Tolley®CPD

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CONTENTS

Personal tax

Spread betting employment income (Lecture P1176 – 14.56 minutes)

Summary – The use of spread betting and linked hedging transactions was a disguised remuneration plan; payments to individuals were liable to income tax and NICs.

Root 2 Tax Limited was incorporated in 2011 to carry on a tax consultancy business. At all relevant times, the individuals referred to in this case were the sole directors and shareholders of the company.

The appeal relates to three sets of "spread bets" and related option arrangements that the individuals and the company entered into in the tax year 2012/13. It was accepted by both parties that these arrangements were undertaken under a structure known as "Alchemy" which many of the company's clients also undertook. In a previous case, HMRC v Root2Tax Limited [2017] UKFTT 696, the Tribunal held that Root 2 Tax Limited was required to disclose this avoidance scheme to HMRC.

Andrew Hubbard provided a neat summary of the case as follows:

> "The scheme involved here is complex but essentially it involved the employee taking out a spread betting contract and at the same time hedging the risk with an equal and opposite contract. The employer took over the hedging contract so if the bet was won, the employee obtained the winnings and the employer paid out a broadly similar amount to the provider of the hedge. The result was that the employee ended up with a sum of money and the employer had paid out a similar sum as a cost."

HMRC's argued that the relevant payments as part of the arrangements were liable to income tax and NICs as employment income.

Root 2 Tax Limited argued that the arrangements triggered minimal tax liabilities as the majority of the individuals' returns were received as tax free "winnings" from gambling under "spread bets".

Decision

Unsurprisingly, the First Tier Tribunal concluded that the betting and hedging transactions were merely a vehicle to provide employment income to the individuals and that income tax and NICs were due.

Andrew Hubbard stated:

> "… the decision of the Supreme Court in the Rangers case about the wide scope of employment income has given HMRC a powerful new weapon in its armoury against attempts to avoid PAYE and NIC. Indeed, you could probably now argue that that decision has rendered most of the disguised remuneration legislation obsolete – although I doubt that there will be any rush to repeal it."

Root 2 Tax Limited v HMRC (TC07502)

Loan linked to pension (Lecture P1176 – 14.56 minutes)

Summary – A loan used to fund a business was an unauthorised payment from the taxpayer's SIPP that gave rise to an unauthorised payment charge.

Robert Rowland was born in 1963 and in February 2005 he started his own business. By early 2010, aged 47, he had no assets except for funds held in a pension scheme. He needed to raise money to invest in his business. Having been declined by a bank, he approached his financial advisor and asked whether he could borrow money from his pension fund. The advisor informed him that this was not allowed.

Shortly after, he searched on the internet for pension loans and found IQ Business Services who said they were able to arrange loans against pension funds. He claimed that he was told that although personal pension scheme rules do not allow for such loans, if he moved his funds into a SIPP then G Loans Ltd would provide him with a personal loan against the tax free cash element of this fund. In February 2011, he set up the SIPP and transferred his entire pension fund totalling £172,000. The funds were used to buy shares with KJK Investments. Subsequently he received a personal loan from G Loans. In June 2015, KJK Investments and G Loans Ltd were wound up for misleading/misadvising their clients.

HMRC claimed that the loan advanced to Robert Rowland by G Loans Ltd was a payment made in connection with an investment using sums or assets held for the purposes of a registered pension scheme and that such a payment gave rise to an unauthorised payments charge and surcharge.

Robert Rowland claimed that he did not know that the investment made from his pension into KJK Investments was in any way connected with the personal loan received from G Loans Ltd. He did not know that KJK Investments were providing any funds to G Loans Ltd. Robert Rowland appealed arguing that the loan advanced by G Loans Ltd was a commercial loan used for investing in his business.

Decision

The Tribunal concluded that the investment in the KJK shares was inextricably linked to the loan made to Robert Rowland by G Loans Ltd. Had the monies not been invested in KJK, no loan would have been advanced.

The Tribunal stated that whether or not the payment was made in connection with an investment made using pension funds was a matter for objective determination and was not dependent on the state of knowledge of the relevant taxpayer. However, for the avoidance of doubt, Robert Rowland did know of the casual link between the investment in KJK and the loan; he knew that if he did not authorise the investment in KJK, no loan would be advanced to him by G Loans and that if the investment in KJK was not maintained, the loan from G Loans was immediately repayable.

He had borrowed £91,578.95 and this was more than 25% of his pension funds. The Tribunal found that the payment from G Loans Ltd was an unauthorised payment which gave rise to an unauthorised payments charge that was correctly calculated by HMRC.

The appeal was dismissed.

Robert Rowland v HMRC (TC07499)

Check Employment Status Tool (CEST) **(Lecture B1177 – 13.53 minutes)**

The IR35 rules are changing from 6 April 2020 for private sector end clients. As part of this reform, HMRC have amended the Check Employment Status Tool (CEST) which is designed to give a verdict on whether a worker can be categorised as self-employed or employed. This change is designed to make the tool more robust.

CEST is still inconsistent with case law. Most tax cases use a much more woolly idea to determine status. They refer to 'painting a picture' then standing back and looking at this to determine if the individual feels as if they are employed or self-employed. The CEST will not always the same answer as might be achieved by taking this more holistic approach.

Disclaimer

The CEST is an online tool accessed via the www.tax.service.gov.uk website. It can be easily found by putting the term 'CEST' into any search engine.

The starting page of the tool states:

> 'HMRC will stand by the result you get from this tool.
>
> This would not be the case if the information you have provided was checked and found to be inaccurate.
>
> HMRC will also not stand by results achieved through contrived arrangements, designed to get a particular outcome from the service. This would be treated as evidence of deliberate non-compliance, which can attract higher associated penalties.'

Obviously, the need to ensure that the information is accurate will be understood but it does not give much leeway for some questions which are perhaps somewhat misleading.

The questions

The CEST can be used for IR35 purposes or just for determining if someone is employed or self-employed. We are going to look at it in the context of IR35.

The CEST can be answered by the worker, the hirer or an agency. You are asked to specify who you are.

The tool is split into different sections. Some of the questions will not get asked, dependent on other answers but most of the questions will get asked most of the time. The sections are:

- Background
- Office holder
- Substitutes and helpers
- Worker's financial risk
- Worker's involvement
- Worker's contracts

Note that there is no section on mutuality of obligation which is one of the key criteria when determining employment status. This is because it is HMRC's view that this must exist if there is a contract between the parties. This is disputed.

There are three possible outcomes of the tool in the context of IR35: inside the IR35 legislation, outside the IR35 legislation and unable to determine the tax status of the engagement.

The following is a list of the questions (although some of them will not get asked if a previous answer is seen as being determinative). The background is not covered and neither is the officer holder question. Broadly if the worker is an officer holder with the end client they are automatically treated as employed/within IR35 and no further questions will be asked. These are the questions from the perspective of the worker. If the hirer or the agency are completing this, then they are asked similar questions worded from their viewpoint.

Substitute and helpers

1. Have you ever sent a substitute?

    a. Yes

    b. Yes, but the client did not accept

    c. No, it's never happened

    d. 1a (Only asked if say yes to above). Did you pay the substitute? If yes, then go on to working arrangements and if no, move on to Q3.

2. Does your client have the right to reject a substitute? Y/N

3. Have you paid another person to do a significant amount of work? Y/N

Working arrangements

4. Does the client have the right to move you from the task you originally agreed to do?

    a. No that would require a new contract

    b. No you would have to agree

    c. Yes

5. Does your client have the right to decide how the work is done?

    a. Yes

    b. No you solely decide

    c. No you agree together

    d. Not relevant was work is highly skilled

6. Does your client have the right to decide your working hours?

    a. Yes

    b. No you solely decide

    c. No you and your client agree

    d. No the work is based on agreed deadlines

7. Does your client have the right to decide where you do the work?

    a. Yes

    b. No you solely decide

    c. No the task sets the location

    d. No some work has to be done in an agreed location and some can be your choice

Worker's financial risk

8. Will you have to buy equipment before your client pays you (this can include heavy machinery or high-cost specialist equipment. This does not include laptops, tablets and phones)? Y/N

9. Will you have to fund any vehicle costs before your client pays you (this can include purchasing, leasing, buying fuel and other running costs for this work. This does not include commuting or personal vehicle costs)? Y/N

10. Will you have to buy materials before your client pays you (this can include items that form part of the work or are left behind when you leave. This does not include items like stationery)? Y/N

11. Will you have to fund any other costs before your client pays you (this can include non-commuting travel or accommodation or external business premises for this work only)? Y/N

12. How will you be paid for this work?

    a. An hourly, daily or weekly rate

    b. a fixed price for a specific piece of work

    c. an amount based on how much work is completed

    d. a % of the sales the worker makes

    e. a % of the end client's profits or savings

13. If the client was not happy with your work would you have to put it right?

    a. Yes, unpaid you would have extra costs that your client would not pay for

    b. Yes unpaid but your only cost would be losing the opportunity to do other work

    c. Yes you would fix it in your usual hours at your usual rate or fee

    d. No the work is time specific or for a single event

    e. No

Worker's involvement

14. Will your client provide you with paid for corporate benefits? Y/N

15. Will you have management responsibilities for your client? Y/N

16. How would you introduce yourself to your client's customers or suppliers?

    a. You work for the client

    b. You are an independent worker acting on your client's behalf

    c. Your work for your own business

    d. This would not happen

Worker's contracts

17. Does the contract stop you from doing similar work for other clients? Y/N

18. Are you required to ask for permission to work for other clients? Y/N

19. Are there any ownership rights relating to this contract (IP, copyright, trademarks, patents, image rights)? Y/N.

    If yes, does the contract state the rights for this work belong to you? Y/N

    If yes, does the contract give the client the option to buy the rights for a separate fee? Y/N

20. Have you had a previous contract? Y/N

21. If yes, will this contract start immediately after the previous one ended? Y/N

22. If no, is the current contract the first in a series of contracts agreed with the client? Y/N

23. Does the current contract allow for it to be extended? Y/N

24. Will the work take up the majority of your available working time? Y/N

25. Have you done any other self-employed work of a similar nature for other clients in the last 12 months? Y/N

Considering the questions

The number of permutations that can be inputted for 25 questions runs into the millions. Playing around with the data, looking at those which might be most relevant, some interesting points emerge.

