the Chancellor asked Office of Tax Simplification (OTS) to take a look at our Capital Gains Tax system and ‘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 November, the OTS published the first part of its report, which highlights features of Capital Gains Tax that may distort behaviour or make things complex in practice. The report flags up that a number of areas that, at this stage, have not been considered: trusts, the attribution of offshore gains to UK resident individuals and an individual’s arrival or departure from the UK.

The OTS has reported on a number of areas and made recommendations, linked to the potential aims of government policy.

Alignment of rates and address boundary issues boundaries (CGT and IT)

If the simplification priority is to reduce distortions to behaviour, it should either consider:

- more closely aligning Capital Gains Tax and Income Tax rates; or
- addressing boundary issues as between Capital Gains Tax and Income Tax.

If the government considers more closely aligning Capital Gains Tax and Income Tax rates it should also consider:

- reintroducing a form of relief for inflationary gains;
- the interactions with the tax position of companies; and
- allowing a more flexible use of capital losses.

If there remains a disparity between Capital Gains Tax rates and Income Tax rates and the government wishes to make tax liabilities easier to understand and predict, it should consider reducing the number of Capital Gains Tax rates and the extent to which liabilities depend on the level of a taxpayer’s income.

If the government considers addressing Capital Gains Tax and Income Tax boundary issues, it should consider:

- whether employees and owner-managers’ rewards from personal labour (as distinct from capital investment) are treated consistently;
- taxing more of the share-based rewards arising from employment, and of the accumulated retained earnings in smaller companies, at Income Tax rates.

Reducing the annual exempt amount

If the government's policy is that the Annual Exempt Amount is intended mainly to operate as an administrative de minimis, it should consider reducing its level.

If the government does reduce the Annual Exempt Amount, it should consider:

- reforming the current chattels exemption by introducing a broader exemption for personal effects, with only specific categories of assets being taxable;
- formalising the administrative arrangements for the real time capital gains service, and linking up these returns to the Personal Tax Account; and
- exploring requiring investment managers and others to report Capital Gains Tax information to taxpayers and HMRC, to make tax compliance easier for individuals.

Capital transfers and the CGT uplift on death

The OTS concluded that taxpayers should not get both an Inheritance Tax exemption and a Capital Gains Tax death uplift and so recommended:

- Where a relief or exemption from Inheritance Tax applies, the government should consider removing the capital gains uplift on death, and instead provide that the recipient is treated as acquiring the assets at the historic base cost of the person who has died.
- The government could consider removing the capital gains uplift on death more widely, and instead provide that the person inheriting the asset is treated as acquiring the assets at the historic base cost of the person who has died but consider:
  - a rebasing of all assets, perhaps to the year 2000; and
  - extending Gift Holdover Relief to a broader range of assets.

Business Assets Disposal Relief

If this is considered to be a relief that is available on retirement, the government should consider replacing Business Asset Disposal Relief with a relief more focused on retirement of the owner manager, increasing the ownership percentage and period of ownership as well as setting a qualifying age.

The government should abolish Investors' Relief as there has been little interest in this relief.

Principal Private Residence relief

When the review was announced, many people thought that taxpayers' principal private residence might be targeted but there is no mention of this in the report.

What next?

We expect to see the second part of the OTS findings early in 2021. This will focus on technical and administrative issues.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935073/Capital_Gains_Tax_stage_1_report_-_Nov_2020_-_web_copy.pdf

Disposal of residence - extent of permitted land (P1226 – 22.13 minutes)

Summary – A Property that included 0.94 hectares of land was sold to a developer and the gain covered by Principal Private Residence relief (PPR).

In 1997, Leslie and Catherine Phillips had bought a property consisting of a five-bedroomed main house, garage for three cars, a one-bedroom cottage, swimming pool and substantial gardens extending to 0.94 hectares.

In 2014, the property and land were sold to a developer, but the couple did not report the disposal on their tax returns as they believed that PPR relief applied to the gain.

In 2017, following a review of SDLT records, HMRC discovered the disposal. In their view, the property was not of a size and character that required grounds of more than the standard statutory maximum of 0.5 hectares. In October 2018, HMRC issued discovery assessments for £162,820 to both Leslie and Catherine Phillips, representing capital gains tax on the excess 0.44 of a hectare.

The couple appealed against these assessments arguing that the land was required for the reasonable enjoyment of the property and therefore formed part of the “permitted area” to which PPR relief applied.

Decision

The First Tier Tribunal were satisfied that the evidence provided by the couple demonstrated that other properties in the area were at least the same size, with some having larger gardens.

HMRC’s expert witness provided less convincing evidence as it showed details of properties that were smaller and in more built-up areas.

The First Tier Tribunal also stated that the property photos provided as evidence showed a natural tree border around the edge of the property, a factor that can be helpful when justifying a larger permitted area.

In conclusion, taking into account the size and character of the house, the 0.94 hectares was required for the reasonable enjoyment of the house and so qualified for PPR relief.

The appeal was allowed and so the discovery assessments were reduced to nil.

Leslie Phillips, Catherine Phillips v HMRC (TC07859)

No combined apartment **(P1226 – 22.13 minutes)**

Summary – When two apartments were bought with the intention of combining them into one, a refund of the 3% SDLT surcharge was not due. The buyers did not intend to live in the second flat as their only or main residence until it was amalgamated with the first.

The taxpayers owned a dwelling in Dubai that they lived in as their only or main residence. In May 2017, they bought two adjoining apartments (Flats 31 and 38), paying the 3% SDLT surcharge on both. The total SDLT paid was close to £1.7 million.

Later, the taxpayers sold their main residence in Dubai and moved into the flats, with the couple living mainly in Flat 31 but their children and any guests living in Flat 38. They used an outside balcony to connect the two. The couple did not consider either Flat 31 or Flat 38 on its own to be a suitable residence for them and their family. They only bought both apartments on the basis that they would carry out works to convert them into one residential property. Consequently, they claimed a refund of the 3% SDLT supplement on both properties, arguing that they planned to combine the flats for them to become their single main residence.

HMRC granted a refund of SDLT in respect of Flat 31 but not Flat 38. By the time of the appeal, HMRC believed that the taxpayers were not entitled to a refund on either flat, but were time barred from correcting the refund given relating to Flat 31. Consequently, this appeal was limited to the second purchase.

Decision

To reach their decision, the First Tier Tribunal stated that it was important to consider the buyers' position at the effective date of the acquisition of Flat 38; intention was not relevant.

On completion, the new property was not their only or main residence and therefore, the buyers were not entitled to a refund of the higher 3% rates.

The appeal was dismissed.

Mehdi Moaref and Armaghan Mozhdeh v HMRC (TC07873)

Holiday property rental business and SDLT **(P1226 – 22.13 minutes)**

Summary – The company should have paid 15% SDLT as the property was not acquired exclusively for use in a rental property business. However, the chargeable consideration was halved, as a trust's shareholding could be attributed to the other shareholder, but not also to her husband.

Waterside Escapes Ltd ran a holiday property rental business.

In June 2015, the company bought a property from Bewl Holiday Homes LLP for £1,250,000 and paid SDLT totalling £68,750 on the basis that it had acquired the property exclusively for the purposes of its holiday letting business.

The LLP's members were a married couple, each holding a 50% interest in the partnership. The wife also held 50% of the shares in Waterside Escapes Ltd, with the remaining shares being held by a trust whose shares were acquired on the day that the property was bought.

On appeal, there were two issues to consider:

1. The occupation issue and whether the 15% SDLT rate applied.

2. The SLP (“sum of the lower proportions”) SDLT issue, specifically whether the chargeable consideration should be reduced as the company acquired the property from a connected limited liability partnership.

Decision

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

On the second issue, HMRC agreed that the chargeable consideration should be reduced by 50% to reflect the wife’s 50% interest in both the LLP and Waterside Escapes Ltd, and the fact that she was associated with the trust. As a fellow shareholder, the trusts shareholding could be attributed to her when considering control. Moving on to consider her husband, the wife’s 50% shareholding in Waterside Escapes Ltd could be attributed to her husband but the trust’s shareholding could not. Even with her rights attributed to him, he was still only treated as having 50% of the shares, whereas s.450(3)(a) CTA 2010 states that the “greater part” of the share capital is required for him to be associated with Waterside Escapes Ltd and so make the SLP 100. The chargeable consideration was therefore not reducible to nil, and 15% SDLT was payable on half of the total consideration paid.

Consequently, the chargeable consideration for the acquisition was reduced by 50% from £1,250,000 to £625,000 and with the 15% higher rate applying, the SDLT charge should have been £93,750 and not the £187,500 charged by the Closure Notice.

Waterside Escapes Ltd v HMRC (TC07881)

Administration

Changes to claims and elections

The Office of Tax Simplification (OTS) has released its report on how the administrative processes for making claims and elections could be simplified, across Income Tax, Corporation Tax, Capital Gains Tax and VAT. It highlights three key areas that would benefit the largest number of people:

- Increased functionality of the personal and business tax accounts, including the ability to make more claims and elections within these accounts;
- Changes to employee expenses to improve the process of making a claim and reduce the number of different levels of flat rate expenses that have to be considered;
- Improvements to HMRC online forms.

www.gov.uk/government/publications/ots-claims-and-elections-review

COVID-19 was not special circumstances **(P1226 – 22.13 minutes)**

Summary – COVID-19 did not constitute special circumstances, so penalties imposed for failure to file RTI returns were upheld.

Cherwell Optical Limited appealed against penalties that HMRC imposed for a failure to file a number of PAYE Real Time Information (RTI) returns on time, citing COVID-19 as special circumstances. The periods affected were those ending 5 June 2019, 5 August 2019, 5 September 2019 and 5 October 2019(!).

The company's grounds for appealing against the penalties were:

- The company made irregular payments to employees, one of whom is full time and one part time/casual;
- It had been trading for ten years and had not previously incurred such penalties,
- The penalties place an excessive burden on small businesses.

Cherwell Optical Limited stated that the company accepted HMRC's review decision but requested a "special reduction" because the company was now non-operational and in negative cash flow owing to the COVID-19 lockdown.

HMRC submitted that a special reduction was not appropriate because:

- any consideration of special reduction would apply to the original penalties and the circumstances at the time that resulted in those failures and not more recent events such as the COVID-19 pandemic;
- ability to pay was not a special circumstance.

Decision

The First Tier Tribunal confirmed that a special reduction could only apply to the circumstances that applied at the time of the failures.

In this case, since HMRC's review letter was dated 16 March 2020, shortly before lockdown started, HMRC could not be expected to take into account the consequences of the subsequent COVID-19 lockdown. Although the pandemic may well affect other cases, that was not the position here. There were no special circumstances in this case.

The Tribunal agreed with HMRC concluding that if the company has been affected by COVID-19 and any restrictions imposed, they can contact HMRC's COVID-19 helpline to discuss a possible deferment of payment.

