Tolley®CPD

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Rate of tax deducted from redundancy payment

Summary – Lack of supporting evidence led the First Tier Tribunal to conclude that only 20% tax had been accounted for and so the balance was payable.

Heather Jones lost her job and under a compromise agreement received a redundancy payment of £36,700 from Doubletake Studios Ltd in four equal instalments. Both parties agreed that the first £30,000 was exempt from tax under s401 ITEPA 2003 but the balance was taxable. Heather Jones had not included the payment in her self-assessment return so HMRC had raised a discovery assessment to collect the balance owed.

The issue under appeal concerned whether the employer, which was now in administration, had taxed it at 20% or 40%:

- The taxpayer said 40% tax had been paid but was unable to produce supporting evidence;
- HMRC said the end-of-year form P14 showed that tax had been deducted at 20% and so additional tax was still owed.

Decision

The First Tier Tribunal said the onus of proof lay with Heather Jones to show that 40% tax had been paid. She had failed to provide any evidence.

The taxpayer's appeal was dismissed.

Heather Jones v HMRC (TC06267)

Disguised remuneration: Technical Note and Legislation (Lecture B1058 – 17.57 minutes)

The majority of the changes to strengthen the disguised remuneration legislation (Part 7A ITEPA 2003) and prevent the future use of disguised remuneration schemes have already been enacted.

Two further changes are included in Finance Bill 2017-18:

1. introducing the close companies' gateway;
2. a clarification of when Part 7A applies.

The technical note published on 8 December also includes information on the changes to ensure the tax and NIC from a disguised remuneration (DR) employment income charge are collected from the appropriate person.

FA 2017 contained comprehensive double taxation relief provisions to ensure no scheme user pays tax twice on the same underlying income. There are currently provisions to relieve liability for overlapping NIC in the Social Security (Contributions) Regulations 2001.

The government intends to introduce further provisions to clarify how double NIC relief is given in "more complicated fact patterns". The draft legislation (not discussed further in these notes) is wholly relieving and will apply from the introduction of Part 7A in the same way as the tax rules.

HMRC will apply the principles of the draft NIC provisions in practice where multiple NIC charges arise.

Close company gateway

Some schemes claim that the DR received by a director/employee is not derived from the employment. The proposed legislation previously had no requirement for the employment to exist at or around the same time as the relevant transaction and relevant step, whereas the material interest test had to be met within 12 months of the relevant transaction.

The changes are:

- The employment must have existed within the preceding three years of the relevant transaction;

- The time period in the material interest condition has been extended from 12 months to 3 years so that the two tests align.

The 'avoidance purpose' test

The avoidance purpose test has now been amended to take account of when the relevant transaction and the relevant step occurred. This will ensure that the purpose of entering into an arrangement (e.g. setting up a trust) many years before the scheme was used will not be taken into consideration.

Potential double charges

There are comprehensive double taxation relief provisions in Chapter 2 of Part 7A, and paragraph 59 of Schedule 2 to FA 2011, so that no-one has to pay tax twice on the same underlying income, even if there are overlapping tax charges.

However, the government has decided to amend Part 7A, to put beyond doubt that it applies regardless of whether contributions to DR schemes should previously have been taxed as employment income. This change is effective from 22 November 2017.

Transfer of liability – update following the 2016 consultation

There are three scenarios where the government was concerned it would not be possible to collect the tax and NIC arising from the measure.

1. There is a non-UK employer set up for the purposes of the DR scheme and the employee provides services to a UK person;

2. The employer exists at the time the Part 7A charge arises but is unable to meet the liability;

3. The employer no longer exists at the time the Part 7A charge arises.

Example - Non-UK employer

An employee, Andrew, is employed by an offshore company, 'B'. He provides services to a UK-based end-client, Host Ltd.

The offshore company invoices Host Ltd for Andrew's services, either

- Directly; or
- via an intermediary or an agency based in the UK.

£10,000 is contributed to a trust by 'B' and the trust subsequently loans £10,000 to Andrew.

Analysis

The loan to Andrew is a relevant step so a Part 7A charge arises.

'B' is outside the scope of the PAYE regulations so s.689 ITEPA 2003 will apply to make Host Ltd, or the agency, responsible for operating PAYE on the Part 7A charge arising on the loan.

Where there is a Non Resident employer and a charge arises because a loan is outstanding loan at 6 April 2019, the employee is liable for the tax. S.689 will not apply to require a UK entity to operate PAYE in respect of the loan charge.

Example 2

An employee, Amber, is employed by an offshore company, 'B'. She provided services to a UK-based end-client, Host Ltd, in 2008.

The offshore company invoiced Host Ltd for Amber's services, either

- directly, or
- via an intermediary or an agency based in the UK.

'B' contributed £10,000 to a trust and the trust subsequently loaned £10,000 to 'A' in 2009 and remains unpaid on 5 April 2019.

Analysis

The outstanding loan triggers a loan charge relevant step so a Part 7A charge arises.

'B' is outside the scope of the PAYE regulations, and s.689 does not apply to the loan charge relevant step. As there is no UK entity required to operate PAYE, Amber must report the income and pay the tax to HMRC directly.

Note: The government will also introduce secondary legislation in relation to NIC, which will mean the end-client and the employee are not liable for Class 1 NIC.

Employer unable to pay

HMRC has decided that this is covered by existing powers and will use regulation 81 of the PAYE regulations to transfer the outstanding liability to the employee, where the employer is unable to pay.

Broadly, a regulation 81 direction can be made if either Condition A or B is met. Condition B allows a transfer of liability if the unpaid tax is in relation to a notional payment, which covers all Part 7A tax charges, including the loan charge.

The regulation 81 direction only transfers the tax liability. The employer will remain liable for any Class 1 NIC due.

How will this work in practice?

- Using existing procedures, HMRC will assess the employer's ability to pay. HMRC will consider time to pay (TTP) arrangements, especially where employers are in scope of the loan charge;

- Where these options are exhausted, and it is clear that the employer is unable to pay the outstanding liability, HMRC will issue a regulation 80 determination in respect of the unpaid tax included in their Real Time Information (RTI) return;

- Once this determination has been unpaid for 30 days, HMRC will use regulation 81 to direct the liability on to the employee. The unpaid tax will then be collected from the employee directly.

The government expects employers who have used DR schemes to include all Part 7A charges in their RTI/PAYE submissions, regardless of their ability to pay. This will prevent any inaccuracy, or failure to notify, penalties.

Where the employer does not include Part 7A liabilities in their RTI submission, HMRC will issue a regulation 80 determination. Once the determination is final, HMRC will make an assessment of whether or not the employer has the ability to pay the outstanding liability. Where appropriate a regulation 81 direction will be made.

Dissolved employer

As the third party in a DR scheme exists independently from the employer, it is possible for a Part 7A charge to arise where the employer has been dissolved or no longer exists.

Under sections 7, 8 and 9 of the TMA 1970, the employee is responsible for reporting the income and paying the tax to HMRC. The employee will not be liable for any Class 1 NIC due.

Loan charge additional information

Every employee who has an outstanding DR loan on 5 April 2019 will have to provide information to HMRC. This will allow HMRC to ensure the loan charge is complied with. This is in addition to the duty to provide information to the employer, contained within paragraph 36 of schedule 11 of Finance (No. 2) Act 2017.

The government has also extended the scope of the duty to provide information to HMRC to include self-employed users of DR schemes.

Contributed by Kevin Read

Car benefit changes (Lecture B1056 – 13.57 minutes)

In response to a question about the range of colours available to purchasers of his new Model "T", Henry Ford famously replied that they could have any colour they wanted as long as it was black.

Nowadays it seems that we can have our cars sprayed in any colour in the spectrum but the taxman will want his pound of flesh if the car isn't green.

The current system

The current car benefit system calculates taxable benefits as a percentage of the list price of the car with the percentage being based on the vehicle's CO_2 emissions. The percentage increases as emissions rise thereby leading to a system that (deliberately and understandably) favours cars with lower emissions.

This has been the case since April 2002 when the emissions-based system replaced the previous regime that curiously reduced benefits for employees with high annual business mileage.

The current benefit percentages are as follows:

	% x List price		
CO_2 emissions (g/km):	*2017/18*	*2018/19*	*2019/20*
Up to 50 (inc. fully electric vehicles)	9	13	16
51 - 75	13	16	19
76 - 94	17	19	22

Thereafter the % increases by 1% for every 5 g/km over 94 g/km. There is a 3% supplement for diesel cars that are not certified to the Real Driving Emissions 2 (RDE2) standard (with the supplement rising to 4% from April 2018). In reality very few diesel vehicles will meet current RED2 standards so the supplement will apply to virtually all diesel cars (it is intended that it will be removed in April 2021). Diesel hybrids are not subject to the supplement. The maximum percentage is 37%.

The system from 6 April 2020

As confirmed by the Government in Autumn 2017, from the tax year 2020/21, the car benefit system will change significantly and will become even more attractive for zero or low emission vehicles.

The changes are designed to provide an even greater incentive for employers to offer (and for employees to accept) the use of ultra-low emission vehicles (ULEVs) and to support the UK's ULEV market. The measures are also intended to address the issues of poor air quality and reduce the effects of global warming. The stated aim is for us all to be at the wheel of zero emission cars and vans by 2040.

The new ULEV rates kick-in from April 2020 with the lowest benefits for cars with CO_2 emissions below 50 g/km. Electric vehicles with zero tailpipe emissions will have a benefit percentage of 2%, thereby differentiating them for the first time from their hybrid relatives. Cars with CO_2 emissions of between 1 and 50 g/km – such as most plug-in hybrid electric vehicles (PHEVs) - will have benefit percentages varying from 2% - 14%.

Within the 1 - 50 emissions category there are different percentage bands based on the vehicle's "electric range" with maximum tax savings offered for those cars that can travel furthest by battery power only. The electric range (also called "zero emissions mileage") is the maximum distance the vehicle can travel in pure electric mode without recharging the battery or using the combustion engine of the plug-in vehicle. This range is declared on the certificate of conformity or type approval certificate (if the range is expressed in kilometres - which it normally is - one should multiply by 0.6214 for a mileage equivalent).

After that the system is reasonably straightforward. The benefit rate is 15% if emissions are 51 – 54 g/km with 1% increments for each subsequent band of 5 g/km.

The benefit rates from 2010/21 will therefore be as follows:

CO_2 emissions (g/km)	*Electric range (miles)*	*Relevant % x list price*
Nil	n/a	2
1 – 50	> 130	2
	70 - 129	5
	40 - 69	8
	30 – 39	12
	< 30	14
51 - 54	n/a	15
55 - 59	n/a	16
		etc

The diesel supplement for non-hybrid vehicles remains (as does the overall percentage cap at 37%). The cap will apply for cars with CO_2 emissions levels at 160 g/km or above (or 145 g/km and above for non-hybrid diesel vehicles).

Company fleet cars account for more than half of all new car sales in the UK with around 1.3 million fleet or business registrations each year. The new benefit bands are expected to bring about a significantly increased take-up of ULEVs by car fleets. This will undoubtedly be accompanied by an increase in the range of ULEVs being offered by the car manufacturers (and hopefully a reduction in the list prices given that a hefty premium is currently being added to the price of ULEVs in comparison to their less eco-friendly cousins).

And don't forget the knock-on benefits of ULEVs in the form of lower Road Tax and exemptions from the London congestion charge. Every little helps.

Fuel benefits

An additional benefit is charged if fuel is provided by the employer for non-business mileage (which includes home to work travel). The benefit is a percentage of the fuel benefit multiplier that is currently £22,600 (rising to £23,400 for 2018/19 and increasing by the RPI thereafter). The percentage is that determined under the car benefit rules.

There are no proposed changes to the way in which the fuel benefit will be calculated from 2020/21, so the reductions in the car benefit percentages for hybrid vehicles from April 2020 will automatically reduce the taxable benefits where private fuel is provided.

For example, offering an unlimited fuel card to the driver of a PHEV could mean that the fuel benefit is as low as (say) £23,400 @ 12% = £2,808 per annum (at current rates) leading to a tax liability for a higher rate taxpayer of around £94 per month. The liability is even smaller if the 8% or 5% rates could be accessed. Prima facie this appears a little anomalous as it seems to give the employee no incentive to refrain from using the vehicle in petrol mode and it could lead to "high mileage" employees choosing the fuel option from their menu of employee benefits.

A few comparisons….

The Ford Mondeo remains a very popular and common company car in 2018. The benefits on the provision to an employee of a Ford Mondeo 2.0 TDCi are as follows:

List Price £27,815

CO_2 emissions 107 g/km

Petrol engine

Tax year	*Relevant %*	*Taxable benefit* £
2017/18	20	5,563
2018/19	22	6,119
2019/20	25	6,953
2020/21	26	7,232

The new rules in 2020/21 have little effect.

Compare this to a typical and popular PHEV such as a Mitsubishi Outlander.

List Price £36,055

CO_2 emissions 42 g/km

Electric range 52 km (32 miles)

Tax year	*Relevant %*	*Taxable benefit*
		£
2017/18	9	3,245
2018/19	13	4,687
2019/20	16	5,769
2020/21	12	4,436

Here we do see a reduction in the benefit in 2020/21 although it still exceeds the taxable benefit for 2017/18 due to the restricted electric range of the car. [Most PHEVs actually have an electric range of less than 30 miles as 94% of all car journeys are 25 miles or less, so accessing the new 2, 5 or 8% rates might be difficult.]

Finally compare the above to a fully electric car such as a BMW i3 :

No CO_2 emissions.

List Price £33,340 (entry level model)

Electric range 195 miles

Tax year	*Relevant %*	*Taxable benefit*
		£
2017/18	9	3,001
2018/19	13	4,334
2019/20	16	5,334
2020/21	2	667

The reduction in the benefit from April 2020 is clear to see giving a tax saving of over £150 every month for a higher rate taxpayer. In addition, the 13.8% NIC saving for the employer shouldn't be overlooked.