Looking at the first section. If you indicate that the client has sent a substitute who was paid by the worker, you are not caught by IR35 regardless of what other answers are given with the narrative supplied saying ‘Your answers told us you have sent a substitute’. If a substitute has been sent or could be sent but the worker did not or would not pay them, then it is treated as if you cannot send a substitute. Whether you have paid someone to do work for you seems to be completely irrelevant as it does not seem to make any difference to the outcome.

Where substitution rights are not relevant, then the question of control seems to become more important. If the client can move the worker from task to task, then it would appear that you are almost always caught by IR35 regardless of how other questions are answered. If you state that you can only be moved with your agreement or with a new contract, there are more cases where the tool cannot make a judgement although there is a greater likelihood that it decides you are not caught.

Other factors which seem to be important, but only where enough of them are present (i.e. one in isolation would not make someone within the rules) would be:

- Rectifying faulty work
- Payment of costs
- Getting benefits
- Having management responsibilities
- Identifying as working for the client
- The IP being held by the client

Practical points

It is important to make sure that the questions are answered accurately but it is not always straightforward. Think about the question about rectifying defective work:

If the client was not happy with your work would you have to put it right?

a. Yes, unpaid you would have extra costs that your client would not pay for
b. Yes unpaid but only cost would be losing the opportunity to do other work
c. Yes you would fix it in your usual hours at your usual rate or fee
d. No the work is time specific or for a single event
e. No

If the answer is you would not put it right, but you would not get paid, what would the answer be? Presumably (d) or (e) but neither of those are helpful in terms of the overall analysis of the situation.

Other issues include what does the CEST mean by someone who is highly skilled? What machinery might be considered to be specialist (since a laptop for someone who is engaged in highly detailed CAD might be a very specialist piece of kit).

The conclusion has got to be that the CEST does give some comfort but might not give a completely accurate picture. Interestingly, the recent round of IR35 cases have given us some judgements with a very detailed picture of the contractual relationships between the parties. The details of the relationship between Lorraine Kelly and ITV were inputted into the CEST. This was unable to make a determination, despite this being comprehensively decided in favour of Lorraine Kelly by the First Tier Tribunal.

Contributed by Ros Martin

Further reform to IR35 (Lecture B1178 – 13.12 minutes)

The off-payroll (IR35) rules were introduced in 2000 to ensure that individuals who were effectively employees but worked through an intermediary would not be able to avoid the income tax and National Insurance Contributions that would have arisen if they had been employees. The legislation failed to have much impact due to potentially affected individuals simply changing their contracts so they could argue that they did not fall within the rules. HMRC also failed to adequately police the system. Most of those who might have been affected would have been working through their own personal service companies and when the legislation was first introduced, it was the job of that company to make the assessment as to whether IR35 applied.

Changes were made from April 2017 where the end client of the intermediary was a public sector organisation. The responsibility for determining the applicability of the IR35 provisions reverted to the client. If the client determined that these anti-avoidance provisions applied, then a deduction for the payroll taxes had to be made by the person paying the personal service company. This saw around 60,000 recategorised as employees according to HMRC and additional revenue of around £400m raised in its first year of operation.

The government believes that the cost of non-compliance with the off-payroll working rules in the private sector is growing and will reach £1.3 billion a year by 2023/24. Because of the success that resulted from the changes in the public sector rules, it became almost inevitable that the changes would be extended to the private sector. It is the current intention for those changes to come in from 6 April 2020.

April 2020 reform

The April 2020 reform will use the public sector off-payroll working rules as a basis to work from and the amendments already announced (or any new amendments) will apply to both the public and private sector (although not the exclusion of small business).

Not all private sector businesses will be affected as the new rules will apply to medium and large businesses in the private sector using the services of off-payroll workers but will exclude small businesses as defined by s382 CA 2006.

So this will cover any corporate business that satisfies two or more of the following requirements:

- Annual Turnover not more than £10.2m;
- Balance sheet total not more than £5.1m;
- Number of employees not more than 50.

There are provisions as to how these limits apply when a company is a joint venture company or a subsidiary such that the other involved parties have to be taken into account. Note, that these rules apply to LLP, unregistered companies and overseas companies.

For non-corporate entities only the turnover is considered so a non-corporate business will be caught if its turnover is more than £10.2m.

There is also an anti-avoidance provision which takes account of the turnover of connected persons in determining whether the business is small.

Where the end client is a small private sector organisation, the personal service company remains responsible for determining whether IR35 applies.

The limits are tested in the financial period ending in the previous tax year. For the commencement of these rules, for companies and LLPs this will mean the accounting period ending before 6 April 2020. For individual and other partnerships, this will be the 2019/20 basis period figures. Going forward, for companies, if that company meets the conditions for two consecutive years, the new rules must be applied from the start of the tax year following the end of the second financial year when the conditions are met. For unincorporated businesses, the rules must be applied from the start of the tax year following the end of the calendar year when the conditions were met.

Responsibilities down the supply chain

Under the public sector rules, clients must provide a status determination to the relevant parties at the time the contract starts or before the off-payroll worker starts work. This is called the Status Determination Statement (SDS) and this must be given to the worker and any fee payer such as an agency. End clients must therefore make sure they have the appropriate processes in place to make and pass on the SDS to all relevant parties. In the absence of this, the end client will take on the responsibilities of the fee payer (if they are not the fee payer) to operate PAYE and NICs if applicable.

There has been an updated Employment Status Checker (called CEST) released in November 2019 to enable the status determination to be made. This is the subject to a separate module. HMRC has stated it will stand by the determination if the user has given correct answers.

One of the major criticisms of the public sector rules has been that there was no right of appeal against a status determination that the worker did not agree with. The draft legislation includes a right of appeal but not to HMRC. If the worker does not agree with their SDS there must be a process whereby this can be raised with the end client and the engager must respond within 45 days stating the reason why or why not they came to the conclusion and indicating if they have changed their view on further reflection.

HMRC will not get involved in any disputes but are planning to publish guidance on how a dispute will be resolved.

Non-compliance

The draft legislation allows for income tax and NICs to be transferred from one party to another where a client fails to provide a determination.

- Where HMRC does not receive the tax due, the liability will initially rest with the party that has failed to fulfil its obligations, until such a time that it did meet those obligations. This means that liability would move down the labour supply chain as each party fulfils its obligations. For example, if an agency in the chain failed to send on the determination that agency would be liable for any income tax and NICs due. Similarly, if a fee-payer, having received the determination failed to make deductions from any payments made to the worker's PSC then it would become liable.

- If HMRC were unable to collect the outstanding liability from that party, for example, because it ceased to exist, the government proposes that the liability should transfer back to the first party or agency in the chain.

- Where HMRC could not collect from the first party or agency it would ultimately seek payment from the client.

Further points to note

Where the organisation paying the worker's PSC is based offshore, the fee-payer responsibilities move up the supply chain to the next UK-based entity.

As with public sector engagements the worker's PSC will no longer be permitted to deduct a 5% allowance in relation to engagements with medium and large-sized clients.

The payment of tax and NICs to HMRC will follow the same model as applies for the public sector:

- The fee-payer is the deemed employer for income tax, NICs and Apprenticeship Levy purposes but will not be required to make deductions for student loan payments;

- The fee paid to the PSC is the off- payroll worker's employment income;

- The employment income will be the VAT exclusive amount paid to the worker's PSC.

- The off-payroll worker must provide their NI Number, tax code and identity details to enable the right tax to be deducted;

- On or before the fee-payer makes payment, the fee-payer must complete the RTI process and notify HMRC of the amount of the taxable earnings and the tax and NICs deducted.

- The deemed employment relationship does not result in employment rights or statutory payments obligations for the deemed employer or fee-payer.

