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Personal tax

Grants for electric cars (Lecture P1286 – 15.27 minutes)

In 2011, to encourage the take up of ultra-low emission cars, the government launched the plug-in vehicle grant scheme (PIVG). Since then, the scheme has been extended to cover eligible vans, trucks, motorcycles and taxis.

The scheme is administered by the Office for Zero Emission Vehicles (OZEV), previously known as the Office for Low Emissions Vehicles (OLEV), a government unit supporting the transition to zero emission vehicles.

The PIVG scheme offers grants towards the price of ultra low emission vehicles (ULEVs). To be eligible, vehicles must be on the government's approved list. Details of the eligible vehicles and the grants that can be claimed can be found at https://www.gov.uk/plug-in-car-van-grants.

For cars, the grant covers 35% of the purchase price (including VAT and delivery fees), up to a maximum of £2,500 provided the vehicles:

- cost less than £35,000;
- have CO2 emissions of less than 50g/km and be able to travel at least 112km (70 miles) without any emissions at all.

Under the PIVG scheme, consumers pay the discounted price automatically, and do not have to go through a separate application process. Only dealers and manufacturers need to access the portal directly to apply for the grants available.

Home charging points

A second scheme, the Electric Vehicle Homecharge Scheme (EVHS), currently provides a grant towards the cost of installing electric vehicle smart chargepoints at domestic properties across the UK.

Under this scheme, up to 75% of the cost of installing these chargepoints is currently available in the UK, capped at £350.

However, from April 2022, the EVHS will:

- no longer be available to homeowners (including people with mortgages) who live in single-unit properties such as bungalows, detached, semi-detached or terraced housing;
- remain open to homeowners who live in flats and people living in rental accommodation (flats and single-use properties).

According to the government, to remain eligible for this grant, orders placed prior to and including 1st February 2022 will still qualify provided that:

- installations in single-unit properties are completed by 31 March 202; and
- a claim is submitted to the Driver and Vehicle Licensing Agency by 30 April 2022.

Scottish EST and Commercial Grants will still remain in place.

https://www.gov.uk/government/collections/government-grants-for-low-emission-vehicles

Allowable accommodation costs **(Lecture P1286 – 15.27 minutes)**

Summary – The taxpayer was allowed to claim a percentage of accommodation costs incurred, to be calculated by reference to the actual duties performed at the accommodation.

Jayamth Kunjur was an experienced, qualified dental surgeon. He lived in Southampton with his wife, a teacher, and his children who were at school there.

He wanted to become a maxillofacial surgeon and in 2012 accepted the only available training position, which was at St George's Hospital, South London. It was a four-year contract. He initially travelled by car from Southampton, leaving home at 5.30 am and returning home at 11pm but within a week, realised that this was not sustainable. He was on-call for two nights each week, but not necessarily the same two nights each week, and also one weekend in six. When on-call, to be able to deal with emergencies, he was required to have accommodation within 30 minutes of the hospital. He was also 'informally on-call' for any maxillofacial patients needing assistance during the night and indeed, this occurred most nights.

He rented accommodation close by, staying there during the week as well as the one weekend in six that he was on-call. He had a telephone and broadband contract so that he could perform his on-call duties, with the cheapest contract also including a Sky TV package. He used the broadband to get access to materials to do research and write articles he was required to undertake under his contract.

During his 4-year training contract, he incurred £39,000 of accommodation-related costs that he claimed were wholly, exclusively and necessarily incurred in the performance of duties.

HMRC denied the claims, arguing that his employment contract did not require him to live near the hospital, and so he did not incur the expenses wholly, exclusively, and necessarily in the performance of his duties. HMRC issued careless behaviour penalties totalling £7,600.

Jayamth Kunjur appealed.

Decision

The First Tier Tribunal considered whether the requirements of s.336 ITEPA 2003 had been satisfied, which states that the general rule is that a deduction from earnings is allowed for an amount if—

a) the employee is <u>obliged</u> to incur and pay it as holder of the employment, and

b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.

The First Tier Tribunal confirmed that as a registered member of the General Medical Council, he was subject to the professional obligation to place the interests of his patients above his own. His formal on-call duties required him to be able to treat patients within 30 minutes of being called and so he was obliged to rent accommodation close to the hospital.

The Tribunal stated that the wholly and exclusively part of the test would only be met where there was no private benefit to the employee, other than a merely incidental benefit. The Tribunal confirmed that Jayamth Kunjur obtained no personal benefit from the accommodation at the weekends when he was not on formal on-call, as he returned to Southampton. Further, there was no private benefit from the accommodation when he was on formal on-call and actually in attendance at the hospital. Nor did he gain private benefit when he was on informal on-call and was actually called for the duration of the call or when he went to the hospital during informal on-call. However, the Tribunal concluded that there was no requirement for him to undertake research and prepare articles so close to the hospital and so he obtained private benefit from the use of the accommodation while preparing those articles.

It was the last part of the legislation that proved to be problematic - that the expenses must be incurred 'in the performance of the duties of the employment'.

The Tribunal concluded that Jayamth Kunjur did satisfy this part of the test when he was on informal on-call and gave advice over the telephone from the accommodation. At this time, both the accommodation and telephone were used in the performance of the duties for the duration of the calls. However, when he was on formal on-call and present at the hospital, the accommodation was not being used in the performance of the employment. They stated that being present at the accommodation waiting for a call was not the performance of the duties.

Overall, the Tribunal stated that only the proportion of the expenditure that satisfied all three aspects of the test within s.336 ITEPA 2003 was eligible for relief and that this proportion must be determined by reference to the amount of time he spent giving advice from the accommodation while on informal and formal on-call. Only a small proportion of the expenses were capable of satisfying the requirements.

In concluding the Tribunal stated that they allowed the appeal in respect of the percentage of the accommodation costs relating to the actual duties performed at those premises and requested the parties to agree the exact proportion involved.

The Tribunal reduced the related penalties to nil. The Tribunal stated that the statutory test was a particularly difficult one that is counter intuitive. Jayamth Kunjur was entitled to rely on his adviser's advice and was not obliged to check that advice.

Jayamth Kunjur v HMRC (TC08296)

Employments not aggregated (Lecture P1286 – 15.27 minutes)

Summary – Two employments should not be aggregated for National Insurance purposes and so the taxpayer was not entitled to claim employment and support allowance.

South-West Ambulance Services NHS Trust (SWAST) used to provide both ambulance services dealing with emergencies and patient transport services dealing with non-emergencies. Management of the two services was separate even though the employees were all paid by SWAST. The services were always invoiced separately.

Following a new tender, in 2013 the patient transport services contract was awarded to an independent private company, NSL Ltd.

SWAST and NSL operated independently of each other from separate premises and had no board members in common. They did not share any vehicles or equipment and each company was responsible for their own maintenance and upkeep. SWAST did not provide services to NSL, and vice versa.

Previously a driver for SWAST providing both services, Martin Long was subsequently employed by both companies. During a working day, he could work for both employers, taking a patient to hospital under his SWAST contract and then later collecting that same patient under his NSL job. He was believed to be the only worker employed in this way.

In 2016, due to bad health, he worked reduced hours. He claimed employment and support allowance which the Department of Work and Pensions rejected, stating in a letter that he had not paid enough NICs on his earnings in 2013/2014 and 2014/2015 to make them qualifying years to receive such payments.

Martin Long argued that the NIC aggregation rules, normally used to prevent the artificial splitting of two employments, should be applied in his case as he was undertaking a single job. More NIC should have been deducted.

However, HMRC advised that the combined earnings from separate employments could not be used in this case to calculate weekly earnings for NIC purposes as he was working for two separate organisations, doing two separate jobs. His income had not reached the Lower Earnings Limit and that his contributions paid were correct. No NICs were paid on his earnings from NSL and only £27 NICs were paid on his earnings from SWAST.

Martin Long appealed.

Decision

The Tribunal stated that for earnings to be aggregated, SWAST and NSL must have carried on business in association with each other. Even though Martin Long did work for both companies during the same day, this was not enough to establish a business association between the two companies.

The Tribunal did not accept Martin Long's argument that SWAST and NSL were 'emanations of the state carrying on business in partnership'. They were two separate companies: SWAST being an NHS trust and NSL a private company. It did not matter that the ultimate funding for the contracts came from the same government department.

The Tribunal concluded that the companies operated completely independently from each other and the appeal was dismissed.

Martin Joseph Long v HMRC (TC08272)

Wrong form but relief allowed (Lecture P1286 – 15.27 minutes)

Summary - It was clear from the company's communications with HMRC that it had intended to submit form SEIS1. Submission of EIS1 was not an acceptable reason for HMRC to deny SEIS relief on qualifying shares.

Fashion on the Block Limited was a fashion technology start-up company that wanted to raise funds by issuing shares that qualified for relief for its investors under the seed enterprise investment scheme (SEIS).

The company applied for Advance Assurance from HMRC, with the covering email headed 'Application for SEIS'. HMRC granted the Advance Assurance by letter dated 2 May 2019 stating that they would be able to authorise the company to issue compliance certificates for the SEIS and Enterprise Investment Scheme (EIS). The letter explained that once the shares had been issued, the company must complete and send a compliance statement to HMRC.

Having issued the shares and raised £150,000 from UK investors, the company's advisors submitted the required compliance statement but unfortunately used form EIS1 rather than SEIS1. However, the covering letter stated, "Please find enclosed an SEIS1 form."

When HMRC replied confirming that the company could issue certificates to investors claiming EIS relief, the advisor realised their mistake and immediately contacted HMRC by email, drawing attention to the mistake and requesting authority to issue SEIS certificates instead. HMRC refused on the grounds that because a form EIS1 had been submitted and shares issued, an investment had already been made under the EIS so that the company could not qualify under the SEIS. Consequently, the investors were adversely affected as SEIS income tax relief is given at 50% rather than the 30% that applies for EIS.

The company appealed.

Decision

The First Tier Tribunal highlighted that in order to authorise a company to issue SEIS certificates, HMRC's requirements are substantively the same as for EIS certificates.

The Tribunal considered the Upper Tribunal decision in X-Wind Power Ltd v HMRC where it was found that 'there is no provision in the legislation for the withdrawal, setting aside, replacement or revocation of a ITA 2007 s 205 [EIS] compliance statement'. However, the Tribunal concluded that there was no evidence in this case that considered what should happen where a company submits an EIS form in error.

HMRC had taken a literal interpretation of the conditions contained within the legislation but the Tribunal found that the legislation should have been applied purposively. With the exception of the incorrect form having been used, everything else submitted by the company made reference to the SEIS and it was clear that this was the relief that the company had intended to apply for. There had been no prior EIS investment and so the conditions needed for SEIS relief to apply had been satisfied.

Alternatively, the Tribunal considered the equitable remedy of rectification. In giving the information and declarations, the company believed it was providing what was required by SEIS1. The Tribunal found that the equitable remedy of rectification would be available to Fashion On The Block Limited, with the form provided by the company being treated as if it had been rectified to reflect the information and declarations in form SEIS1.

The appeal was allowed.