For those needing an extended battery range, BMW have the i3 with Range Extender (BMW i3 REx) which incorporates a small scooter engine alongside the battery which kicks-in when the battery is nearly flat. The Extender is intended as an emergency backup to get you to the next recharging location and increases the range of the vehicle to a possible 275 miles. The Extender powers the battery (rather than driving the wheels of the car like normal hybrids).

Drivers need to put petrol in the Range Extender (it has a 2.4 gallon tank). So this makes the i3 REx a hybrid and not a zero emissions electric car (although with a zero-emissions range of over 130 miles, the new benefit rate from 2020/21 will be 2% - ie, the same as a 100% electric car). The Range Extender adds around £3,000 to the list price of the standard BMW i3.

Capital Allowances

In addition to standard capital allowances available for vehicle ownership, businesses are able to claim Enhanced Capital Allowances (which are essentially first year allowances) for electric and low emission vehicles used for business purposes. This includes use by employees.

ULEVs are eligible for a 100% write-down in the first-year of purchase. The vehicle must be brand new (ie, unused and not second-hand).

All businesses (of whatever size) can claim 100% ECAs on a car provided that:

- It is electric or has CO_2 emissions of ≤ 50 g/km (75 g/km until 31 March 2018);
- The expenditure is incurred before 31 March 2021.

There is an increasingly appealing range of vehicles which will qualify for 100% ECAs including the VW e-Golf, the Volvo V60 / XC90 PHEV, the Audi e-tron A3 and Q7, Mercedes PHEVs (such as the C-class and E-class ranges and the S-class 500s), the BMW e-range (225xe, 330e, 740e and i3) and several others. To this one can add more exotic creatures such as the BMW i8 hybrid and the Porsche 918 Spyder (although the Spyder's list price of £625,000 might be a little rich for some pockets).

The attractiveness of ULEVs is further advanced by the availability of Government grants towards the cost of a new electric vehicle or PHEV. The grant is typically either £2,500 or £4,500 depending on the vehicle category. Grant applications are generally handled by the car dealer. The amount eligible for capital allowances is the net spend – ie, the cost of the vehicle less the grant received.

Cars which are not ULEVs will continue to be eligible for capital allowances at 18%. There is a special rate of 8% for cars with emissions exceeding 110 g/km (130 g/km before 1 April 2018).

Contributed by Steve Sanders

Capital withdrawn from a property letting business (Lecture B1057 – 11.18 minutes)

A worrying recent tax development is that HMRC appear to have changed their attitude towards remortgaged rental properties, denying interest relief on additional borrowings where capital is withdrawn from the property letting business.

The position for many years has been that, if an individual client with such a business asks the question 'Can I remortgage my let properties and extract the money for my own use?' The answer to this query has invariably been in the affirmative. Deductions for a property letting business are, broadly speaking, treated in the same way as deductions for any other type of business.

Admittedly, where the let property is residential, the deduction for interest and other finance charges is subject to a 25% restriction in 2017/18, ie. only three-quarters of the relevant costs are allowable, with the remaining one quarter being relieved by way of a basic rate income tax reducer. However, this part of the legislation is not relevant to the current problem.

The standard practice has been that the buy-to-let property owner can remortgage his properties and take out capital from the property letting business, subject only to the proviso that his capital account does not become overdrawn. All his mortgage interest (including any additional payments relating to the new loan) should be eligible for tax relief.

If the taxpayer extracts no more than the capital that he originally brought into the business (ie. the market value of the properties when they were first let), there should be no effect on the tax position. The fact that a greater proportion of the capital in the business is now supported by a mortgage would appear to be completely irrelevant.

This position is illustrated in Para BIM45700 of the Business Income Manual that includes the example of a Mr A who owns a London flat which he bought some years ago for £125,000. He has a mortgage of £80,000 on this property. He has recently been offered a job abroad and so he intends to move there to live and work. Given that Mr A is likely to be returning to London at a later stage, he decides to retain the flat and rent it out. The London flat has a current market value of £375,000. The opening balance sheet of Mr A's property letting business shows:

Property at market value	375,000
Less: Mortgage	*(80,000)*
MR A's CAPITAL ACCOUNT BALANCE	295,000

Mr A renegotiates the mortgage on the flat, converting it to a buy-to-let mortgage, and, in doing so, he borrows a further £140,000. He then withdraws the £140,000 that he uses to buy a flat near his new place of work. The balance sheet at this stage shows:

Property at market value	375,000
Less: Mortgage	(220,000)
MR A's CAPITAL ACCOUNT BALANCE	155,000

The capital account balance is made up as follows:

b/f	295,000
Less: Drawings	(140,000)
c/f	155,000

In HMRC's words:

> 'Although (Mr A) has withdrawn capital from the business, the interest on the mortgage loan is allowable in full because it is funding the transfer of the property to the business at its open market value at the time the business started. The capital account is not overdrawn.'

If a client finds himself in the same position as Mr A in the Business Income Manual, one would not be expecting the interest deduction to be challenged by HMRC. However, this is precisely what is now starting to happen. In one reported instance, the HMRC officer who enquired into the client's tax return insisted that the additional mortgage should be used to provide working capital for the property letting business and should not be extracted for private purposes. Unfortunately, this official was not looking at the helpful example of Mr A in Para BIM45700 of the Business Income Manual, but was instead referring to the HMRC guide entitled 'Income Tax When You Let Your Property: Work Out Your Rental Income'. Under the heading 'Increasing your mortgage', this guide says:

> 'If you increase your mortgage on your buy-to-let property, you may be able to treat interest on the additional loan as a revenue expense, as long as the additional loan is wholly and exclusively for the purposes of the letting business.
>
> Interest on any additional borrowing above the capital value of the property when it was brought into your letting business is not tax- deductible.'

The argument appears to have been that, because the interest on the additional element of the mortgage did not relate to something that was used wholly and exclusively for the purposes of the property letting business (ie. under S34 ITTOIA 2005), tax relief for that interest should be denied. But HMRC's contention totally ignores the original 'capital introduced to the business' argument.

It is understood that this dispute is in line for a First-Tier Tribunal hearing.

Bear in mind the words of one well-known tax writer:

> 'HMRC manuals are not the law. The guidance they contain is guidance which can, and will, be ignored by the Courts if it does not agree with the tax law. However, if you are relying on a section of HMRC guidance to defend a client's tax position, always print a dated copy of the page (given that the words in the guidance) can be changed without notice.'

Contributed by Robert Jamieson

Income and exemptions relating to securities

Summary – The loan notes at issue were not restricted securities for the purposes of Pt 7 ITEPA 2003 and were therefore subject to income tax and national insurance contributions.

This is a decision relating to two appeals following First Tier Tribunal cases concerning the acquisition of loans by various employees of “Cyclops” and “Graceland”. The issue to be decided was whether, because of the existence of a forfeiture provision in the Loan Notes terms, they were “restricted securities” under Part 7 ITEPA 2003.

If, as the Appellants contended, the Loan Notes were restricted securities, then by virtue of section 425 ITEPA (and corresponding provisions in the NIC legislation) there was no income tax or NIC payable upon acquisition by the Employees of the Loan Notes.

HMRC contended that because there was no business purpose for the inclusion of the forfeiture provision, the effect of the Supreme Court's judgment in UBS AG v HMRC; DB Group Services (UK) Ltd v HMRC[2016] STC 934 (UBS) was that the Loan Notes were not restricted securities and that the acquisition of the Loan Notes by the employees should be treated for PAYE and NIC purposes in the same way as a payment of cash equal to the principal amount of the Loan Notes.

The First Tier Tribunal analysed the UBS case, holding that the correct approach to be followed was to focus on the provisions for forfeiture and to ask whether they had a business or commercial purpose or whether they were commercially irrelevant conditions whose only purpose was the obtaining of the exemption. The Tribunal concluded that none of the Loan Notes were restricted securities.

They also concluded that when the employees had received the Loan Notes, the principal amount of those Loan Notes had been placed unreservedly at their disposal. Therefore, they had received 'earnings' in the form of cash and the measure of those earnings was accordingly the principal amount of the Loan Notes. They could require immediate payment of the redemption proceeds if they wished. They concluded that the employees had received earnings in the form of cash equal to the principal amount of those Loan Notes. The taxpayers appealed to the Upper Tribunal.

Decision

The Upper Tribunal agreed that the First Tier Tribunal had correctly identified the relevant principles to be applied in considering the terms of the restrictions, as derived from UBS and had correctly applied those principles to the relevant facts in the appeals. The Loan Notes were not restricted securities.

They also said that the First Tier Tribuanl had properly taken into account the employee's powers as directors and shareholders to ensure that the Loan Notes could have been redeemed at any time in determining whether cash had been placed unreservedly at the employees' disposal. The employees should be treated as receiving money earnings equivalent to the principal amount of the Loan Notes and the restriction in the Loan Notes should not be taken into account in valuing them.

The appeal was dismissed.

Cyclops Electronics Limited / Graceland Fixing Limited v HMRC
(UT/2016/0193 and UT/2017/0195)

Help-to-save accounts

Help to Save is a government backed savings account to help working people on low incomes build up their savings. They will be able to pay in up to £50 a month and receive a 50% government bonus on their savings.

Subject to the approval of the House, Help to Save will begin with a trial in January 2018, rolling out in stages to increasing numbers and available to all those eligible from October 2018 at the latest.

Introducing it in this controlled way will allow HMRC to thoroughly test and develop it at every stage so that it provides the best customer experience possible, and a quality service for savers over the lifetime of the scheme.

From January, HMRC will start to invite Working Tax Credits customers into the trial, gradually increasing their numbers, with the expectation that Universal Credit customers will start to be invited in from April. Eligible customers will still have the full 5 years to register for Help to Save from the end of the trial, and the overall cost of the programme to government will be the same.

www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-12-11/HCWS330

Foreign dividend DTR error

Summary – Although percentages were not included in the return, it was pretty obvious that the amounts claimed were materially in excess of 15% and the errors were of a kind that should have been picked up by tax software.

On filing his 2012/13 and 2013/14 returns, both returns included entries in the "Foreign" pages in respect of foreign dividends from three jurisdictions, two of which were France and Canada.

His 2012/13 return was filed electronically on 22 January 2014. Under s 9A(2)(a) TMA HMRC had until 22 January 2015 to open an enquiry but no enquiry was opened within the time limit.

His 2013-14 return was filed electronically on 17 November 2014. HMRC had decided to look at all returns where double tax relief had been claimed and so opened an enquiry into the 2013/14 return on 24 September 2015. HMRC found that the relief claimed in respect of both the French and Canadian dividends was in excess of the permitted amount under the terms of the relevant double tax treaty, being 15%. The credit actually claimed was around 30% for the French dividends and 25% for the Canadian dividends.

HMRC's findings as part of the 2013/14 enquiry led them to check the 2012/13 return, where the same error was detected. On 19 January 2016, HMRC issued a discovery assessment for 2012/13 (within the four year time limit set by s 34 TMA).

The appeal to the First Tier Tribunal in this case is an appeal against the discovery assessment in the amount of £16,560. Adam Cooke does not challenge the quantum of the tax payable but rather the validity of the assessment.

HMRC clearly discovered that there was an error in the double tax relief claim. They argued that the condition in s 29(4) TMA 1970 was met because taxpayer's accountant had been careless, and that s 29(5) TMA 1970 also applied because there was insufficient information on the return for HMRC to know from looking at it that the foreign tax credit figures were excessive.

Adam Cooke's accountant claimed that HMRC was not entitled to make a discovery assessment because the error could have been picked up by HMRC just as easily as it had been for 2013/14. HMRC had simply chosen not to review the earlier return.

Decision

The First Tier Tribunal said that the case appeared to raise something of a conundrum with HMRC are arguing that the taxpayer's accountant was careless in not identifying that the claims were excessive, but at the same time an HMRC officer could not have been expected to pick the point up.

The Tribunal went on to say that any HMRC officer of general competence, knowledge or skill ought to have some understanding of double tax relief, including that there are limitations on the relief that can be claimed. 15% rate is a standard rate, and in fact generally the maximum treaty rate, for portfolio dividends from companies in jurisdictions with which the UK has double tax arrangements in place. That same officer should have been able to ascertain that the claims were excessive. Although percentages were not included in the return, it was pretty obvious from looking at the figures that the amounts claimed were materially in excess of 15%.

Secondly, s29(4) TMA 1970 had not been satisfied.. Adam Cooke's accountant, had not failed to take reasonable care. They were a small firm of general practice accountants who cannot reasonably be expected to have the same level of expertise and knowledge as a substantial firm with specialist practitioners. They had limited tax expertise.

Like many other small, and indeed larger, firms they relied on commercially available software to complete tax returns. The errors were of a kind that might have been expected to be picked up by the software (or indeed by HMRC's own computer programme when it processed the return). The country code included in column A on page F2 is the code provided by HMRC. The foreign tax included in column C exceeds the treaty rate for the relevant countries, a fact that can readily be determined by applying the correct percentage to the income figures included in column B. Computers (or, more frequently, those who input information into them) do make mistakes and for that reason a checking system should be in place. The accountant had a checking system in place, and that a check was made in this case. The check focused mainly on the tax calculation pages and amounted to a high-level check for errors and omissions. In all the circumstances they did not think that this was an unreasonable approach.

The appeal was allowed.

Adam Cooke v HMRC (TC06239)

Capital Taxes

Entrepreneurs' relief – time limits (Lecture P1056 – 9.47 minutes)

Entrepreneurs' Relief (ER) must be claimed within the statutory time limit of the first anniversary of the 31 January after the tax year in which the qualifying disposal is made (TCGA 1992, s 169M).

A revocable provisional claim is allowable (CG 63970) which may be amended or revoked within the stated time limit. One example might be where a client has made a disposal of family company shares qualifying for relief, having acquired these in a piecemeal fashion over the years: some at full value, other by gift or legacy.