All employer NICs paid as a result of deemed employment income are excluded liabilities for the purposes of the Employment Allowance. They would not be able to claim the Employment Allowance against secondary Class 1 NIC liabilities arising from the payment of deemed employment income.

Where an agency contracts directly with the worker as an employee and operates tax and NICs, or engages them on a self-employed basis but operates tax and NICs under agency rules, then the off-payroll working rules do not apply.

Where an umbrella company employs the worker directly as an employee and does not contract with the worker's PSC, the off-payroll working rules do not apply. If the worker's PSC receives payments for the off-payroll worker's service through their PSC then the off-payroll working rules will apply.

Where the conditions in the off-payroll working rules apply, these rules will take precedence over the managed service company rules in Chapter 9, Part 2 ITEPA 2003 and the rules in the construction industry scheme.

Contributed by Ros Martin

IR35 review **(Lecture P1176 – 14.56 minutes)**

The Government is launching a review of changes to off-payroll working rules to address any concerns from businesses and affected individuals about how they will be implemented.

The review will determine if any further steps can be taken to ensure the smooth and successful implementation of the reforms, which are due to come into force in April 2020. As part of this, the review will also assess whether any additional support is needed to ensure that the self-employed, who are not in scope of the rules, are not impacted.

The review, which will conclude by mid-February, will engage with affected individuals and businesses on their experiences of the implementation of these reforms.

As part of the review, the Government will hold a series of roundtables with stakeholders representative of those affected by the reform, including contractor groups and medium and large-sized businesses, to understand how the government can ensure smooth implementation of the reforms. The Government will also carry out further internal analysis, including evaluation of the enhanced Check employment status for tax (CEST) tool and public sector bodies' experience of implementing the reform to the off-payroll working rules in 2017.

In parallel to the review, HMRC will continue its comprehensive programme of education and support activities, proactively helping customers to prepare for the reform to off-payroll working rules in April 2020. This will include one-to-one engagement, webinars and workshops alongside targeted communications and support for customers, and their representatives to help them prepare for implementation on 6 April 2020.

www.gov.uk/government/news/off-payroll-review-launched

Students and young workers (Lecture P1180 – 14.16 minutes)

In this article we explore the legal position of employing students and young workers, what they should be paid and how they should be taxed:

- Students are individuals of any age who are attending a college or university;
- Young workers are children who are under the school leaving age looking to work before or after school, at weekends or during their school holidays. Note, it is illegal to employ anyone under the age of 13.

Young workers

A child reaches school leaving age from the last Friday in June, where the child will reach 16 by the end of the school summer holiday and from that date is allowed to work full time for up to 40 hours. Adult employment rights only apply from the age of 18.

It is illegal for a child below school leaving age to work:

- Without an employment permit, where bylaws require one (Modelling, acting roles);
- In a factory or on an industrial site;
- Before 7am or after 7pm;
- During school hours;
- For more than an hour before school starts;
- For more than four hours without a minimum break of at least 1 hour;
- Doing any work that would be detrimental to their health, education or wellbeing.

The number of hours that a child can work is set out in legislation. In summary, a child can work during term time for a maximum of 12 hours a week and how those are split depends on the child's age:

- 13 to 14: Maximum of 2 hours on school days/ Sunday and 5 hours on Saturday;
- 15 to 16: Maximum of 2 hours on school days/ Sunday and 8 hours on Saturday.

These periods are extended during school holidays as follows:

- 13 to 14: Maximum of 25 hours/week - 5 hours on weekdays/ Saturday and 2 hours on Sundays;
- 15 to 16: Maximum of 35 hours/week - 8 hours on weekdays/ Saturday and 2 hours on Sundays.

What to pay

With the exception of university or college students who are doing work placements as part of their degree, the national minimum wage rates apply to anyone over school leaving age.

The national living wage must be paid to employees who 25 and over. This is increasing from £8.21 to £8.72 on 1 April 2020.

The National Minimum Wage is also increasing from 1 April 2020 for younger age groups as follows:

- 21 to 24 year olds – the rate is increasing from £7.70 to £8.20;
- 18 to 20 year olds – the rate is increasing from £6.15 to £6.45;
- 16 to 17 year olds – the rate is increasing from £4.35 to £4.55; and
- apprentices under 19 or in the first year of their apprenticeship – the rate is increasing from £3.90 to £4.15.

Paying tax and national insurance

Everyone, regardless of age, is entitled to a personal allowance and this allowance is spread equally over the year. Thus, where a student or young worker earns less than £240 a week, no tax will be due. Where weekly earnings exceed this amount, tax at 20% will be deducted at source through the PAYE system.

Once the student or young worker reaches 16, national insurance will be payable on earnings in excess of £166 per week at a rate of 12%. For workers that who are under 16, the employer should use NI category X indicating that no national insurance is payable.

Paying too much tax

Where a student works in the holidays rather than regularly throughout the year, they may end up paying tax that is covered by their unused tax free personal allowance from non-working months in the year.

When their holiday job ends, they should receive a P45 showing their total earnings and tax deducted at source. Where a student will not be working again in the tax year, they can seek a repayment of tax deducted by applying to HMRC:

- At https://www.gov.uk/claim-tax-refund; or
- Call HMRC and ask for guidance;
- Contact HMRC and ask to complete a self- assessment tax return.

It is at HMRC's discretion as to whether they repay the tax during the tax year or wait until the end of the tax year, just in case the student does pick up some causal work later in the tax year.

Any national insurance that has been deducted is not reclaimable.

Created from the seminar by Alexandra Durrant

Maturing child trust funds

Child Trust Fund accounts will start to mature in September 2020 when the first children reach 18. From 6 April 2020, amending regulations will come into force allowing investments in child trust fund accounts to retain their tax-advantaged status after the account holder's 18th birthday, and will allow these savings to be transferred from the matured child trust fund into an ISA without reducing the annual ISA subscription limit.

www.gov.uk/government/publications/maturing-child-trust-funds

Some facts about child benefit (Lecture P1177 – 17.28 minutes)

In October 2019, the Office of Tax Simplification (OTS) published a 92-page report entitled 'Taxation And Life Events: Simplifying Tax For Individuals'. For this purpose, they have explored individuals' experiences of engaging with tax – principally income tax and NICs – in relation to a wide range of important life events such as having a child, entering the workplace, changing jobs, saving for a pension and drawing a pension in retirement.

This article examines their thoughts about the child benefit regime which was introduced in 1977 and is given for the eldest child as well as for the younger ones (unlike the previous family allowance system). A subsequent amendment brought in a higher payment for the first child than for younger siblings. Shortly after the Coalition Government came to power in 2010, they announced that child benefit would be withdrawn from families where any member of the household was a higher rate taxpayer (i.e. someone with income of more than – at the time – £42,475). This caused a public outcry when it was realised that, if a married couple each earned, say, £40,000, there would be no removal of the benefit, despite the fact that the family enjoyed an annual income of £80,000 (given that neither of the spouses was a higher rate taxpayer). As a result, this proposal was rethought.

The revised legislation involving a high income child benefit charge (HICBC) is set out in Ss681B – 681H ITEPA 2003 (as inserted by Para 1 Sch 1 FA 2012). It differs significantly from the Chancellor's original submission. The HICBC applies where an individual or their partner receives child benefit and either of them has an income of more than £50,000. The charge claws back:

- an equivalent sum to all the child benefit paid if that person's income is £60,000 or more; and
- a tapered proportion of the child benefit if the person's income falls between £50,000 and £60,000.

The difficulty with this regime is that those parents who are affected have various options about their next course of action, but unfortunately the consequences of these possibilities are not immediately obvious.

The options for better-off parents of the new-born child are:

- not to claim child benefit at all;
- to claim the benefit but not to receive payment of it; or
- to receive the benefit but, in effect, to pay some or all of it back through the HICBC.

Registering a claim for child benefit but then opting not to receive it is the only way to avoid payment of the HICBC (and its associated administration), while preserving national insurance entitlements. It is not widely appreciated that, in addition to providing financial support for families with children, child benefit has important links with the wider national insurance system by virtue of:

- being the main way whereby children are issued with a national insurance number (NINO) when they reach the age of 16; and

- providing the child benefit claimant (usually the mother) with national insurance credits until the child is 12 (which can help fill gaps in the claimant's national insurance record for state pension purposes if they are not working).

The consequences of not claiming child benefit at all (perhaps to avoid needing to pay the HICBC and to register for self-assessment) are that:

- the child will have to take an additional step at a later stage in order to prove their identity for the purpose of obtaining their NINO; and

- one of the parents may lose out on future state pension claims to which a more complete national insurance record would entitle them.

As the OTS point out:

> 'All this can easily be confusing for parents and there have been numerous complaints about the process and comments in the national media. One reason for this is that the process appears illogical. It could be more helpful (both in the child benefit claim form and the guidance on www.gov.uk) to explain the benefits of making a claim before going on to cover the option not to receive payments, if the claimant wishes to ensure there will not be a HICBC.'