The appeal was dismissed.

Cherwell Optical Limited v HMRC (TC07852)

Penalties cancelled **(P1226 – 22.13 minutes)**

Summary – A South African couple had daily and six-month late penalties cancelled due to their accountant attending to his sick father. Only the three-month filing penalty was due.

Christopher and Madeleine Stokes lived in South Africa, and for several years they had earned rental income from UK property. On or around 6 April 2018, HMRC sent both Christopher and Madeleine Stokes a notice to file a tax return for the 2017/18 tax year, with a due date for filing electronically of 31 January 2019.

The couple had appointed Mr James as their UK accountant and tax agent. Having already missed the January 2019 filing deadline, Christopher Stokes sent Mr James the information required to file the tax returns on 17 June 2019. Unfortunately, Mr James' father was seriously ill in hospital from April 2019 up until he died on 15 June 2019, with Mr James by his side. After his father's death, much of Mr James' time was taken up dealing with his father's affairs.

HMRC received the tax returns electronically on 18 August 2019 and proceeded to impose a £100 late filing penalty that was not appealed against, a £300 "six-month" penalty and daily penalties totalling £900.

The question in these appeals was whether

- there was a "reasonable excuse" for Christopher and Madeleine Stokes' failure to submit the tax returns on time; and/or
- owing to the presence of "special circumstances", the amount of the penalties should have been reduced.

Decision

Based on the information that had been received on 17 June 2019, the First Tier Tribunal concluded that Mr James would have taken about a week to prepare and submit the couple's tax returns. That would have made the filing date 24 June 2019.

The excuse given for not filing the tax returns prior to 24 June 2019 was that the accountant had not sent his usual reminder. In the Tribunal's view reasonably careful taxpayers, including those living abroad and receiving UK property income, would make themselves aware of the filing deadlines and would contact their accountants if they had not heard from them by the time of the deadline. The couple did not take such action and so there was no reasonable excuse for their failure to file their returns prior to 24 June 2019.

The Tribunal concluded that the couple's excuse for not filing on or after 24 June 2019 was reasonable as they had chased up Mr James at regular intervals in order to avoid further delay in the filing their returns. As a result, both the "six-month" and daily penalties accruing from 24 June 2019 should be cancelled.

Could special circumstances apply to the penalties before 24th June 2019? The Tribunal went on to conclude that the illness of Mr James' father, causing him to devote less time to his clients than he normally would have, was a special circumstance. Mr James did not send his clients the reminders he would ordinarily have sent prior to the time when daily penalties started to accrue. Although this does not provide a reasonable excuse for late filing, had such reminders been sent, the Tribunal concluded that the couple would in all likelihood have provided the necessary information to Mr James in time to avoid any daily penalties accruing. On this basis, due to these special circumstances, the daily penalties were reduced to nil.

The appeal was allowed and the contested penalties cancelled.

Christopher and Madeleine Stokes v HMRC (TC077836)

Protecting yourself when handling an enquiry (Lecture P1230 – 21.24 minutes)

Why protect yourself?

When faced with a tax enquiry, the initial thought may be to consider the client's position. However, accountants should be considering how to ensure that they protect their own position. This may seem obvious but is often overlooked.

A change of focus, by considering your own position first, can increase the likelihood of a satisfactory outcome to the enquiry. The approach can also help to maintain the relationship with the client, which can sometimes be strained, particularly where the client has been known for a long time. Another, and not to be under-estimated, reason of taking this approach is to help avoid professional indemnity insurance claims.

Enquiry management

Key to protecting yourself is effective management of the enquiry. In this regard it is essential to recognise your level of competence in this area. I have seen numerous cases over the years where an accountant has continued to handle an enquiry long after the point at which they should have sought specialist advice.

Handling an enquiry is not rocket science, but it is essential to check the basics. This includes checking that any notices or assessments (including the initial enquiry notice) have been correctly issued. Where HMRC have missed a statutory deadline, or the notices or assessments are not otherwise considered valid, the investigating officer should be challenged.

Many practitioners take a reactive approach to an enquiry. It is far better to be proactive. When the enquiry notice is received, it is important to discuss the position with your client, to establish whether there are any issues or problems that need to be resolved. This should be done before any response is sent to HMRC.

The same considerations apply when it comes to the provision of information or documents. You should, however, consider whether the HMRC officer is entitled to the items they have requested. There is not a prescriptive list that can be given to assist in this regard, and this is one area where it may be prudent to seek assistance. Giving documents or information to HMRC that the officer is not entitled to can, at best, lead to additional questions from the officer, which unnecessarily extends the duration of the enquiry.

Another key element of enquiry management is making sure that you stick to any agreed deadlines with the investigating officer. It can be helpful to agree a timetable, for you and the officer to adhere to, which will be enable adequate progress to be made. Where it is not possible to meet a deadline, you should notify the officer and agree a revised timetable.

It can be helpful to establish a protocol for handling enquiry cases, which will help to ensure that the basics are covered. In addition, in larger firms it is worthwhile considering establishing an enquiry register, to assist with the management of cases.

External assistance

When considering your level of competence for dealing with enquiries, you may conclude that you need assistance from day one of the enquiry. Other accountants may feel comfortable dealing with the whole enquiry, and may not feel the need for external assistance. However, it is always wise to consider whether specialist assistance should be sought, even if only for a second opinion, or on a particular aspect of a case (for example, HMRC's entitlement to certain documents or information). Consulting a specialist investigator may help to reduce the extent of HMRC's enquiries. I was recently asked to assist in a case where HMRC had sent an extensive information request. After my intervention, HMRC agreed to restrict their initial enquiries, with an understanding that the other issues could be re-visited later in the enquiry, if necessary.

Where advice is needed, it is better to seek it sooner rather than later. A specialist adviser can usually have a greater impact the earlier they are engaged.

I am often asked to assist in the questioning of a client where the accountant knows that there is, or believes there may be, a disclosure to make. As a specialist investigation consultant, I can ask questions that the accountant does not feel comfortable in doing, which can help to maintain the accountant's ongoing relationship with his client.

The use of external specialist assistance can help to prevent claims of negligence, and subsequent claims on professional indemnity insurance. As with any area, it can be very difficult to be familiar with the rules of enquiry work unless you are dealing with them on a daily basis.

Contributed by Phil Berwick (Director, Berwick Tax)

Deadlines

1 December 2020

- Corporation tax due for periods to 28 February 2020 (not paying by instalments)

7 December 2020

- VAT returns and electronic payment for 31 October 2020 quarter

14 December 2020

- Quarterly corporation tax instalment for large companies depending on year end
- Monthly EC sales list (paper return)

19 December 2020

- Pay PAYE, NIC, CIS and student loan liabilities for month to 5 December 2020 (cash)
- File monthly CIS return

21 December 2020

- File online monthly EC sales list
- Submit supplementary intrastat declarations for October 2020

22 December 2020

- PAYE, NIC, CIS and student loan liabilities for month to 5 December 2020 (electronic)

30 December 2020

- SA tax returns where underpayments to be collected by PAYE coding adjustment

31 December 2020

- End of EU transition period
- Accounts to Companies House
    - private companies with 31 March 2020 year ends
    - PLCs with 30 June 2019 year ends
- CTSA returns due for periods ended 31 December 2019
- CT61 quarterly reporting period end
- Year-end for taxable distance supplies to UK for VAT registration
- Non-EC traders claim recoverable UK VAT in year ended 30 June 2020

News

Budget March 2021

The Permanent Secretary at HMT has confirmed that the next Budget will be held in March 2021. The precise date has not yet been announced.

www.parliamentlive.tv/Event/Index/6e9c4cf2-6fb2-4ab6-90fa-d6d27d92420b

Additional draft clauses for Finance Bill 2021

A tax policy update published on 12 November 2020 included some additional draft clauses for Finance Bill 2021 and include:

- measures to prevent abuse of R&D relief for SME;
- technical changes to the hybrid mismatch rules;
- changes to target CIS abuse; and
- amendments to leasing provisions following the withdrawal of LIBOR.

www.gov.uk/government/collections/finance-bill-2021

Self-Employment Income Support (SEISS) compliance activity

The ICAEW has reported that HMRC has sent around 24,000 emails to traders who have claimed grants under the SEISS but who HMRC believe may have ceased trading and do not qualify for the grants.

These individuals have been asked to complete a form to confirm that either:

- they have ceased trading and need to repay the grant; or
- HMRC's information is incorrect and they did not cease trading or have restarted.

In cases where the taxpayer accepts that they need to repay the grant HMRC will follow up with an assessment. Where the taxpayer responds to say that they have continued trading HMRC may request further evidence.

https://www.icaew.com/insights/tax-news/2020/oct-2020/hmrc-begins-seiss-postclaim-compliance-activity

Undercover operations

It seems letters and emails to businesses are not the only way that HMRC is trying to crackdown on fraudulent COVID-19 related claims.

We have read that HMRC is checking out businesses that have made claims by contacting them by phone in a business-related capacity to see what response they receive. One

example given was of HMRC staff posing as a potential customer seeking the services of businesses that should be closed.

In theory, only businesses fraudulently claiming funds should be concerned and rightly so. However, all businesses need to be careful as their response could trigger a further investigation by HMRC. For example, furloughed directors should only be undertaking statutory duties and dealing with customer queries does not fall into that category. When handling phone enquiries, answers need to be clear. Maybe it would be safer to have a standard voicemail recording, explaining that the business is closed due to COVID-19.

Nudge nudge

October and November 2020 has seen HMRC busy issuing a number of nudge letters relating to discrepancies in 2018/19, hoping to prompt taxpayers in to correcting errors.

Residential property disposals

HMRC are targeting individuals who they believe have failed to report a taxable residential property disposal in 2018/19. The letter is aimed principally at those selling a second home.

www.tax.org.uk/policy-technical/technical-news/hmrc%E2%80%99s-one-many-letter-omitted-capital-gains-tax

HMRC has also written to individuals who they believe may have disposed of residential property and included this disposal under 'other assets' rather than as residential property, resulting in a lower rate of CGT being charged.

www.tax.org.uk/policy-technical/technical-news/hmrc%E2%80%99s-one-many-letter-residential-property-capital-gains-tax

Corporates who have not filed ATED returns

HMRC are interested in corporates that have bought residential properties worth over £500,000 but have not filed an ATED return. Such entities are being asked why ATED does not apply.

www.tax.org.uk/policy-technical/technical-news/hmrc-letter-annual-tax-enveloped-dwellings-ated-non-filers

Investment income discrepancies

HMRC are interested in individuals where the investment income reported on their tax returns differs to the figures received from financial institutions. To assist taxpayers, the letters contained details of the accounts and information HMRC had received.

www.tax.org.uk/policy-technical/technical-news/hmrc%E2%80%99s-one-many-letter-investment-income-financial-institutions

Pay and Benefit in kind differences

HMRC has written to employees where pay and taxable benefit information from their employers does not match the information reported on their tax returns. The letters will ask these individuals to check their returns and amend them if needed.

www.tax.org.uk/policy-technical/technical-news/hmrc%E2%80%99s-one-many-letter-pay-tax-discrepancies

www.tax.org.uk/policy-technical/technical-news/hmrc%E2%80%99s-one-many-letter-benefit-kind-octobernovember-2020

Business Taxation

Extended SEISS: Grants 3 and 4 (Lecture B1226 – 26.07 minutes)

On 24 November 2020, HMRC published its updated guidance relating to the SEISS Grant 3, with the claim process due to go live on 30 November 2020. HMRC will stagger the exact go live date for individual traders, in the same way that they did for the earlier grants.