Fashion On The Block Limited v HMRC (TC08248)

Capital taxes

Lack of a bath, shower or hand basin (Lecture P1286 – 15.27 minutes)

Summary – The purchase of a property with a self-contained annex did not qualify for Multiple Dwellings relief as it lacked suitable washing facilities.

Simon Ogborn bought a property on 1 November 2017 and filed his SDLT return two days later, stating that SDLT was payable of £57,850.

Just over a year later, Simon Ogborn claimed a repayment of close to £20,000 arguing that he was eligible for Multiple Dwellings Relief.

HMRC refunded the difference but later, following an enquiry, issued a closure notice denying the relief.

Simon Ogborn appealed arguing that the annex was a self-contained annex, with its own entrance as well as living and sleeping accommodation, kitchen, washing and toilet facilities.

Decision

The First Tier Tribunal accepted that there were separate entrances to the main house and annex.

However, relief was denied due to the lack of appropriate washing and personal hygiene facilities as the annex had no bath, shower or hand basin. The Tribunal found that a tap, hot water and a sink in the utility room was 'not practical, private or indeed hygienic'.

Simon Ogborn's appeal was dismissed.

Simon Ogborn v HMRC (TC08263)

Reduced IHT reporting requirements

In an attempt to reduce the IHT reporting burden HMRC has confirmed certain changes to be introduced for deaths occurring on and after 1 January 2022.

For low value and exempt excepted estates, the information to be produced instead of an inheritance tax account is simplified, and the relevant monetary limits are increased as follows:

- the limit for the aggregate of chargeable transfers and exempt 'normal out of income' transfers made before death, is increased from £150,000 to £250,000; and
- the limit for chargeable trust property is increased from £150,000 to £250,000.

For exempt estates, the value limit in relation to the gross value of the estate is increased from £1m to £3m with the total amount of trust property including exempt amounts limited to £1m.

For estates of foreign domiciliaries, the estate is not an excepted estate if chargeable gifts over £3,000 in any year were made in the seven years before the death, or it contains overseas property with value attributable to UK residential property.

The meaning of 'inheritance tax threshold' is revised to reflect the nil-rate band multiplier when less than 100% of an unused nil-rate band is transferred to the deceased.

The time limit for the UK court services to transmit the information produced instead of an inheritance tax account to HMRC is extended from one week to one month, and the period in which HMRC may make enquiries into the estate is aligned at 60 days from the grant of probate or confirmation.

https://www.gov.uk/government/publications/inheritance-tax-reduced-reporting-requirements

Pilot trusts and S81 IHTA 1984 (Lecture P1288 – 19.22 minutes)

S81 IHTA 1984 is an anti-avoidance section which is headed 'Property moving between settlements'. The legislation prevents a person from obtaining a tax advantage by switching property between discretionary trusts. This is achieved by providing that such property remains comprised in the first trust. Accordingly, property cannot be moved out of a discretionary trust into another one with a different 10-year anniversary date with the intention of avoiding an imminent 10-year charge. Similarly, property cannot be transferred from a fund with a high cumulative total into a different fund with a much lower one.

Illustration

Gerald put property into a life interest trust for his children in June 2009, but the trustees have the power to transfer all or any of the fund into what the trust deed refers to as a 'qualifying settlement' (defined as any trust from which the children can benefit).

In October 2014, the trustees exercised this power and transferred the entire fund into a discretionary trust which Gerald had established in February 2002.

The transferred property is treated for IHT purposes as remaining comprised in the June 2009 settlement. Hence the first 10-year anniversary charge on it was in June 2019.

Note that there is no equivalent rule for other taxes which may therefore result in the transfer giving rise to a CGT charge. This CGT liability could not be held over unless the trust assets fall within S165 TCGA 1992. As a matter of trust law, the transferred assets merge with whatever property was already in the February 2002 settlement.

A potential problem for a wealthy client who has created a multiplicity of pilot trusts is that, once the main assets have been added to, say, the 20 trusts, there will be an ongoing requirement for 20 tax returns to be submitted each year and the trusts are likely to incur 20 sets of trust management expenses. These costs will undermine the IHT advantage of holding assets with 20 separate nil rate bands. By subsequently merging all the 20 trusts into a single global entity, the best of all worlds is achieved:

- one tax return will be needed on an annual basis and there will be a single set of running costs; but

- when an exit or a 10-year anniversary charge arises, the trustees will benefit from 20 nil rate bands.

Contributed by Robert Jamieson

IHT and the 'commorientes rule' (Lecture P1289 – 9.00 minutes)

Background

A non-tax law provision (the 'Presumption of survivorship') deals with situations involving the simultaneous deaths of two (or more) persons.

Another term used for the presumption of survivorship is the 'commorientes rule'.

Simultaneous deaths

The commorientes rule is contained in the Law of Property Act (LPA) 1925, s 184, which applies to England and Wales (but not Scotland or Northern Ireland). It broadly states that where two or more individuals have died in circumstances where it is uncertain which of them survived the other, those deaths are presumed for property law purposes to have occurred in the order of seniority. Consequently, the elder of those individuals is deemed to have died first, so the younger person is deemed to have survived the elder.

For example, in Scarle James Deceased, the Estate of v Scarle Marjorie Deceased, the Estate of [2019] EWHC 2224 (Ch), an elderly couple died of hypothermia in their home, but their bodies were not found until around a week later. The High Court concluded that it could not be inferred from the facts and evidence that one spouse had survived the other. Accordingly, the presumption of survivorship (in LPA 1925, s 184 applied). As Mr Scarle was the elder of the couple, Mrs Scarle was presumed to have survived him. The application of the presumption of continuity affected the devolution of their estates.

IHT implications

For IHT purposes, the operation of the commorientes rule could give rise to double or multiple IHT charges (albeit potentially subject 'quick succession relief' under IHTA 1984, s 141).

By contrast to the commorientes rule, the IHT legislation dealing with IHT on death (IHTA 1984, ss 4(2) and 54(4)) states that where it cannot be known which of the two survived the other, both individuals are assumed to have died at the same instant. This 'same instant' rule is generally of particular relevance to married couples or civil partners.

For example, in the case of a married couple with wills (with no survivorship clause – see below), where each spouse leaves their estate to the surviving spouse on the first death, the effect of this general IHT rule is that the elder spouse's death estate does not increase the estate of the younger spouse.

HMRC's guidance points out that the interaction of these provisions and the commorientes rule can result in the estate of the elder spouse escaping IHT on both deaths (see HMRC's Inheritance Tax manual at IHTM12197).

Transferable nil rate band

The facility to transfer unused nil rate bands between spouses or civil partners (IHTA 1984, ss 8A-8C) can potentially improve the IHT position further in commorientes circumstances.

HMRC's position on the transferable nil rate band (in England and Wales) is that where spouses died at the same time with wills and it is not possible to establish who died first, there is a presumption that the elder person died first. The couple's estates are treated for IHT purposes on this basis and where the terms of the will mean that there is unused nil rate band on the death of the first spouse (such as where their estate is left to the surviving spouse), it is generally available to be transferred to the estate of the surviving spouse. The IHT 'same instant' rule continues to operate on the death of the younger spouse to exclude the assets received from the elder spouse's estate.

Consequently, in effect the younger spouse's estate could benefit from a double IHT nil rate band and the assets accruing to their estate from the elder spouse are excluded (see IHTM43040).

Survivorship clauses

Double (or multiple) IHT charges can arise on successive deaths, i.e., where two or more people have died; not at the same time, but within a short time of each other.

However, where under the terms of a will (or otherwise) property is held for someone (X) on condition that they survive another person (Y) for a period of not more than six months, and Y becomes entitled to the property because it transpires that the six month survivorship condition has not been satisfied by X, the IHT position is the same as if Y (who actually received the property) had been entitled to it in the first place (IHTA 1984, s 92).

Many wills for married couples (or civil partnerships) include survivorship clauses, which typically provide for a survivorship period of (say) 30 days or three months.

If there is to be a survivorship clause in the wills of spouses or civil partners, it may be worth considering the addition of a condition in the will of the elder spouse or civil partner, excluding the operation of the survivorship clause in the event of simultaneous deaths.

Contributed by Mark McLaughlin

Administration

Reduced late filing penalties due to special circumstances

Summary – Late filing penalties were reduced due to special circumstances. HMRC had failed to advise the taxpayer that filing an online return rather than the paper return supplied by HMRC would result in lower penalties becoming payable.

Keith Puttock was a self-employed contractor in the construction industry.

The Tribunal established that HMRC had issued him with a notice to file a tax return for 2017/18 on or around 6 April 2018. The due date for filing was either 31 October 2018 (for a paper return) or 31 January 2019 (for an electronic return).

Having been charged an Initial late filing penalty of £100, Keith Puttock called HMRC on 15 July 2019 about his 2017/18 tax return and HMRC's notes record that they sent him a paper return to complete for 2017/18 on 16 July 2019. Keith Puttock duly filed this return nine days later on 24 July 2019.

HMRC subsequently charged two further penalties:

- Daily late filing penalty of £900, issued 29 October 2019;
- Six-month late filing penalty of £300, issued 29 October 2019.

Keith Puttock appealed, arguing that he believed that his accountants had been dealing with his return and that the penalty would cause hardship.

Decision

The First Tier Tribunal held that the penalties were properly charged and that Keith Puttock did not have a reasonable excuse.

However, the Tribunal went on to find that special circumstances applied. HMRC had failed to suggest that Keith Puttock would have lower penalties if he were to file his return online. Consequently, the First Tier Tribunal reduced the penalties to those which would apply if he had filed an electronic return on 24 July 2019:

- the six month penalty was reduced to nil; and
- as the return was filed 84 days after the three-month penalty date (1 May 2019), the daily penalties were reduced to £840.

The Tribunal upheld the initial late filing.

Keith Puttock v HMRC (TC08283)

Disclosure of documents

Summary – Two appeals were to be heard at the same time. The First Tier Tribunal appropriately concluded which documents could be disclosed to one taxpayer to assist his appeal, where documents contained information about the other taxpayer's tax affairs.

Mark Mitchell and Paul Bell are shareholders in two companies, Universal Payroll Services and Universal Project Services. Between 2010 and 2014, HMRC believed there were inaccuracies in the companies' VAT returns involving claims for input tax credit that was not due. Consequently, HMRC assessed the companies to recover that input tax, and charged penalties determined on the basis that the inaccuracies were deliberate. The companies subsequently went into liquidation and have not appealed the assessments or the penalties. HMRC also used their power under paragraph 19(1) Schedule 24 FA 2007 to issue personal liability notices Mark Mitchell and Paul Bell, making each liable for 50% of the penalties charged on the companies, on the basis that the deliberate inaccuracies were attributable to an officer(s) of the company. Paul Bell argued that Mark Mitchell was responsible for running the Universal Companies and that he had no involvement, while Mark Mitchell argued that he was not responsible for running the companies.

Both Mark Mitchell and Paul Bell appealed. The First Tier Tribunal directed that the appeals should be heard together. Paul Bell wrote to HMRC to request early disclosure of some of the documents that HMRC had referred to, including some of the material relating to HMRC's Code of Practice 9 investigation into Mark Mitchell and companies controlled by him.