Another concern with the FA 2012 legislation is that some taxpayers can face an unexpected charge at the end of a tax year which they may not have readily anticipated. For example, an individual's income may fluctuate because they are self-employed or a mid-year bonus or promotion might result in their income being at a higher level than they expected at the beginning of the year. It is believed that HMRC have been alerted to this prospect with the result that they are planning more targeted publicity in order to increase the public's awareness of these difficulties.

With reference to these matters, the OTS have made three firm recommendations:

> 'Recommendation 1 - The Government should review the administrative arrangements linked to the operation of child benefit, making clear the consequences of not claiming the benefit, with a view to ensuring that people cannot lose out on national insurance entitlements.
>
> Recommendation 2 - The Government should consider the potential for enabling national insurance credits to be restored to those people who have lost out through not claiming child benefit.
>
> Recommendation 3 - The Government should consider how to ease the process of enabling children of those who have not claimed child benefit to receive their NINO.'

These recommendations take into account that, since the HICBC regime went live on 7 January 2013, there are likely to be hundreds of thousands of children who will not be given their NINO automatically on attaining the age of 16 and a somewhat smaller number of parents who will not receive national insurance credits while looking after their youngsters.

Finally, one planning thought which needs to be factored in is this: where couples with young children run a family company, careful consideration should be given to the level of income withdrawn from the company – for example, by paying modest dividends one year followed by much larger payouts the next, can the couple still receive child benefit on a tax-free basis every other year?

Contributed by Robert Jamieson

Updated loan charge guidance **(Lecture P1176 – 14.56 minutes)**

As we know, following the publication of Sir Amyas Morse's loan charge review, the government announced it will make changes to the loan charge legislation. HMRC has now published guidance setting out the key changes and draft legislation was published on 20 January 2020.

The key changes to the loan charge are:

- the loan charge will apply to outstanding loans made on, or after, 9 December 2010;
- the loan charge will not apply to outstanding loans made in any tax years before 6 April 2016 where the avoidance scheme use was disclosed to HMRC and HMRC did not take action (for example, opening an enquiry);
- people can now elect to spread the amount of their outstanding loan balance (as at 5 April 2019, recalculated in line with the above changes) evenly across 3 tax years: 2018 to 2019, 2019 to 2020 and 2020 to 2021. This will give greater flexibility on when the outstanding loan balance is subject to tax and may mean that the loan balance is not subject to higher rates of tax;
- HMRC will refund voluntary payments (known as 'voluntary restitution') already made in order to prevent the loan charge arising and included in a settlement agreement reached since March 2016 (when the loan charge was announced) for any tax years where:
    - the loan charge no longer applies (loans made before 9 December 2010)
    - loans were made before 6 April 2016, the avoidance scheme use was disclosed to HMRC and the department did not take action (for example, opening an enquiry)

HMRC will not be able to process any refunds until changes to the loan charge legislation have been enacted by Parliament.

The package also includes a number of changes that will give individuals additional flexibility over the way they pay:

- if they do not have disposable assets and earn less than £50,000, HMRC will agree time to pay arrangements for a minimum of 5 years; for those earning less than £30,000, this can be extended to a minimum of 7 years. Those earning more than £50,000, or needing longer to pay, will need to provide HMRC with detailed financial information. There is no maximum time limit for a time to pay arrangement

- in line with existing practice, those needing time to pay, will pay no more than 50% of their disposable income, unless they have a very high level of disposable income. The amount paid into an arrangement each month will depend on their own individual circumstances.

www.gov.uk/government/publications/disguised-remuneration-independent-loan-charge-review/guidance

Capital Taxes

Loss on unbuilt villas (Lecture P1176 – 14.56 minutes)

Summary - Capital loss in respect of contractual rights over two Barbados villas represented allowable losses even though the villas were not built.

Lady Lloyd-Webber & Lord Lloyd Webber are, and were at all material times, resident and domiciled in the UK. The couple had holidayed in Barbados for many years with family and friends. Having previously rented, they wanted to buy property on the island as a holiday home but had been unable to find anything suitable. In 2007, they learned of a development at Clearwater Bay. The couple selected two plots of land, Lot 7, to become a beach front villa, and plot 15, that was situated directly behind Lot 7 which was intended to be used by the nannies and children to enable the entire family to be accommodated and holiday together.

The couple entered into a contract with a developer and made payments in stages as construction progressed. After paying a total of just over $11 million, it became clear that the developer was in trouble, that the contracts would not be fulfilled, and that the villas would never be built

Lady Lloyd-Webber & Lord Lloyd Webber claimed the capital loss on their 2011/12 tax returns of just over £3m each.

HMRC disallowed the losses and the Lloyd Webbers appealed.

Decision

It was not disputed that the couple had suffered a commercial loss in that they had spent considerable sums and it seemed unlikely that the villas would in fact be built. The issue between the parties was whether the amounts paid under the 2007 Contracts were paid to acquire/enhance their contractual rights and so were allowable as a deduction under s 38. HMRC argued that the payments were for the acquisition of land (in due course) and not for the purpose of acquiring the contractual rights as distinct assets.

The Tribunal concluded that the couple entered into the 2007 Contracts with the intention of ultimately acquiring completed villas. The payments made under the 2007 Contracts were for the acquisition of contractual rights, the only asset they actually acquired. This contractual right remained unfulfilled and therefore resulted in a real loss. Had Parliament considered that such a loss should be excluded from relief, it could have put that in the legislation, as it did in the case of losses resulting from a forfeited deposit. Such provision had not been made.

The appeal was allowed.

(The Tribunal confirmed that under s43 TCGA 1992, if and when the project had been completed, the amounts paid under the contractual rights would have been expenditure on the land, as, in such circumstances there would have been "change in nature" of the contractual rights).

Lady Lloyd-Webber & Lord Lloyd Webber v HMRC (TC07488)

Capital loss relief for loan guarantee? (Lecture P1178 – 29.02 minutes)

When someone pays up under the terms of a loan guarantee, it is possible to make a claim for a capital loss, but only if all the conditions in S253 TCGA 1992 have been satisfied. This can be illustrated by the different outcomes in the recent First-Tier Tribunal cases of:

- Dennis v HMRC (2018); and
- Hunt v HMRC (2019).

Hitherto, in order to qualify for relief under S253 TCGA 1992, the loan had to be to a borrower who:

- was resident in the UK; and
- used the money wholly for trading purposes (or to set up a trade provided that trading actually started).

Relief is only available if there is no reasonable prospect of the loan ever being repaid and, where claimed, S253 TCGA 1992 allows the lender the write the loss off against his chargeable gains. The rules cover both individual and corporate lenders, but the claimant and the borrower must not be spouses, civil partners or members of the same 75% group. Legislation will be introduced in FA 2020 to extend this relief, with effect from 24 January 2019, to borrowers who are resident outside the UK.

The section also applies to a guarantor of a qualifying loan. The guarantor must have made a payment under the guarantee to the lender or to a co-guarantor and he will then be treated as if an allowable loss equal to the amount of his payment had accrued to him on the date when that payment was made. One commentator has confirmed that the word 'guarantee' covers 'the case where a person's property is charged as security for a qualifying loan – it does not include an indemnity which creates a primary liability'.

Dennis v HMRC (2018)

In 1998, the taxpayer (D) entered into a joint venture agreement with a company called TAG Group Holdings SA (TAG) to develop and manufacture high quality electronic audio and audio-visual equipment. The joint venture vehicle was a UK-incorporated company (TAG McLaren Audio Ltd). D and TAG made their respective series of investments in the joint venture vehicle by way of loan and by subscription for ordinary shares (which carried votes) and preference shares (which did not). Some of the amounts which were initially advanced as a loan were later converted into preference shares. Their aggregate investment was substantial:

- D put in over £5,000,000; and
- TAG invested more than £15,000,000.

Clause 10.3 of the joint venture agreement envisaged the situation where the joint venture vehicle was wound up and the investors failed to recover their full investment so that there was a shortfall. In that case, the overall shortfall had to be apportioned in accordance with the investors' respective voting entitlements and the parties undertook to make balancing payments between themselves to bring each one's share of the economic loss to that proportion.

TAG McLaren Audio Ltd did not meet its financial targets and so, on 4 July 2005, the company went into a members' voluntary liquidation. By virtue of Clause 10.3 (see above), TAG made a claim against D which was eventually settled at £3,000,000. This sum was paid over on 23 April 2007. D claimed £3,000,000 as an allowable loss under S253 TCGA 1992 and offset it against his chargeable gains for 2007/08.

HMRC argued that nearly all of D's loss of £3,000,000 related to an investment in ordinary and preference shares in the joint venture vehicle, for which he could not claim relief under S253 TCGA 1992 given that the section only applies to loans. Accordingly, it did not represent an eligible payment under a guarantee, although HMRC were prepared to concede an allowable loss of just over £490,000. This approach of denying relief was contested by D and the case hinged on whether Clause 10.3 amounted to a loan guarantee. If it did not, then no relief was, strictly speaking, available.

In legal terms, a guarantee is a specific form of indemnity, i.e. an arrangement whereby one person can look to another to satisfy their losses. A guarantee must always consist of a written agreement between three parties:

1. a guarantor;
2. who agrees to meet the financial obligations of the principal (or debtor);
3. to the creditor.