Anyone making a claim must do so on or before 29 January 2021.

The guidance confirms that only self-employed individuals who were eligible for SEISS grants 1 and 2 are potentially eligible for the extended SEISS grant 3. The scheme has not been extended to those that were previously excluded.

SEISS Grant 3 will be calculated as 80% of average monthly trading profits, paid out in a single instalment covering 3 months' worth of profits, and capped at £7,500.

To be eligible individuals or partners must have traded in both 2018/19 and 2019/20 and must either:

- be currently trading but impacted by reduced demand due to COVID-19;
- have been trading but are temporarily unable to do so due to COVID-19

Being temporarily unable to trade could be due to government restrictions or because an individual has tested positive for COVID-19 or is required to self-isolate. However, HMRC has specifically stated that where an individual is required to self isolate on returning from abroad, this does not count.

Further, HMRC states that no claim should be made where the only impact on a business is increased costs.

Reasonably believe a significant reduction in profits

Further, traders must declare that they intend to continue to trade and that they reasonably believe there will be a significant reduction in trading profits due to reduced business activity, capacity or demand or inability to trade due to COVID-19 during the period 1 November to 29 January 2021. However, HMRC goes on to say:

> " Before you make a claim, you must decide if the impact on your business will cause a significant reduction in your trading profits for the tax year you report them in."

So it seems that the significant reduction test applies to the three months of the claim as well as the tax year that those reduced profits are reported. For a trader with a year to 30 April 2020, they will need to consider a significant reduction in the 3 months to 29 January 2021 as well as the profits for the year to 30 April 2021.

Further HMRC state that:

> "You should wait until you have a reasonable belief that your trading profits are going to be significantly reduced, before you make your claim."

Previously, traders who were uncertain of the effect of COVID-19 may have claimed in advance and then looked to repay the grant if trading had been better than expected. It seems now the instruction is to wait to make a claim until you have a reasonable belief.

Useful examples

HMRC's guidance includes some useful examples to help taxpayers decide where no reasonable belief exists, some of which are reproduced below.

1. A cafe owner has fewer customers due to government restrictions on households mixing, which initially reduces her takings but she increases her prices to compensate;

2. An electrician is still trading but has had increased costs due to buying masks, cleaning supplies and screens. HMRC state that the electrician is not eligible for the third grant because increased costs were the only impact on the business and no customers have been lost;

3. A dentist returns from a holiday abroad and has to self-isolate for 14 days due to quarantine rules. HMRC specifically exclude the scenario where reduced demand is due to self-isolation after foreign travel is not included in the eligibility criteria;

4. The client of a dog walker cancels a contract due to coronavirus. The dog walker could but chooses not to look for additional work to replace the contract. This means her business activity and her trading profits are reduced because she chooses not to replace the contract and not because of coronavirus. She is not eligible for the third grant;

5. A IT consultant has other income from renting property. He has made losses on renting due to renovation costs. This is not related to his trading profits from his IT consultancy service. As his consultancy business has not been affected due to coronavirus, he is not eligible for the third grant.

SEISS Grant 4

HMRC has confirmed that there will be a fourth grant covering February 2021 to April 2021, with further details, including the level of the fourth grant in due course.

https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme

https://www.gov.uk/guidance/how-your-trading-conditions-affect-your-eligibility-for-the-self-employment-income-support-scheme#examples

AIA £1 million limit extended **(Lecture B1226 – 26.07 minutes)**

From 1 January 2021, the AIA was due to revert back to £200,000.

However, on 12 November 2020, the Government announced that the current £1 million limit is now being extended for a year and so will run until 31 December 2021.

The means that until this date, businesses can continue to claim a 100% tax deduction for the accounting period in which they purchase qualifying plant and machinery, up to the £1 million limit.

https://www.gov.uk/government/news/government-extends-1-million-tax-break-to-stimulate-investment-in-uk-manufacturing

Diver's fitness training (Lecture B1226 – 26.07 minutes)

Summary –A diver's fitness training expenses were incurred wholly and exclusively for the purposes of his trade and so allowable in arriving at his taxable profits.

Robert Osborne worked as a self-employed saturation (deep-sea) diver, working at 150m depths, spending days or weeks in compressed chambers of a vessel and working at depth.

Such diving is dangerous, and fatalities occur if divers are not fit. As a result, the industry and contractors require divers to pass strict fitness tests. Robert Osborne claimed his training expenses as deductible expenses in arriving at his taxable profits, arguing that they were wholly and exclusively for the purposes of his trade. He included travel costs as part of his training expenses as he had been advised to run on soft soil or sand and so needed to travel to appropriate places.

HMRC argued that there was a dual purpose to his training, as fitness is a human need.

Robert Osborne appealed.

Decision

The First Tier Tribunal accepted that saturation diving was dangerous and that divers were required to meet a strict fitness level. The Tribunal concluded that his only reason for training, in the way that he did, was to ensure that his cardiovascular system and other muscular fitness enabled him to continue working as a diver.

There was no reason to believe that he would undertake such training for personal fitness. Training at that level was essential to allow him to practice his trade, and to continue to do so as he grew older. The Tribunal concluded that any improvement in his fitness was merely incidental.

The appeal was allowed.

Robert John Osborne v HMRC (TC07851)

Accommodation and travel disallowed (Lecture B1226 – 26.07 minutes)

Summary – Travel and accommodation for a sole trader who lived in Scotland but took work in Swindon was disallowed.

Hamish Taylor had been a self-employed subcontractor for many years and was registered under the Construction Industry Scheme.

Although his home was in Scotland, in 2016/17 he had undertaken a number of contracts in Swindon where the rates of pay were significantly higher. While working on these contracts, he had stayed at a hotel and claimed the costs of accommodation and travel as deductible expenses, but not his meals. He argued that travel to obtain the better pay in Swindon was a business decision. He had paid for basic accommodation solely to allow him to work there. He maintained that the expenses were wholly and exclusively incurred in the course of his self-employment.

On 6 April 2018 HMRC opened an enquiry into his 2016/17 Self Assessment return. Rejecting his claim for the travel and accommodation expenses, HMRC contended that he had chosen Swindon as his base for undertaking work at various sites, but the cost of travel between his home in Scotland and his work in Swindon were not allowable expenses, because they were not wholly and exclusively incurred for business purposes. Certain other travel and subsistence claims were however allowed.

HMRC argued Hamish Taylor worked out of Swindon, not his home address in Scotland, so that travel and accommodation between Scotland and Swindon was not wholly and exclusively incurred as required by s34 ITTOIA 2005. He had chosen Swindon as a convenient base for his work at different sites. HMRC referred to the decision in Horton v Young, where the judge had given the example of a commercial traveller living in London whose "patch" was Cornwall. The judge had stated that in this example, the cost of travel between London and Cornwall would not be allowable even if the occupation were a travelling one.

Hamish Taylor appealed.

Decision

The First Tier Tribunal acknowledged that Hamish Taylor would never have been in Swindon except in the course of earning his living. His hotel appeared to have been chosen for economy rather than comfort and he made no claim for his evening meals.

However, the Tribunal concluded that the travel and accommodation costs were not incurred wholly and exclusively for the purposes of his trade as Hamish Taylor was able to work near his home in Scotland, though at a lesser rate. Staying in Swindon for some 165 nights during the tax year meant that his base for the work on a variety of subcontracts was in Swindon. His expenses were effectively general commuting costs for his work in Swindon and so disallowed. Had he gone to Swindon for a specific contract, the travel and accommodation costs for that would have been deductible.

The appeal was dismissed.

Mr Hamish Taylor v HMRC (TC07893)

Entertaining costs **(Lecture P1227 – 15.35 minutes)**

Business entertaining

The basic principle is that the costs of business entertaining are disallowable.

This seems straightforward but there are grey areas.

Firstly, there is the situation when we have the costs of refreshment/hospitality at what is, in reality, a business meeting but where a meal or other refreshments are taken at the same time. In this case, it is the motive behind the arrangement that is critically important. If the motive is to entertain someone, a discussion about business does not remove that from the definition of entertainment. If the motive is to discuss business, then the provision of some hospitality does not make that entertainment.

Clearly the motive is not always going to be apparent. Any invoice that could potentially be either should be annotated with the customer and purpose of the meeting. However, this is not going to be sufficient if the information provided is inconsistent with the described purpose. HMRC will be looking for things like:

- Number of people
- Extent of hospitality provided
- Regularity of meetings with particular clients
- Time of day and day of week
- Vague or implausible descriptions of purpose.

It is important to note that where something is clearly entertaining, then the fact that there might be a business motive is irrelevant; it is still always going to be disallowed as business entertaining.

The second situation we have is where there is sponsorship involved. It is legitimate for a business to advertise and they might do this by sponsorship of a leisure activity. As part of that, there may be hospitality involved.

With sponsorship, there are two issues. Generally, it is incurred wholly and exclusively for the purposes of the trade.

However, there could be a problem where there is an alternative motive for the sponsorship and it is not really linked to any benefit to the trade. In this case it would be disallowed in the corporation tax computation. There is a body of case law that considers some of the issues that need to be considered. It can be a hugely contentious area for clients because they will, rightly, assume that large companies will get tax relief for the costs of sponsoring TV programmes or sporting events but they will have done that by looking a detailed business case for the effectiveness of the cost as part of a larger advertising budget. Such cost benefit analysis is rare in smaller businesses and may be much more closely aligned with the interests of the business owners.

The second issue is if the hospitality is provided at a cost, as this would need to be identified, although it will depend on who is using that hospitality. In most situations, it would be difficult to argue that there is any specific cost related to any entertaining element. So for example if you were to sponsor a local football club and get two season tickets, unless HMRC could show that the sponsorship was more expensive because of the season tickets (i.e. there was a cheaper option which did not include those), then normally the cost would not be disallowed as entertaining.

If there was a cost involved in the hospitality, then you would need to consider who is using that product (the season tickets in the above example – are you taking clients, do staff use them etc.) and then determine the tax treatment on first principles.