Mark Mitchell objected to the disclosure of some of these documents. At a case management hearing, the First Tier Tribunal discussed and confirmed what documents HMRC should be permitted to disclose to Paul Bell. The parties agreed to classify the documents within levels of confidentiality that would enable submissions to be made on them without a need to refer to the documents themselves. The First Tier Tribunal agreed to decide which levels of documents should be admitted into evidence, with the parties agreeing after the hearing which documents fell into which level.

Level 1. A section of any document which directly refers to the Universal companies or either of them (other than simply a bare mention of their name).

Level 2. A section of any document which shows interaction between the Universal companies and/or either Mark Mitchell or Paul Bell. This level was sub-divided as follows to consider any mention of:

a) direct interaction by Mark Mitchell and/or Paul Bell with the Universal companies;

b) interaction between the Universal companies or either of them with other companies controlled or allegedly controlled by Mark Mitchell and/or Paul Bell;

c) interaction between Mark Mitchell and Paul Bell even if in a context outside the Universal companies.

Level 3 – Any mention in a document which goes to show Mark Mitchell's interactions with other companies which he controlled or allegedly controlled, and in particular his interactions with companies which had dealings with the Universal companies.

Level 4. Anything which went to Mark Mitchell's or Paul Bell's credibility generally and in particular the credibility with which they presented the affairs of companies which they controlled or allegedly controlled.

Mark Mitchell and Paul Bell appealed the First Tier Tribunal's decision in respect of levels 2B, 2C, 3 and 4.

Decision

The Upper Tribunal upheld the First tier Tribunal's decision regarding the various levels of document, finding that only the relevant material could be relied on by HMRC and disclosed to Paul Bell. More specifically:

- Level 2B: Where HMRC's statement of case did not reference a company by name, these documents should be excluded from evidence and not disclosed to Paul Bell. If HMRC wanted to rely on evidence about the relationship between Mark Mitchell and other companies then they would need to amend their statement of case.

- Level 2C: The relationship between the parties was relevant as they were seeking to downplay the extent to which each was responsible for the management of the companies. Evidence of the wider relationship between them was relevant and so these documents should be included and copied to Paul Bell.

- Level 3:This level was decided on the same basis as Level 2B. Documents could only be relevant to the extent that those other companies were referred to by name in the statement of case.

- Level 4: The Tribunal did not consider that Mark Mitchell's credibility was "in general" in issue and was not relevant to HMRC's pleaded case. These documents were not relevant and should not be disclosed to Paul Bell.

Mark Mitchell and Paul Bell v HMRC [2021] UKUT 0250 (TCC)

Appeal against information notice

Summary - Information requested by HMRC was reasonably required to check the taxpayer's tax position, and HMRC has good reason to suspect that self-assessments by the taxpayer may be or have become insufficient.

Sarah Thomas and her immediate family are no strangers to tax litigation. Connoisseurs of tax cases may well recognise the names of Spring Salmon & Seafood Ltd and Spring Capital Ltd (formerly known as Spring Seafoods Ltd), in both of which they were involved. Sarah Thomas was also one of the appellants in R Thomas & another v HMRC [2014] UKFTT 980 (TC) in 2014 in which discovery assessments and penalty determinations were upheld. This is relevant for two reasons.

1. It was during the course of enquiries into the tax affairs of the appellant's husband, and the trust and companies with which he was associated, that HMRC had become aware of certain large outgoings of the appellant which did not tally with her modest taxable income.

2. The evidence from the 2014 case was that at least two of Sarah Thomas' Self Assessment tax returns were inaccurate; this was cited by the judge in the instant case as a factor in considering the reliability of Sarah Thomas' returns and accounts.

HMRC had become aware that, over a period of three to four years, Sarah Thomas had:

- taken out a £1 million mortgage and loaned the funds to a company, Thomas Maclennan Ltd;

- she had made loans of £250,000 to Thomas Maclennan Ltd and £650,000 to Spring Seafoods Ltd;

Further, HMRC became aware that Thomas Maclennan Ltd had assigned two debts totalling £2,135,713 to it to Sarah Thomas and she had reassigned the total debt to Spring Seafoods Ltd on the same day. It was secured by a debenture from Spring Seafoods Ltd in her favour.

On 13 December 2018, HMRC opened a compliance check under Schedule 36 into her personal tax affairs as well as an enquiry into her Self Assessment tax return for the year ended 5 April 2018 under section 9A Taxes Management Act 1970.

HMRC raised 15 questions. In relation to the two payments to Thomas Maclennan Ltd and Spring Seafoods Ltd, he wanted to know how the funds to make the payments accumulated in Sarah Thomas's bank account. He required details of any material deposits above £20,000 (which the First Tier Tribunal found proportionate) for the 12 months prior to each payment being made. If any gifts or funds had been provided by other parties, Sarah Thomas was asked to provide particulars of dates and reasons. There were a number of questions in relation to the debt assignment and the payments due on the mortgage. The information notice followed from the fact that the information was not forthcoming.

Decision

The First Tier Tribunal found that Sarah Thomas had not cooperated with HMRC and had not provided extensive evidence of her wealth. She had failed to provide all the information within her power or possession. She had made vague and unsupported assertions, some of which were wrong.

The Tribunal found the HMRC officer to be an entirely credible witness and had investigated fully before requesting information. In the absence of any cross-examination (unusual for a case in which HMRC bore the burden of proof) his evidence stood unchallenged.

Sarah Thomas v HMRC (TC08291)

Adapted from the case summary in Tax journal (5 November 2021)

Fraudulent tax return

Summary –The First Tier Tribunal had no jurisdiction to consider the taxpayer's appeal against the assessments on the basis that the returns were submitted fraudulently by a third party ;and should be treated as not having been made because they were fraudulent.

In February 2019 HMRC enquired into Stuart Cormack's tax returns for 2014/15 and 2015/16, where SEIS/ EIS relief of £24,000 had been claimed in each year. HMRC had repaid tax in both years.

However, in March 2019, discovery assessments were issued on the basis that the claims had been invalid as the required compliance certificates had not been issued.

Stuart Cormack acknowledged that he had discussed the possibility of SEISS/EIS relief claims with the third party who completed and submitted his returns, but he could not afford the relevant investments and was not aware that claims had been made. Indeed, he stated that he had been the victim of fraud, as the tax payments had been made to the third party or their associates.

Stuart Cormack appealed to the First Tier Tribunal arguing that:

- The discovery assessments were wrong in law because he had been the victim of fraud.
- HMRC were aware that the third party involved was making fraudulent claims;
- He should not have to repay the tax because he had not received the repayments.

HMRC applied to have the taxpayer's appeal struck out on the grounds that the Tribunal had no jurisdiction and that Stuart Cormack has no reasonable prospects of success.

Decision

The Tribunal concluded that its jurisdiction with regard to assessments is limited to by statute to considering whether the amount of such assessment is correct; there is nothing in statute which gives them power to consider whether such assessment should have been raised in the first place. Consequently, the First Tier Tribunal concluded it had no jurisdiction to consider Stuart Cormack's appeal against the assessments on the basis that the returns:

- were submitted fraudulently by a third party; or
- should be treated as not having been made because they were fraudulent.

The First Tier Tribunal granted the strike out application in respect of all grounds of appeal except the grounds of appeal relating to the validity of the discovery assessments. HMRC had not produced any evidence to support its argument that an officer could not reasonably have been expected to be aware of the invalid claim within the normal enquiry window. HMRC had not satisfied the required burden of proof.

Stuart A Cormack v HMRC (TC08289)

Penalties for getting client returns wrong? (Lecture P1287 – 8.44 minutes)

Background

The penalty regime for errors in tax returns etc. (FA 2007, Sch 24) broadly provides that if a taxpayer document (e.g., an individual's self-assessment return) contains an inaccuracy such as an understated profit, overstated loss or inflated claim to a tax repayment, a penalty may be due.

However, what if the tax return error was caused by someone else, such as the taxpayer's agent?

The 'another person' penalty

The penalty regime for errors was extended (in FA 2008) to provide for penalties where an error in a taxpayer's document is attributable to another person (FA 2007, Sch 24, para 1A). This provision is sometimes referred to as the 'other person' penalty.

In the above example of a tax return error, the other person ('T' in the legislation, but assuming in this example that T is an agent) is liable to a penalty broadly if the error was attributable to the agent deliberately supplying false information (directly or indirectly) to, or withholding information from, the taxpayer with the intention of the return containing the inaccuracy.

The 'deliberately' requirement is important. The agent would need to have known that the false information (or the withholding of information) would result in the taxpayer's return containing an error that leads to what the legislation refers to as a 'relevant inaccuracy' (e.g., an understated tax liability).

It's all your fault!

If the taxpayer is faced with a penalty for an inaccurate tax return, they might (and often do!) consider trying to blame their agent for the error, as a convenient escape from a penalty.

However, the taxpayer would still need to demonstrate that the tax return error arose despite them having taken reasonable care. Furthermore, in the context of the 'other person' penalty, it would need to be shown that the agent deliberately caused the error.

HMRC acknowledges in its Compliance Handbook manual (at CH84545): "It is extremely unlikely that a tax adviser would be liable to this kind of penalty". However, this statement from HMRC is in the context of a tax adviser who receives information from the taxpayer and gives advice based on that information. What about errors in tax returns?

Even if an agent can be blamed for the tax return error, it's possible for both the taxpayer and the agent (or other person) to be separately liable to a penalty in respect of the same error (FA 2007, Sch 24, para 1A(3)), if the taxpayer hasn't taken reasonable care to avoid the error. The taxpayer would be liable under the general penalty rule that applies to taxpayers, and the agent would be liable to the 'other person' penalty as mentioned. However, the aggregate amount of the penalties will not normally exceed 100% of the potential lost revenue (although a higher maximum than 100% can apply if the error involves an offshore matter or an offshore transfer; see FA 2007, Sch 24, para 12(4), (5).

Information withheld

In Hutchings v Revenue and Customs [2015] UKFTT 9 (TC), the 'other person' was not an agent or tax adviser, but a family member.

In that case, an individual ('RH') made a lifetime gift to his son ('CH'). The gift was of funds held in an offshore account and was made in or around March 2009. RH died in October 2009. CH was a residuary beneficiary of RH's estate. RH's executors wrote to various members of the deceased's family, including CH. Their letter asked the family members to disclose if they had received any gifts from the deceased. CH did not reply to the letter.

The executors subsequently submitted an inheritance tax (IHT) return (form IHT400) to HMRC in relation to the deceased's death. The return did not refer to cash held by RH or the transfer of funds in that account to CH seven months before his death.

HMRC subsequently assessed CH to IHT on the basis that he had received a lifetime gift of the offshore funds. HMRC also issued a penalty under the 'other person' provision (FA 2007, Sch 24, para 1A) in respect of the error in the IHT return. The First-tier Tribunal dismissed CH's subsequent appeal. The tribunal held: (1) that the inaccuracy on the IHT return was attributable to CH; (2) that CH withheld information from the executors; (3) that the withholding of information was deliberate; and (4) that CH didn't answer the executors' questions on gifts with the intention that the IHT return would not contain the information about the gift to him. The tribunal concluded that the conditions for the 'other person' penalty were met.