There are two particular characteristics which were important in this case:

1. the principle of coextensiveness (there is no liability on the part of a guarantor if the underlying obligation is void or unenforceable or if the obligation ceases to exist); and
2. the right of subrogation (once a guarantor has made payments under the agreement, he has the right to pursue the principal for this expenditure).

D's obligations under Clause 10.3 only arose once TAG McLaren Audio Ltd's obligations to TAG had ceased to be in any way enforceable. As the judge remarked:

> 'Since (D) could not make full payment under Clause 10.3 until the last distribution in the company's liquidation has been made, (D) could never have any meaningful right of subrogation against the (joint venture vehicle).'

The conclusion was therefore that, while Clause 10.3 was clearly a form of indemnity, it was not a guarantee.

D lost his appeal. Arguably, he came off better than he might have expected to, in view of the fact that HMRC had already conceded the £490,000 loss – since there was no guarantee, this relief should not, in all strictness, have been given.

Hunt v HMRC (2019)

In contrast to the Dennis case, the taxpayer (H) in Hunt v HMRC (2019) had made a payment under what everyone agreed was a valid loan guarantee. The questions here revolved around the trading status of the company which received the loan.

H was a 22% shareholder in Altala Ltd (Altala), a company set up to establish a health lottery with the specific aim of supporting the NHS. He issued a guarantee, via a nominee company, for Altala's £17,500,000 loan facility with Barclays Bank plc.

Following significant set-up activity which took place over 2007 and 2008, Altala failed to obtain a lottery management operating licence from the Gambling Commission. On 4 December 2009, Altala went into administration and, on 13 January 2010, its assets were sold to Health Lottery Ltd which successfully launched what became known as 'The Health Lottery' in October 2011 with, in the words of the case report, 'all the distinguishable features established by Altala including the logo, advertising campaign and IT systems and infrastructure'.

By this stage, the bank had recalled their debt and H's nominee company had paid the £17,500,000. H claimed an allowable loss under S253 TCGA 1992. HMRC agreed that H had made a payment of slightly more than the specified sum in pursuance of his guarantee, that this had become irrecoverable and that the loan had been used by Altala for the purposes of setting up a trade. However, HMRC contended that Altala had never actually traded. If there was no trade, HMRC said that there could be no relief. In support of this argument, HMRC pointed to the fact that no Gambling Commission licence had been obtained at the time when Altala went into administration. A consequence of this was that the company could not legally trade as a lottery manager.

The judge looked at the activities which Altala had undertaken in anticipation of obtaining a licence. These included:

- the production of play cards;
- agreements with payment handlers and retailers;
- advertising and marketing;
- establishing a customer contact centre;
- setting up a suitable IT infrastructure;
- the acquisition of lottery ball machines; and
- taking out prize insurance.

It was significant that Altala's successor used most of Altala's groundwork and assets for the successful launch of the new lottery. In other words, Altala had put virtually everything in place bar the Gambling Commission licence.

The judge then referred to the leading case on this matter (Mansell v HMRC (2006)) where the following comments were made:

> 'A trade commences when the taxpayer, having a specific idea in mind of his intended profit-making activities and having set up his business, begins operational activities – and, by operational activities, I mean dealing with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits and which involve the trader putting money at risk.'

On this basis, he considered that Altala did engage in operational activities in relation to which it incurred a financial risk. The company had done enough to be treated as trading and so H's appeal was allowed in full.

Contributed by Robert Jamieson

Change in payment date for CGT (Lecture P1179 – 10.28 minutes)

Currently, Capital Gains Tax for individuals is paid on the self-assessment due date and has no impact on the payments on account. Given this date is 31 January following the end of the tax year, this means it can be paid anywhere between 10 months and 22 months after the date of the sale. Legislation has been introduced which will make the due date for sales of residential property 30 days after the date of the disposal as well as imposing an obligation to make a return of the sale. This will give a large one-off additional tax yield to the Exchequer.

This will apply for disposals on or after 6 April 2020. Self-assessment taxpayers will have to report the gain on their tax returns as well.

This regime already applies for disposals by non-residents and this legislation extends those provisions to UK resident sellers.

Provisions

The legislation applies to direct disposals of UK land on which a residential property gain accrues. This distinguishes it from the gains which arise to non-UK residents which also include indirect disposals of land (i.e. shares in property companies). It relates only to UK land.

It will not apply where the gain is an excluded disposal which are:

- No gain/no loss disposals;
- Disposals which are the grant of an arm's length lease for no premium to a person unconnected with the grantor;
- Disposals by charities;
- Disposals of any pension scheme investments (of course, unlikely to be residential property gains in any case).

A return does not have to be made where the person is not required to make a payment on account of their CGT liability. This might include gains covered by private residence relief, or where there are losses or where the gain is covered by the annual exemption.

A return must be made within 30 days of the date of disposal. For the purposes of these provisions, it is the date of completion which is treated as the trigger date rather than exchange which is, of course, still the date of sale for CGT purposes. No return has to be made if the person has submitted or is due to submit, prior to the filing deadline for the return, a self-assessment return which takes into account the disposal. This is going to be a rare occurrence.

The notional tax due must also be calculated and submitted within the same timescale. It is referred to as a payment on account of the CGT due. Any other disposals in the year not subject to this regime are ignored when computing the tax due. The tax is due on same day as the return is due.

In calculating the tax due the following principles apply:

- Capital losses can be offset where available;

- Other relevant disposals are taken into account (i.e. earlier residential property sales) in determining availability of annual exemption or basic rate band so that a cumulative tax payable figure is calculated where there are multiple disposals in a year;

- An in-year repayment could be made if factors change. So if a person makes an allowable loss on a disposal which, if a gain had accrued would have been reportable, the person can make a return to facilitate a repayment. This only applies where the loss relates to residential property. So someone who pays tax on disposal of a buy-to-let and then makes a loss on another buy-to-let could make a return to facilitate a repayment. Someone who pays tax on disposal of a buy-to-let and makes a loss on shares after the date of the original disposal cannot as the event causing the repayment had not happened at the time of the original return being due. You would have to get repayment at the time of the completion of the self-assessment return;

- HMRC acknowledge that information may not be available or complete within a short timescale (so where valuations need to be made for example) and in this case the return has to be completed to the best of the taxpayer’s ability with the legislation allowing for certain estimates and assumptions to be made.

A return must include information as specified in the relevant provisions and must include a declaration that return is completed to the best of the person’s knowledge and is complete.

The return may be amended but only in respect of events which had already occurred at the date the return was delivered. There is the normal 12-month period for amending the return but the return cannot be amended once the self-assessment return has been filed or the self-assessment filing date has passed (whichever is earlier). If the person is not required to submit a self-assessment return, the disposal of UK land return can be amended within 12 months of the 31 January following the tax year in which the disposal was made.

The standard enquiry regime applies for these returns and if there is an enquiry into a self-assessment return, then any return made under this legislation that is also shown on that return is deemed to be under enquiry too.

Residential property gain

A residential property gain has the meaning given to it in Schedule 1B TCGA 1992. It effectively means a chargeable gain accruing to a person on a disposal of residential property. A person disposes of residential property if they dispose of an interest in land where:

- The land consisted of or included a dwelling;
- The land subsisted for the benefit of land that consisted of or included a dwelling; or
- The interest in land subsists under a contract for the acquisition of land consisting of or including a building that is to be constructed or adapted for use as a dwelling (basically an off-plan purchase).

A dwelling in this context means a building which is used or suitable for use as a dwelling or in the process of being constructed or adapted for use as a dwelling. It does not include 'institutional buildings' which include hotels, prisons, hospitals, care homes, student accommodation (meaning halls of residence) and residential accommodation for school pupils.

Where land is mixed use, it is necessary to attribute the gain relating to the residential property. Firstly, you calculate the 'relevant fraction' which is the number of days in which the land consists of or includes a dwelling divided by the total number of days in the applicable period (being the day on which the interest was acquired and ending with the day before the disposal occurred). Secondly if there is land which falls within the definition above and land which does not in a single sale, the gain has to be adjusted on a just and reasonable basis.

Practical issues

The main issue is going to be education of taxpayers who are attuned to the self-assessment cycle to disclose their tax liabilities.

The second issue is going to be to find out about disposals at the time when they are made so that gains can be calculated and tax paid. There is going to need to be some delineation of responsibilities with conveyancers.

The final issue is going to be having sufficient information to be able to prepare returns and compute tax liabilities.

Contributed by Ros Martin

Will that created an interest in possession (Lecture P1176 – 14.56 minutes)

Summary – A mother's will conferred a life interest in her share of the family home, making it settled property within her brother's estate on his death.

Margaret Vincent's parents, Mary and Derek Hadden, together with Mary Hadden's brother, Ian Thom, decided to sell their respective homes and buy a house together. On 30 August 2015 they bought "Hopefield" in Somerset for £125,000. On completion of conversion works, they agreed an informal allocation of rooms for joint use and rooms for private occupation.