In reality, with sponsorship, it is the first aspect that is more problematic.

Entertaining of employees

The costs of entertaining employees, including directors, is generally allowable for the company but the costs would then have to go on a P11d as a benefit in kind for the individuals.

There are exceptions where:

- there is a specific exemption such as an annual party or parties (as long as cost per head is less than £150 p.a.);
- the amount falls within the trivial benefits exemption (where cost is less than £50 but if the benefit is a reward for services it will not benefit from exemption);
- the entertaining of the employee is incidental to the entertaining of others and the employee is obliged to attend as part of their job in which case it is disallowed for the company as entertaining and no P11d benefit arises;
- the employee has paid for the costs themselves, and amounts are then reimbursed, then there is no employment charge on the employee as long as it is identified as entertaining (and disallowed in the company accounts) and it is part of their duties to entertain clients.

Where a P11d benefit arises, the company could decide to pay the tax instead via a PAYE Settlement Agreement.

On the face of it, it would appear that there are no situations where there would be a double tax charge i.e. where it is disallowed for corporation tax purposes and there is also a P11d issue but that is, in reality, not true.

Entertaining of employee not incidental

If HMRC were to consider that the entertaining of the employees was not incidental to the entertaining of others, then there would be a possibility that something could be both disallowed for corporation tax purposes as entertaining generally and give rise to a benefit in kind to the employee. This could also cover directors as well as employees.

This could cover a variety of situations, for example where an employee attends an event because there is no client who wants to attend an event but the company has already paid for a ticket. It is still entertaining (of the employee rather than a client) and it is not part of the duties for the employee to be there.

A more complex example would be where there is an alternative reason why the employee is attending which is not linked to their employment. This is a much more difficult area.

Let’s just think about an example.

A company pays for shooting events, which are attended by clients but also by Nigel who is the current MD, and his father Eric who was the founder of the business so has many years' experience in the industry but who no longer has a formal role. These are clearly business entertaining, notwithstanding that much business is done at these meetings. The costs will be disallowed for corporation tax purposes.

However, both Nigel and Eric are keen shooting enthusiasts and so HMRC might take the view that their attendance at this is not incidental to the entertaining of others but are due to a personal desire to attend such meetings.

Both Nigel and Eric believe that there is added value to their business by attending such events but the costs are significant and it is not possible for them to state categorically that they have increased their business or taken on new clients simply by virtue of the costs incurred. This could well be something that HMRC might look at.

This is a particularly relevant point in relation to Eric as he is no longer an employee. His participation would appear to have nothing to do with the business as he is no longer working for it. Whilst he may have a long-standing association with the company the general analysis relating to entertaining of employees only works if it is part of your job to be entertaining clients. If you don't have a job, then it can't be part of a job. The cost would definitely be taxed on someone – probably Nigel – as a benefit in kind.

If they can demonstrate that there is real value (which can be demonstrated by hard facts) then they might be able to argue that their attendance is untrammelled by their own personal hobbies but this could well be a very difficult argument to win with HMRC once they know of the personal involvement.

This sets the parameters of any arguments. Any event that is attended by directors, employees and clients needs to be scrutinised. If there is no particular link between a main director and a particular activity – if they are attending horse racing, sport events or similar – then you may have a stronger argument about the fact that attendance is incidental to the entertaining of clients. However, each case must be looked at carefully to make sure those arguments are sustainable.

The other area that needs to be looked at carefully is where there is significant cost involved. In a recent case, the director had taken his two best customers (who were also good friends) to the Rugby World Cup final in Japan. They had stayed in a posh hotel and had a very pleasant time over in Japan at the cost of the company. It is probably not feasible to consider that HMRC would accept that there is no benefit arising to those who attend because it can be justified from a business perspective. Unless there is a unique reason why they needed to go to these events, it is likely that HMRC would just view it as a personal trip for everyone. Again, these would clearly be disallowed as business entertaining but HMRC would want to tax the cost relating to the director as a benefit in kind.

To conclude, there is a real risk that HMRC would look to charge a benefit on attendees at events where there is a question over whether the director's (or employee's) involvement is actually incidental to the entertainment of others. If HMRC were to pick this and challenge it, which they might do if large amounts of high level of entertaining costs are being shown in the company accounts, then they could go back into earlier years to collect any tax and NICs that were due. The tax would be the liability of the director/employee (although it could be met by the company) but there would be NICs costs for the company. It is likely that HMRC would go back 6 years.

Arguments are often made by clients that they have to do these types of events because their clients expect it. However, this has not really got anything to do with the type of clients they have as it is acknowledged that it is legitimate for them to be doing this entertaining and that is dealt with by the corporation tax disallowance.

Finally, it is worth mentioning that there is an exemption for the provision of entertainment to an employee or members of their family where the entertaining is provided by a third party. There are conditions to be met though:

(a) The person providing the entertainment is not the employer or a person connected with the employer;

(b) Neither the employer or a person connected with the employer has directly or indirectly procured its provisions;

(c) The entertainment is not provided in recognition of particular services that the employee has performed in the course of their employment or in anticipation of particular services that are to be performed in the course of their employment.

The only common situation where this exemption does not apply would be where attendance at an event is part of a performance related competition – so a third-party supplier has offered to take an employee to the FA Cup final and the employer decides it will be the individual who has the best sales figure in the month prior to this. That would be quite an unusual situation.

Contributed by Ros Martin

Making Tax Digital (MTD) for income tax **(Lecture P1229 – 26.18 minutes)**

It was announced in the summer of 2020 that MTD roll out would move to income tax from 6 April 2023, and that all businesses and landlords with gross income in excess of £10,000 would be mandated into the new rules from that date. This would mean that landlords will remain in Self Assessment until 2022/23 but would need to keep digital records from 6 April 2023.

Income tax businesses with a 31 March year end would not come within MTD until the accounting period commencing 1 April 2024.

We have a ‘roadmap’ for these developments, with a proposed pilot commencing April 2022.

How would this work – software issues?

I think that HMRC’s expectation is that for income tax the submissions by agents (around 50% of the whole income tax population) would be through tax software, but given the success of VAT reporting capabilities I wonder whether the quarterly submissions might best be made through accounting software such as Xero, or from spreadsheets and similar using bridging software.

It would probably be a small matter for accounting software to make the submissions required for income tax, with the final (period 5) submission being made through tax software, which would also include details of other income and allowables such as pension contributions and gift aid.

HMRC does need to think carefully about how unrepresented taxpayers will be affected by this so that they are not "shut out" of the new system – I believe functionality should be provided through the personal tax account to replicate what would normally be done by the agent using tax software.

The 2016 plans

It is likely that the broad structure of MTD will not change significantly from the plans announced in 2016. And indeed much of the initial infrastructure for MTD has already been built by HMRC in the expectation that it would move ahead at some point.

However, it is also clear that HMRC will be working collaboratively with businesses, agents and representative organisations to develop the system over the next year or so, and try to ensure that it works for everyone.

Bringing business tax into the digital age

The consultation issued in 2016 is the focus of the changes proposed for businesses in terms of record keeping and regular updates to HMRC. This provides a useful check on what a new system for income tax might look like, and the final result is unlikely to differ much from the below.

- Businesses which are not exempt from the requirements will be required to keep digital records;
- Businesses will be required to update HMRC at least quarterly with details of their transactions, using MTD compatible software;
- Annual accounts and tax computations based on them must be finalised within 10 months after the end of the accounting period;
- HMRC will feed back the estimated tax liability based on the submissions made so far in the tax year; taxpayers will be able to choose to pay their tax based on the submissions made;
- Prompts and nudges will be included in MTD compatible software, which will encourage and support taxpayers to file updates on time, and gradually help to eliminate errors in accounting records.

Who is affected?

All income tax businesses and landlords will be affected by the new rules unless they are exempt. The level of gross turnover and/or gross rents for which exemption is provided is £10,000.

This means that businesses and landlords with total income from both sources below that level will not have to keep digital records, nor will they have to update HMRC quarterly. In addition:

- Charities and Community Amateur Sports Clubs will be exempt from the requirements completely;

- There may be other exempt categories of business, which is likely to include some types of unit trust. Trading subsidiaries of charities will not be exempt. It is likely that there will be some form of exemption for insolvent businesses;

- There will be an exemption for businesses "unable to engage digitally". This will cover the existing exemption from MTD for VAT returns;

- Partnerships will submit updates (and keep records) on a whole firm basis, but updates will be required to identify the share applicable to each partner;

- Trusts, which have rental or trading activities, are subject to the rules. It is likely that very large partnerships will have more time to comply, as HMRC believes that there are complexities that need to be resolved. The same will probably apply to partnerships that include a limited company partner.

Digital records

Affected businesses and landlords will be required to keep digital records. This will mean either using MTD approved accounting software or spreadsheets accompanied by software that together meet the requirements of MTD. HMRC expects business to keep their records as near to real time as possible, but the requirement for quarterly updates means that this will be at a minimum quarterly.

The exact content of the digital records will be determined by secondary legislation (not yet finalised but expected in Spring 2021) but is likely to include enough information to identify the nature of any expenditure, and possibly the supplier and details of income.

It is likely that retailers will be permitted to include their daily till totals rather than individual transactions (as is the case for VAT). This will probably involve:

- Analysis of their transactions in accordance with the categories on the current Self Assessment return, viz:
  - Turnover
  - Other business income
  - Cost of goods bought for resale or goods used
  - Construction industry – payments to subcontractors
  - Wages, salaries and other staff costs
  - Car, van and travel expenses
  - Rent, rates, power and insurance costs
  - Repairs and renewals of property and equipment
  - Phone, fax, stationery and other office costs
  - Advertising and business entertainment costs
  - Interest on bank and other loans
  - Bank, credit card and other financial charges
  - Irrecoverable debts written off

  - Accountancy, legal and other professional fees
  - Depreciation and loss/profit on sale of assets
  - Other business expenses

- Landlords will keep their records in line with the current tax return entries, viz
  - Income, analysed between rents, premiums and reverse premiums
  - Rates, insurance, rent and ground rent
  - Property repairs and maintenance
  - Loan interest and other financial costs
  - Legal, management and other professional fees
  - Costs of services provided, including wages
  - Other allowable property expenses

Where a business is permitted to file the 'three line' details on the current tax return, this is likely to remain, but it will not remove the requirement to keep detailed records as described above.

Landlords are likely to be particularly affected by this requirement as in many areas of the UK the gross rent limit is likely to be exceeded. But my own experience is that landlords dealing with their own tax affairs have very poor records (if any) and are very likely to submit incorrect figures on their Self Assessment returns.

Quarterly updating

Businesses and landlords will be required to submit updates of totals of transactions to HMRC at least once every three months. For businesses with turnover below the VAT limit (currently £85,000) this may be submitted as total income, total expenses and net profit. This does not obviate the need to keep records with more detail, as described above. Larger businesses will submit the analysis shown above.