Take care

Finally, whether the 'other person' is an agent or someone else, taxpayers should always exercise due diligence and reasonable care when checking information from other persons. Otherwise, the taxpayer may be liable to a penalty instead of, or as well as, the other person.

Having said that, HMRC accepts (in its Compliance Handbook manual at CH81168, in Example 1) that the taxpayer will have taken reasonable care to avoid a tax return inaccuracy (and so won't be liable to a penalty in addition to the other person) if it was not possible for the taxpayer to independently check that the information given by the other person was correct.

Contributed by Mark McLaughlin

Furlough fraud **(Lecture P1290 – 11.50 minutes)**

There has been increased media coverage recently of "furlough fraud". This session considers what furlough fraud is, the action being taken by HMRC to address the issue, and provides practical considerations for advisers. The session will also be of interest to advisers who are reviewing errors made by their clients.

What is the furlough scheme?

Most advisers will be aware of The Coronavirus Job Retention Scheme (CJRS), also known as the furlough scheme. The scheme was introduced by the government in March 2020 to assist businesses in retaining employees during the COVID-19 pandemic. The scheme assisted employers by paying a percentage of the wages for furloughed employees, with the intention of avoiding the need for redundancies. One of the key requirements of the scheme was that furloughed employees were not allowed to work for their employer. The scheme ceased on 30 September 2021. Advisers should not that legislation regarding the taxation of Covid-19 support payments is at Schedule 16, Finance Act 2020.

What is furlough fraud?

Furlough fraud is where an employer deliberately made an excessive claim under the furlough scheme.

There were numerous ways in which employers could commit furlough fraud, including the following:

- Making a claim under the scheme for a non-existent employee;
- Asking an employee to return to work as a "volunteer" without pay;
- Not paying employees the full amount received from HMRC;
- Placing an employee on furlough but requiring them to continue to work as normal
- Incorrectly reporting the hours an employee has worked, to increase the amount recoverable

Mistakes were made, as employers, and their advisers, had to get to grips with the new rules in a short period of time. HMRC recognised this, and there was a 90-day correction period. Where a genuine error has been made, and that can be demonstrated, the employer may only be required to repay the overpayment of furlough monies. If an overclaim is rectified outside the correction period, a penalty may apply. It is important to distinguish whether a genuine error has been made, or there has been fraud, before making the approach to HMRC .

How is HMRC tackling furlough fraud?

The furlough scheme, as with the other Covid support schemes, was introduced quickly in response to the risk to jobs. Although the scheme was designed to minimise fraud and error, it was inevitable that payments would be made erroneously. Various changes have been made to the scheme, since its introduction, to reduce the risk of fraud and error. Although some claims were blocked from payment upfront, there has been a significant level of payments which were made as a consequence of fraud or non-deliberate errors.

There have been numerous figures published of the level of fraudulent or erroneous claims. HMRC's annual report for 2020/21 estimates that £5.2 billion of the £60 billion paid out during that period was because of fraud or paid out in error. The largest loss is believed to be due to what is described as "opportunistic fraud" (£3.64 billion), with £1.37 billion arising due to errors, and the balance (£170 million) because of organised crime.

The government has invested over £100 million in a HMRC Taxpayer Protection Taskforce, with 1,265 staff, to tackle the problem. HMRC have reported that the unit is expected to recover £1 billion from fraudulent or incorrect payments from the various Covid support schemes over the next two years. There are understood to be 23,000 ongoing investigations (across the Covid support schemes), with that number expected to reach around 30,000.

As noted above, in the early stage of the furlough scheme, HMRC generally took a light touch when dealing with erroneous claims. A Covid fraud hotline was established, and employees encouraged to report suspected fraudulent activity. There have been, approximately, 30,000 calls to the hotline, giving HMRC intelligence to follow-up on. HMRC also has its own data (including from the Eat Out to Help Out Scheme), to add to its risk profiling and assessments. HMRC can be expected to use its full range of powers, covering criminal and civil options, to investigate cases of suspected furlough fraud.

HMRC has recently updated its guidance on the taxation of Covid-19 support payments (https://www.gov.uk/guidance/overview-of-joint-and-several-liability-notices-for-the-taxation-of-coronavirus-covid-19-support-payments). Advisers should note that HMRC can collect wrongly claimed furlough payments from directors.

Criminal investigations

A small number of HMRC's investigations into suspected furlough fraud will result in the use of their criminal powers. That is the same approach adopted when investigating tax fraud. HMRC does not have sufficient resources to investigate all suspected fraud cases using its criminal powers. Criminal investigation will be used sparingly, in the most suitable cases, to send out a deterrent message, and encourage others to come forward voluntarily. Advisers should note that the strict corporate liability offences may be relevant to furlough fraud.

The first arrest for alleged furlough fraud was in July 2020, involving a suspected £495,000 fraud. It is understood that the number of arrests has now increased to 13, some relating to suspected frauds involving several million pounds.

Civil enquiries

HMRC will use its full range of civil powers, including compliance checks, and the Contractual Disclosure Facility (CDF), for cases where HMRC suspect fraud but do not use their criminal investigation powers, when investigating furlough claims.

In addition to using its formal procedures, HMRC are making heavy use of "nudge letters", to encourage offenders to come forward voluntarily. HMRC has issued thousands of nudge letters targeting users of the furlough scheme, and that policy is expected to continue. Nudge letters have been covered in a separate session, and advisers are recommended to access that session, if they have not already done so.

Penalties can be applied by HMRC where there has been an erroneous claim under the furlough scheme. The penalty can be up to 100% of the wrong claim, but the amount charged will depend on the circumstances, and mitigating factors. In addition to a penalty, employers can be subject to non-financial sanctions, including "naming and shaming".

Practical considerations

Advisers are encouraged to review furlough claims made by clients. Where errors are discovered, whether through a genuine mistake or dishonesty, advisers they consider the best route to make the disclosure to HMRC. This should include consideration of the Contractual Disclosure Facility where fraud is suspected or admitted by the client. That process has been covered in a separate session, and advisers should refer to that, if they have not already viewed the session. It is recommended that advisers seek specialist advice where they are not familiar with the Contractual Disclosure Facility, before making an approach to HMRC. Although the number of criminal investigations will continue to be used to tackle only a very small number of suspected fraudulent claims, advisers should be aware that it remains a possibility.

It is important to ensure that clients who have used the scheme have retained the relevant records and evidence and continue to do so. This will enable the appropriate voluntary disclosure to be made, or the appropriate responses to be sent to HMRC in the event of any queries being raised by the tax authority.

Contributed by Phil Berwick, Director at Berwick Tax

Deadlines

1 December 2021

- Corporation tax due for periods to 28 February 2021 (SMEs not paying by instalments)

7 December 2021

- VAT returns and payment for 31 October 2021 quarter (electronic payment)

14 December 2021

- Monthly paper EC sales list —businesses in Northern Ireland selling goods only

19 December 2021

- PAYE, NIC, CIS, student loan liabilities for month to 5 December 2021 if not paying electronically
- File monthly CIS return

21 December 2021

- File online monthly EC sales list —businesses in Northern Ireland selling goods only
- Submit supplementary intrastat declarations for October 2021
  - arrivals only for a GB business
  - arrivals and despatch for businesses in Northern Ireland.

22 December 2021

- PAYE, NIC, CIS and student loan liabilities cleared in HMRC bank account

30 December 2021

- File online SA tax returns if underpayments to be collected by PAYE coding adjustment

31 December 2021

- Companies House should have received accounts for:
  - private companies with 31 March 2021 year ends
  - public limited companies with 30 June 2020 year ends.
- CTSA returns deadline for companies with periods ended 31 December 2020

News

Bounce Back loan fraud

The BBC has reported two directors have fraudulently claimed £200,000 in Bounce Back Loans.

Investigations were triggered when the two men put their companies into voluntary liquidation, after the directors had claimed the loans. Investigators stated that there was no evidence any of the companies had ever traded.

The first man was the director of three companies, all registered to the same address. The Insolvency Service found he had opened bank accounts for each company in June 2020, fraudulently obtaining three loans of £50,000 each.

The second man was appointed as director of an online sports retailer, in May 2020. He bought a Rolex watch, transferred £16,000 to his own account, withdrew cash and transferred £12,500 to other parties and then placed his company into liquidation in November 2020.

Both have been banned from running companies, for thirteen and six years respectively

https://www.bbc.co.uk/news/uk-england-south-yorkshire-59293345

SEISS letter to 2019/20 non-filers

SEISS 1, 2 and 3 claimants must file a self-assessment tax return for 2019/20 together with the relevant self-employment or partnership pages.

Where SEISS claimants have failed to do so, HMRC has written, informing them that they need to do so within 30 days to enable HMRC to check eligibility for the SEISS grant(s) claimed. The letter is not being copied to agents but suggests that recipients show the letter to their tax adviser if they have one.

If a claimant was not trading in the 2019/20, they must repay the grant(s) received, and the letter explains how they should do this.

https://www.icaew.com/-/media/corporate/files/insights/tax-news/hmrc-seiss-non-filers-letter.ashx?la=en

Cryptoassets project

The CIOT has reported that HMRC's Wealthy External Forum has issued a briefing to its members about 'one to many' letters being sent to taxpayers who they believe have held cryptoassets, advising them of the potential tax implications and linking to relevant guidance.

The letters advise taxpayers that gains on cryptoassets are liable to Capital Gains Tax and highlight common types of disposal.

A copy of the letter will be sent to the taxpayer's agent where the taxpayer is represented by an agent.

https://www.tax.org.uk/hmrc-s-one-to-many-letter-cryptoassets-project

Business Taxation

Sky TV presenter and IR35 (Lecture B1286 – 19.00 minutes)

Summary – A sports TV presenter engaged by Sky TV was held to be a deemed employee under IR35, resulting in PAYE and Class 1 NICs payable of £281,000.

Dave Clark was a boxing and darts presenter who undertook work for Sky TV, initially on a self-employed basis but, at the company's request, from 2003, he provided his services through his personal service company, Little Piece of Paradise Ltd. This case concerned the period from 2013/14 through to 2017/18. Following a review, HMRC sought to collect £281,000 in PAYE and NICs under the IR35 legislation.

Dave Clark argued that under the contract, there was no mutuality of obligation, he was allowed to provide a substitute and Sky TV had little control over his work as he was presenting live broadcasts and he was responsible for preparing his shows at home in his own time.

Decision

Once again, we return to whether had the presenter been engaged directly, would he have been engaged under a hypothetical contract of service or a contract for services.

The First Tier Tribunal established that during the period concerned, contracts were signed under which Little Piece of Paradise Limited agreed to provide the services of Dave Clark as a lead presenter of professional darts for a total of 64 days a year when tournaments were being televised. There was a fixed annual fee payable, invoiced monthly irrespective of whether any days were actually worked in that month. Dave Clark was subject to a number of restrictive covenants for non-disclosure and non-compete. Where conditions were not met, Sky had the right to terminate the contract with immediate effect. Sky provided all the necessary equipment, organised Dave Clark's travel and accommodation and paid reasonable expenses. Although he prepared for the programmes in his own time and had control over his service delivery, Sky retained editorial control.