The brother contributed a larger proportion of the purchase price of the property and so it was agreed in a declaration of trust, that he owned 5/8th of the property as tenants in common with Margaret Vincent's parents who owned the remaining 3/8th as joint tenants.

Her parents executed mirror wills, whereby their share in the property would pass to Mary Vincent on the second death, but with the brother being allowed to continue living in the property, rent free for as long as he wished. During this time he would be responsible for the day-to-day running costs including water rates, insurance and maintenance repairs of an income nature. On his death, the brother's will left his 5/8 share in the property to Margaret Vincent absolutely.

Following her father's death, his share of the property passed by survivorship to her mother. When she died later the same year, Margaret Vincent was registered as the owner 3/8 of the property. From this date, she owned 3/8th of the property as tenant in common with her uncle. As agreed, the brother continued to live at the property.

Following the uncle's death, HMRC issued a determination assessing his estate to IHT on the whole value of the property, arguing that he had had an interest in possession in the remaining 3/8 of the property.

Margaret Vincent appealed arguing that her parents had only sought to permit her uncle to continue to reside at the property if they should pre-decease him and had never intended to confer an interest in possession.

Decision

The First Tier Tribunal concluded that Ian Thom held his 5/8th of the property as tenants in common with Margaret Vincent.

Her mother's will protected the uncle against a potential forced sale and but also gave him the right to occupy and enjoy the whole property. He paid all of the income expenses relating to the property, not just a 5/8th share. The Tribunal stated that this showed his knowledge and acceptance of Mrs Hadden's will.

The Tribunal found that, an interest in possession had been created and so IHT applied to the full value of the home.

Margaret Vincent had argued for a 10% discount against the valuation as HMRC's website guidance created a legitimate expectation that such a discount would apply when it states "For property or land shared with others… You can then take 10% off the share of the person who died." However, the First Tier Tribunal concluded that it had no jurisdiction to consider a claim of judicial review on the grounds of legitimate expectation or to rectify a will.

Margaret Vincent v HMRC (TC07432)

Administration

Valid notice given

Summary – Overturning the First Tier Tribunal's decisions, the Upper Tribunal found that notices issued were valid and that the taxpayers were liable to the penalties imposed by HMRC in the penalty notices that had been issued.

Under s8 TMA 1970, HMRC must give notice 'by an officer of the Board' where taxpayers are required to file a self-assessment return.

HMRC charged both taxpayers, Nigel Rogers and Craig Shaw, penalties for failing to file their returns on time. Both taxpayers appealed to the First Tier Tribunal. The Tribunal dealt with both appeals without a hearing.

The First Tier Tribunal concluded that the phrase "given to him by an officer of the Board" meant what it said; such notice should be signed by a named officer and evidence provided that showed that to be the case. The officer giving the notice needed to be identified in the notice because the return must be made and delivered by that officer. In other words, there must be evidence that the named officer had signed the notice or it must be otherwise made clear that he was "giving" it. HMRC challenged the First Tier Tribunal's conclusion arguing that the First Tier Tribunal was wrong to conclude that s8 TMA 1970 required a notice to file to be issued by a "flesh and blood" officer rather than a computer.

Decision

The Upper Tribunal disagreed with the First Tier Tribunal when it found that s8 TMA 1970 does not impose a requirement that an officer of the Board must be identified in the notice as the giver of the notice. The Upper Tribunal concluded that s8 imposes a substantive requirement that the giving of a notice must have been under the authority of an officer of HMRC.

The Tribunal noted that for the purposes of exercising their role, anything started by one officer could be continued by another. Further, under s113 TMA 1970 'Any notice … requiring any return to be made ….to an inspector or other officer of the Board may be issued or given in the name of that officer or, as the case may be in the name of the Board.'

The Upper Tribunal found that the notices issued were valid and that both Nigel Rogers and Craig Shaw were liable to the penalties imposed by HMRC in the penalty notices.

HMRC v Nigel Rogers, Craig Shaw [2019] UKUT 0406 (TCC)

Security required

Summary - Significant debts to HMRC coupled with the company's compliance failures for filing and late payments, meant that the Tribunal were satisfied that security should and would properly be required.

Bluechipworld Sales & Marketing Limited was incorporated on 2 June 2017. The directors of Bluechipworld Sales & Marketing Limited were the same individuals who were directors of a company that went into administration on 31 August 2017.

Bluechipworld Sales & Marketing Limited operated from the same business premises and had the same trade (electronic and telecommunication parts) as this company. The previous company owed HMRC in excess of £91,000 in relation to PAYE and NIC and £69,000 in relation to VAT;

In view of these debts and given the connections between the two companies, a “warning letter” stating that, in the absence of further information, security for VAT might be required was issued to the company on 19 September 2017 but no reply was received.

By 12 March 2018, returns for monthly periods October 2017, November 2017 and December 2017 were overdue which had led to a central assessment in the sum of £18,008 being issued but was not paid. As a result, HMRC required Bluechipworld Sales & Marketing Limited to give security as follows:

- VAT - £74,158;
- PAYE - £12,636; and
- National Insurance Contributions - £19,277.

The company appealed.

Decision

The First Tier Tribunal rejected the taxpayer’s submission that the decisions to require it to provide security for VAT and PAYE/NIC were ones that could not reasonably have been arrived at.

HMRC took into account relevant matters that were more than adequate to support a requirement to give security, specifically the previous company went into administration with significant debts to HMRC and the current company:

- had the same directors as the previous company;
- carried on broadly the same business as the previous company;
- was sent a warning letter in relation to VAT security and yet provided no further information to allay HMRC’s concerns; and
- was late in filing its VAT returns leading to a central assessment being raised.

The Tribunal found that there was a logical and coherent explanation of how the amount of security required had been calculated and the amount was proportionate to the risk.

The appeal was dismissed.

Bluechipworld Sales & Marketing Limited v HMRC (TC07477)

Late filing and UTR

Summary – A delay in receiving his self-assessment activation code meant that the taxpayer had special circumstances, resulting in the 12 month late payment penalty being cancelled.

On 1 December 2016, an interest in PXP Vietnam Emerging Equity Fund was sold realising a capital gain.

The investment in the Fund was made by Henry Irving's father on his behalf some 15 years earlier and was never held directly by Henry Irving, but rather with a wealth management firm, with which he had little contact.

Henry Irving claimed that he had never completed a tax return before, had no idea of his tax liability and got confused which year the sale related to for tax purposes.

Henry Irving failed to notify HMRC of his gain by 6th October 2017 and also failed to pay the CGT due by the due date of 31 January 2018.

On the 8 January 2019, Henry Irving registered under the self-assessment system notifying HMRC of his obligation to submit a tax return. He made five phone calls to the HMRC helpline. The first call was on 7th of December 2018 when he was told that he needed a unique tax reference (UTR) number to complete his tax return. He was informed that this would be sent in the post. By 18 December 2018, he had not received the UTR number. He called HMRC to follow up on the UTR the number. On 4 January 2019 after not receiving the UTR code, he called and sent another request letter. On 23 January 2019 he called to say he had not received an activation code and was informed that this takes 10 days to arrive.

The following penalty notices had already been issued:

- 2 March 2018: 30-day penalty - 5% of the unpaid tax;
- 31 July 2018: 6 month penalty - additional 5% of the unpaid tax;

By missing the 31 January 2019 deadline, he picked up a 12 month penalty - yet another 5% of his unpaid tax.

On the 12 February 2019 he settled the tax, paying £19,441,05 plus interest.

He appealed against the penalties issued.

Decision

The First Tier Tribunal stated that Henry Irving knew that the investment was made on his behalf and that he had received the benefit of that investment. The Tribunal stated that it would be sensible to assume there would be a tax liability on the profits. A reasonable person would have taken steps to find out and not waited 10 months before actioning the matter. As he worked for a company that provided financial advice, it would have been a sensible first step to consult one of his fellow employees to ask for advice.

He did make efforts to find out about his tax liability and to file returns but it was a year late. These are not the actions of a reasonable man and do not support a reasonable excuse. There is therefore no reasonable excuse.

Were there any special circumstances? The activation code was not sent by HMRC on time and it was common knowledge that, at the time, there were delays in sending out these codes and HMRC accepted that the code was late. When Henry Irving registered under the self-assessment system on 8 January, he should have received his UTR 14 days later on the 22 January. He should have received his activation code in January and would not have incurred a 12-month penalty if this had been received on time. The paperwork shows that he called on 26 January still requesting an activation code. He was clearly trying to sort things out and made five phone calls between 7 December 2018 and 26 January 2019 to HMRC requesting information on the UTR and code. He was delayed in submitting his return. Consequently, the Tribunal reduced the penalty payment by £972.05 representing the 12-month late payment penalty imposed on the 31 January 2019.

The other penalties were upheld.

Henry Irving v HMRC (TC07445)

Old age and holiday – a reasonable excuse?

Summary – With no reasonable excuse, nor special circumstances, the £1,600 late filing penalties were upheld.