The time permitted for filing the quarterly updates is one month from the end of the quarter. Businesses are permitted to choose their quarterly filing pattern, and if it is not coterminous with the accounting period end, a further short period will be required.

There is no requirement for the quarterly updates to include accounting adjustments to reflect accruals, prepayments or stock, but these are permitted if the business chooses. It is also possible to record capital allowance claims and other tax adjustments on the quarterly update if desired.

Quarterly submissions are not a return for the purposes of tax and therefore are not subject to any penalty for inaccuracy legislation.

Annual finalisation

Once the final periodic return has been filed, businesses (or their agents) will have to finalise their profits for the accounting period at the earlier of:

- Ten months after the end of the accounting period; or

- 31 January following the year of charge for the profits.

So, for a business with an accounting date of 30 April, the date for finalising the accounting adjustments is 28/29 February. For an accounting date of 30 September, the date is 31 July, and for 31 March it will be 31 January.

Finalisation will require amendments to correct the monthly submissions made, adjustments for accruals and prepayments and stock if necessary and any tax adjustments as normal for the preparation of a self assessment return.

Tax estimates

HMRC intends to provide an estimate of the tax due to date based on the quarterly submissions. In practice this may prove challenging if clients are not very accurate in their record keeping. It may also prompt concern from clients with seasonal businesses when they see a period showing a loss that will eventually be overtaken by profit later in the period. In any event, the question of claiming capital allowances mid year may well prove difficult to manage from a communication viewpoint.

There will not presently be a requirement to make payments based on these estimates, but that is likely to be the direction of travel in the medium term, bringing the payment of tax much closer to the income it relates to, improving Government debt positions and providing for easier collection through earlier intervention.

Contributed by Rebecca Benneyworth

Making Tax Digital (MTD) for corporation tax (Lecture B1227 – 12.56 minutes)

On 12 November 2020, the government published its consultation on the potential design of Making Tax digital for corporation tax (MTD for CT)and has stated that a simplified version of this consultation will be issued for small companies in due course.

The consultation will run for 16 weeks from 12 November 2020 to 5 March 2021. Following this the government proposes to run a voluntary pilot of MTD for CT from April 2024, and has stated that MTD for CT will not be mandated prior to 2026.

Who will it apply to?

MTD for CT will apply to all companies resident in the UK, as well as the activities of non-resident companies in the UK and other corporates that, under UK domestic legislation and tax treaties, are subject to a UK CT charge.

What it will mean?

Under the proposals, entities within the charge to corporation tax would need to:

- maintain their records of income and expenditure digitally, requiring that for each transaction the date, amount and amount category be recorded;
- use MTD compatible software with integrated *iXBRL tagging* to provide quarterly summary updates to HMRC; accounting and tax adjustments as well as are claims for incentives, allowances and reliefs will be optional at this stage;

- provide an annual CT return, iXBRL tagged accounts and tax computations using their MTD compatible software, making any outstanding tax adjustments and claiming allowances and reliefs at this stage.

Transactions categories

The categories needed for MTD for CT will be more detailed than the current CT600 as they want to get a reasonable tax estimate from the uploads. As part of a company's Company Tax Return, entities already provide a breakdown of income and profit, categorised under a number of headings. However, with the exception of certain types of expenditure that must be identified for tax purposes, there is no equivalent standardised categorisation of expenses within the Company Tax Return (CT600) and supplementary pages.

The government wants such categories to have some parity with the categorisation required under MTD for IT and so are proposing minimum categories as follows.

For income:

- trading income;
- bank, building society or other interest and income and gains from non-trading loan relationships;
- income from land and buildings;
- income relating to finance;
- income not falling under other heading.

For expenses:

- costs of goods bought for resale or goods used;
- payments made to CIS sub-contractors;
- wages, salaries, pension and other staff costs;
- car, van and travel expenses;
- rent, rates, utilities and insurance costs;
- repairs and maintenance of property and equipment;
- phone, fax, IT stationery and other costs;
- advertising costs;
- business entertaining costs;
- accountancy, legal and other professional fees;
- expenses related to finance;
- bank, credit card and other financial charges;
- interest expense on bank and other loans;
- other trading expenses;
- property business expenses;
- investment management expenses;

- irrecoverable debts written off;
- dividend payments
- loans and other benefits provided to directors, participators and others, including director loan account balances;
- capital expenditure (split by land & property, cars & vans, other plant & machinery and intangibles);
- gains and losses on asset disposals, change of use, sales proceeds (split as for capital expenditure);
- depreciation;
- gains not falling under any other heading.

iXBRL tagging

This will be integrated into MTD software to facilitate quarterly uploading of summaries within one month of quarter end. Where any entries appear to be wrong, nudges will be generated flagging the area of concern.

Groups of companies

The government acknowledges that groups may operate their accounting or tax function at a group level and are interested to know whether such groups would prefer to be able to fulfil the digital record keeping obligation on a similar basis, through one nominated entity. The consultation document takes the idea of a single nominated entity further. The government asks would it be appropriate for single nominated entity to also be responsible for providing the quarterly summary updates and annual CT returns using their MTD compatible software for the group as a whole.

As part of a group's digital record keeping, the government proposes that the group will be required to provide a breakdown of their group structure, identifying all group members within the charge to corporation tax.

The consultation raises a number of questions regarding how MTD for CT will work for companies within the quarterly instalment regime and how the system will deal with claims, reliefs and elections.

The government is seeking views on how MTD for CT would interact with a number of areas of the international tax system, including the rules relating to double taxation relief, hybrid entities and transactions, corporate interest restriction and transfer pricing.

Improvements when filing tax payable

The government is looking for ways to improve the process of filing and paying tax due as well as dealing with any amendments that are needed and are asking would it be appropriate to:

- align filing dates for tax and accounting purposes under company law?
- make amendments to Company Tax Returns through MTD compatible software?

Exemptions

Section 6 considers special cases and the possibility of exemptions. The government:

- states that many charities, Community Amateur Sports Clubs and not for profit organisations are within the scope of the charge to corporation tax but are exempted because of the tax reliefs available to them but sometimes are required to file a tax return. Others have non- exempt income and currently need to complete a Company Tax Return and pay tax. The government asks whether such entities should be within the scope of MTD for CT and if so, how the system should be tailored for their special needs;

- has confirmed that where HMRC has previously agreed that a person is digitally excluded for one set of MTD obligations, for example MTD for VAT obligations, it will also be exempt from MTD for CT;

- considers that where an insolvent entity retains its responsibility to file an online Company Tax Return, then MTD for CT obligations would continue to apply but where an insolvency practitioner has been appointed to act, and an existing exemption for online filing applies, it would be unreasonable to require them to comply with MTD for CT.

And finally

The consultation questions what timescales and costs would be involved in acquiring, updating, replacing or adapting existing software in order to be MTD- compliant as well as making the transition to MTD for CT?

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/934638/Making_Tax_Digital_-_Corporation_Tax.pdf

Non-resident companies disposing of UK property

HMRC has updated its guidance for non-resident companies disposing of UK property. The guidance confirms that, unless an exemption applies, such companies are required to submit a CT CT600 return form with iXBRL tagged computations.

Companies must also provide the following additional information:

- a clear breakdown of how the gain or loss has been calculated;

- details of how the company has used any losses, exemptions and reliefs;

- the property's address

- state whether the property is:
  - residential property or land
  - non-residential property or land
  - mixed use (the property or land was partly residential during ownership)
  - indirect disposal of UK land

HMRC has stated that this information can be provided in a covering letter accompanying the CT600.

www.gov.uk/guidance/register-a-non-resident-company-for-corporation-tax

Apportioning ring-fenced profits

Summary – The companies' basis of apportionment of adjusted ring-fence profits, for an accounting period that straddled a change in the rate of the supplementary charge, was just and reasonable.

The taxpayer companies operated oil fields and were subject to the supplementary charge on their adjusted ring-fence profits.

For accounting periods beginning on or after 24 March 2011, the supplementary charge was increased from 20% to 32%. Accounting periods straddling that date were treated as two separate periods, with profits apportioned accordingly. Both companies had accounting periods that ran from 1 January to 31 December 2011 and so straddled the point at which the supplementary charge was increased.

FA 2011 provides that, where basic time apportionment would 'work unjustly or unreasonably', companies can elect to apportion the profits using a different basis that was 'just and reasonable'.

The taxpayers elected to use an 'actual' basis of apportionment which treated the pre-24 March and post-24 March periods independently as if they were two separate accounting periods, and allocating income, expenditure and allowances to the periods according to when they arose. This resulted in all the profits being allocated to the pre-24 March period (thus escaping the 32% supplementary charge), as a result of capital allowances being treated as incurred in the later period.

The Upper Tribunal (UT) found that this apportionment did not produce a just and reasonable result. The question on appeal was how much of the companies' adjusted ring-fence profits for 2011 was liable to the supplementary charge at 20%, and how much at 32%.

Court of Appeal's decision

Reversing the UT's decision, the Court of Appeal held that, although time apportionment was clearly the starting point, electing for an alternative basis of apportionment would be available to all companies whose profits differed greatly from one part of the year to the other and which could be disadvantaged by a change of rate part way through an accounting period. The court also found that the companies' approach to capital allowances, taking account of capital expenditure at the date it was incurred, did not prevent the basis of apportionment from being just and reasonable.

Total E&P North Sea UK Ltd and another v HMRC [2020] EWCA Civ 1419

Adapted from the case summary in Tax Journal (6 November2020)

Guidance on changes to intangibles

The corporate intangibles rules were amended in relation to acquisitions of pre-FA 2002 assets made from related parties on or after 1 July 2020.

Tax relief for amortisation or impairment of the asset will however be restricted where it falls within the definition of a 'restricted asset'. An asset will be a restricted asset if it falls within one of three cases:

- Case 1 deals with more straightforward types of transaction that involve a basic transfer.
- Case 2 deals with arrangements, such as those involving licences, where a new asset created on or after 1 July 2020 derives its value from a pre-2002 asset or a restricted asset;
- Case 3 covers other transactions not within the first two cases, such as sale and licence back arrangements.

HMRC has published guidance at CIRD46000 onwards on the operation of the rules for each case including worked examples of when the special restricted asset rules will apply.

https://www.gov.uk/hmrc-internal-manuals/corporate-intangibles-research-and-development-manual/cird46000

Adapted from summary provided in Tolley Guidance Daily Round-up

VAT

Extended notification when opting to tax (Lecture B1226 – 26.07 minutes)

Under normal circumstances where a taxpayer opts to tax land and buildings, they are required to notify HMRC within 30 days by either:

- printing and sending the notification, signed by an authorised person within the business;
- emailing a scanned copy of the signed notification.

Due to COVID-19, HMRC has temporarily extended the time limit to 90 days from the date the decision to opt was made.