In this situation we may need to establish the market value of the tranches of shares acquired by gift/legacy and this could result in lengthy negotiations with HMRC. The time limit is unforgiving; there are no concessions even if delays are caused by HMRC being slow to reply so a provisional claim would be a very good idea in this situation

There are certain situations where the charge to UK tax on a capital gain may be contingent or deferred, in which case the normal time limits may not partly applied. One such situation relates to deferred gains and EIS.

S.44 FA 2015 (introducing sections 169T to 169V into TCGA 1992) contains provisions to allow gains which are eligible for ER, but instead deferred into an EIS qualifying investment, to benefit from ER at a later date when the gain is partly or wholly realised as a result of the disposal of the EIS shares.

In this case ER on what is referred to as the 'first eventual gain' must be claimed by the anniversary of 31 January next following the end of the tax year in which the gain is brought into charge. In many cases of course this may be a number of years after the shares giving rise to the original gain were disposed of

Example

Murray sells his business on 1 July 2017 and realises a gain of £1m qualifying for ER. He makes an investment of £1m in 1000 qualifying EIS shares and claims to defer the gain.

On 1 August 2020, he disposes 20 of the shares which brings into charge £200,000 of the deferred gain The disposal takes place in the 2020/21 tax year and as result crystallizes the 'first eventual gain' as above. An ER claim must be made by 31 January 2023

If the first disposal is not of all of the EIS shares acquired then the initial claim will also encompass all future gains on disposals of those remaining shares, and so relief will be due without the need for further claims. In the above example, when Murray comes to dispose of the remaining 80 shares he will not need to make a further claim.

(But note that if he fails to take a timely claim following the sale of the 20 shares in 2020/21 he is as a result disbarred from making an ER claim following the sale of any or all of the remaining 80)

Contributed by Brian Ogilvie

UK Immoveable Property Gains By Non-Residents (Lecture P1057 – 17.17 minutes)

This consultation was published on 22 November 2017 and closes on 16 February 2018.

The objectives of the changes being consulted on are to:

- More closely align the tax treatment of NR owners of UK immovable property with that of UK residents; and
- Reduce the incentive for multinational groups to hold UK property through offshore structures, often in low tax or no tax jurisdictions.

The rules will create a single regime for both residential and commercial property, thereby extending the rules for residential property to:

- indirect sales, and
- disposals made by widely-held companies.

Indirect disposal rules will apply where an entity is 'property rich':

- (broadly) where 75% or more of its gross asset value at disposal is represented by UK immovable property; and
- the person holds, or has held at some point within the five years prior to the disposal, an interest of > 25% in the entity.

Direct disposals

April 2015 will remain the rebasing point for direct disposals of interests in residential property for those already in the NRCGT regime. For non-residential UK property, the rebasing point will be April 2019.

For mixed-use property (one that consists partly, but not exclusively, of one or more dwellings) a different rebasing point will be needed for the residential and non-residential elements.

Where a property has changed use between residential and non-residential over the ownership period since April 2015, the calculations for the apportioned elements of the gain for the different periods will use different rebasing points.

- Normal tax rates will apply;
- Losses and gains arising to non-resident companies will be treated in the same way as other capital losses and gains for corporation tax, in terms of available relief;
- For individuals, no distinction between gains/losses arising on UK residential and non-residential property;
- Rollover relief available (subject to normal conditions).

Indirect disposals

A non-resident will be chargeable in respect of a disposal of an entity that substantially derives its value from UK immovable property, whether commercial or residential property. Any gain will be computed by reference to the gain on the interest in the entity that derives its value from land, rather than by reference to any increase in value of the land itself.

Rebasing to April 2019 will be the only acceptable method of computation for indirect disposals.

The following two tests must be performed at the date of disposal, to establish whether a disposal is in scope:

- Is the entity being disposed of “property rich”?; and

- Does the non-resident hold a 25% or greater interest in the entity, or have they held 25% or more at some point in the five years ending on that date?

If the conditions are met then the disposal will be in scope.

Although the new charge will apply only to disposals after April 2019, this test will take into account ownership before that time, to determine if the 25% threshold is met.

Any interests held by related parties to the non-resident will also be taken into account when calculating whether the 25% test is met. This will use the connected party test (within the meaning in s.1122 CTA 2010), supplemented with ‘acting together’ rules modelled on those in the corporate interest restriction rules (s. 465(3) of TIOPA 2010).

The ‘property richness test’ rules will apply only where, at the time of disposal, directly or indirectly, >75% of the value of the asset disposed of derives from UK land. The test will be made on the gross asset value of the entity, so not including liabilities such as loan finance. It will use the market value of the assets at the time of disposal.

For the purposes of establishing whether this 75% test is met, all UK land (both residential and non-residential) held in the envelope entity will be taken into account. Non-UK land will not count toward the 75%.

The new rules on ‘property deriving its value from land’ will be modelled on s.356OR CTA 2010. Where it is necessary to trace value, the rules will allow this to be done through layers of ownership, or through entities, trusts or other arrangements.

Compliance

For transactions within these new rules, the process will be as for the existing regime for NRCGT, for both direct and indirect, residential and non-residential disposals.

For transactions falling within the CT regime, the non-resident will be required to

- register for CTSA with HMRC, and

- report the gain or loss within that framework, and

- pay any tax under the normal CT rules.

Again this applies to both direct and indirect, residential and non-residential disposals.

If not already within CTSA, the chargeable accounting period will be one day long, beginning and ending on the date of disposal.

For indirect disposals, certain advisors who are aware of the conclusion of the transaction are likely to have to report. This will be where the advisor:

- is based in the UK
- has received fees for advice or services relating to a transaction that could fall within these rules
- has reason to believe, in a business capacity, that a contract for disposal of UK property has been concluded that could fall within these rules
- cannot reasonably satisfy themselves that the transaction has been reported to HMRC.

The time limit for third-party reporting will be 60 days, giving advisors time (if appropriate) to get evidence from the disposer that the disposal has already been reported.

Other matters

There are various other matters covered in the thirty-three page document, including:

- The impact of tax treaties;
- Possible abolition of the ATED-related CGT charge from April 2019 to be replaced by the CT charge under the new rules;
- Ownership by and through CIVs;
- Anti-forestalling rules (dealt with in a separate technical note), largely aimed at preventing 'treaty shopping'.

Contributed by Kevin Read

Chattel Be The Day…(Lecture P1058 – 15.06 minutes)

A client of mine has an elderly mother who has recently moved into a nursing home. To help pay the fees, the client is arranging for his mother's house to be sold. Before putting the house on the market, the property is being decluttered of the various nick-nacks one tends to accumulate over the years. But among the general detritus within the property there are a number of pieces that have potentially lucrative resale value and it was this that triggered the call from my client who wished to know the CGT implications (if any) of selling his elderly mother's bric-a-brac.

I think he expected a nice simple answer. Unfortunately the chattels rules within TCGA 1992 are not quite as simple as one might think…

General principles

CGT is levied on most types of tangible property including chattels. Chattels are defined as tangible moveable property (things you can see, touch and move). Common examples are paintings, antiques, furniture, fine wines, stamps, coins, shotguns, racehorses, jewellery and clocks. [I'm not suggesting my client found a shotgun or a racehorse in his mother's attic, but there was certainly evidence of several of the others.]

Motor vehicles are also chattels but all passenger vehicles, including classic cars, are exempt from CGT so these are not considered any further.

For CGT purposes chattels are divided into "wasting" and "non-wasting" chattels, the non-wasting variety being chattels with a predictable useful life of more than 50 years. Useful life is determined at the date of acquisition, having regard for the intended use of the asset when it was obtained. This can be a topic of lively discussion particularly in the case of assets such as wines and spirits where some are not intended to be kept for more than 50 years (and would therefore be wasting assets) and where lifespan is affected by external factors such as vintage and storage. There are of course many fine wines (and fortified wines such as ports) which are intended at the outset to be kept for more than 50 years and which will therefore be non-wasting assets, so specialist advice may be required in the event of a disposal.

All chattels that are "machines" (being assets which have some sort of mechanism) are automatically treated as wasting chattels (the UK tax legislation refuses to recognise any possibility of a machine having a useful life of more than 50 years). Therefore assets such as yachts, clocks and watches will be treated as wasting chattels for CGT purposes (being machines by nature), notwithstanding the fact that in reality there are antique clocks and watches that have been around for many decades.

Wasting chattels are exempt from CGT. No chargeable gains or allowable losses will therefore arise on a disposal of a wasting chattel regardless of the sales proceeds. This is intended to protect the Exchequer by denying relief for the capital losses that inevitably arise on assets with a limited shelf-life.

However from a planning prospective it can sometimes do the opposite as this blanket exemption makes assets such as antique clocks and watches potentially very investible given that no CGT will be paid on sale (although regular purchases and sales of such assets could lead HMRC to try and tax any profits under the trading income rules, so care must be taken).

Perhaps less obviously, assets such as antique shotguns should also be exempt from CGT given that working shotguns have a mechanism thereby qualifying them as wasting chattels. The market for antique shotguns is historically buoyant. Investing in thoroughbred racehorses can also be a CGT-free pastime although this is perhaps not an investment for the risk averse (the performance of an animal by nature being less predictable than a shotgun or a grandfather clock).

Note that wasting chattels are CGT exempt unless they are used in a trade and capital allowances have been (or could have been) claimed on them. Therefore if (unusually) a trader sells a piece of plant and machinery at a profit, the gain is chargeable.

However a sale at a loss will not normally give rise to an allowable loss for CGT purposes because relief for the fall in value of the asset will already have been taken through the capital allowances computation.

Non-wasting chattels are chargeable assets for CGT and special rules apply to calculate gains and losses on disposal. These can be summarised in the Table below:

Gross proceeds	Base cost	CGT treatment
< £6,000	< £6,000	Gain not chargeable / loss not allowable
> £6,000	< £6,000	Gain restricted to 5/3 x (Gross proceeds - £6,000)
< £6,000	> £6,000	Loss calculated assuming gross sale proceeds are £6,000
> £6,000	> £6,000	No special rules (Gain = Proceeds – Cost)

Illustration 1

Mrs Richardson sold the following assets in 2017/18:

Asset	Gross proceeds	Selling expenses	Base cost
	£	£	£
Antique ring	4,000	200	7,000
Grandfather clock	30,000	1,500	5,000
Bottle of vintage wine	5,500	275	1,000
Vase	9,000	450	2,500
Oil painting	20,000	Nil	7,500

Her chargeable gains for 2017/18 are as follows;

Asset:	£	£
Antique ring:		
Gross proceeds (deemed)	6,000	
Less: Selling expenses	(200)	
Net proceeds	5,800	
Less: Base cost	(7,000)	
Allowable loss		(1,200)

Grandfather clock:		Exempt
Bottle of vintage wine:		Exempt
Vase:		
Gross proceeds	9,000	
Less: Selling expenses	(450)	
Net proceeds	8,550	
Less: Base cost	*(2,500)*	
Gain	6,050	
Restricted to: 5/3 x £(9,000 – 6,000)		5,000
Oil painting:		
Proceeds	20,000	
Less: Base cost	(7,500)	
Gain		12,500
Net gains for year		16,300

A useful tip for married couples / civil partners is for them to buy non-wasting chattels in joint names. This means that no CGT will arise if the sales proceeds are £12,000 or less. Transferring a chattel into joint names by means of a no-gain-no-loss gift prior to disposal will also achieve the same result although a formal deed of gift is recommended to evidence the inter-spouse transfer in case of a HMRC enquiry.

Sets

A "set" is a number of chattels that are similar and complementary to each other and worth more together than separately. Examples include books by the same author, matching ornaments, commemorative stamps or complementary pieces of furniture. A collector could therefore inadvertently create a set of assets even by acquiring them individually and at different times.

Bottles of vintage fine wine are typically regarded as separate assets for CGT purposes. Sales for less than £6,000 per bottle will generally therefore be CGT exempt. However a collection of bottles may form a set if they are similar and complementary (ie, produced from the same vineyard in the same vintage year and worth more when sold collectively).

Disposal of assets in a set are treated as separate disposals unless they are sold to the same person (or persons who are connected with each other or who are acting in concert). If a "set" of chattels is sold to the same person or persons, the set will be considered to be one asset for CGT purposes. This means that the £6,000 limit in the Table above applies to all of the set collectively and not to each item individually.

Illustration 2

Olivia bought a set of 4 watercolour prints in 2010 for £1,000. Each depicted a view of Regents Park in a different season of the year. The death of the artist in 2017 greatly increased the value of the prints and in January 2018 Olivia sold each print for £3,000 to a local collector.

Solution

The prints are non-wasting chattels. Although each print was individually bought and sold for less than £6,000, the gain on each disposal is not exempt as the assets collectively form a set. The proceeds must therefore be aggregated together to determine the CGT treatment.

		£	£
Watercolour prints:			
Collective proceeds (4 x £3,000)		12,000	
Less: Base cost		(1,000)	
Gain		11,000	
Restricted to: 5/3 x £(12,000 – 6,000)	10,000		

Inheritance tax issues

Please note that the above rules apply for CGT only and do not apply for inheritance tax (IHT). So if a chattel is given away or is left to a beneficiary in the will, IHT could be payable based on the open market value of the chattel.

There is no differentiation between wasting and non-wasting chattels (so cars, clocks and shotguns are all chargeable to IHT) and there is no £6,000 de-minimis rule.

The lifetime gift of a chattel to a non-spouse will be a potentially exempt transfer (PET) only chargeable to IHT if the donor dies within 7 years. The amount chargeable to IHT is the loss to the donor's estate as a result of the gift. In most cases this will be the open market value of the asset at the date of the gift. However care must be taken where sets or collections of assets are concerned because transfers of value are measured in terms of the loss to the donor's estate as a result of the disposition and if part of a set or collection is given away, the loss to the estate is likely to be higher than the stand-alone value of the asset gifted.