The First Tier Tribunal concluded that:

- mutuality of obligation was present as Sky TV had first call on Dave Clark's services and in return, he was paid 12 monthly instalments calculated based on a fixed fee;

- Sky TV had control over what, when and where services were performed. Further, the extensive restrictive covenants governing his work indicated a high level of control by Sky. The Tribunal acknowledged that through necessity, as with any expert, Dave Clark had a high degree of control over how his work was delivered but this was not the deciding factor.

The Tribunal concluded that Dave Clark was not in business on his own account but was dependent on Sky paying for his work done. Due the restrictive covenants, he was not free to work elsewhere outside of the contracted 64 days.

Although theoretically possible, there was no right of substitution. When such a substitution had taken place, it was Sky who had engaged and paid an existing Sky Sports presenter, and not Dave Clark himself.

On balance, the First Tier Tribunal concluded that any hypothetical contract was caught by the IR35 legislation.

The appeal was dismissed.

Little Piece of Paradise Limited v HMRC (TC08300)

Insurance premium rebates

Summary - Insurance premium rebates were not taxable receipts on the company, as they were invested in the mutual fund run by the company for the benefit of its members, who had effectively funded the original premiums.

In return for paying membership subscriptions, The Medical Defence Union Limited provides a range of benefits to its members who work in the medical profession. One of those benefits was protection against professional negligence claims.

Prior to 2000, part of members subscriptions was paid into a mutual fund used to provide indemnity cover, on a discretionary basis, to members facing claims. HMRC accepted that the subscriptions applied to maintain the mutual fund were not taxable under the "mutuality" principle and because the indemnity was provided on a discretionary basis, it was accepted that it was not carrying on an insurance business.

With increasing claims and damages being awarded, the company was concerned that its fund might not be sufficient to provide the level of cover that its members needed. Consequently, it entered into arrangements for third party insurance companies to provide insurance cover to its members, alongside the discretionary indemnity that the company continued to offer. The company's large membership meant it could negotiate favourable terms with those insurance companies, including an arrangement under which premiums payable in later years could be reduced, or rebated, if claims in earlier years were lower than expected.

This case concerned the tax treatment of these partial refunds. HMRC argued that these amounts were a taxable receipt but the company disagreed. The First Tier Tribunal had found in HMRC's favour, concluding that the payments were made by the insurer to the company and so were taxable.

The Medical Defence Union Limited appealed to the Upper Tribunal.

Decision

The Upper Tribunal overturned the decision.

Although the partial rebate was paid to the company, the third-party insurance company was effectively repaying part of the members' subscriptions. Consequently, the partial refund received by The Medical Defence Union Limited should be treated in the same way as if it had been repaid to the members themselves. It did not matter that the rebate was invested in the company's mutual fund, as this was a mutual fund for the members' benefit.

The Medical Defence Union Limited's appeal was allowed.

The Medical Defence Union Limited v HMRC [2021] UKUT 0249 (TCC)

Was a potato store plant? (Lecture B1287 – 24.57 minutes)

On 12 July 2021, the First-Tier Tribunal published their decision in JRO Griffiths Ltd v HMRC (2021) which concerned a claim for capital allowances on a potato storage facility.

During the accounting period ended 31 March 2015, the appellant company (G) incurred capital expenditure of £319,483 on the construction of a specially designed warehouse which was used to store potatoes. G claimed capital allowances on this expenditure, but, following several enquiries and a review, HMRC disallowed the claim. G then appealed to the First-Tier Tribunal on 11 June 2019.

G is a private company involved in producing specialist crisping potatoes. Based on 1,500 acres in Shropshire, the company grows 28,000 tons of potatoes each year which are sold to crisp manufacturers, principally Walkers, for which it is the largest UK supplier. Growing this type of potato is a very specialised activity. Walkers and other manufacturers require a constant supply throughout the year and it is fundamental to G's business that it is able to store potatoes in a controlled environment so that they maintain a consistent quality from harvesting in September through until May, June or even July in the following year which is generally accepted to be the end of the season for crisping potatoes.

If the potatoes are not stored in a controlled environment, they will only last a few weeks before they start to deteriorate to a condition where they are no longer saleable. In a normal commercial warehouse, this might be from September to early November. It is no secret that the condition and storage of potatoes affect their value to crisp manufacturers such as Walkers who require a supply of potatoes all year round which:

- is consistent; and
- meets their manufacturing standards.

G is paid a base price by Walkers for their potatoes, but this is topped up by a bonus if the product has a very low defect level. The best case scenario attracts a bonus of £20 per ton. On, say, 20,000 tons, a £20 bonus is worth £400,000 per annum. A bonus of this size would represent approximately two-thirds of the company's profits. It is therefore vitally important for G's finances to achieve this sort of result.

The case report contains detailed information about the structure, design and function of G's potato store. It was designed by a Dutch company and built in 2014 in accordance with the Dutch principles of potato storage, under which a large amount of air is introduced for a very short period of time. The process is managed by a computerised control system which operates a sophisticated air management algorithm so as to keep the store cooler and uses less air than the English system.

The additional engineering requirements of the store mean that its cost is in excess of £300,000 as against a figure of some £55,000 for a general purpose warehouse of the same size.

It is now time to consider the capital allowances legislation.

The conditions for claiming plant or machinery allowances in the current appeal can be summarised as follows:

(i) The company must carry on a qualifying activity (S11(1) CAA 2001).

(ii) The company must incur capital expenditure (S11(1) and (2) CAA 2001).

(iii) The expenditure must be on plant or machinery (S11(4)(a) CAA 2001).

(iv) The company must own the plant or machinery as a result of incurring the expenditure (S11(4)(b) CAA 2001).

(v) If the expenditure is on a building or structure, it does not qualify (see Ss21 and 22 CAA 2001) unless it satisfies one of the descriptions in List C in S23 CAA 2001. For this purpose, the relevant items in List C are:

Item 18 (cold stores); and

Item 28(a) (silos provided for temporary storage).

It was common ground that G satisfied conditions (i), (ii) and (iv) above. It was also common ground that the potato storage facility was either a building or a structure. The issues in this case are therefore:

(i) whether the expenditure was on plant or machinery; and

(ii) whether the potato storage facility constituted a cold store or a silo.

G's barrister argued that the potato store was plant, given that it carried out a critical function in the company's activities (ie. to store the potatoes in the right condition until they were needed by Walkers and the other crisp manufacturers with which G dealt). He cited, in particular, the decisions in Yarmouth v France (1887) and CIR v Barclay Curle & Co Ltd (1969). He also relied on the comments of the First-Tier Tribunal in May v HMRC (2019) which, while not binding, was a decision on facts very similar to those of the current appeal. In that case, the First-Tier Tribunal held that a horizontal grain store was indeed plant.

The gist of HMRC's case was that the potato store is not the apparatus with which the farming trade is carried on but rather premises or a setting for the company's trade.

The two judges sided with the company – the potato storage facility was plant. They said:

> 'The functions that are carried out by the structure and equipment integrated into the potato store satisfy Lindley LJ's test in Yarmouth v France (1887) of being the "apparatus . . . used by a businessman for carrying on his business". We accept (the owner's) evidence that it is central to the appellant's business of growing and selling crisping potatoes to Walkers and other crisp manufacturers. In order to do so, the potatoes must be stored until Walkers need them, potentially as late as May following the harvest the previous autumn, and that, during that time, they do not deteriorate. To achieve that – and so to be a supplier to Walkers at the prices the appellant wishes to charge – the potatoes need to be treated in the way the potato store is designed to achieve. The potatoes need to be dried and quality-maintained by being kept at a precise temperature with no condensation or variation in sugar content. This treatment enables the potatoes not only to be kept for longer than

> would otherwise be the case, but also at a quality that means Walkers will both buy them and pay the significant quality-related bonuses. Each item of machinery integrated into the store functions as part of the whole. The store is not the setting for the appellant's trade but an integral part of how the appellant carries out its qualifying activity.'

Even if the potato store can qualify as plant, it is excluded from the capital allowances regime unless it satisfies any of the definitions in List C. Clearly, the potato store is a building or structure and so, in order for G to be entitled to capital allowances, the store must fall into one of the items in List C.

Turning to Item 28(a), there was a good deal of discussion about whether the potato store could be described as a silo. The First-Tier Tribunal accepted the Shorter Oxford English Dictionary's definition:

> 'A pit or underground chamber used for storing grain, roots etc; specifically one in which green crops are compressed and preserved for fodder as silage. Also, a cylindrical tower or other structure built above ground for the same purpose.'

The judges concluded that the store was a silo in that it was a structure built above ground for the purpose of storing roots (ie. potatoes). It was specifically designed to perform the functions of drying and conditioning the crops.

There is one other point which needs highlighting. The judges stated that the facts in this latest appeal 'are, if anything, stronger than those in May v HMRC (2019)'. They pointed out that HMRC's representative had used the same arguments in this appeal as HMRC had done in the May case (which they lost and did not seek to appeal). It is, the First-Tier Tribunal said, 'not appropriate for HMRC to fail to bring an appeal to the Upper Tribunal on a point of law decided by the First-Tier Tribunal and then seek to litigate the same point repeatedly at first instance'. The speaker feels that these words should be given more publicity.

In view of the fact that the First-Tier Tribunal found that the potato store amounted to a silo provided for temporary storage, it was not necessary for them to consider Item 18. However, they decided, for completeness, to rule on this matter as well. G's barrister highlighted the company's evidence that one of the functions of a potato store was to cool the potatoes down after harvest and then maintain them at a temperature of between 6.5°C and 11.5°C, depending on the variety. This cooling is done artificially in order to preserve the potatoes. The barrister rejected HMRC's submission that, in order for it to be a 'cold store', the facility must be 'objectively cold', ie. colder than the outside temperature. The judges agreed with the barrister's contention.

The First-Tier Tribunal therefore allowed the company's appeal. The expenditure incurred by G was on plant or machinery within S11(4)(a) CAA 2001 and the potato store satisfied the definition of being both a silo provided for temporary storage and a cold store (either of which findings would have been sufficient for the company).

Contributed by Robert Jamieson

Extended loss carry-back for groups (Lecture B1288 – 8.19 minutes)

Five companies (A, B, C, D and E) make up a group for the purposes of S269ZZB CTA 2010. For the year ended 31 March 2021, these five companies have unrelieved trading losses remaining after a carry-back to the previous accounting period as follows:

	£
Company A	(125,000)
Company B	(150,000)
Company C	(175,000)
Company D	(200,000)
Company E	(1,800,000)

Companies A, B, C and D all have losses at or below the de minimis threshold and so they are able to make extended loss carry-back claims in advance of submitting their CT600 corporation tax returns to HMRC.