This applies to decisions made between 15 February 2020 and 31 March 2021.

The notification can be emailed to optiontotaxnationalunit@hmrc.gov.uk using an electronic signature together with evidence that the signature is from a person authorised to make the option on behalf of the business.

If notifying as an agent, the email must include proof that the signature is from a person authorised to make the option on behalf of the business and that authority has been granted by the business to use the electronic signature.

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

Finger Licking Chicken registration (Lecture B1226 – 26.07 minutes)

Summary – Both companies should have been registered for VAT and HMRC's best judgement assessments were valid.

Withington KFC Services Ltd owned and operated a takeaway business known as 'Finger Licking Chicken'. In June 2016, the business was transferred as a going concern (TOGC) to NNS Services Ltd. Neither company was registered for VAT.

S.49 VATA 1994 states that when the purchaser acquires the trade and assets of a taxable person then they shall inherit the seller's taxable turnover for registration purposes. Where the seller is:

- VAT registered with taxable income greater than £85,000, the buyer would have a compulsory registration obligation at the date of the purchase, which in turn triggers the TOGC treatment for the transfer;
- not registered for VAT as their taxable income is less than £85,000 the buyer will have a fresh start for registration purposes.

NNS Services Limited believed that they were buying from a non-registered trader.

Following an unannounced visit in August 2016 and a number of undercover purchases, HMRC decided to investigate further. HMRC calculated NNS Services Ltd's turnover on a best judgment basis and concluded that the company should have been registered for VAT as the company was trading well above the £85,000 registration threshold.

Further, HMRC back-calculated the turnover into the period of Withington KFC Services Ltd's ownership and concluded that Withington KFC should have been compulsorily registered for VAT when they owned the business. This in turn meant that under s.49 VATA 1994, NNS should have been registered on the date of the TOGC.

Having done so, HMRC formed the view that both companies should have been registered for VAT but with Withington KFC Services Ltd having now ceased to trade, this company was Liable No Longer Liable. HMRC issued a 'best judgement' assessment against NNS Services Ltd back-calculated to the period of Withington KFC Services Ltd's operation of the business. HMRC also issued a personal liability notice to the director of Withington for the failure to notify penalty of £33,000, calculated as 63% of the VAT due. This was not appealed.

Decision

The First Tier Tribunal concluded that NNS Services Ltd had produced no evidence to back up their argument. There was nothing to differentiate sales of different types of food, or food from drink and no till records, or meal slips provided. When the company produced its daily takings schedules, the Tribunal questioned their reliability stating that these were "far too neat and tidy to have been compiled day-on-day… no scribbles, crossings-out or alterations." They were not a proper record of takings. The First Tier Tribunal was satisfied with HMRC's calculations which were sufficient for them to conclude that NNS Services Ltd takings required the company to be registered for VAT. HMRC had used best judgment in reaching the figures assessed.

Despite no sale contract or legal documents, looking at the substance of the 'sale', the First Tier Tribunal was satisfied that the trade had always been operating above the VAT registration thresholds and that there had been a TOGC. The business was the same business, using the same premises, equipment, front of house set-up and staff. The business traded under the same name. The Tribunal concluded that there was nothing to indicate that it was under new management or that its offering was changing to any significant degree.

As a transfer of business as a going concern, HMRC's back-calculation to the period of Withington's ownership was valid. Withington should have been registered to the date of the TOGC and NNS should have been registered from the date of the TOGC.

Once the First Tier Tribunal had found in HMRCs favour, the personal liability notice took effect. HMRC's guidance states that an officer or officers of a company may be personally liable to pay all or part of the company penalty where:

- a company is liable to a penalty for a deliberate wrongdoing; and

- the wrong doing is attributable to the deliberate action of an officer or officers of the company.

Before you can consider charging a company officer penalty both of the two conditions above and one of the two circumstances below must also apply

1. the officer gained or attempted to gain personally from the wrongdoing, or

2. the company is insolvent or likely to become insolvent.

Following the sale, Withington KFC no longer existed and so the unpaid VAT relating to Withington is likely to have never been paid but the £33,000 assessed under the PLN was payable by the former director.

The appeal was dismissed.

Withington KFC Services Ltd; NNS Services Ltd v HMRC (TC07801)

Roller blinds installed by a developer (Lecture B1226 – 26.07 minutes)

Summary – Roller blinds installed in new dwellings were a permanent part of the building, qualifying as building materials ordinarily incorporated in a building and the 'builders block' did not apply.

Wickford Development Co Ltd is a UK VAT-registered property development company. The company sells finished homes, with no specification changes allowed by buyers. The company includes blinds in all properties, irrespective of the property size or style. At the time of the hearing, the company had built 1,000 homes at a site in Essex, with a further 600 left to be developed and sold.

Group 5, Schedule 8 VATA 1994 zero rates the first grant of a major interest in a newly constructed dwelling and this in turn allows input tax recovery on related costs unless blocked by way of SI 1992/3222. SI 1992/3222 (6) blocks the recovery of input tax on building materials not ordinarily incorporated by builders into that dwelling.

This case considered whether the supply and fit of blinds that were installed as standard in all Wickford properties were building materials ordinarily incorporated into new dwellings. HMRC stuck to their view in John Price v HMRC [2010] that blinds were akin to curtains and therefore blocked from input tax recovery.

Following the John Price decision, HMRC released Customs Brief 02/11, which stated:

> **"**HMRC's view remains unchanged in that roller blinds (and other 'window furniture') are not 'building materials' as defined and will not be changing its policy. The Tribunal chairman did not hear any evidence on the point of what is and what is not a 'building material' for VAT purposes but reached his conclusion as a matter of judicial notice, that is, as a common sense fact.

Further, HMRC stated:

> "Given the small amount of VAT at stake in this particular case, HMRC will not be appealing this decision further."

Decision

The First Tier Tribunal concluded that the supply and installation of the blinds did qualify as building materials as they were fitted individually, and to remove them would cause damage to both the walls and window frames. The Tribunal considered that they were a permanent part of the building and not merely part of the furniture. They were no different to curtain poles that HMRC accept as being ordinarily incorporated and so input tax was recoverable on the blinds.

Further, the Tribunal confirmed that HMRC's view, expressed in Customs Brief 02/11, was incorrect. It will be interesting to see whether, having now lost twice at the First Tier on the same issue, whether HMRC will appeal or now accept the First Tier's decision.

Wickford Development Co Ltd v HMRC (TC07864)

Student union catering

Summary - Supplies of hot food and coffee were not exempt supplies, as the student's union did not make any supplies of education or vocational training.

The University of Southampton's student union claimed a repayment of output tax relating to the supplies of hot food and coffee, arguing that these were exempt supplies that fell within Schedule 9 Group 6 Item 4 VATA 1994.

To be classed as such exempt supplies, the:

- student's union needed to make principal supplies of education or vocational training;
- supplies of hot food and coffee from the union shop must have been "closely related" supplies for the purposes of exemption under Item 4; and
- student's union needed to meet the definition of an "eligible body" as set out in Note (1)(e).

The student's union stated that its principal supplies consisted of vocational training including academic representatives training, clubs/societies committee training, preparation for candidates for elected positions, training on using LinkedIn, a safety/welfare programme, food safety and hygiene training and safety bus driver training. The only charge that was mentioned for any of these supplies was £25 for the safety bus driver-training course.

HMRC accepted that the student's union trained students to work for the student union in their commercial activities. However, for those activities to constitute a supply of vocational training, there must be consideration for that supply. However, only the safety bus driver training was provided for a consideration; no charge was made for the other training courses, with the result that they could not be regarded as supplies at all.

Decision

The First Tier Tribunal concluded that there was insufficient evidence provided by the student's union as to how the courses and activities constituted training, re-training or work experience for any trade, profession or employment or any voluntary work connected with the activities specified in Note (3). They were either "on-the-job training" or recreational activities and so fell short of meeting the definition of vocational training. Even the safety bus driver-training course was rejected as successfully completing the course merely allowed students to "sign out" the union's minibus rather than being employed to drive the bus. Further, The Tribunal agreed with HMRC that to represent a supply that could be exempted, it must be a supply for consideration. With the exception of the bus driver course, this was not the case here. In conclusion, the First tier Tribunal stated that the student's union did not make principal supplies of education or vocational training.

Although not necessary, the Tribunal did go on to consider the second and third tests listed above. The student's union failed on both counts. There was no evidence to show who the supplies were made to or that the supplies of hot food and coffee from the union shop were "closely related". Although the student's union did not distribute any of its profits, it was unable to show that any profits were applied to the continuance or improvement of the supplies benefitting from the exemption for education. The Student's union was free to apply their profits to any of its other activities and so did not qualify as an eligible body.

The appeal was dismissed.

University Of Southampton Students' Union v HMRC (TC07896)

R&C brief 16(2020)

This Brief sets out HMRC's position following the Upper Tribunal decision in Cheshire Centre for Independent Living that examined the VAT treatment of payroll services provided by a charity to disabled persons who employed personal assistants to help them live at home.

In 2019, First Tier Tribunal had ruled that the services were exempt from VAT because they were ancillary to and therefore fell within the exemption for services directly connected with welfare. HMRC was granted leave to appeal, but Cheshire Centre for Independent Living withdrew its appeal. The First Tier Tribunal's decision has therefore been set aside by the Upper Tribunal and will not be remade.

In this Brief, HMRC confirms that it is now not possible to rely on the First Tier Tribunal's earlier decision and so cases for claims to exemption where the facts are materially similar to those in the Cheshire case will be rejected. HMRC's policy remains that such payroll services are not exempt welfare services. Cases for claims to exemption where the facts are materially similar to those in the Cheshire case will be rejected.

https://www.gov.uk/government/publications/revenue-and-customs-brief-16-2020-vat-liability-of-payroll-services

R&C Brief 17(2020)

In August 2020, we considered the First Tier Tribunal decision in Window To The Womb (Franchise) Limited, D I Harries Limited, DJC Studios Limited v HMRC (TC07687). The First Tier Tribunal concluded that the customers' primary purpose when buying the scans was to monitor the pregnancy and, if necessary, receive a diagnosis of any abnormality.

The Tribunal confirmed that to be exempt, the services must be:

1. provided by an appropriately qualified and registered health professional;

2. medical care meeting the primary purpose test.

As both conditions were satisfied, the Tribunal concluded that the supplies were exempt.

As a result of this decision, HMRC has produced Revenue & Customs Brief 17(2020) that clarifies HMRC's policy on the VAT treatment of ultrasound scanning services for pregnant women and more specifically when they should be treated as exempt. Providing that the two conditions above are met, other providers supplying such services should exempt their supplies

https://www.gov.uk/government/publications/revenue-and-customs-brief-17-2020-vat-liability-of-private-sonography-services-first-tier-tribunal-decision

Financial services "specified supply" rules (Lecture B1226 – 26.07 minutes)

Currently, a UK business providing certain specified supplies to non-EU customers are entitled to input VAT recovery on the costs associated with those supplies under the VAT (Input Tax) (Specified Supplies) Order 1999 (the Specified Services Order).