In terms of the death estate, chattels must be valued at their open market value and are generally chargeable to IHT (there are exceptions for chattels which comprise decorations or awards for valour or for gallant conduct such as military medals and medals awarded for public conduct such as OBEs and MBEs).

Note that it is important to value the chattels separately from the house in which they are kept because the residence nil rate band introduced in April 2017 cannot exceed the value of the property (this being the value of the land and buildings only). The value of personal possessions within the property must therefore be excluded.

Where the estate includes a large number of valuable chattels (such as works of art and fine antiques), the estate could attract a very high IHT liability without having the liquid funds to meet the tax. Selling the chattels is of course a solution but that could then lead to family heirlooms that had been passed down through the generations having to be sold simply to fund the tax bill.

One solution here is to use condition exemption for Heritage Property that involves:

An approach to HMRC to see whether the assets in question qualify as objects which are “pre-eminent for their national, scientific, historical or artistic interest”; and if so

Allowing reasonable public access to the assets (which could be as little as making the chattels available for public viewing for around 30 days a year). A temporary loan of the asset(s) to a local museum or gallery will typically serve this purpose.

A successful claim for conditional exemption will mean that any IHT payable on the chattels within the claim is deferred until either the assets are sold or the undertakings given to HMRC re public access etc. are broken). In many cases a successful claim will defer the IHT until the death of the owner at which point a new claim can be made (and new undertakings given) by the new owner to prolong the IHT deferral.

Contributed by Steve Sanders

Reimbursement of purchaser’s costs (Lecture P1059 – 8.39 minutes)

When calculating the capital gain on the sale of a property, S38 TCGA 1992 permits the deduction of a number of specific costs. Put briefly, these are:

- the property’s original acquisition value;
- the expense of enhancing the value of the property;
- the expense of establishing, preserving or defending the vendor’s title to, or rights over, the property; and
- any incidental costs of the disposal.

Normally, the vendor would have paid these costs. However, in O’Donnell v HMRC (2017), the First-Tier Tribunal had to consider whether a vendor’s reimbursement of certain items of expenditure that were incurred by the purchaser of a property was allowable against the vendor’s capital gain.

S38 TCGA 1992 expressly permits deductions for fees and other amounts paid for various professional services (such as those of surveyors, valuers, accountants and legal advisers), together with any transfer or conveyance costs incurred wholly and exclusively for the purposes of the disposal.

O'Donnell v HMRC (2017) is a complicated property case, but, drilling down to the essential point, the Tribunal decided that the vendor's reimbursement of the purchaser's legal costs facilitated the sale because it was part of the agreement reached in connection with the deal. This meant that the relevant expenditure was, in the end, incurred by the vendor and that it met the 'wholly and exclusively' test.

Taxpayers should note both the potential availability of, and the limits on, the deductibility of purchasers' costs on a property disposal. The fact that some costs are primarily those of the purchaser does not necessarily prevent the vendor from accessing a deduction, but each case must be analysed carefully to ensure that:

- any such payment is only made by the vendor by way of reimbursement;
- the amount reimbursed falls within the categories set out in S38 TCGA 1992; and
- there is no reason for the reimbursement other than to secure that the disposal goes ahead.

Contributed by Robert Jamieson

A continuing excluded property dilemma (Lecture P1060 – 8.51 minutes)

Two years ago, the High Court examined a long-standing area of uncertainty relating to excluded property held in a trust (Barclays Wealth Trustees (Jersey) Ltd v HMRC (2015)).

S48(3) IHTA 1984 provides that, where settled property is situated outside the UK, it represents excluded property for IHT purposes unless the settlor was domiciled in the UK at the time when the settlement was made.

This seems clear enough, but what is the position where a foreign-domiciled settlor establishes an excluded property trust, subsequently becomes UK-domiciled (or deemed to be domiciled in the UK) and then adds overseas assets to that trust? Are those added funds also regarded as excluded property?

The dilemma in the High Court case was succinctly summarised by Mann J when he said at the start of his judgment:

> 'The facts are short, but it will help in understanding their significance if I distil the facts and issues to their simplest. Trust property in Trust No. 1 was "excluded property", settled by a non-domiciled settlor, and so would have been free from the 10-year charge had it stayed there. Some of it was transferred to Trust No. 2, which had the same settlor but who had by now become domiciled in the UK, and it became (at that point) not excluded property. It was then transferred back to Trust No. 1. The question, distilled to its simplest, is whether it had reacquired excluded status.'

The answer depends on what is meant by 'at the time the settlement was made' in S48(3) IHTA 1984. It can be forcefully argued that a settlement is made at the time when it was originally established, in which case the added funds (if of foreign situs) should qualify as excluded property. However, HMRC have always taken the opposing view by suggesting that a new settlement comes into being whenever funds are added. Accordingly, if the addition takes place when the settlor is UK-domiciled (as happened here, the settlor became deemed domiciled in the UK from the start of 2003/04, having set up the trust some two years earlier), the new trust assets will not rank as excluded property.

Mann J's decision was to agree with HMRC's stance. Parliament, he commented, could not have intended additions of foreign property to a settlement after the settlor had acquired a UK domicile to have the character of excluded property. He said:

> 'This result is even more striking if one imagines a settlement which was seeded with a nominal sum (which frequently happens), with a massive subsequent contribution made when the settlor became domiciled. Why should that subsequent contribution be able to acquire the characteristic of the original £100 in those circumstances?'

He therefore concluded that the words 'at the time the settlement was made' were capable of encompassing both the making of the original settlement and the later addition of property to that settlement. The subsequent addition to the settlement by the settlor did not have the character of excluded property.

The trustees appealed against this finding and, in Barclays Wealth Trustees (Jersey) Ltd v HMRC (2017), the Court of Appeal have unanimously reversed Mann J's decision. The leading judgment was given by Henderson LJ.

He considered that the settlement represented a single settlement for IHT purposes, constituted by a number of separate dispositions of property to be held on the settlor's trusts.

He stated:

> 'Not only is this how a trust lawyer or practitioner would view the matter, but it fits comfortably with the definition of "settlement" in S43(2) IHTA 1984 which applies for all purposes of the 1984 Act. In particular, the express reference to "disposition or dispositions of property" in the definition is in my view naturally read as intended to cover the common situation where a settlement is first made, often with a small or nominal sum of money, and further assets are then added by the settlor.'

Henderson LJ went on to add:

> 'I find it implausible to suppose that, in S48(3) IHTA 1984, the same word "settlement" was intended by Parliament to have two different meanings or that it has a single meaning which requires one to focus separately on each occasion when property is added to a settlement.'

He continued:

> 'The natural (and, in my opinion, correct) interpretation of the subsection is that it requires one to look at a single settlement as it is constituted from time to time, whether by one or a series of transfers into settlement, and provides that any foreign property comprised in it is excluded property unless the settlor was UK-domiciled "at the time the settlement was made". The time when the settlement was made will then be ascertained in accordance with the usual principles of trust law and will normally be the occasion when the settlor first executed a trust instrument and constituted the trust by providing property to the trustee.'

Interestingly, the Court of Appeal – like Mann J in the High Court – made no mention of S67 IHTA 1984 which provides a special procedure for the calculation of a 10-year anniversary charge where further assets have been added to a relevant property settlement by the settlor. If the HMRC interpretation had been found to be correct, S67 IHTA 1984 would appear to be redundant.

Could Parliament really be presumed to have passed legislation that has no effect?

One final point should be noted. Before making the assumption that further foreign property can always be added to what was originally an excluded property trust on a tax-efficient basis, Henderson LJ's important caveat needs to be borne in mind:

> 'For completeness, I should mention that different considerations may arise in cases where a settlor makes an offshore settlement when he is non-UK domiciled, later acquires a UK domicile and then makes further substantial transfers of property into the settlement. It may arguably seem anomalous that, in such a case, the property in question – if it is or becomes foreign property – should qualify as excluded property in the settlement merely because the settlor was non-UK domiciled when the settlement was originally made. I emphasise that the present case is not of that character . . . I express no view on the question whether the same result as in the present case should be reached in cases of the other type which I have described, because wider policy considerations may then be engaged.'

Enough said!

Contributed by Robert Jamieson

Trust registration for 'digitally-excluded' agents

The CIOT has passed on the update below provided by HMRC on 4 January.

Process for agents that currently have no digital access to the TRS

HMRC recognise that a small number of users who have no/insufficient HMRC digital footprint have not been able to access the TRS and hope to have a solution in early January 2018.

In the interim, the process that should be followed by these agents who currently have no access to the digital TRS is as follows:

For Existing Trusts

Agents of existing trusts (that do not require SA registration or are already SA registered) can register after the 31 January 2018 deadline but before 5 March 2018 and we will not impose a penalty. We advise that these agents should wait until they have digital access to the TRS in early January and then submit their registration by online.

For New Trusts

For agents of new trusts (that incurred income tax or capital gains tax liability for the first time in 2016-17) and have no/insufficient HMRC digital footprint the Trusts and Estates helpline will issue a paper Data Capture Sheet. HMRC will manually process the paper returns upon receipt, both enabling TRS registration and allowing them to provide a UTR so that agents can proceed with submitting their client's SA tax return. HMRC will take a reasoned and proportionate approach to penalties where the customer or agent have not been able to register on the TRS solely due to technical issues but have done so as soon as reasonably possible.

Timescales for Trust SA returns

If trustees, or an agent acting on behalf of trustees, file their SA return within 3 months of receiving a UTR then no penalties will be incurred. If the tax return is filed later then a penalty will be applied. The payment of any tax owed for 2016-17 will need to be submitted no later than 31 January 2018 or a penalty charge will be applied.

Extending the 5 January 2018 registration deadline

Given the vast majority of the agent community have had access to the TRS since October 2017 and taking into account the relatively small numbers of trusts requiring a UTR, HMRC do not consider there to be sufficient grounds to merit a further extension to the deadline.

www.tax.org.uk/policy-technical/technical-news/

Welsh land transaction tax threshold to rise

The starting threshold for land transaction tax in Wales will increase from £150,000 to £180,000 for the residential main rates when the tax is devolved in April 2018.

The new threshold is £55,000 higher than the starting threshold for stamp duty land tax in England and will reduce the tax burden for around 24,000 homebuyers – including first-time buyers – in Wales.

Professor Drakeford's decision to change the starting threshold for land transaction tax follows the UK Government's introduction of a stamp duty land tax relief for first-time buyers in the Autumn Budget last month.

gov.wales/newsroom/finance1/2017/171211-more-homebuyers-to-benefit-from-changes-to-land-transaction-tax/?lang=en

Administration

Getting real time information right

In their December 2017 Employer Bulletin, HMRC has identified some of the more common areas where mistakes are made:

- Pay and tax figures from previous employments: The taxable pay to date and total tax to date fields should include the amounts from this employment only;

- Payment date: The Full Payment Submission (FPS) payment date is the earlier of the date an employee is paid or the date they were entitled to that payment, not the payroll run date, or another date from your payroll system;

- 4 weekly pay periods: When using a tax code on a cumulative basis, employers should use the table for week 4 for the first payment in the tax year, even if the payment is made in the first, second or third week. If using the code on a week 1 or month 1 basis, they should use the table for week 4 on each payday;

- Quarterly pay periods: When using a tax code on a cumulative basis, employers should use the table for month 3 for the first payment in the tax year, even if the payment is made in an earlier month;

- Making PAYE/ CIS payments quarterly: employers must still file their FPS weekly or monthly on or before the payday;

- Not paying anyone: This must be reported on an Employer Payment Summary (EPS);

- Reasonable excuse for filing late: employers should use a late reporting reason code for every payment on the FPS where the reason applies;

- Change in pay period:
    - Moving from monthly to weekly and the employee has already been paid in the month, employers should use the same monthly table for the rest of that month and then move to the weekly table;
    - Moving from weekly to monthly, use the monthly table on the first payday after the change;

- Payrolling of benefits: Employers must register with HMRC before the start of the tax year and tell their employees what this means for them.

- Employee payroll ID numbers:
    - If an employee has more than one employment in the PAYE scheme, you use a different payroll ID for each employment
    - If an employee leaves and is re-employed you should use a different payroll ID and start their year to date information again – do not report the pay and tax figures from the earlier employment

- Failing to submit an FPS or report incorrect year to date figures:
    - Discovery before 19 April following the end of the tax year - submit an additional FPS with amendments;
    - Otherwise submit an EYU.
- Paying employee who has died: employers should tell HMRC and report this on a FPS.

www.gov.uk/government/publications/employer-bulletin-december-2017

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Fulfilment House Due Diligence Scheme

From 1 April 2018, the Fulfilment House Due Diligence Scheme will open for online applications. Businesses in the UK that store any goods imported from outside the European Union (EU) owned by, or on behalf of, someone established outside the EU, will need to apply for approval by HMRC if those goods are offered for sale. The deadline for applications is 30 June 2018. There are penalties for late applications.

Businesses that only store or fulfil goods that they own, or only store or fulfil goods that are not imported from outside the EU, are not required to register.

Registered businesses must carry out certain checks and keep certain records from 1 April 2019. Businesses covered by this scheme will not be allowed to trade as a Fulfilment Business from this date if they do not have approval from HMRC. Those that do, risk a £10,000 penalty and a criminal conviction..

Worldwide Disclosure Facility reminder

HMRC have reminded us that clients have until September 2018 to use HMRC’s Worldwide Disclosure Facility to bring their offshore tax affairs up to date.

Termination Payments and Sporting Testimonials reminder

Changes to the income tax and National Insurance Contributions (NICs) treatment of termination payments will take effect from April 2018, subject to the will of Parliament. These include income tax and Class 1 NIC liability on all payments in lieu of notice and the removal of foreign service relief for employees resident in the UK.

The new employer Class 1A NICs charge on termination payments and sporting testimonials will start from April 2019.