On the other hand, Company E has a loss of £1,800,000 to relieve. Since this amount exceeds the de minimis, Company E has to submit an extended loss carry-back claim in its return alongside an allocation statement (this assumes that Company E is the nominated company for doing this), showing all claims made within the group. The other four claims total £125,000 + £150,000 + £175,000 + £200,000 = £650,000. The group cap applies to restrict Company E's relief against its profits for the year ended 31 March 2019 to a maximum of £1,350,000. The balance of £1,800,000 – £1,350,000 = £450,000 can be carried back a further year for offset against Company E's profits for the year ended 31 March 2018.

Contributed by Robert Jamieson

Joint experts required

Summary – The appellant companies and HMRC should appoint joint expert witnesses to provide evidence on relevant tax law in Germany and the Netherlands.

The companies claimed cross-border group relief over several years in respect of losses incurred by two subsidiaries resident in the Netherlands and Germany. Both of the subsidiaries had subsequently been liquidated. HMRC opposed the claims, with the tax at stake amounting to £4.5m.

The claims could only succeed if there was no possibility of the losses being utilised in Germany and the Netherlands and both sides agreed on the need for expert evidence to set out the relevant tax law in those countries.

- The companies believed a joint expert should be instructed for each jurisdiction;
- HMRC argued that there should be a sequential exchange of separate expert evidence.

The companies sought a direction from the First Tier Tribunal that joint experts should be appointed.

Decision

The First Tier Tribunal broadly applied the factors set out in Practice Direction 35 para 7 which supplements CPR rule 35. The starting point was that there should be a joint expert unless there was a reason for not having one. All the circumstances should be taken into account and in particular the factors identified at para 7. These include whether using a single expert would be proportionate considering the complexity of the case and the amount in dispute, whether a joint expert would be likely to enable the case to be resolved more speedily and cost-effectively and whether there is likely to be a wide range of opinion.

The First Tier Tribunal found the factors to be very finely balanced but ultimately concluded that HMRC had not provided sufficiently good reason for departing from the starting point. The tax at stake was not exceptionally large in the context of appeals requiring expert evidence and joint instruction would assist in reducing the costs of the appeal and in reducing the length of the hearing. Expert opinion was unlikely to span a wider range than on any other issues. Given that the appellants had to demonstrate that there was no possibility of the losses being used in Germany or the Netherlands, there was significantly less scope for areas of uncertainty and dispute.

Europcar Group UK Limited, Premier First Vehicle Rental Franchising v HMRC (TC08293)

Adapted from the case summary in Tax Journal (30 October 2021)

Interest paid by UK resident borrower

Summary - Interest paid had a UK source because the borrower was UK tax resident and UK assets and profits funded the interest payments. Further, the interest was yearly interest because although the loans were repaid within a year, they were replaced by the same lenders with loans of the same or greater amount.

Hargreaves was the UK tax resident parent of a group engaged in UK property investment for which funding was provided in the form of loans. These loans were restructured in 2004 for tax purposes. Before the refinancing, the loans generally remained outstanding. After the refinancing:

- each lender assigned its right to interest to a Guernsey resident entity shortly before it was due and its right to the principal to another group company; and from 2012, after being assigned to the Guernsey entity, the interest was assigned again, but to a UK incorporated and tax resident company;

- a day or two after the assignment, interest was paid and the principal repaid; and then

- the relevant lender advanced a new loan equalling or exceeding the amount of its previous loan to Hargreaves, with the new loan being funded by the proceeds of the loan assignment.

The cycle of assignment, repayment and new advance normally occurred on an annual basis or sometimes at a longer interval.

HMRC assessed the taxpayer to income tax because it failed to withhold this from the interest payments.

Hargreaves Property Holdings Limited appealed, arguing that it was not obliged to withhold tax since the payments did not have a UK source, were not yearly interest or had the benefit of relief under the double tax treaty between the UK and Guernsey or the UK to UK exemption.

Decision

The First Tier Tribunal decided that interest paid under the loans was UK source yearly interest and that neither of the exemptions contended for by the taxpayer applied. Consequently, the tax assessments were upheld because the taxpayer had failed to comply with its obligation to withhold UK income tax from the interest payments.

As regards UK source, this case is one of very few cases on the application of the source principle and, like in Ardmore Construction Ltd v HMRC [2018] EWCA Civ 1438, the factors that carried the greatest weight, and therefore determined that the interest had a UK source, were the residence of the debtor and the location of the assets used to pay the interest and against which any judgment would be enforced. The First Tier Tribunal's decision, like Ardmore, underlined how little weight is given to the residence of the lender and the source of the funds used to advance the loan.

On yearly interest, the First Tier Tribunal applied the Hay tests (IRC v Hay (1924) approved by the Supreme Court in Lehman [2019] STC 661, deciding in this case that the interest on loans that were repaid within a year in circumstances where the original lender would re-lend the same amount or more shortly after the original loan was repaid, were found to be yearly interest.

The First Tier Tribunal also provided two helpful reminders about the concept of yearly interest:

1. It is possible to have a short-term investment in the form of a loan enduring less than a year so that the loan does not have the measure of permanence or future tract of time, so that the interest payable under that loan is not yearly interest (at paras 69 and 70).

2. It is possible for a loan to be 'technically repayable on demand but which the parties nevertheless intend and expect to last for a considerable period of time or which has a propensity to last for a considerable period of time, such that the loan has a measure of permanence, is in the nature of an investment and has a "tract of future time",' so that the interest payable under that loan is yearly interest (at para 71).

On double tax treaty relief, the Tribunal confirmed that, even if the relevant double tax treaty would fully remove the UK withholding tax obligation on yearly interest payments, in order to give effect to the double tax treaty relief, a claim for such relief would need to be made and a direction from HMRC authorising gross payment would need to be received by the borrower, none of which happened in this case.

For interest paid to a UK tax resident company (to whom the right to interest was assigned shortly before the interest was due), the withholding tax exemption in ITA 2007 s 933 does not apply.

On a purposive construction of the exemption, the First Tier Tribunal found that assigning the right to interest to the UK tax resident company shortly before interest was paid had no commercial purpose and therefore, to the extent that the UK recipient of the interest was obliged to pay for the assignment, deprived the UK tax resident company of being the beneficial owner of the interest, with the result that the withholding tax exemption could not apply. On the facts of this case, the English law meaning of 'beneficially entitled' seems to have been overridden.

Hargreaves Property Holdings Limited v HMRC (TC08310)

Adapted from the case summary in Tax Journal (12 November 2021)

R&D Expenditure Credit **(Lecture B1289 – 16.55 minutes)**

A company is large if it has:

1. More than 500 employees and either

2. Revenues exceeding €100 million, or gross assets exceeding €86 million

RDEC can also be claimed by SMEs on certain costs such as R&D costs that have been subsidised and sub-contract work from a large company.

The tax credit is 13% of qualifying R&D costs, with qualifying R&D costs having the same meaning as for SMEs apart from the exceptions noted above.

Illustration

A large company spends £1 million on qualifying R&D in its year ended 31 December 2020.

The tax credit is 13%, i.e. £130,000

This is recorded as income in the P&L (chargeable to corporation tax) and a corresponding amount of tax recoverable from HMRC.

-	Dr Tax recoverable	130,000	
-	Cr P&L income		130,000

The calculation of when and how the tax recoverable is actually recovered requires a methodical approach, broken down into steps and is best illustrated by examples.

Example 1 – profit-making company

Step 1 – assume year ended 31 March 2021

"The set off amount is to be applied in discharging any liability of the company"

Turnover		16,500,000
R&D expense	10,000,000	
Other expenses	5,000,000	(15,000,000)
Profit		1,500,000
RDEC (13% of £10,000,000)		1,300,000
Pre-tax profits		£2,800,000
CT at 19%		532,000
RDEC		(1,300,000)
Payable credit after discharging CT liability		£768,000

Step 2

If amount remaining after step 1 exceeds net value of the set-off amount (R&D credit minus the main rate of CT) reduce that amount to net value of the set-off amount.

i.e. Compare the amount remaining after step 1 with the net value of the credit i.e. after deducting the potential corporation tax on the credit.

- Amount remaining from step 1 £768,000
- Net RDEC (£1.3m less 19%) £1,053,000
- Carry forward the lesser of the two i.e. £768,000

Step 3

Amount brought forward from Step 2	768,000
Relevant PAYE/NIC (say)	(300,000)
Carried forward to next accounting period and added to expenditure credit for that period	£468,000
Capped amount carried forward to Step 4	£300,000

Step 4

Amount remaining after Step 3 applied in discharging any liability of the company to pay corporation tax for any other accounting period.

Brought forward from Step 3	300,000
Other period CT liability (say)	(nil)
Balance c/f to Step 5	£300,000

Step 5

If the company is a member of a group, it may surrender the whole or any part of the amount remaining after Step 4 to any other member of the group.

Brought forward from Step 4	£300,000
CT liabilities of the group (say)	(£100,000)
Balance c/f to Step 6	£200,000

Step 6

The amount remaining after Step 5 is applied in discharging any other liability of the company to pay a sum to HMRC.

Brought forward from Step 5	£200,000
Set off against any other liability (say)	Nil
Amount remaining	£200,000

Step 7

The amount remaining after Step 6 is payable to the company, ie £200,000.

Summary

Discharge against current liability	532,000
RDEC credit c/fwd	468,000
Company liability of group companies	100,000
RDEC paid	200,000
Total	£1,300,00

Example 2 – loss making company

Step 1

The set off amount is to be applied in discharging any liability of the company.

Turnover		5,900,000
Expenses		
R&D	10,000,000	
Other	5,000,000	(15,000,000)
Profit/(loss) before credit		(9,100,000)
RDEC (13% x £10,000,000)		1,300,000
Adjusted loss		(£7,800,000)

CT due	Nil
RDEC	£1,300,000
Amount remaining (no liability to be discharged)	£1,300,000

Step 2

Take smaller of the 2 figures below to Step 3

1. Amount remaining from Step 1 £1,300,000
2. Net RDEC (£1,300,000 less 19%) **£1,053,000**

The restricted amount of (£1.3m - £1.053m), ie £247,000 is not available as a payable credit.

- Carried forward to following years and brought in at Step 1 in preference to a later year's payable credit
- Should it be recognised as a tax asset?
- Based on principles for DT assets, no (existence of tax losses is a strong indicator that future profits will not be available for set-off)
- The company would have to show why they would be, eg that the tax loss is a 'one-off'

Step 3

Brought forward from Step 2	(3)	1,053,000
PAYE/NIC (say)	(4)	(400,000)
		£653,000

If (4) is less than (3) – capped at £400,000 c/fwd to Step 4

£653,000 must be c/fwd to next year

Step 4

The amount remaining after Step 3 is to be applied in discharging any liability of the company to pay corporation tax for any other accounting period.

Brought forward from Step 3	£400,000
Other period CT liability (say)	(Nil)
Balance c/fwd to Step 5	£400,000

Step 5

If the company is a member of a group, it may surrender the whole or any part of the amount remaining after Step 4 to any other member of the group.

Brought forward from Step 4	£400,000
CT liabilities of the group (say)	(£190,000)
Balance c/f to Step 6	£210,000

Step 6

The amount remaining after Step 5 is to be applied in discharging any other liability of the company to pay a sum to HMRC.