These specified supplies include financial services such as banking and insurance.

The Chancellor, Rishi Sunak, has announced that from 1 January 2021, when the UK is no longer a member of the EU, these 'specified supplies' rules are being extended to include sales to non-UK customers and so will include export services to the EU.

Richard Asquith, VP Global Indirect Tax at Avalara has stated:

> "The UK measure will give a tax subsidy to the import UK sector. This comes at a time with the UK has lost its Financial Services 'passporting rights' into the EU market, and will likely not win 'equivalence' with EU rules. That means a loss of direct rights to sell into the EU."

https://www.forbes.com/sites/robertmarchant/2020/11/02/the-uk-vat-implications-of-brexit-for-services-businesses/?sh=1de2b54d3895

Brexit VAT rules for e-commerce (Lecture B1228 – 20.03 minutes)

Goods sold online but stored in the UK at point of sale

The key aspect for the cross border selling of goods is initially the location of the goods at the point of sale. Many UK online retailers would be storing their goods in UK warehouses. When a sale is processed through the website the goods will be dispatched to the customer's location. Identifying the customer and the delivery address will be crucial to determine the VAT treatment of the sale.

Up until 31 December 2020

Prior to 1 January 2021, If the goods:

- remain in the UK, the goods will follow their normal VAT rate, irrespective of whether the buyer is a VAT registered business or an unregistered individual;
- are exported out of the EU the goods will be zero rated providing proof of export is retained. The identity of the customer is not critical for exports;
- are dispatched to an address in the EU, the sale is zero rated provided that the EU customer provides their business' VAT number at the point of sale;
- are transported to a non-business customer in the EU, UK VAT should be charged at the UK rate applicable to those goods BUT the sales must be tracked for distance selling purposes.

Distance selling from the UK

When selling to the EU, the seller must monitor their calendar year distance selling threshold in the customer's territory:

- Germany, Netherlands and Luxembourg are Euro 100,000;
- All other EU countries have a Euro 35,000 threshold.

As business to the EU increases they will need to monitor their sales into each EU country.

Where the online retailer exceeds the local distance selling threshold, the place of supply changes to that member state, requiring the seller to register in that state and charge and account for the local VAT rates on their sales.

Illustration 1

A UK VAT registered online retailer sells sports goods via their own website and UK VAT is charged on their sales. EU sales have never been more than £20,000 per year so UK VAT is correctly charged.

During lockdown they experienced increased demand from the EU.

If they breach the French threshold (say) they must register for VAT in France. From the date of their French registration they must charge and account for French VAT on sales to French individuals. UK VAT will no longer be charged or accounted for on those French sales.

They will continue to charge and account for UK VAT for sales into other member states until they breach the thresholds those member states.

What if the goods are stored in the EU at point of sale?

It is not uncommon for online retailers to transport goods from the UK and store them in EU fulfilment houses so optimising delivery times. Amazon has numerous EU fulfilment arrangements with sellers to facilitate online sales.

As the goods are being stored in an EU fulfilment house the UK retailer would ordinarily have a registration obligation in that member states. Moving UK sourced goods to the EU fulfilment house is a movement of own goods and as such the retailer should be registered in the destination state so as to secure a zero rated deemed supply from the UK. Acquisition tax will be due on their EU VAT return. When the goods are subsequently sold, this is treated as a domestic sale with domestic VAT.

When the goods are sold online, the place of supply will be where the goods are located. So if the goods were stored in a Belgium fulfilment house the online sale would be subject to Belgium VAT. Distance selling from Belgium would then need to be considered.

If Amazon (say) were acting as undisclosed/own name agent then your client can avoid an EU registration. In this instance your client is selling the goods to Amazon from a VAT perspective so a zero rated dispatch to Amazon for your client. Amazon would have acquisition tax in the country where the goods are stored followed by a domestic supply when the goods are sold (subject to distance selling considerations).

Selling goods from 1 January 2021

Once we leave the EU, all sales to customers outside the UK will be a zero rated export of goods.

When selling into EU destinations VAT and customs duty will be payable locally although consignments less than Euro 150 are not subject to customs duty. This limit is per consignment not per item.

Destination VAT would be payable locally by the customer via variations of our postal import system, or by the UK supplier if they are the importer of record, requiring registration in the destination state. Many UK suppliers are expected to avoid importer of record status.

Simplification from 1 July 2021

The EU commerce directive was due to come into effect from 1 January 2021 but it has been delayed until 1 July 2021 because of COVID-19.

From 1 July 2021 destination VAT will be due on all online sales into the EU. This is achieved by scrapping the distance selling limits for EU suppliers. So EU and Non-EU sellers must charge VAT at point of sale for consignments up to Euro 150.

Sales up to Euro 150 will still be free of Customs Duty.

Destination VAT can be reported and paid via a new One-Stop-Shop VAT return (OSS) effectively extending the current Mini One Stop Shop (MOSS) to e-commerce.

Non-EU suppliers such as UK will be able to use the OSS and it is anticipated that UK retailers will be able to register for OSS in a member state of their choosing.

Illustration 2

BaseGolf Ltd is a UK VAT registered online retailer. Francois orders a pair of golf shoes directly from the company's website for £95.

If this sale was in 2020 it would be subject to UK VAT unless BaseGolf breaches the French distance selling limits.

From 1 January 2021 to 30 June 2021 French VAT is payable by customer where BaseGolf use the postal import system in France. There will be no Customs Duty as the consignment is less than Euro 150.

From 1 July 2021, BaseGolf will need to charge French VAT at point of sale. The French VAT collected will be accounted for via the new OSS return.

E-commerce Imports into the UK from 1 January 2021

Reliance on the postal import system is reduced.

Import VAT will apply to all imports as the £15 low value consignment is abolished but there will be no Customs Duty if the consignment is less than £135 (Euro 150 equivalent).

VAT will be 'supply VAT' rather than 'import VAT' and the supplier will need to register for UK VAT and charge VAT at point of sale.

There will be a simplified import declaration for data collection purposes as no VAT or duty is due at point of import.

Illustration 3

Jim orders five dozen golf balls from a German supplier in 2020 for an online price of £119 (£100 plus 19% German VAT).

The German supplier would need to monitor the UK distance selling threshold of £70,000 in the 2020 calendar year but until they breach that threshold, German VAT is correctly charged.

For sales from 1 January 2021 the online price increases to £120 and UK supply VAT of £20 will be due at point of sale. The German supplier will need to be UK registered to account for the supply VAT. There will be no Customs Duty as the consignment is < £135.

Illustration 4

What if the golf balls were bought for £100 (net) by a UK business for promotional purposes?

For sales up to 31 December 2020 we will have a zero rated dispatch from Germany with UK acquisition VAT on the UK customer.

From 1 January 2021 no German VAT is charged as goods are being exported from Germany. As the customer is UK registered the German supplier need not charge UK supply VAT at point of sale. The UK customer will give their VAT registration number at point of sale and the UK customer will account for the reverse charge.

Online market places (OMP)

An OMP is a website advertising goods for sale such as Amazon. However, a business that only provides one of the following will not be an OMP:

- The processing of payments in relation to the supply of goods;
- The listing or advertising of the goods;
- The redirecting or transferring of customers to other websites/apps where goods are offered for sale, without any further intervention in the supply.

Facilitating OMPs have a new role post transition and an OMP is facilitating where any of the following conditions are met:

- Sets the general terms and conditions of the sale; or
- Authorises the charge to the customer for payment; or
- Involved in ordering or delivering the goods.

Overseas sellers into the UK with goods < £135

If goods less than £135 are located outside the UK at the point of sale, ordinarily the supplier would charge point of sale VAT. However, where such goods are sold via a facilitating OMP, VAT is charged and accounted for by the OMP. There is no need for overseas seller to register for UK VAT.

The reverse charge will apply where the sale is via the OMP to a UK VAT registered business.

There are similar rules coming into the EU from 1 July 2021.

Overseas seller with goods located in the UK

If goods are located inside the UK at point of sale, the overseas supplier would already be VAT registered and would have dealt with the import procedures prior to sale. If the goods are sold via an OMP to unregistered individuals, the point of sale VAT is accounted for by the OMP, with a zero rated sale from supplier to the OMP. However, if the goods are sold to VAT registered customers then the supplier must charge VAT, with the OMP simply providing the supplier with the sale information

Similar rules coming into the EU

Similar rules are coming into the EU from 1 July 2021, the idea being that EU OMPs will charge and account for supply VAT at destination VAT rates.

Ordinarily, if goods were sold for less than < £135, and located in the UK at point of sale, the UK supplier would have charged point of sale VAT and used the OSS to account for the EU VAT charged.

Under the OMP rules, if these goods are sold by via an OMP, the OMP will charge and account for point of sale VAT so removing the need for the UK seller to use OSS.

Goods costing more than £135

Goods, or consignments of multiple goods, costing more than £135, will be treated as:

- Zero rated exports in country of dispatch;
- Subject to import VAT, rather than supply VAT, in the country of arrival;

Any duty payable will depend on whether the UK and EU have a free-trade deal in place.

There will be an Import declaration at the time of arrival, with the 'importer of record' being responsible for the import VAT. If this is the supplier, they will have an obligation to register in the destination state.

Post Brexit VAT rules for services (Lecture B1229 – 15.39 minutes)

In my previous recordings, I considered how the VAT procedures will change on 1 January 2021 for a GB business trading in goods that involves moving them between EU countries. The good news is that the rules for services will largely remain unchanged but there are some important changes that will take place for many B2C services supplied to EU customers, and also those services affected by the 'use and enjoyment' provisions.

The challenge is knowing what will and will not change – I will consider both questions in this session.

Sales of B2B services

Example - you act for a client who is a management consultant, working for business customers in the UK, EU and non-EU. Since 1 January 2010, the place of supply for VAT purposes has always depended on where his customers are based – where he carries out his work is irrelevant. This outcome applies to the majority of services and is known as the general B2B rule VAT Notice 741A, para 6.3. If the customer is outside the UK and in business, then no UK VAT is charged on the services in question.

There will be just one change when the UK's transitional deal with the EU ends on 31 December – our management consultant won't need to complete EU Sales Lists. But the place of supply will continue to be the EU country where his customer is based. In other words, the status quo is preserved.

Should we still show the EU customer's VAT number on our sales invoices? The practical answer is 'yes' because the customer's VAT number is the best evidence of a B2B deal. It is the B2B outcome, which means the place of supply is the customer's country.

Will we need to register for VAT in other EU countries? – for B2B services, EU customers will continue to deal with the VAT by doing the reverse charge on their own returns.