Student Loan reminder

It is important that you take the correct action to start or stop Student Loan deductions as soon as possible. Employers must remember to:

- check online notices for Student Loan Start (SL1) and Student Loan Stop (SL2) notices
- let HMRC know if their email or correspondence address changes

The Pensions Regulator (TPR) update

TPR has warned employers that as well as automatically enrolling staff into a workplace pension, they must also ensure they contribute to their staff's pension every month.The vast majority of employers comply with their duties but any employer failing to make payments due to their staff is one too many and TPR will take action.

Submitting tax returns

Customers must have an active SA account before they submit a tax return to HMRC. Even if they have a Unique Taxpayer Reference (UTR) from a previous tax year, they must re-register their SA account and ensure it is active before submitting their return. Using an UTR on online returns without an active SA account could lead to customers' tax liability and calculations being wrong.

Marriage Allowance

Legislation will be included in Finance Bill 2017-18 to allow Marriage Allowance claims on behalf of deceased spouses and civil partners. These claims can now be backdated by up to four years, if the eligibility conditions are met.

2018-19 Annual Tax on Enveloped Dwellings (ATED) return online

From 1 April 2018, all online ATED returns must be filed using the new ATED digital service. The old online forms will be withdrawn on 31 March 2018. Taxpayers can prepare for the annual reporting period and appoint their agent if they have not already done so. Go to ATED online for more information. Please note that you will not be able to submit a return for the 2018-19 chargeable period until 1 April 2018.

Help for landlords

HMRC have revised their income from property webinar and case studies. The webinar has been broken down into shorter, easy-to-follow sections. The case studies have been written around different scenarios.

Cyber Security advice

Agents are reminded that they have a responsibility to protect their clients' data and confidentially. The National Cyber Security Centre offers a range of guidance on staying secure online, which can be found on the GOV.UK National Cyber Security Centre webpages.

www.gov.uk/government/publications/agent-update-issue-63

Postponing the disguised remuneration loan charge

The loan charge for disguised remuneration loans arises on 5 April 2019 and taxpayers will have to pay the loan charge for any loan from 6 April 1999 that:

- was received through a disguised remuneration tax avoidance scheme; and
- is still outstanding on 5 April 2019

HMRC has now issued guidance on when and how to apply for postponement of the new loan charge but applications must be made by 31 December 2018. Only the person liable for the loan charge can apply for postponement.

1. Approved fixed term loan postponement

The form to apply for postponement outlines additional information that HMRC needs in order to give approval that the loan is a qualifying loan. This is the case if it:

- was made before 9 December 2010;
- has a term of 10 years or less;
- is not an excluded loan (after it was granted it's been replaced (directly or indirectly) by another loan, or its terms have been altered to meet the 10 year term or change the date on which it must be fully repaid).

In addition, HMRC must agree that the loan:

- repayments are 'qualifying payments' with the taxpayer providing evidence that they have made regular repayments at intervals of no more than 53 weeks; and
- is a 'commercial loan'.

2. Accelerated payment postponement

Postponement is also possible if the taxpayer has already made an accelerated payment for the same loan and as long as the amount of the loan outstanding at 5 April 2019 is less than or equal to the value of the accelerated payment.

The taxpayer must send HMRC a copy of a loan statement from the lender that includes the balance outstanding on the loans at the date of your application. HMRC will consider alternative evidence which could include, but is not limited to a:

- letter from the lender stating the initial amount of the loan and the current balance;
- letter or loan agreement from the lender showing the initial amount along with bank statements showing repayments and a note of the current outstanding balance;
- ledger printout from the lender showing the loans and amounts outstanding.

Once applied for, HMRC will tell the taxpayer in writing if their application has been approved. The letter will also state:

- how long the postponement will last;
- what to do if the loan is repaid;
- how to pay when the postponement ends.

www.gov.uk/guidance/disguised-remuneration-postponing-the-loan-charge

Late filing penalty notice – is a computer a person?

Summary – There was no evidence of any decision-making by 'flesh and blood human being who is an officer of HMRC' so the penalty notice was not valid.

On 17 April 2016, Khan Properties Ltd was issued with a notice to file a company tax return for its accounting period 1 April 2015 to 30 March 2016. That notice required the return to be filed by 31 March 2017.

On 19 April 2017 HMRC issued a notice informing the company that a penalty of £100 had been assessed for failure to file the return by the due date.

The return was filed electronically on 16 May 2017.

The taxpayer appealed against the penalty.

Decision

The First Tier Tribunal said that HMRC's submission failed to address the issue of burden of proof that was 'quite clearly' its responsibility.

The judge questioned the validity of the penalty saying that the evidence presented suggested that the HMRC computer is programmed to run checks shortly after the passing of the due date for filing a return that is entered into it, and if it finds no entry for the return being received, without human intervention, the computer issues a notice of assessment. In this case, the notice had been issued by HMRC (CT Services, Corporation Tax Services, HMRC, UK) but no name had been given. Rather it appeared to have been automatically generated by a computer. Yet, the penalty stated 'I attach …'

In the judge’s view, s100 (1) TMA 1970, required a 'flesh and blood human being who is an officer of HMRC' to assess the penalty and that person should be named in the notice so the recipient knows to whom an appeal should be addressed. This was not the case here. Further, the covering letter accompanying the notice was also computer-generated.

The judge said there was no evidence of any decision-making by an HMRC officer so the notice was not valid. He added the caveat that his comments were confined to penalties in FA 1998, Sch 18 para 17 (company taxation) and should not be read as applying to those issued under FA 2009, Sch 55 and Sch 56 (personal taxes).

If he had been wrong on this point, he said that he would have agreed with the taxpayer that they had a reasonable excuse.

This was that it had every reason to trust its accountant to file the return because it was the first late return by the company, the tax was paid on time and the delay had been caused in part by HMRC withdrawing its free corporation tax filing software.

The taxpayer's appeal was allowed.

Khan Properties Ltd v HMRC (TC06225)

Notice to file not received

Summary – The notice to file was not given to the taxpayer and so no were penalties due. The penalties for failure to file continuing after 3, 6 and 12 months from filing date were out of time and the decisions cancelled.

Dorothy Nnaji was issued with a notice to file an income tax return for the tax year 2013/14 on 25 April 2014. That notice required her to deliver the return by 31 October 2014 if filed in paper form or by 31 January 2015 if filed electronically.

On 16 June 2015 HMRC issued a notice informing her that a penalty of £100 had been assessed on her for failure to file the return by the due date.

On 21 February 2017 HMRC issued a notice informing her that a penalty of £900 had been assessed on her for failure to file the return by a date 3 months after the due date, a penalty of £300 had been assessed for failure to file the return by a date 6 months after the due date and that a penalty of £300 had been assessed for failure to file the return by a date 12 months after the due date. These ‘additional penalties’ totalled £1,500.

Dorothy Nnaji appealed.

Decision

Dorothy Nnaji said she had not received the original notice to file and assumed it had gone to her old address. The tribunal accepted this because of the confused and confusing picture of addresses and her unchallenged evidence that she did not receive the notice to file. The Tribunal held that HMRC had not shown that the notice to file was validly issued

They continued that if they had reached the right decision, although the initial penalty had been issued within the time limit, those for a continuing failure to file were out of time.

Dorothy Nnaji v HMRC (TC06233)

Self assessment return – Tribunal changes mind

Summary - The Tribunal Judge originally upheld the late filing penalties as he did not think that the taxpayer had a reasonable excuse or special circumstances to justify a reduction in penalties. Having had time to examine the ‘bundle’ in more depth he came to a different conclusion

Andrew Newton, resident in Paris, was issued with a notice to file a tax return for 2012/13 on 6 April 2013 but the return was not filed until 29 September 2014 (electronically).

He admitted that he was aware of the deadline, but said that he made a choice between finishing his Masters degree in Philosophy and filing his tax return. He assumed that the penalty would be £200 as in previous years. When he discovered that the penalty was £1,200 on top of the initial £100 he appealed on the basis that he had not been aware of the steep increases in late filing penalties that applied. He showed that there was a major advertising campaign to get home the message that the new penalties were far harsher than the old, especially where as in his case, there was no tax due. He pointed out that these communication efforts had been aimed only at UK residents. There was no similar campaign aimed at non-residents.

HMRC said that he would have had access to a computer and so to their website which at the time highlighted the new penalties. He had also received various documents explaining the new regime

Decision

The Tribunal concluded that there was no reasonable excuse for his failure to file the return by 31 January 2014. A person reasonably trying to meet their tax return filing responsibilities would have realised from reading any of the documents that had been sent to them that the penalties had changed. The taxpayer gambled, as he admitted, but he lost and assuming that the penalties had not changed without making any checks or heeding many warnings is not the action of someone taking reasonable care.

On reviewing the ‘bundle’ of documents in more detail, the Tribunal judge concluded that HMRC had not address the question of whether there were special circumstances. They concluded that this amounted to a flawed decision.

It was clear from the taxpayer's return that he was not liable to UK tax in the year. Further, he did not have a permanent UK establishment and, as a result, under art 7(1) of the double tax convention with France, the UK had no taxing rights over him.

In these circumstances, he did not meet the self-assessment criteria used by HMRC and had no obligation to notify chargeability under s7 TMA 1970. It therefore seemed 'arguable' to the judge that the taxpayer would not be legally obliged to complete a UK tax return. Because of these considerations, which were not taken into account by HMRC, the Tribunal reduced the £900 daily penalty and £300 6 month penalty to nil.

The taxpayer's appeal was allowed.

Andrew Newton v HMRC (TC06269)

Deadlines

1 February 2018

- £100 penalty /extended enquiry window 2017 SA returns not filed by 31 January 2017
- Corporation tax due for SME accounting periods ended 30 April 2017

2 February 2018

- Due date of filing for P46(Car) for quarter ended 5 January 2017

7 February 2018

- Filing date for VAT returns and electronic payment for 31 December 2017 quarter

14 February 2018

- Quarterly corporation tax instalment for large companies due, depending on year end
- Filing date for monthly EC sales list if paper return used
- Application deadline to defer Class 1 NICs for 2017/18; deferral applications up 5 April 2018 considered only with employer(s) approval.

19 February 2018

- Due date to pay PAYE, National Insurance, construction industry scheme and student loan liabilities for month ended 5 February 2018 if not paying electronically
- Due date to file monthly construction industry scheme return

21 February 2018

- File online monthly EC sales list by this date.
- Submit supplementary Intrastat declarations for January 2018 by this date

22 February 2018

- PAYE, National Insurance, construction industry scheme and student loan liabilities should have cleared HMRC's bank account by this date

28 February 2018

- Payment of 2017/18 SA liabilities after this date will be subject to a 5% surcharge
- Private company filing deadline for those with 31 May 2017 year end
- Public limited company filing deadline for those with 31 August 2017 year end
- Corporation tax SA returns for companies with periods ended 28 February 2017

13 March

- Spring Statement

News

Pension schemes Scottish rate of income tax newsletter

This newsletter provides information about how HMRC will notify pension scheme administrators operating relief-at-source pension schemes of their individual scheme members' residency tax status, in time to apply the correct rate of relief for Scottish rate taxpayers from April 2018.

Notification of residency status report

HMRC aim to tell administrators the residency tax status of their scheme members in the January before the start of the next tax year, enabling them to apply the correct rate of relief at source to their scheme members from the start of each year. They will send a report based on data from the last annual return of individual information submitted for the previous tax year (deadline 5 July of current tax year). To receive this residency status report, administrators must be enrolled on the secure data exchange service (SDES). HMRC will automatically migrate those pension scheme administrators who currently use secure electronic transfer (SET) to SDES.

What will be included?

Each scheme member will be allocated a letter showing:

- S for Scottish tax status
- U for unmatched individuals
- blank field for rest of the UK

The report will also show if the National Insurance number submitted for an individual is incorrect and if it is, it will give you the correct one.

Downloading the report

Administrators will receive an email informing them that the file is available for download and have 6 days to download it.

Residency status look up service

This service will be available on GOV.UK early in the new year and will enable administrators to check the status of relief at source where notification is not received for any reason, including members not included on their notification of residency status report. In order to use the service, administrators will need scheme member's:

- first and last name
- date of birth
- National Insurance number

For a bulk search, you'll need to create a specific file to upload. If you have more than one bulk file to upload onto the service, you'll have to wait until you get the residency status results for each bulk file before uploading the next bulk file.

Members without a National Insurance number will need to contact HMRC unless they are under 16 in which case their residency status should be taken as 'England, Northern Ireland or Wales'.

Change of status during the tax year

Administrators must apply the same tax rate for a member for the whole of a tax year:

Use the status notified in January or from the look up service at the start of the year;

Default to the 'Rest of UK' status if the administrator did not receive a notification, did not look up the residency status or it is not possible to look up a new joiner's status;

Submitting the annual return

From April 2018, HMRC recommend that administrators use SDES to submit their returns because it's secure, free and easy to use.

Administrators still be able to submit their annual return of individual information by email, USB, CD or DVD until April 2019 but in a structured format which has yet to be notified. Paper returns are not an option. From April 2019 the SDES route will be the only option.

www.gov.uk/government/publications/pension-schemes-relief-at-source-for-scottish-income-tax-newsletter-december-2017

Pension schemes newsletter 94

Published on 28 December 2017, this edition of the newsletter includes much of what was covered in the newsletter above so we will not repeat this here. The other main area of interest relates to small pension pots.

Reporting multiple small pots payments through RTI

Some scheme administrators continue to have problems when reporting multiple small pots payments because RTI matches on the first part of the payroll ID reference and can treat some reports of multiple small pots payments as duplicates.

This affects the reporting of:

- multiple payments on the same Full Payment Submission (FPS)
- multiple payments with the same end date
- payments where the scheme administrator payroll ID reference only differs in the last couple of digits

HMRC have carried out a scan to correct all affected records for tax years 2015/216, 2016/17 and 2017/18. The guidance in paragraph 2.2.5 of the CWG2 has been amended to say that if when reporting these types of payments administrators should enter a different end date for each payment. Anyone having problems reporting these types of payments, should email: pensions.businessdelivery@hmrc.gsi.gov.uk and put 'Reporting multiple small pots payments' in the subject line of your email.

www.gov.uk/government/publications/pension-schemes-newsletter-94-december-2017

Trust Registration Service - agent services account

Agents who tried to register for the trust registration service (TRS) before 8 January, or who already hold an agent code, should now be able to create an agent services account with HMRC.