B/fwd from Step 5	£210,000
Any HMRC liability	Nil
Amount remaining	£210,000

Step 7

Amount remaining after Step 6 is payable to the company £210,000.

Summary

Tax withheld available to set off against next year's liability	247,000
PAYE capped credit c/fwd	653,000
Total c/fwd	900,000
CT liability of other group companies	190,000
Paid to company	210,000
Total	£1,300,00

Example 3 – profit making but only because of RDEC

Step 1

The set off amount is to be applied in discharging any liability of the company.

Turnover		12,000,000
Expenditure		
R&D	10,000,000	
Other	2,500,000	(12,500,000)
Loss before RDEC		(500,000)
Expenditure credit (13% x £10,000,000)		1,300,000
Profits		£800,000
CT @ 19%		152,000
RDEC		£1,300,000
Amount remaining after discharging liability		£1,148,000

Step 2

Smaller of 2 figures below goes to Step 3

1.	Amount remaining from Step 1	£1,148,000
2.	Net expenditure credit (£1.3m less 19%)	**£1,053,000**

Restricted amount of (1,148,000 - 1, 053,000), £95,000 must be carried forward to future periods.

Step 3

b/fwd from Step 2	(3)	1,053,000
Relevant PAYE/NIC (say)	(4)	465,000

If (4) is less than (3) this amount goes to Step 4

The difference (1,053,000 – 465,000) £588,000 must be carried forward to future periods.

Step 4

B/fwd from Step 3	465,000
Other period CT liability (say)	(Nil)
Balance c/fwd to Step 5	£465,000

Step 5

Brought forward from Step 4	465,000
CT liabilities of the Group (say)	(50,000)
Balance c/fwd to Step 6	£415,000

Step 6

B/fwd from Step 5	415,000
Set off against any other liability	Nil
Amount remaining	£415,000

Step 7

Payable £415,000.

Summary

Discharge against current liability (Step 1)	£152,000
Carried forward to future periods (95 + 588)	683,000
Set off against other group companies (Step 5)	50,000
RDEC paid to company (Step 7)	415,000
Total	£1,300,00

Contributed by Malcolm Greenbaum

VAT and indirect taxes

Default surcharge – reasonable excuse? (Lecture B1286 – 19.00 minutes)

Summary – There was no reasonable excuse for a "Faster payment' being received one day late. The default surcharge remained payable.

Rada In Business Limited had been in the VAT default surcharge regime since the period 07/20, meaning that all payments had to be made on time for the next 12 months to avoid a surcharge penalty.

The company submitted late returns and payment in both 7/20 and 10/20. This appeal related to the company's third default in the 01/21 period, attracting a surcharge at the rate of 5% on outstanding VAT. The due date for filing and payment was Sunday 7 March 2021. The return was received on time but the payment was not received by HMRC until Monday 8 March 2021, having been sent by "Faster Payment" on Friday 5 March.

A 5% surcharge of £2,281 for being one day late was charged.

The company appealed

Decision

"Faster payments" are processed 365 days a year, including non-working days, with funds usually transferred within a couple of hours at most. However, the company provided no evidence to the Tribunal as to why this "Faster Payment" had taken three days to reach HMRC. They would have expected such an issue to have been raised with the bank, so providing a supporting audit trail. Consequently, the Tribunal concluded that this was not a reasonable excuse for the late payment.

Further, the Tribunal concluded that a year into the COVID-19 pandemic, the company should have had procedures in place to ensure payments were made in time. Remote working and staff on furlough was also not a reasonable excuse.

The company's appeal was dismissed.

Rada In Business Limited v HMRC (TC08268)

New regime for filing and payment penalties (Lecture B1286 – 19.00 minutes)

For VAT returns starting on or after 1 April 2022, the new harmonised penalty regime will come into force, replacing the existing default surcharge that applies to both late returns and payment.

Going forward, separate penalties will apply for late submission and late payment, plus interest. As a reminder, the two systems will broadly work as follows:

Late VAT returns

Late VAT returns will fall under a points-based penalty system, with each late return resulting in a penalty point being awarded.

A taxpayer will become liable to a fixed £200 penalty only after they have reached the points threshold, with the threshold being dependant on the taxpayer's submission frequency (annually = 2 points, quarterly = 4 points, monthly = 5 points).

If the taxpayer continues to miss submission deadlines after they have reached the points threshold and have been issued with a penalty, they will become liable for a further fixed rate penalty for each additional missed obligation.

Total points can be reset to zero once the taxpayer has met the following two conditions:

1. Submission of returns on or before the due date, for a period of time based on their submission frequency:
    - annually — 24 months
    - quarterly — 12 months
    - monthly — 6 months
2. All returns that were due within the preceding 24 months have been received.

We understand that a taxpayer's default surcharge history will not be carried forward into the new system, meaning that everyone will start with a clean slate. There is no soft landing on the late filing penalties.

Late payment

VAT paid late will have a penalty charged based on the amount and how late the payment is made.

The first penalty will be calculated as 2% of the outstanding amount if the taxpayer settles between 16 and 30 days after the due date. If there is any tax left unpaid 30 days after the due date, the penalty is set at 2% of the outstanding amount at day 15 plus 2% of the outstanding amount at day 30. In most instances this will amount to a 4% charge at day 30.

A second late payment penalty will be charged at a rate of 4% per annum, calculated on a daily basis on the total unpaid tax incurred from day 31.

In addition, interest will accrue daily after 30 days.

We understand that HMRC will not be charging a late payment penalty for the first year from 1 April 2022 until 31 March 2023 provided that the amount due is paid in full or a time to pay agreement is in place within 30 days of the payment due date.

https://www.gov.uk/government/publications/interest-harmonisation-and-penalties-for-late-submission-and-late-payment-of-tax/interest-harmonisation-and-penalties-for-late-payment-and-late-submission

Supply of medical staff (Lecture B1286 – 19.00 minutes)

Summary –Supplies made by a company employing consultants and GPs were supplies of staff, making them standard rated. They were not supplies of exempt medical care.

Mainpay Limited supplied medical consultants and specialist GPs to an intermediary company called Accident & Emergency Agency Limited. This agency company then supplied the consultants and GP Specialists on to various hospital clients, which were generally NHS Trusts.

The issue to decide was whether Mainpay Limited was supplying medical care (Group 7 Schedule 9 VATA 1994/ Article 132(1) (c) of the Principal VAT Directive 2006/112/EC), meaning that its supplies were exempt from VAT or, as HMRC contended, the company was making a standard rated supply of staff.

The First Tier Tribunal had found in HMRC's favour and Mainpay Limited appealed to the Upper Tribunal.

Decision

Much of the argument before the Upper Tribunal was based on whether the First Tier Tribunal had been correct to decide that the NHS Trusts had control over the consultants and Specialist GPs supplied by Mainpay. The argument was that if Mainpay Limited retained control of its consultants and Specialist GPs then it could not be making a supply of staff and that its supplies were the exempt supply of medical care. If, however, Mainpay ceded control over the consultants and Specialist GPs to the NHS, it was accepted that this would be a supply of staff which, it was common ground, would not be exempt from VAT.

The Upper Tribunal found that the First Tier Tribunal were correct to consider the facts and circumstances under which the supplies took place including who controlled, directed and supervised the consultants. It was clear that although the consultants were paid by Mainpay Limited, the consultants' rate of pay was determined by negotiation between the agency and the NHS Trusts; not by Mainpay Limited. Mainpay Limited was not involved in the day-to day provision of medical care. Mainpay Limited would not know where in a hospital a consultant was based or what hours the consultant was working on any particular day . Mainpay Limited could not direct consultants to undertake an assignment but rather it was the intermediary company and the NHS Trusts that decided which consultant would undertake an assignment. There was no contact between the consultants and Mainpay Limited as to medical or professional matters. Even Mainpay Limited's Employee Handbook and Guide indicated that it was supplying staff, not medical care.

The Upper Tribunal concluded that the exemption contained in Article 132(1)(c) and Item 1(a) of Group 7 of Schedule 9 to VATA did not apply to the supplies made by Mainpay Limited. The appeal was dismissed.

Mainpay Limited v HMRC [2021] UKUT 0270 (TCC)

COVID-19 testing (Lecture B1286 – 19.00 minutes)

COVID tests are now a common-place requirement for individuals travelling abroad but how are they treated for VAT?

HMRC considers that the objective purposes of COVID-19 testing are diagnosis and the protection of human health. This includes tests taken when travelling abroad. As a result, such testing may be treated as exempt medical care provided that the normal conditions are satisfied.

In summary:

- Sales of tests where the test is self-administered with an immediate result are standard rated;
- Sales of tests which include testing and diagnosis by someone other than the buyer are exempt where the testing and diagnosis is carried out or directly supervised by a registered health professional; otherwise they are standard rated;
- Tests administered by the pharmacist in pharmacies are exempt;
- Tests in GP surgeries are exempt where administered or directly supervised by a registered healthcare professional;
- Tests supplied by manufacturer to hospitals, pharmacies or GP surgeries are standard rated.

https://www.gov.uk/government/publications/revenue-and-customs-brief-11-2021-vat-liability-of-coronavirus-covid-19-testing-services

Grant of store pod long leases (Lecture B1286 – 19.00 minutes)

Summary - The supply of Store Pods to investors was the exempt supply of a building and not the standard rated supply of storage facilities.

In December 2014, Harley Scott Commercial Limited purchased the freehold of a building in Nottingham and did not opt to tax.

Subsequently, third-party contractors were engaged to fit out the building as a self-storage facility that included the installation of Storage Pods. The external structure of the building remained unchanged and was described as being a large shed with an A-frame roof. It had mezzanine floors which were a steel frame covered with plywood. On the ground floor the base was concrete. Each floor was kept in place with bolts. The Store Pods were manufactured from single skin sheet metal with steel swing doors. There were corridors, communal areas and stairwells.

The company granted long leases over the Storage Pods to investors, who leased them back on a six-year lease to Harley Scott Commercial Limited in return for rent thus guaranteeing an advertised 8% return. The company then sought customers to whom they granted licences to use the units for storage. This supply also included office facilities, conference rooms, internet, car parking and security facilities. The supply also included "office facilities, catering facilities, conference rooms and free wifi as well as facilities you would expect such as

manned reception areas, security facilities and supplies". Other facilities such as car parking spaces were also provided.

Harley Scott Commercial Limited argued that the supply of the Store Pods to the investors was the exempt supply of part of a building. The Store Pods were simply rooms in the building, the equivalent of flats in an apartment block.

HMRC disagreed, contending the company was supplying standard rated storage facilities and raised best judgement assessments totalling £653,000

Following a review, the company appealed to the First Tier Tribunal.

Decision

The First Tier Tribunal found that it was the clear intention of both Harley Scott Commercial Limited and its investors to obtain an interest in a building that could be used to generate income.

The long leases were registered in the Land Registry, with the Store Pods being immoveable property. The pods were like rooms in a building and the supply was of a part of that building and so exempt from VAT.