Buying services from EU suppliers

There has always been some misunderstanding about the rules for a UK business buying services from overseas suppliers. The reverse charge is applied by a VAT registered business that buys services from abroad and not just the EU. This has always raised a few eyebrows: how can the reverse charge apply to bookkeeping services provided by an Indian based supplier when VAT is an EU tax and India is outside the EU? But the commercial reality is that the rules are intended to prevent a UK business with an input tax restriction from gaining a VAT advantage by using an overseas supplier – see Insurance broker using computer services of an Indian business.

Example - Insurance broker using computer services of an Indian business

ABC Insurance Services has received two quotes for computer services. A UK business has quoted £100,000 plus £20,000 VAT; an Indian business has also quoted a fee of £100,000 but will not charge VAT.

ABC is partially exempt, only able to recover 5% input tax on its overheads. It will apply the reverse charge to the invoices from the Indian supplier, accounting for output tax of £20,000 in Box 1 of its VAT return but only claiming input tax of £1,000 in Box 4 i.e. £20,000 x 5%.

If it used the services of the UK supplier, it would charge £119,000 to its profit and loss account and only claim input tax of £1,000. In other words, there is a level VAT playing field for both deals. This example also applies before and after 1 January 2021 if India is substituted for an EU country.

Selling B2C services

The general rule for the supply of B2C services is that VAT is charged based on the location of the supplier. So, if a UK accountant completes a tax return for a private individual living in Spain, the fee will be subject to 20% UK VAT. However, most professional services are not subject to UK VAT if the B2C customer is resident outside the EU. In such cases, the place of supply is based on the customer's location. So, there is no VAT charged if you complete a tax return for a private individual living in America or Australia. The services where this rule applies are listed in VATA1994, Sch 4A, para 16 – and also VAT Notice 741A, section 12.

An important question is whether legislation will be passed before the end of the year to remove the difference between EU and non-EU supplies of B2C services? After all, HMRC's commentary has made it clear that EU and non-EU trading in goods will be the same – will the same principle apply to services? I asked the HMRC press office for clarification. The spokesperson said (23 October, 2020):

> "From 1 January 2021, the place of supply of services rules will remain broadly the same as they are now. The general rule for B2C supplies remains as where the supplier is based, with the exception of UK to EU rules changing to the same as those currently for UK to Rest of World."

In effect, this means that legislation will take effect from 1 January so that no VAT will be charged on B2C services supplied to EU customers in the list at Sch 4A, para 16. So, in my example, the accountant working for their B2C customer living in Spain will no longer charge VAT. There will be no requirement to register for VAT in Spain either. Is this a chance to increase fees, perhaps sharing the VAT saving with the EU customer? The accountant can

still claim input tax on his expenses, even though he is not charging output tax on these fees – known in VAT speak as 'outside the scope with recovery'.

Services where the use and enjoyment override applies

Let us consider an important change that will take place on 1 January for services, namely for those services where the place of supply depends on where they are 'used and enjoyed' by the customer. These rules apply where the normal place of supply rules would mean they take place outside the EU and are not subject to UK VAT but are actually used inside the UK. Alternatively, they would be subject to UK VAT under the place of supply rules but are actually consumed outside the UK and EU.

From 1 January 2021, references to 'outside the EU' will change to 'outside the UK' – see main article. The services are as follows:

- Hiring of goods including means of transport
- Electronically supplied and telecommunication services (B2B only)
- Repairs to goods under an insurance claim (B2B only)
- Radio and telephone broadcasting services.
- VAT Notice 741A, section 13

To give an example, if a UK business photographer currently hires a camera in Ireland to take photos there, he will not be charged Irish VAT by the camera shop under the general B2B rule, i.e. the UK photographer applies the reverse charge on his UK VAT return. But when we become a non-EU country on 1 January, the Irish supplier will charge Irish VAT on the fee because Ireland also applies the 'use and enjoyment' rule for hiring goods to non-EU customers. The UK photographer will need to recover the Irish VAT by submitting a non-EU VAT refund claim directly to the Irish tax authorities.

To reverse the situation, consider an American based photographer (in business) who is touring the UK taking photos of our stately homes for an American magazine that has commissioned his services. He has hired a camera from a UK shop for a fee of £2,000. The general B2B rule would mean that no UK VAT is charged on the fee (place of supply being America) but the use and enjoyment rules for the hiring of goods means that the place of supply is the UK where he is using the camera. He will be charged £400 VAT by the shop. However, if the photographer is based in an EU country, he (the photographer) will do the reverse charge on his own VAT return and not be charged VAT by the shop. Will this outcome change after 1 January 2021? The answer is 'yes' - the HMRC press office confirmed: "The current use and enjoyment provisions will continue to apply, the only change being that UK to EU rules will effectively be the same as those currently for UK to Rest of World". In other words, the rules for my example of the American photographer will apply to every country outside the UK, including EU countries.

Contributed by Neil warren

Preparing for Brexit – practical VAT tips (Lecture B1230 – 14.29 minutes)

Call-off stock arrangements will change

An EU concession is that an EU business holding call-off stock in another EU country does not need to register for VAT in that country if a known customer will buy the stock and is registered for VAT in that country – the customer can account for the VAT on his own return when he calls off the stock. But that concession will no longer be available for a GB business when we leave the EU on 31 December.

Example

Imagine that a GB business manufactures ice cream and has one customer in Ireland who is registered for Irish VAT. A stock of ice cream is held in Ireland by the GB supplier, which he owns until the customer needs it and calls it off as and when required. This is a call-off stock situation and means that the GB manufacturer does not currently need an Irish VAT number – a sales invoice is raised each time the customer calls off the stock and the customer accounts for the VAT on his own return. From 1 January 2021, the manufacturer's ice cream will be subject to import VAT and duty when it arrives in Ireland, or any other EU country for that matter. The manufacturer must register for VAT in Ireland, complete Irish VAT returns and charge domestic VAT on future sales. The fact that the goods will be sold to a known VAT registered customer in Ireland is no longer relevant.

Overseas business - nil registration threshold

Why must the manufacturer register for VAT in Ireland? What if his total annual sales of ice cream will be less than the Irish VAT registration threshold? The reason is because an overseas business only gets a threshold in its own country, not for supplies it makes in other EU countries. A zero threshold applies in such cases.

EU businesses making supplies in GB

The opposite situation will also apply from 1 January 2021 ie EU suppliers holding call-off stock in GB will need to register for VAT here. HMRC has accepted requests for registration since 1 October 2020, with the registrations going live on 1 January.

MOSS returns

B2C supplies in the EU of broadcasting, telecommunication and electronic services are taxed according to the VAT rate that applies in the customer's country. The Mini-One-Stop-Shop return is the way a business pays this tax at the end of each calendar quarter. A UK business making B2C digital supplies does not currently have to worry about MOSS if total annual B2C sales in the EU are less than £8,818 ie 10,000 Euros. If sales are less than this threshold, the supplier charges the VAT rate that applies in his own country. But there will be major changes from 1 January 2021:

- The £8,818 threshold will end - a zero threshold will apply instead;
- A UK business making MOSS sales must register in an EU country of its choice under the non-Union MOSS scheme and submit returns and pay tax in that country. The alternative is to separately register for VAT in each EU country where digital supplies are made, which will be very time-consuming;

- The final UK MOSS return will include sales up to 31 December 2020 and be submitted by 20 January 2021.

https://www.gov.uk/guidance/pay-vat-when-you-sell-digital-services-to-eu-customers-after-brexit

Reclaiming VAT paid in other EU countries

From 1 January 2021, when we will become a non-EU country (third country in EU speak), procedures will change for a UK business that reclaims VAT paid in other EU countries. Until 31 December, this VAT is recovered by making a single online claim to HMRC, which is forwarded to the tax authorities in the other countries and hopefully repaid within six months. HMRC has confirmed that a business can submit claims up to 31 March 2021 for the December 2020 quarter.

But a non-EU business must submit what is commonly known as a 13th Directive claim instead. The claims must be submitted directly to the tax authority on a paper form, usually in the country's own language. Each EU country might have different deadline dates.

Example

Imagine the following situation: you travel to the Netherlands on business in 2021 to meet a client and you incur the following expenses while you are there, all include Dutch VAT: car hire, road fuel, hotel bills, food and drink for subsistence, a separate meal for entertaining the client.

As with EU refund claims, the first challenge is to check the input tax rules in the Netherlands to see if any of the above items are non-deductible under local tax law. Dutch tax law blocks input tax claims on business entertaining, as well as food and drink purchased in hotels, cafes and restaurants, so that will reduce your claim.

With regard to submitting a claim to the Netherlands, there is a useful link to get information on the refund procedures relevant to each EU country:

https://ec.europa.eu/taxation_customs/business/vat/eu-country-specific-information-vat_en

Note - the information for the Netherlands in the above link was very clear. A claim can be submitted each quarter and the deadline for calendar year claims is the following 30 June. And, most importantly, the form can be submitted in Dutch, English or German.

Practical issues

For 13th Directive claims, it is likely to come down to a cost v benefit analysis. Will the time spent dealing with the paperwork and learning Hungarian be worthwhile to claim 100 Euros of VAT?

Alternatively, it might be worth contacting a specialist VAT refund business to deal with the claim. If their fee is based on a percentage of the VAT rather than a fixed amount, this will hopefully be worthwhile.

Retail export scheme

For many years it has been possible for retailers to sell goods to visitors from outside the EU VAT-free through the 'retail export scheme' and at popular holiday destinations many retailers promote 'tax free shopping for tourists'.

The Government has announced that this scheme will cease on 31 December 2020.

Some businesses and trade organisations are pressuring the Government to reverse its decision so a change of policy is a possibility. Retailers who use the scheme must, as well as ensuring that their staff are aware of the change (shop staff may well have to deal with queries from overseas visitors who do not realise that their shopping is 20% more expensive than they had expected), keep monitoring the situation for developments.

Triangulation

Imagine the following situation: Goods are manufactured in Poland (country A); sold to a UK intermediary business (country B); but the goods are shipped directly from Poland to the final customer in Germany (country C).

All customers are registered for VAT in their own country.

Until 31 December 2020, the EU simplification process of triangulation works in this situation ie the supplier in Poland invoices the UK intermediary without charging VAT – and the UK intermediary invoices the customer in Germany without charging UK VAT. The German customer deals with the VAT on his own return by accounting for acquisition tax and claiming input tax. Relevant entries are made on EU Sales Lists for the code of 'triangulation'

This procedure will end for a GB business on 31 December because the triangle is broken when we leave the EU. It only works if A, B and C are all VAT registered in different EU countries. Depending on whether the GB business takes ownership of the goods in Poland or Germany (more likely Germany) it will need to register for VAT in one of these countries ie it is making taxable supplies of goods.

Contributed by Neil warren