The CIOT has passed on the following from HMRC:

> "For agencies which attempted to register before 8th January 2018, please try again. The online service has been enhanced and you should now be able to register with Agent Services. As part of the process you will be asked to provide your HMRC agent code so please make sure you have that information before starting.
>
> If it was after 8th January 2018 - have you previously registered with HMRC as an agent and obtained an agent code?
>
> 1 Yes I have an agent code - You will need this and to have previously acted on behalf of a client for either Self-Assessment or PAYE in order to be able to create a new Agent Services account. This may have been a paper transaction using a 64-8. If this is the case you should be able to register using your existing agent code and UTR. Please visit www.gov.uk/guidance/register-your-clients-trust to register your trust online.
>
> 2 I have no agent code or have never represented a client for HMRC - If you do not have any clients who are Self-Assessment or PAYE customers with HMRC you will not be able to access Agent Services at the moment.
>
> To be able to register for HMRC Agent Services you will require an agent code and you will need to apply for one in writing. Further guidance is available online at: www.gov.uk/guidance/self-assessment-for-agents-online-service#how-to-get-an-agent-code. Once you have received your agent code you will need to be appointed as an agent for an existing Self-Assessment or PAYE client."

www.tax.org.uk/policy-technical/technical-news/trust-registration-service-digitally-excluded-agents

Facts sheets

HMRC have updated a number of compliance check factsheets to explain that penalty reductions for 'telling, helping and giving' will be restricted where taxpayers take 3 years or more to correct or disclose inaccuracies.

An extract from factsheet General information about compliance checks: CC/FS1a reads:

> " When we work out the quality of disclosure, we'll take into account how long it has taken for you to tell us about the inaccuracy. If you've taken a significant period (normally 3 years) to correct or disclose the inaccuracy, we'll normally restrict the amount of reduction given for disclosure.
>
> We'll restrict the penalty range by 10 percentage points above the minimum to reflect the time taken, before working out the reductions for telling, helping and giving."

https://www.gov.uk/government/collections/hm-revenue-and-customs-compliance-checks-factsheets

Final guidance on penalties for enablers of tax avoidance schemes

HMRC has updated its guidance on the new penalties for individuals or entities who enable the use of defeated tax avoidance arrangements, replacing the draft version published in October. The final version of the guidance reflects the legislation contained at Sch 16 Finance (No 2) Act.

The penalties will apply to arrangements entered into, and enabling action taken, on or after 16 November 2017. No penalty can be charged without HMRC first having obtained the opinion of the GAAR advisory panel.

Changes from the draft version include confirmation given in the legislation that 'Condition A' for accepting that arrangements have been defeated includes adjustments in a partial, as well as final, closure notice.

Finally, the guidance now reflects the regulations (SI 2017/1245) providing for a safeguard in the form of a declaration made by a 'relevant lawyer' that information needed to establish that a person is not liable to an enablers penalty is legally privileged.

www.gov.uk/government/publications/penalties-for-enablers-of-tax-avoidance-schemes-draft-guidance

HMRC's money laundering enforcement measures

This guidance was updated in December 2017 to confirm that HMRC intends to start publishing details in 2018 about individuals or businesses to whom it issues penalty notices under the new money laundering regulations.

Under Regulation 85 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs), HMRC has a duty to publish details of penalties, naming businesses and individuals after it issues a penalty notice and before any potential appeal against the penalty is raised.

These details will be published on the GOV.UK website for at least 5 years and can include:

- name or the name of the business
- nature of the breach(es)
- penalty HMRC has issued
- status of any appeal against the issuing of the penalty

HMRC will publish these details anonymously in situations where it considers that publishing the details would be disproportionate or may affect the stability of the financial markets. It will also not publish if it considers the penalty to be of a minor nature. Only penalties that apply to the new regulations will be considered.

HMRC will notify those affected in advance of its decision to publish, at which point there will be a 30-day window to make representations against publication.

www.gov.uk/government/publications/money-laundering-supervision-enforcement-measures

Updated Model Tax Convention

On 18 December 2017 The OECD published the latest edition of the Model Tax Convention, incorporating changes developed under the OECD/G20 BEPS project:

- Action 2 (Neutralising the Effects of Hybrid Mismatch Arrangements);
- Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances);
- Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status);
- Action 14 (Making Dispute Resolution More Effective).

The full version of the OECD Model Tax Convention will be published in the coming year.

www.oecd.org/tax/tax-treaties-2017-update-to-oecd-model-tax-convention-released

New EC tax guidelines to make life easier for cross-border investors

On 11 December 2017 the Commission put forward new guidelines on withholding taxes to help Member States reduce costs and simplify procedures for cross-border investors in the EU.

Implementation of the Code of Conduct is voluntary for Member States.

It provides a snapshot of the problems faced by cross-border investors and explains how more efficient tax procedures can be put in place. The Code outlines a range of practical ways for Member States to address key issues including:

- Measures to help smaller investors for whom the rules on the refund of withholding tax are overly complex;
- The creation of user-friendly digital forms to apply for withholding tax relief in the case of overpayment;
- A reliable and effective timeframe for tax authorities for the granting of withholding tax relief;
- A single point of contact in Member State tax administrations to deal with questions from investors on withholding tax.

http://europa.eu/rapid/press-release_IP-17-5193_en.htm

Business Taxation

Goodwill - scope of appeal

Summary – HMRC's closure notice concerned the calculation of the amortisation and not the value of the goodwill that meant that he scope of the appeal was limited to the amortisation charge.

On 1 February 2011, Towers Watson Ltd acquired the trade and assets of EMB Consultancy LLP and EMB Software Managements LLP (the "EMB LLPs") for cash consideration of £57,094,000 as part of the Group's acquisition of the EMB Group worldwide.

This transaction was recorded in the financial statements for the year ended 30 June 2011. The goodwill attributable to the acquisition of the EMB LLPs was £51,157,000. Note 1 to the accounts provided that an amortisation rate of 20% would be applied to the goodwill arising from the acquisition of the EMB LLPs. The accounts were prepared on the basis of a 20% amortisation charge of the figure of £51,157,000 – i.e. £10,232,001.

The decision to be determined in this case concerned the taxpayer's argument that HMRC's closure notice and the scope of the appeal covered the method of amortisation only; the substantive appeal has still to be determined. HMRC said the closure notice encompassed the value of the goodwill, which it considered had been overstated in the accounts.

Decision

The First Tier Tribunal said that HMRC made clear in the closure notice that details of the amortisation charge in the accounts had not been prepared in accordance with UK GAAP. A 'reasonable recipient' would have assumed from that letter that it concerned the calculation of amortisation, not the value of the goodwill.

The taxpayer's application that the scope of the appeal was limited to the amortisation issue was allowed.

Towers Watson Ltd v HMRC (TC06241)

Corporate tax adjustment for Apple Europe

Apple Europe, a UK subsidiary of Apple, provides sales support, marketing, financial and administrative services to other Apple group companies. It made a pre-tax profit of £297m in the 18 months to April 2017.

Following an extensive audit by HMRC, it has agreed to pay £136m. A note to the full accounts to 1 April 2017 for the company, prepared by auditor EY, states:

> 'This payment of additional tax and interest reflects the company's increased activity and is recognised in the current financial period which ended on 1 April 2017. As a result of this adjustment the company's corporate income tax payments will increase going forward.'

An Apple spokesperson said:

> 'As a multinational business and the largest taxpayer in the world, Apple is regularly audited by tax authorities around the world. HMRC recently concluded a multi-year audit of our UK accounts, and the settlement we reached with HMRC is reflected in our recently filed accounts. It covers corporate income tax for prior years due to the increased activity in our business in the UK.'

Adapted from Taxation (18 January 2018)

EU investigate Ikea'

We are all aware that the likes of Starbucks, Apple, and Amazon are being closely scrutinised by HMRC but attention has now moved to include IKEA. Following concerns that Netherlands tax rulings in 2006 and 2011 may have given IKEA an unfair advantage contrary to EU state aid rules, the European Commission is now investigating the tax treatment of Inter Ikea Systems in the Netherlands who records worldwide revenue from Ikea franchise fees.

A tax ruling endorsed a method to calculate an annual licence fee to be paid by Inter Ikea Systems in the Netherlands for the use of intellectual property rights to another group company, I I Holding, based in Luxembourg. As a result, a significant part of Inter Ikea Systems' franchise profits was shifted to I I Holding, where they remained untaxed. This is because the entity was part of a special tax scheme exempting it from corporate taxation in Luxembourg.

In July 2006, the commission concluded that the Luxembourg special tax scheme was illegal under EU state aid rules and ordered it to be repealed. In 2011, Inter Ikea changed the way it was structured. Inter Ikea Systems bought the intellectual property rights formerly held by I I Holding, financing this by an intercompany loan from its parent company in Liechtenstein.

The Dutch authorities issued a second tax ruling in 2011, which endorsed the price paid by Inter Ikea Systems to acquire the intellectual property. It also endorsed the interest to be paid to the parent company in Liechtenstein and the deduction of these payments from Inter Ikea Systems' taxable profits in the Netherlands. As a result of the interest payments, a large part of Inter Ikea Systems' franchise profits after 2011 was shifted to its parent in Liechtenstein.

Adapted from Taxation magazine (11 January 2018)

Can corporate losses be set against profits subject to income tax?

Summary – The Upper Tribunal held that losses subject to corporation tax could be set against profits subject to income tax.

English Holdings is a company registered in the British Virgin Islands and is not UK resident.

The company had a permanent establishment in the UK through which it traded in UK land and was chargeable to corporation tax on any profits made. However, in the year to 31 March 2011, there was a trading loss of in excess of £2 million.

The company also owned a number of UK investment properties from which it earned rental income. However, this letting activity was not carried out through a permanent establishment and so any profits were chargeable to income tax. In the tax year ended 5 April 2010 the letting business made profits of over £1 million that HMRC consider resulted in an income tax liability of just over £200,000.

Under the corporation tax rules, a trading loss can be set against total income of that or the previous year. Under the income tax rules, a trading loss can be set against general income of that or the previous year.

The issue in this appeal is whether English Holdings was able to set off the loss incurred in the 'corporate' trade against the profits arising from the letting business that were liable to income tax:

- English Holdings said that there is no reason why they should not be able to do so and the First Tier Tribunal agreed.

- HMRC argued that s3 CTA 2009 separates the corporation tax regime from the income tax regime so that where a trade is within the corporation tax regime then its profits and losses are dealt with exclusively under the corporation tax regime and cannot fall within the income tax regime.

The First Tier Tribunal held that the natural meaning of the words in s3 CTA 2009 was more limited in scope than HMRC submitted and affected only those provisions of the Income Tax Acts which dealt with the taxation of income, not those that dealt with the treatment of losses. In English Holdings' case, there was no such income because the PE trade had made a loss.

Taking a literal reading of s64 ITA 2007 meant that English Holdings would succeed and that in theory a taxpayer could set off against its general income a loss incurred in a trade which, if profitable, would have been subject to corporation tax.

HMRC appealed

Decision

The Upper Tribunal held that the literal reading of s3 CTA2009 only means that income is not subject to income tax if it is subject to corporation tax. There was no obvious reason why parliament would have intended s3 to prevent losses being used as requested.

English Holdings also presented arguments that HMRC's interpretation would violate the EU rules in respect of free movement of capital. While this was not relevant, given the ruling on the substantive point, the Upper Tribunal did comment on the EU law issues, again finding in favour of English Holdings. They held that the freedom of movement of capital did apply to UK overseas territories, and in the circumstances of this case, if the domestic legislation had prevented the use of the loss in the way claimed, it would be a restriction on the movement of capital and therefore contrary to EU law.

Comment: From April 2020, companies letting property in the UK will be subject to corporation tax, not income tax, so the circumstances needed for this ruling are less likely to recur in future.

HMRC v English Holdings (BVI) Limited ([2017] UKUT 0842 (TCC)

Refund for research and development expenditure

Summary – HMRC no longer had reasonable grounds for keeping the enquiry open and the taxpayer's appeal was allowed.

Hadee Engineering Co Ltd applied for a refund for research and development expenditure but in May 2010, HMRC opened an enquiry under code of practice 9 (civil investigation into cases of suspected serious fraud) on the basis that the taxpayer had not shown it met the criteria for R&D tax credit relief.

After an enquiry lasting seven years, its adviser said HMRC had not discovered any fraud. HMRC said it required more information before it could close the enquiry. The taxpayer applied for a closure notice on the ground that it could produce no more information or documents.

Hadee Engineering Co Ltd applied for HMRC to issue a closure notice in respect of their enquiries into the claim for a refund in respect of qualifying expenditure for research and development (R & D) of £182,377.00 for 2009 and 121,317.00 for 2010.

In a separate appeal hearing before the same tribunal the same day, Hadee Engineering Co Ltd appealed against a penalty notice imposed for failure to provide information. The adviser said he had submitted a formal request for a review within the specified time. Further, since HMRC did not receive the letter asking for a review, it should allow a late request on the ground of reasonable excuse or natural justice.

Decision

The First-tier Tribunal decided that HMRC no longer had reasonable grounds for keeping the enquiry open. The Tribunal directed that HMRC issue a closure notice within 30 days of the date of release of their decision, informing the Company that it has completed its enquiries into the periods of account ending 30 April 2009 and 30 April 2010 and stating HMRC's conclusions.

The Tribunal accepted that the adviser had posted a letter requesting a review and that its existence had been brought to HMRC's attention at a meeting a couple of months later. The penalty was quashed.