Harley Scott Commercial Limited v HMRC (TC08299)

Sporting exemption did not apply

Summary - the ultimate beneficiaries of the supply of a boathouse to various rowing clubs were the clubs themselves and not the individual rowers. Consequently, the sporting exemption did not apply and input VAT was reclaimable.

Cambridge University Boathouse Limited built a boathouse and related facilities, opting to tax the property.

The company then licensed the use of the boathouse on a 99-year lease to three rowing clubs linked to Cambridge University, with each club limited by guarantee.

The rowing clubs select and train university crews to compete against Oxford University in the annual Boat Races, with the races organised by a separate company, the Boat Race Company Limited.

Cambridge University Boathouse Limited reclaimed input VAT on the basis that the supply of the Boathouse to the rowing clubs was a standard rated supply but the claims were denied.

HMRC argued that the supply of the boathouse fell under the Sporting exemption (Item 3, Group 10, Schedule 9 VATA 1994) which reads:

> "The supply by an eligible body to an individual of services closely linked with and essential to sport or physical education in which the individual is taking part."

If HMRC were correct, Cambridge University Boathouse Limited was making exempt supplies, so blocking the VAT recovery.

Cambridge University Boathouse Limited appealed.

Decision

The First Tier Tribunal found that the true beneficiary of the supply of the Boathouse were the Rowing Clubs as, under the lease, it was them who had the right to use the Boathouse. They could use the property for storage and running their training programmes. The rowers were only entitled to use the Boathouse if invited by the rowing clubs or their employees. The individual rowers were selected by the clubs and trained by them and made no payment for the use of the Boathouse.

Consequently, the First Tier Tribunal found that the sporting exemption did not apply as the true beneficiaries of the supply were the rowing clubs rather than individual rowers.

At the end of the case report, the First Tier Tribunal stated that this decision does not determine Cambridge University Boathouse Limited's appeal. HMRC's position is that Cambridge University Boathouse Limited's entitlement to recover VAT in respect of the relevant period may depend on the outcome of further issues, which the parties will now seek to agree.

Cambridge University Boathouse Limited v HMRC (TC08304)

Consideration for a lease

Summary – Looking at the package as whole, the payment for the grant of the lease was a premium liable to VAT.

Polo Farm Sports Club is a non-profit club that provides facilities for hockey, cricket, tennis and croquet.

Both Polo Farm Sports Club and Canterbury Christ Church University are registered for VAT but Canterbury Christ Church University's activities are primarily exempt from VAT.

Polo Farm Sports Club and Canterbury Christ Church University discussed at length the concept of developing a new indoor sports centre to be used by them and by the local community. Eventually the parties agreed that Polo Farm Sports Club would be responsible for obtaining planning permission and for building the hub and upgrading the existing facilities in exchange for a £2m premium payable by Canterbury Christ Church University. Polo Farm Sports Club was also required to pay in £2m out of its own funds towards the works.

Under the principal terms of the lease, Polo Farm Sports Club was going to lease the hub to Canterbury Christ Church University for £250,000 per annum and Canterbury Christ Church University would lease it back to Polo Farm Sports Club for a peppercorn rent.

After reviewing the documentary evidence and contractual terms, HMRC concluded that the £2m premium represented consideration for the grant of a leasehold interest which was liable to VAT.

Polo Farm Sports Club disagreed with HMRC's decision, arguing that the payments made by Canterbury Christ Church University and Polo Farm Sports Club amounted to sharing the cost

of developing the site rather than consideration for the provision of the lease. The club appealed.

Decision

The First Tier Tribunal noted that the starting point for determining the nature of a supply and the legal rights and obligations between the parties should be the contract as this normally reflects the commercial reality. For VAT purposes, the value of a supply was the full amount of consideration received.

The First Tier Tribunal held that payment of £2m and the grant of the lease were inextricably linked on both a commercial and economic basis. A legal relationship existed between the parties, there was reciprocal performance, there was a direct link between the provision of the lease and the £2m consideration paid for the grant of that lease. The £2m was therefore liable to VAT.

Polo Farm Sports Club v HMRC (TC08294)

Adapted from the case summary in Tax Journal (5 November 2021)

R&C Brief 14 (2021) - VAT on importations of dental prostheses

In the Autumn Budget 2021 the Government announced that the import of dental prostheses registered dentists or dental care professionals would be exempt from VAT.

This Brief explains the changes, how businesses can claim repayment of overpaid import VAT paid after 1 January 2021, and how businesses can declare the correct VAT value for imports of dental prostheses.

The exemption can be claimed by selecting the correct customs commodity code for the type of dental prostheses that are being imported when declaring the goods on Customs Handling of Import and Export Freight (CHIEF) or Customs Declaration Service (CDS):

1. 9021 21 1000 – artificial teeth - of plastics
2. 9021 21 9000 – artificial teeth - of other materials
3. 9021 29 0000 – other (than artificial teeth)

Claims must include the signed declaration shown in Appendix A and quote the Revenue and Customs Brief.

The treatment will be applied retrospectively from 1 January 2021, and following Royal Assent of the Finance Bill, HMRC will allow repayment claims to be made where VAT has previously been accounted for between 1 January 2021 and 27 October 2021. Further guidance will be published at a later date.

https://www.gov.uk/government/publications/revenue-and-customs-brief-14-2021-changes-to-the-vat-treatment-of-importations-of-dental-prostheses-into-the-united-kingdom

VAT on professional services (Lecture B1290 – 22.27 minutes)

Basic rule

The majority of services provided to overseas business customers will be supplied where the business customer belongs – the so called B2B supply.

So if you are billing a French company the place of supply is France and the French company has a mandatory reverse charge obligation.

The UK company must ensure they have proof of their customers business status (e.g. VAT number, contracts, letterhead etc).

B2B services are outside the scope of VAT but the UK company must include the sale in Box 6 of their VAT return. From 1 January 2021, there is no requirement to complete an EC Sales List.

It is also good practice (but not mandatory) for the UK company to put the reverse charge narrative on their invoice to remind their French customer of their reverse charge obligation.

There are limited overrides to the basic B2B rule and these can be found in VATA 1994 Schedule 4A. VAT Notice 741A is also very useful.

Services supplied to non-business overseas customers are generally B2C and UK VAT would be charged. Again Schedule 4A and Notice 741A are useful for any overrides to these rules.

Overrides to the basic rules

Schedule 4A VATA 1994 lists the overrides in three parts:

- Part 1 – General Exceptions (Paras 1 to 8)
- Part 2 – B2B overrides only (Paras 9 to 9E)
- Part 3 – B2C overrides only (Paras 10 to 16)

Whilst the basic rules remain unchanged post Brexit there are some important changes to the overrides within Schedule 4A. I will outline the more common overrides below.

Schedule 4A Para 16 services (B2C only)

Para 16 services include consultants, accountants and lawyers.

Up to 31 December 2020 para 16 services provided to non-EU consumers were supplied where the customer belongs. As a result no UK VAT was chargeable when invoicing non-EU consumers.

Consultancy fees must be for the provision of information and expert advice. Where the services fall short of this or go beyond this then the basic B2C rule will still be in point and UK VAT should be charged. In the recent case of Gray & Farrar the courts held that dating agency fees charged to non-EU individuals went beyond the provision of information and advice so UK VAT was chargeable under the B2C rule. In contrast the career coaching fees charged to

non-EU families in Mandarin Consultancy were held to fall within the definition of consultancy so no UK VAT was chargeable.

From 1 January 2021 Para 16 is extended to any consumer outside the UK i.e. EU and non-EU consumers.

So accountants would not charge VAT to any overseas client from 1 January 2021. B2B services remain basic rule whilst B2C services are covered by Para 16. There would be no EU registration obligation for B2B services as these are covered by the mandatory reverse charge. And unless the member state has a use and enjoyment rule for Para 16 services (unlikely) there will be no EU VAT registration for B2C services either.

It should be noted that when accountants are invoicing a non-resident landlord for accountancy work (rental accounts, tax etc) we will have a B2B service. As such, UK VAT will only be charged where the non-resident landlord has a UK business establishment or a UK fixed establishment. This would normally involve employing staff in the UK to manage the portfolio.

Land related services (B2B or B2C)

Under Schedule 4A para 1, services relating to specific sites are supplied where the land is situated.

Services relating to the sale of a UK property by an overseas individual would be subject to the standard rate of UK VAT e.g. estate agent commission, lawyers conveyancing fees etc.

Likewise, if a UK individual was selling their Spanish holiday home they would be charged Spanish VAT on similar costs.

UK providers of land related services would need to be careful of requests to undertake land related services on EU sites as this can create an EU registration obligation for the UK provider. For example, an interior designer is engaged by a high worth individual to work on his French, Italian and Austrian homes. These are land related services and as such the interior designer would have registration obligations in France, Italy and Austria.

From 1 July 2021 the designer could register for the non-union OSS (see below) and account for the relevant VAT through their OSS registration. Prior to 1 July 2021 multiple EU registrations would have been required.

If the land related services were provided to an EU registered business we would need to check whether the destination state had a reverse charge rule for land related services. If it did then the reverse charge would take precedence and no OSS reporting would be required.

Non-union OSS

The non-union one stop shop (OSS) was formerly known as the non-union MOSS scheme. For the first six months of 2021 it was used to report and account for EU VAT when UK businesses supplied broadcasting, telecommunication and electronically supplied services to EU individuals.

Prior to 31 December 2020 UK traders would have been reporting the same via the union MOSS scheme.

The non-union OSS is an optional system and the UK supplier can still VAT register in each Member State in which they make supplies, if they prefer. Where they opt to use OSS, they register in a single Member State and complete a single return to account for VAT due in each Member State. It is submitted electronically, and records all supplies of services to Member States that are taking place there, along with their value and VAT due. A return must be submitted by the end of the month following the tax period covered by the return. Tax periods are calendar quarters. Therefore, for a return covering January to March, it must be submitted by 30 April. Payment should be made at the same time.

If a UK trader was already registered for MOSS in a Member State then they were moved over to the new OSS system from 1 July 2021.

Input VAT incurred in another Member State cannot be recovered under an OSS return. In order to recover any input tax incurred in the EU a UK supplier needs to submit a 13th Directive claim. A supplier is under no obligation to issue an invoice when using OSS.

All supplies of services, where the place of supply is in the EU, are covered under the OSS scheme. Non-union MOSS only covered broadcasting, telecommunication and electronic services.

The types of services that are covered by the OSS scheme include (the list is not exhaustive):

- Broadcasting, telecommunication and electronic services
- Admission to cultural events
- Transport services
- Hiring of means of transport
- Land related services

Reverse charge

There have been no changes to reverse charge rules under Brexit.

If a UK business buys services from an overseas business they must reverse charge the service on their VAT return. The entries are normally made in Boxes 1, 4, 6 and 7 of the UK VAT return. Input tax recovery in Box 4 is dependent on the company using the service for their taxable activity.

company. The agent will invoice the actor for their commission but the commission will be zero rated i.e.,, the main supply between actor and production company is outside he UK – the provisions within Group 7 apply.

Where the production is filmed is not relevant – it is where the film production company is based that will determine the VAT treatment of the actor's fee and in turn the agent's fee.

Contributed by Dean Wootten