Daisy Ncube's 2015/16 Notice to File was properly issued on 6 April 2016 and sent to the latest address at 368 Shannon Road, HU8 9RZ. The issue of the notice to file or the return is made by an automated service so HMRC was unable to produce a copy of the actual notices.

Her filing date was 31 October 2016 for a non-electronic return and 31 January 2017 for an electronic return.

However, her electronic return for the year was received late on 3 February 2018. This was more than a year late and so HMRC issued penalty assessments of £100, then £900 (3 months late and so for daily penalties of £10 per day up to a period of 90 days). Two further penalty notices were issued for £300 each, when the return was 6 and 12 months late. The penalties total £1,600.

On 19 November 2018, Daisy Ncube appealed against the penalties on the grounds that she:

- is an elderly lady who depends on her relatives to complete her tax returns;
- went to Canada to stay with her children as she was not able to work;
- was not working during this period and didn't think it necessary to file a tax return;
- is still not working and has no means of paying this penalty.

Decision

Daisy Ncube gave no dates for her trip to Canada but even if she had done so, it was clear to the First Tier Tribunal that she made no provision for the submission of her return as would the prudent person envisaged by the legislation. A reasonable person would exercise foresight and due diligence and engage an agent to deal with the simple task of submitting their tax return. Leaving without making such arrangements can be viewed as irresponsible in meeting deadlines laid down by law.

By her own admission, information provided through her tax return for 2015/2106, she did receive income from self-employment. This meant she was working and it was not correct to say she had no income and was not working.

The Tribunal stated that has been in self-assessment since at least 2007 that meant that she was considered to be an experienced and knowledgeable filer. The expectation from such a taxpayer was that their affairs would be in order and filings would be done diligently and on time.

If Daisy Ncube was having problems paying at this time, she could have contacted the HMRC's Payment Helpline (0300 200 3822) to arrange a Time to Pay (TTP) agreement where she could pay in instalments.

The Tribunal stated that they had sympathy with her circumstances and her age but this alone could not allow a reduction in penalties.

The appeal was dismissed

Daisy Ncube v HMRC (TC07448)

Overseas postal system problem

Summary – Penalties relating to the late filing were all dismissed due to a combination of lack of evidence being provided by HMRC and a reasonable excuse put forward by the taxpayer.

Mark Knewstubb moved from the UK to the Philippines in July 2008. HMRC's system had been updated to show his new address in Manila in June 2008.

2008/2009 was the first self-assessment tax return that Mark Knewstubb had ever had to submit but it was not received by HMRC in a satisfactory form until 18 February 2011. His 2009/2010 return was also received on this date. His 2010/2011 return was submitted on 5 January 2012, like the two earlier returns, it was a paper return.

With all three returns having been submitted late, HMRC charged penalties and it was these penalties that are the subject of this appeal.

HMRC claimed that they had sent the 2008/09 and 2009/10 penalty notices to Mark Knewstubb at his Philippines address but he claimed that he had not received them. He explained that the postal service in the Philippines was not reliable and that post often went missing.

By 21 February 2012, Mark Knewstubb had moved to Italy and had notified his new address to HMRC. HMRC had sent this fixed penalty notice to that Italian address but he claimed that he was not aware of this penalty notice until December 2018.

Decision

The First-tier Tribunal found as a fact that the taxpayer had not received the notices for 2009/10 and 2010/11. HMRC was unable to show the notices had been served on the taxpayer, although the tribunal accepted it was 'likely' the notices had been issued.

It also found he had not received the first penalty notice for 2008/09, but that he had received the second one. So the appeals against the penalties were allowed except for the second 2008/09 one. For this, given the notice had reached the taxpayer, the burden of proof fell to him to show he had a reasonable excuse for the late return.

The tribunal noted that the taxpayer had not submitted any returns before the 2008/09 one but 'discovered through his researches' while he was in the Philippines that he needed to do so. HMRC sent him a paper return but the taxpayer discovered he could submit online. He began the process but needed a pin code which HMRC would have to send by post. He hoped it would reach him before the 31 January deadline, but it did not. It was then too late to submit a paper form but he did so to ensure HMRC received a return for the year. The tribunal said this was the behaviour of a 'reasonable taxpayer'. He had allowed at least a month to register for online filing which did not seem unreasonable. The 'guilty party in the saga is the Philippines postal service'. HMRC had behaved 'perfectly properly' by sending the pin code through the post.

The taxpayer had a reasonable excuse so the appeal against the second fixed penalty was also allowed.

Mark Knewstubb v HMRC (TC07418)

Common causes of negligence claims (Lecture B1179 – 10.20 minutes)

This article considers why risk management is important and considers the impact that failing to have a good risk management culture and processes can have upon a firm. It will consider what can go wrong within a firm, look at common pitfalls and then takes a quick look ahead at futures articles that will consider what more can be done to minimise claims and their impact.

The costs of a claim

The cost of a claim is not just the excess that is payable. It also includes the lost fee earning time that is spent investigating the claim, talking to others within the firm and the lawyers handling the claim. This can be a substantial cost to the firm. As a result of a claim, premiums are also likely to be impacted

Don’t discount the potential for losing clients. A combination of dissatisfied clients talking publically about their feelings and bad publicity created where a case goes through litigation can have an adverse affect on other clients and their desire to remain with the firm.

Additional work will be required involving significant amounts of senior management and partner time dealing with the claim but also time will be needed to meet with other clients and disaffected staff as well as the time involved in implementing new procedures that may be required.

Not all bad news

It is important to treat any claim as a learning opportunity by identifying what went wrong and then use that event to put things right. Putting things right quickly can strengthen relationships with clients. "Near misses" where something goes wrong but serious problems were averted can be invaluable in this respect.

What can go wrong?

There are a number of areas where issues can arise:

- Technical Issues involves getting the law wrong and is usually managed by technical training and awareness;

- People Issues would normally be managed by recruitment and HR processes like appraisals and ongoing training;

- IT Issues are managed by good processes and systems being in place;

However, 80 to 85% of professional negligence claims are caused by common pitfalls that are discussed in this session as well as retainer issues that will be discussed in a future article covering engagement letters and the like.

Common pitfalls

Most people get the difficult, technical tax aspects right so what is it that goes wrong that subsequently results in a negligence claim?

Deadlines – Missing deadlines can be very costly. A lot of the work that we do is deadline based. Diary systems need to be clear. It is no good setting deadlines in personal diaries only. What happens if that individual is unavailable? Deadlines need to be in a firm-wide diary, accessible by all. There is no point putting a deadline in a diary for a complex piece of work to be completed by a certain date, if the deadline is put in on that date and that date alone. There needs to be a reminder, sufficiently in advance, so that the work can be done in time.

File Notes - A lot of claims arise as a result of a file note being missing, poorly filed, or poorly prepared. Filing needs to be kept up to date. If you have more than one person working on the file, if the information is not on the file, how can the other person know what has happened. Any advice given to the client needs to record the assumptions and facts upon which the advice is based. Tell the client that, if those assumptions are wrong, the client needs to advise you, because otherwise the advice cannot be relied upon. File notes are as important as any emails or letters to the client, particularly where more than one person is acting on the file.

Emails - The problem with emails is their immediacy. The thinking time has gone. The informality of emails can lead to ambiguity. If substantial advice is included in an email, time should be spent in preparing the email, reviewing it and, perhaps, peer reviewing it, before it is sent. Double-check the address to which the email is being sent. Ensure you have not sent "reply all" unless you really mean to. Check the email chain, do you mean to send the chain to the client?

Supervision - You may have a post signing policy whereby letters are reviewed by a senior member of staff before being sent out, but what about emails? Firms must have a policy in relation to emails. Some firms have a policy where junior staff can't send out emails; others have a "holding pen" where emails are reviewed before they are sent out. Others have a policy where junior staff have to get emails approved before they are sent, and then check emails after the event. Think carefully about what system you need in your firm.

The Rising Star –These individuals are vulnerable. They do not have enough experience to know what they do not know. They may make a mistake that is not picked up because they are not adequately supervised. A claim will follow and a potentially talented individual's future can be blighted. Even rising stars need careful supervision.

Communication - We are all encouraged to cross-sell. The Courts will expect information that comes into the firm to be known across the firm. You need to have systems to ensure that knowledge is imputed across the firm. Even small firms are vulnerable. How do you ensure that information imparted to department A is made available to department B? Perhaps have general client files and alerts when new information is recorded? A no blame culture is also important – people have to feel able to speak up when things go wrong or problems arise.

Looking ahead

This is the first in a series of four articles looking at professional negligence. Subsequent articles will cover:

- engagement letters, retainer issues – who am I acting for, what am I doing, what am I not doing? Fee issues and liability caps;
- how to reduce the chances of things going wrong, what processes and systems can be put in place to minimise the risk of a common pitfall arising;
- what to do when things do go wrong, identifying a complaint, a circumstance and a claim, how to deal with a problem and how to minimise the chance of a problem with your insurer.