Hadee Engineering Co Ltd v HMRC (TC6272 and TC6270)

Distributions in a winding up **(Lecture B1059 – 19.42 minutes)**

As predicted, it is becoming increasingly clear that the targeted anti- avoidance rule (TAAR) introduced by FA 2016, which applies with effect from 6 April 2016 to certain distributions made on a winding up, is causing uncertainty for many businesses and is affecting investment decisions. This is particularly the case for companies in the property sector where it is a common practice for each development to be structured within a new company, usually for commercial reasons involving the financing of the development and the ring-fencing of liabilities.

The CIOT have explained the problem as follows:

> '(This) uncertainty is caused by the broad scope and consequent perceived lack of clarity in the legislation and we understand that this, combined with the limited examples in HMRC's guidance, is leading to investment delays. It has been reported . . . that some taxpayers are reluctant to invest in new projects if there is uncertainty around the after- tax proceeds that they will receive (both on existing projects, which were in place before the TAAR was introduced, but also on future investments). As a result, plans for future projects can be on hold until the taxation of an earlier project is resolved.'

HMRC's response to the CIOT's concerns, first expressed in the summer of 2016, was to say that they would be publishing comprehensive guidance using a variety of examples to demonstrate the type of transactions to which the TAAR should and should not apply. However, this did not materialise until July 2017, more than 15 months after the starting date for S396B ITTOIA 2005 – the relevant details can be found in Paras CTM36300 – CTM36350 of the Company Taxation Manual. The opinion of most of those who have reviewed the published guidance is that it is far too brief and lacks constructive, useful and practical case studies. What is especially disappointing is that none of the scenarios that the CIOT provided in their earlier correspondence as being suitable for guidance have been included. For example, there is no mention of the impact of the new rules on companies used for a single major property development. The result is that the guidance is hardly helpful in mitigating the uncertainties of the legislation.

Para CTM36350 deals with requests for clearance and confirms that there is to be no formal or informal pre-transaction clearance procedure for the TAAR. The paragraph goes on to explain that, although the transaction in securities legislation does provide a statutory clearance procedure at S701 ITA 2007, a clearance given on a distribution in a winding up under this section does not extend to S396B ITTOIA 2005. In view of the similarity of the wording in the motive tests in the transaction in securities legislation and in the TAAR, it would be helpful to have established when HMRC would seek to apply the TAAR in circumstances where a S701 ITA 2007 clearance has been granted following disclosure of the full facts.

It is understood that difficulties are arising in practice where the shareholders of the company being wound up are individual trustees who may have connections to other companies carrying on the same or a similar trade. It would be useful if a relevant example could be added to HMRC's guidance in order to help taxpayers understand when the TAAR might apply to a winding up involving trustee shareholders.

Two commonly occurring sets of circumstance are considered below. They cover:

1. a gradual retirement from business; and

2. the winding up of a corporate partner.

In neither case is the guidance clear as to whether or not the TAAR will apply.

Illustration 1

Jeremy, aged 68, is a consulting engineer who wants to wind up his company with a view to retiring. He knows that he will pick up some occasional work as a sole trader during the course of this process (including a substantial, albeit short-term, project abroad).

It seems clear that, on the winding up, Conditions A, B and C of the TAAR (see S396B(2) – (4) ITTOIA 2005) would be met, given that Jeremy will continue to work in a similar way as a sole trader. However, it is doubtful whether Condition D of the TAAR (see S396B(5) ITTOIA 2005) would apply in these circumstances.

Jeremy's main aim is gradually to retire from business. In view of this, he has decided to avoid the administrative burdens of running a company, although continuing to undertake occasional work as a sole trader. As a result, he may actually be subject to increased taxation, given that the higher income tax rates will be in point for his sole trader operation. If he had kept his company going, the revenue received would have been subject to the 19% corporation tax rate.

Arguably, the winding up of Jeremy's company does not result in an income tax advantage when looking at the future taxation of profits from his business, as Condition D requires. This particular winding up gives rise to a charge to income tax (and, were Jeremy younger, Class 4 NICs) which would not have resulted if the trade had been run to extinction within the company, with the profits being retained until the company's final liquidation. Similarly, if the company had not been wound up and had paid out all its profits as dividends, the overall income tax liability could have been smaller in the light of the £5,000 dividend tax-free allowance and the lower income tax rates for dividends in excess of this limit.

In considering whether it is reasonable to assume that one of the main purposes of the winding up is the avoidance or reduction of a charge to income tax, is the fact that the post-winding up activity was foreseen and was virtually indistinguishable from that previously carried on by the company at all relevant? Surely the key factor in this gradual retirement scenario is Jeremy's intention to stop working so that, even if there was a tax advantage arising from the winding up of the company, that would be a secondary concern.

Given that phased retirements are quite common in practice, should they not be specifically addressed in the TAAR guidance?

Illustration 2

Prior to the FA 2014 changes in the tax rules involving corporate partners, it was not uncommon for family partnerships (particularly in farming) to have a corporate partner. If such a corporate partner is now to be wound up, presumably Conditions A, B and C will be satisfied if the partnership continues to be operated by the shareholders or their connected parties. However, it is not clear that Condition D would be met in this scenario. For example:

- The main motive for the creation of the original corporate partnership structure was tax planning – usually the avoidance, at the time, of a 50% income tax charge – and so the winding up of the company will mean that more tax will be payable in the future.

- In a similar vein to Illustration 1, the winding up will result in a greater charge to income tax on the remaining partners which would not have arisen had the corporate partner remained in situ. This makes it difficult to conclude that a main purpose of the winding up was the avoidance or reduction of income tax.

When looking at whether Condition D has been met, it is uncertain from the TAAR legislation and guidance what weight (if any) needs to be given to the motive for setting up such a structure, any past savings from it and the potential future increase in taxation. Further guidance on this point would be invaluable.

Contributed by Robert Jamieson

VAT

R&C Brief 4/2017: Supreme Court judgment in Investment Trust

Following the Supreme Court judgment in Investment Trust Companies (ITC) (in liquidation) v HMRC [2017] STC 985, R&C Brief 4/2017 confirms HMRC's position that the only person entitled to make a claim in respect of overpaid VAT is the supplier who has actually accounted for the VAT. End customers who have, in effect, been overcharged VAT by a supplier may have a claim against the supplier, but not against HMRC. Any such action against HMRC would have to be brought in the ordinary courts.

www.gov.uk/government/publications/revenue-and-customs-brief-4-2017-judgment-of-the-supreme-court-in-investment-trust-companies

R&C Brief 5/ 2017: Final judgment in Littlewoods

The Supreme Court's judgment in Littlewoods Limited and others handed down on 1 November 2017, determined that simple interest at statutory rates is sufficient to vindicate the EU law right to an adequate indemnity.

HMRC have confirmed when a refund of overpaid VAT is paid it will be paid with simple and not compound interest. Claims for compound interest on overpaid VAT or for any compensatory amounts other than simple interest under the provisions of the VAT Act 1994 will not be paid. HMRC will invite claimants to withdraw their claims and any related appeals to the Tribunal.

R&C Brief 6/2017: VAT treatment of sports facilities by local councils

Following the ECJ judgment in London Borough of Ealing (Case C-633/15), HMRC has changed its policy on the VAT treatment of local authorities' supplies of sporting facilities.

Local authorities now have a choice as to how they treat such supplies to the public:

1. Opt to make a claim for exemption on the sporting services that they supply to members of the public under the European VAT directive and make a claim in respect of past accounting periods. VAT on inputs will be restricted where not treated as insignificant under paragraph 8.2 of VAT Notice 749: local authorities and similar bodies; or

2. Continue to tax supplies of sporting services under current UK law, recovering input tax where it relates to taxable supplies.

Claims will not be accepted where councils proceed on an inconsistent basis year on year.

Unjust enrichment

HMRC reserves the right to refuse claims on the grounds of unjust enrichment where they're able to show that the claimant passed the economic burden of the VAT charge on to their customers. The provisions are explained in sections 9 and 10 of VAT Notice 700/45: how to correct VAT errors and make adjustments or claims.

HMRC have issued VAT information sheet 8/2017 which considers the VAT treatment of sports facilities by local councils

www.gov.uk/government/publications/revenue-and-customs-brief-6-2017-vat-treatment-of-sports-facilities-by-local-councils

www.gov.uk/government/publications/vat-information-sheet-0817-claims-by-local-authorities-for-overpaid-vat-on-supplies-of-sporting-services

R&C Brief 1/2018: VAT treatment of affiliation fees for sports clubs

A sport's governing body, or similar umbrella organisation, often charges an affiliation fee to individual clubs who make an onward charge to their members:

- Where the clubs are non-profit making, the supply of this affiliation fee to their individual members is exempt from VAT.
- If the club is a profit-making commercial club, then the supply to their individual member is standard rated.

Previously, the Extra Statutory Concession, published in paragraph 3.6.2 of VAT Notice 701/45, aimed to put profit-making commercial clubs in a similar position to non-profit making clubs. The concession allowed profit-making commercial clubs to treat such recharges to their members as though they were disbursements. However, as such recharges of affiliation fees are not legally disbursements, the concession goes beyond HMRC's discretion and is being withdrawn with effect from 1 April 2018.

Withdrawal of the concession means that the onward charge of the affiliation fee will be liable to VAT at the standard rate of 20%, unless it meets the conditions of a disbursement. A full explanation of those conditions can be found in paragraph 25.1.1 of Notice No 700.

www.gov.uk/government/publications/revenue-and-customs-brief-1-2018-vat-treatment-of-affiliation-fees-for-sports-clubs

Notice 799: DOTAS for VAT and other indirect taxes (DASVOIT)

This is a new notice containing guidance on the new disclosure of avoidance schemes regime for VAT and other indirect taxes (DASVOIT), which has effect from 1 January 2018.

The objectives of the disclosure rules are to obtain:

- early information about indirect tax arrangements and how they work;
- information about who may be involved with them.

DASVOIT applies to notifiable arrangements or notifiable proposals relating to the taxes listed in the Notice (VAT and many other indirect taxes). This includes arrangements that have been implemented and those proposed but not yet implemented.

Any arrangements or a proposal for arrangements are notifiable and must be disclosed to HMRC where:

- they enable, or might be expected to enable any person to obtain a tax advantage in relation to indirect taxes (see paragraph 4.2)

- that tax advantage is, or might be expected to be, the main benefit or one of the main benefits (see paragraph 4.3)

- they fall within any description (the 'hallmarks') prescribed in the Notifiable Arrangements Regulations (see paragraphs 4.4 and 4.5 and section 7)

In most situations the responsibility for disclosure lies with the promoter of the arrangements. However in some circumstances the user of the arrangements is responsible. (section 3 of the notice indicates who must disclose and section 8 provides information about when they must disclose).

Where arrangements produce a tax advantage in more than one indirect tax only one disclosure need be made but it must identify all tax advantages.

Once arrangements have been disclosed, HMRC will normally issue the person who has made the disclosure, and any co-promoters, with a scheme reference number. This number must then be notified to clients and, if appropriate, to further clients until the final user of the arrangements has received it. The scheme user must report their use of the arrangements to HMRC at the outset and then annually for as long as they use the arrangements.

A promoter must also provide HMRC with periodic lists of persons ('clients') to whom they're required to issue a scheme reference number.

Commencement and 'Grandfathering'

Arrangements are are excluded from disclosure where a promoter:

- made the proposal for those arrangements available before 1 January 2018;

- made the proposal available for implementation before 1 January 2018; and

- becomes aware of any transactions which are part of those arrangements before 1 January 2018.

Notice 700/8

This notice is no longer applicable to arrangements notifiable under the DASVOIT rules but will continue to apply to arrangements entered into before 1 January 2018.

www.gov.uk/government/publications/notice-799-disclosure-of-tax-avoidance-schemes-for-vat-and-other-indirect-taxes

Redundancy payments not part of consideration

Summary – Redundancy payments negotiated as part of a separate legal agreement were not value given in return for the supply of any services.

In early 2010, Lloyds Banking Group decided to close its retail and intermediary business in Ireland. In order to retain local administrative capability, historic knowledge and continuity of customer relationships, it was proposed that Bank of Scotland would enter into an agreement with an independent service company which would carry out administrative functions relating to the Bank of Scotland (Ireland) Ltd banking business, using its former employees. As part of the proposal, it was intended that the majority of Bank of Scotland (Ireland) Ltd's employees would be transferred to the service company under the Transfer of Undertakings (Protection of Employment) Regulations 2006 in relation to employees in Northern Ireland and the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 in relation to employees in the Republic of Ireland ("TUPE").

Bank of Scotland engaged Certus, a new Irish company formed by six of the existing Bank of Scotland (Ireland) Ltd directors. A 'Services Agreement' was entered into between Bank of Scotland, Bank of Scotland (Ireland) Ltd and Certus with Certus agreeing to administer and collect on the remaining loan book in Ireland.

The proposal involved the transfer of more than 700 employees from Bank of Scotland (Ireland) Ltd to Certus. In parallel with the commercial negotiations, an HR team carried out a separate negotiation involving Bank of Scotland, Certus and Unite, the Union that represented the affected workers. Unite's standpoint was that all the employees to be transferred were effectively on notice of "deferred compulsory redundancy". They put pressure on Bank of Scotland to ensure that employees who transferred to Certus benefitted from redundancy terms following the transfer which were at least as advantageous to them as the terms which would have applied had they remained employees of Bank of Scotland (Ireland) Ltd. Bank of Scotland, Bank of Scotland (Ireland) Ltd, Certus and Unite entered into the 'Legal Framework Agreement' on 21 December 2010 under which the redundancy terms for transferring and future employees were agreed, with Bank of Scotland taking on the liability for the Redundancy Payments. These obligations were to continue even if the Services Agreement terminated or a new service provider was engaged.

HMRC's believed that the Redundancy Payments made by Bank of Scotand to Certus were additional consideration for the services provided by Certus and that Bank of Scotand ought to have accounted for VAT on those payments under the reverse charge provisions. HMRC raised two assessments for underdeclared VAT: the first on 31 March 2016 in respect of the VAT period 03/12 in the sum of £17,025 and the second on 9 September 2016 in respect of the periods 09/14 to 09/15 in the sum of £5,623,000.

Lloyds Banking Group appealed against the two assessments, arguing that although the Redundancy Payments were made under the Service Agreements with Certus, the obligation to make them derived from negotiations with the employees' union, Unite, which were ultimately embodied in a the 'Legal Framework Agreement'.

Decision

The Tribunal concluded that the Redundancy Payments were not value given in return for the supply of any services. The Redundancy Payments were part of a separate, stand-alone obligation arising out of the negotiations with Unite. They concluded that their decision was entirely consistent with the economic reality of the arrangements. The contractual and commercial reality was that the Redundancy Payments formed no part of the consideration paid for the services provided by Certus and so were not subject to VAT.

The appeal was allowed.

Lloyds Banking Group v HMRC (TC06230)

Apple iPhones with no invoice

Summary – iPhones bought by 'runners' resulted in no input deduction for the company making the sale.

Scandico Ltd is a phone trader specialising in acquiring newly issued iPhones in the United Kingdom and selling them to customers in other countries where stocks of that particular model of phone have not yet been released for sale in Apple's retail stores.

Apple generally refuses to sell phones through its ordinary retail stores to phone traders and limits the number of phones that any single person can purchase to two phones. Scandico engaged individuals referred to as "runners", provided them with cash and instructed each of them to buy two phones on as many occasions as they could manage. The runners would hand the phones and the till receipts from the Apple store to a 'head' runner who would then pass them to Scandico.

Scandico sought to recover the VAT that had been charged on the retail sales by Apple as recorded in the till receipts. Initially HMRC accepted the reclaims for VAT. However, over the months of January and February 2011 approximately 7000 phones were purchased and HMRC changed their view arguing that, in the absence of VAT invoices from Apple to Scandico Ltd, there was not enough information provided by Scandico Ltd for HMRC to decide whether there has been a taxable supply or not. HMRC therefore exercised the discretion conferred on it by regulation 29(2) of the VAT Regulations 1995 by declining to direct that the alternative evidence that Scandico provided should be treated as sufficient evidence of the supply of the iPhones to Scandico Ltd.

Scandico Ltd appealed to the First Tier Tribunal who found in HMRC's favour and Scandico Ltd appealed to the Upper Tribunal.

Decision

The Upper Tribunal said that the refusal to allow a deduction of input tax is the potential result of two different decisions:

1. Was there no taxable supply or that the supply is exempt, so that the taxpayer was not entitled to input tax credit?

2. Was HMRC correct not to be satisfied based on the evidence presented that there had been a taxable supply.?

The Tribunal held that the First Tier Tribunal should have addressed only the decision which was before it, namely HMRC's decision that, in the absence of the VAT receipts, they were not prepared to exercise their discretion to accept the alternative evidence provided by the taxpayer as to whether there had been a taxable supply.

The Upper Tribunal declined to express any view on whether there was a taxable supply in this case. They said that there had been no decision by HMRC and it is not the task of either the First Tier Tribunal or the Upper Tribunal to arrive at a decision on that point.

The Upper Tribunal concluded that Scandico Ltd should have realised from the outset that they were not going to receive VAT invoices from Apple because their business model depended on Apple not knowing the ultimate destination of the iPhones. They could have set up and operated their business in a way that enabled them to provide HMRC with clear and unequivocal information supporting their entitlement to a deduction. Instead the case officer was fully entitled to conclude on the basis of the evidence before her that she could not be satisfied that the supply of the phones to Scandico Ltd for which a credit was claimed had taken place. She was not setting an impossibly high standard for Scandico Ltd to meet in order to claim the deduction.

The appeal was dismissed.

Scandico Ltd v HMRC [2017] UKUT 0467 (TCC)

VAT flat rate scheme for farmers

Summary – The partnership should have their agricultural flat rate certificate reinstated from the date it was withdrawn.

A family farming partnership reared beef cattle in Northern Ireland and in 2004 had joined the flat rate scheme.

In 2012, HMRC argued that because the partnership obtained a much greater net benefit under this scheme than under normal VAT registration it was justified in cancelling the flat rate scheme certificate. (Notice 700/46).

On appeal to the First Tier Tribunal, the partnership's appeal was dismissed but in March 2016, on appeal to the Upper Tribunal, two matters were referred to the CJEU to clarify.

Decision

Last October, the CJEU stated that:

1. When considering Article 296(2) of Council Directive 2006/112/EC, they concluded that legislation should specify any exclusions from the flat rate scheme for farmers.

2. Article 296(2) of Directive 2006/112 must be interpreted as meaning that farmers who are found to be recovering substantially more as members of the common flat-rate scheme for farmers than they would if they were subject to the normal value added tax arrangements or the simplified value added tax arrangements cannot constitute a category of farmers within the meaning of that provision."

Consequently the Upper Tribunal have now allowed the partnership's appeal and stated that their agricultural flat rate certificate should be reinstated from the date it was withdrawn and it should issue 4% flat rate invoices to VAT-registered customers retrospectively.

Shields & Sons Partnership v HMRC ([2017] UKUT 0504 (TCC)

Shortage of funds

Summary – the taxpayer had a reasonable excuse as a major customer defaulting on settling the invoiced amounts meant that the insufficiency of funds was not reasonably avoidable.

Mr Skuce is an engineer and the sole proprietor of Structsteel Engineering, which specialises in the supply and installation of steel beams made to measure in the construction of buildings. He has been registered for VAT since 2008, and making returns and payments electronically from February 2010. The business had an ongoing history of defaults, and the period of 03/17 under appeal represents the twelfth default in the rolling surcharge period that commenced with the period 09/13.

During the quarter of 03/17, the business was due payments from a major customer for a contract with a value of £174,000 net of VAT but this customer had been in financial difficulty and was 'at risk of going to the wall'. Mr Skuce was unable to secure any payment against the contract. He brought forward another job and on the completion of the job, a cheque for £72,000 was lodged into the business bank account.

On 6 May 2017, the VAT return for 03/17 was submitted and an electronic payment was authorised on the same day but the payment did not go through due to insufficient funds.

Further lodgements were made to the business account on 8 May for £5,400, and on 9 May for £50,000.

On 11 May 2017, Mr Skuce became aware that the VAT payment had not gone through. He immediately re-authorised another payment by Faster Payment Service to reach HMRC on the same day.

It was common ground that the due date was 7 May 2017, and that the payment was made on 11 May 2017 and was therefore late. Mr Skuce argued that insufficiency of funds were a reasonable excuse for late payment.

Decision

The Tribunal concluded that he lodgement of the cheque on 5 May 2017, followed by the submission of the VAT return on 6 May 2017, provided a consistent pattern of actions that Mr Skuce had worked towards procuring the funds by the due date of VAT to enable payment. However, the Tribunal noted that 5 May 2017, the day the £72,000 was lodged, was a Friday and 7 May when the VAT was due was the Sunday. Even if the faster clearance system had been up and running, it would not have generated cleared funds until at least the next working day. A cheque lodged on Friday could not create cleared funds on a Sunday to meet the VAT payment on time. Had Mr Skuce applied some business acumen, he could have requested the contract customer of £72,000 to make a same-day payment to him on 5 May 2017, but that was not what he did. They concluded that the first payment instruction failed to be honoured due to an insufficiency of funds.

The key question to answer was 'Having foreseen the insufficiency of funds, was the insufficiency reasonably avoidable?' They concluded that a major customer defaulting on settling the invoiced amounts meant that the insufficiency of funds was not reasonably avoidable. They had special regard to the scale of this default, and that the quantum of VAT payable for 03/17 was over three times in excess of the average VAT liability or all the previous quarters in the rolling surcharge period beginning with 09/13. The Tribunal considered that Mr Skuce has demonstrated a high sense of responsibility towards his obligations as a taxpayer.

The appeal was allowed.

The Tribunal added that in due course he might consider joining the cash accounting scheme to enable VAT to be returned on a receipt (instead of invoice) basis but to do so he must be out of the default surcharge regime, and his annual turnover must fall within a certain limit.

Jonathan Skuce v HMRC (TC06282)

VAT exemption on fundraising income (Lecture B1060 – 12.29 minutes)

A fundraising event organised by a charity or non-profit making body will qualify for exemption for the event in question (VATA1994, Sch 9, Group 12). The exemption applies to trading subsidiaries wholly owned by a charity and also not for profit bodies such as sports clubs and most professional associations. An organisation can host up to 15 events of the same type at the same location in its financial year, which is good news for, say, a monthly car boot sale hosted at the ground of a local football club. Unfortunately, if 16 or more events are held in a financial year, then none of the events qualify for exemption. The exemption covers all income generated at the event, including admission fees, the sale of commemorative items and food.

However, similar events can be ignored for the 15 event limit if total gross takings in a week are less than £1,000 (Note 5, Group 12, Sch 9, VATA 1994). The challenge is to ensure that all events meet the necessary criteria.

What is a fundraising event?

Events can include any of the following:

- ball, dinner dance, disco or barn dance
- performance - concert, stage production and any other event which has a paying audience
- showing of a film
- fete, fair or festival
- horticultural show
- exhibition: art, history or science
- bazaar, jumble sale, car boot sale, or good-as-new sale

- sporting participation (including spectators): sponsored walk or swim
- sporting performance
- game of skill, contest or a quiz
- participation in an endurance event
- fireworks display
- dinner, lunch or barbecue
- an auction of bought in goods - an auction of donated goods is zero rated

However, events where accommodation is provided are excluded, unless the accommodation is for two nights or less (whether or not consecutive) and does not fall within the tour operators' margin scheme.

Conditions for fundraising events

These conditions must be met for income to qualify as exempt from VAT:

- The event must be clearly intended to raise money for the benefit of the organisation ie a fundraising purpose.
- An event should be expected to make a surplus, even if it makes an actual loss (which can sometimes happen, for example, if the British weather has an adverse impact….rain stopped play to use a cricket phrase!)
- The event must be advertised as a fundraiser on promotional literature eg tickets, advertising flyers, committee meeting minutes.
- The event must be one of 15 or less of that kind being held at the same location in a financial year.

What does 'location' mean?

Location means in the same place. Similar kinds of events held in different locations would qualify for exemption provided all other conditions were met. For example, 20 balls held by a national charity each in different towns in the same financial year would all qualify for relief.

Clearly, events that need to be held on special premises, such as a sports ground, swimming pool or theatre are easy to define. Each of these will be accepted as a different location.

If the event is held in a complex of cinemas, theatres or concert halls, the location is the specific cinema, theatre or concert hall in which the fundraising event takes place.

HMRC regards a charity's entire website as a location for events held over the internet.

The rule is designed to be generous to charities which may hold a number of events of the same type in different locations, but in the same town.

HMRC will not accept arrangements such as weekly boot sales each held in different, but adjacent fields, as constituting a separate location without considering whether such an arrangement is potentially distorting competition.

Case study

Imagine a VAT registered cricket club holds a fundraising event and identifies that it qualifies for exemption on the income. The committee also recognise that the direct costs of the event are input tax blocked under the rules of partial exemption eg catering fees, cabaret cost, venue hire. However, this is not the end of the story:

It is possible that the club can still claim all of its input tax by using the partial exemption de minimis rules at the end of its partial exemption tax year ie 31 March, 30 April or 31 May depending on its VAT periods.

The reason I refer to the annual period is because the input tax on the costs of the event is unlikely to be de minimis in a VAT period – the main de minimis test is that exempt input tax must be both less than 50% of total input tax and also less than £625 per month ie £1,875 in a quarter of £7,500 in a year.

The annual adjustment calculation is carried out at the end of the tax year and any adjustment can be included either on this VAT return or the following return ie 31 March or 30 June in the case of a business on calendar quarter return dates.

Planning tip

To help input tax recovery, goods or services that qualify for zero-rating are still zero-rated if supplied in connection with a fundraising event.

This might apply in the following cases:

- the sale of donated goods by a charity
- eligible food
- eligible printed matter
- young children's clothing
- the supply of advertising time or space to a charity
- any other goods which qualify for zero rating

Past errors

If you act for charity clients or not-for-profit organisations and have identified some VAT over or underpayments, then adjustments can be made for the last four years in the same way as for a commercial business. If the net value of the errors is less than £10,000 (or less than £50,000 and also 1% of outputs in Box 6 of the return where the correction is to be made) then the next return can be corrected. If the net error is above these limits, then a disclosure to HMRC is needed on form VAT652.

Contributed by Neil Warren

Charitable 'Countryside Days' and 'Careers in Focus' events

Summary – The events were charitable in nature and did not constitute economic activities.

The Yorkshire Agricultural Society is a charitable company that looks to support and promote agriculture, rural and allied industries and to champion the role of farmers.

This appeal is concerned with two of its events called “Countryside Days” and “Careers in Focus” where no admission fee is charged by the Society for either event:

Countryside Days is an annual event over 2 days where some 6,000 primary school children and their teachers attend the Showground. The focus is educational and includes numerous workshops and activities where participants get a hands-on experience of various agricultural and rural activities;

Careers in Focus is an annual one day event attended by some 1,500 secondary school children. The focus involves showcasing careers in agriculture, rural and allied industries.

The only income generated from the events was a small commission from caterers and ice cream vendors. The society claimed that this income should be classified as business rather than charitable enabling them to recover input tax.

HMRC said the 'Countryside Days' and 'Careers in Focus' events were of a charitable nature.

Decision

The First- Tier Tribunal concluded that the events clearly fell within the charitable objects of the society and did not constitute economic activities. The events were 'gratuitous in nature' and not directly linked to any taxable supplies or economic activities. There was no evidence that the promotion of the Great Yorkshire Show at the free events increased visitor numbers.

The taxpayer's appeal was dismissed.

Yorkshire Agricultural Society v HMRC (TC06263)