Contributed by Karen Eckstein

Professional Negligence Solicitor and a CTA – Consultant with Womble Bond Dickinson
Author of book Managing Risk – A Guide for Accountants and Tax Advisers

Deadlines

1 February 2020

- £100 penalty and extended enquiry window if 2018/19 self-assessment tax returns not filed on or by31 January 2020
- SME CT payment due for periods ended 30 April 2019

5 February 2020

- Employment intermediaries report for quarter to 5 January 2020

7 February 2020

- VAT returns and electronic payment for 31 December 2019 quarter

14 February 2020

- Monthly EC sales list if paper return used
- Application to defer class 1 NICs for 2019/20, subject to approval of deferred employer(s)

19 February 2020

- PAYE, NIC, CIS, student loan due for month to 5 February 2020 if not paying electronically
- File monthly construction industry scheme return

21 February 2020

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

22 February 2020

- PAYE, NIC, CIS, student loan liabilities should have cleared HMRC's bank account

28 February 2020

- CTSA returns filed for companies with accounting periods ended 28 February 2019

News

Budget 2020

The Chancellor of the Exchequer, Sajid Javid, has announced that his first Budget will be on Wednesday 11 March 2020.

www.gov.uk/government/news/chancellor-launches-budget-process-to-usher-in-decade-of-renewal

Location of cryptoassets

HMRC's policy paper "Cryptoassets: tax for individuals" was updated on 20th December 2019 to include details on where such assets are located for tax purposes.

HMRC considers that throughout the time an individual is UK resident the exchange tokens they hold as beneficial owner will be located in the UK.

This means a person who holds exchanges tokens is liable to pay UK tax if they are a UK resident and carry out a transaction with their tokens which is subject to UK tax.

If an exchange token is co-owned between two or more beneficial owners then under s275C TCGA 1992, each beneficial owner's interest in the asset will be where that beneficial owner is resident. If one or more of the co-owners are UK resident, this will not affect the location for those co-owners who are not UK resident.

https://www.gov.uk/government/publications/tax-on-cryptoassets/cryptoassets-for-individuals

Business Taxation

Deductible expenses (Lecture B1176 – 23.24 minutes)

Summary – The taxpayer was denied professional fees against his employment income and self-employment expenses were held not to be genuine.

Alastair Jordan had extensive experience at a senior level in the provision of logistical services and equipment and had developed skills in property portfolio management.

Rapid Platforms Ltd was owned by Alastair Jordan's parents though he held a minority shareholding and was employed by the company for many years. His parents decided to sell the company and advised Alastair Jordan that he would be made redundant and so he should find alternative work. He commenced self-employment while still employed with the company

Alastair Jordan realised that it would be beneficial to incorporate his business and so A & C Jordan Ltd (ACJ Ltd) was incorporated on 19 February 2014.

He signed a contract of employment with Rapid Platforms Ltd for his director duties and a second contract for consulting services for which he received £5,000.00 in the year in question. Against this income for 2013/14, he claimed £120,000 of expenses creating a loss of £115,000. HMRC denied the expenses on the basis that the business was not run on a commercial basis with a view to making a profit.

As he had little in the way of provision for his retirement he sought the services of a professional to explain the options available to him. This advice cost him £25,000 and was reported as employment expenses in 2013/14. HMRC denied the employment expenses arguing that they were not deductible under s336 ITEPA 2003 as the expenses were not incurred wholly, exclusively and necessarily in the performance of his employment duties.

Alastair Jordan appealed.

Decision

Starting with the employment expenses, the Tribunal concluded that as the invoice related to advice of a personal nature, these were not incurred wholly, exclusively and necessarily in the performance of the duties of the employment.

The £120,000 related to 1,200 hours of work invoiced at £100 per hour. These services were performed between 19 February 2014 and 31 March 2014 during which time there were only 984 hours (41 days x 24 hours). The burden was on Mr Jordan to prove on the balance of probabilities that the work referred to in the invoice could genuinely have been carried out. The Tribunal stated that Alastair Jordan had failed to adequately explain what the "Value Adding Services" totalling £120,000 related to.

In the alternative, the Tribunal was satisfied that there was no commercial activity supporting the arrangement. A net loss over the period 19 February 2014 to 5 April 2014 with no further income reported in subsequent years does not amount to a commercial trade as required by s66 ITA 2007.

The appeal was dismissed.

HMRC indicated they were going to issue a penalty notice for inaccuracies of just over £11,000. However, in error HMRC failed to raise a penalty assessment and accordingly no penalty was payable by Mr Jordan.

Alastair Jordan v HMRC (TC07501)

R&D tax credit– lack of accounting records (Lecture B1176 – 23.24 minutes)

Summary – R&D tax credit claim was denied due to a lack of supporting evidence and failure to pay remuneration.

In November 2015, Teksolutions-Inc Ltd filed a tax return for the period 28 February to 21 October 2015, showing expenses of £246,500 and trading losses of £224,300. The expenses included £75,000 of salaries and wages, £62,000 of subcontractor payments, £30,000 of accountancy and audit fees, £24,000 of consultancy costs, £5,000 for entertaining and £12,000 of travel and subsistence.

A second tax return, for the period 28 February 2014 to 30 January 2015 contained similar figures, and gave expenses of £182,825, with trading losses of £174,025.

There was no tax return filed for 31 January 2015 to 27 February 2015.

Teksolutions made a claim for R&D tax relief in the tax returns to be made in the form of an R&D credit.

HMRC requested further details on the expenses and invoices to support the costs. The company responded and noted that they could not provide details as some suppliers had gone out of business. They also noted that in relation to the wages, salaries and sub-contractor payments there were no records as they had not yet been paid. The director of the company advised that the cash book recording payments to other suppliers had been thrown away. There was further lengthy correspondence between HMRC and the company director but no further evidence supporting the claim for R&D credit was provided. And so the matter was finally referred to the Tribunal.

Decision

The First Tier Tribunal dismissed the claim for R&D tax credit due to the lack of supporting evidence. In addition, none of the remuneration amounts had been paid and therefore were not allowable as qualifying R&D costs.

Teksolutions-Inc Limited v HMRC [2019] UKFTT 0683

Corporation tax instalments for very large companies (Lecture B1176 – 23.24 minutes)

HMRC has published new guidance, with examples, on the new corporation tax instalment payment dates for companies with taxable profits exceeding £20m. The new regime applies to accounting periods beginning on or after 1 April 2019.

Assuming a 12-month accounting period, instalment payments will be due:

- 2 months and 13 days after the beginning of the accounting period
- 3 months after the first instalment
- 3 months after the second instalment, and
- 3 months after the third instalment

A very large company

A very large company is one whose profits for the accounting period in question are at an annual rate of more than £20 million. The threshold is reduced proportionately if the accounting period is less than 12 months and where the company has one or more related 51% group companies.

Exceptions

A company does not have to pay by instalments for an accounting period even though the profits exceed the threshold of £20 million if the amount of its total liability for the accounting period is less than £10,000 (pro-rated if accounting period less than 12 months).

There is no first year period of grace for a very large company as there is for large company instalment payments.

Example 1

A company with a December year end in 20X1 will have to pay on:

14 March 20X1

14 June 20X1

14 September 20X1

14 December 20X1

A March 20X2 year end will pay on:

14 June 20X1

14 September 20X1

14 December 20X1

14 March 20X2

Accounting periods less than 12 months

If the accounting period is shorter than 12 months, the rules apply to ensure that the final instalment payment falls within the accounting period.

Subject to exceptions detailed below, the last instalment date will depend on which day of the month the end of the accounting period falls - if the accounting period ends on:

- the last day of the month, the last instalment will be due 14 days after the end of the preceding month
- a day for which there is a corresponding date in the preceding month, the last instalment falls 14 days after that date in the preceding month
- a day for which there is no corresponding day in the previous month, the last instalment is due 14 days after the last day of the previous month

Exceptions

If the last instalment date falls before the beginning of the accounting period, a single payment is due on the last day of the accounting period.

The first instalment date is 2 months and 13 days after the start of the accounting period. There is an exception to this is if this date falls on or after the date of the final instalment. If this occurs, the total liability is paid on the final instalment date.

The second instalment date is 3 months after the first, unless this falls on or after the final instalment date in which case the total liability is paid on the first and final instalment dates.

The third instalment date is 3 months after the second, unless this falls on or after the final instalment date in which case the total liability is paid on the first, second and final instalment dates.

Example 2

Instalment payment dates for an accounting period from 1 January 2020 to 30 March 2020. The accounting period ends on a date for which there is no corresponding day in the previous month.

There is no first instalment. This would have been 14 March 2020, that is 2 months and 13 days after the beginning of the accounting period. As this ends on the date of the final instalment, the whole liability is payable on the last instalment date of 14 March 2020.

Example 3

Instalment payment dates for an accounting period 1 January 2020 to 30 May 2020. The accounting period ends on a day for which there is a corresponding date in the previous month.

There is no second instalment as this would have been 3 months after the first instalment (14 June 2020). As this is after the final instalment date, the liability is payable over 2 instalments on 14 March 2020 and 14 May 2020.

Instalment payments for short accounting periods

If there is only one payment date, the whole of the CT liability for the period is due on that date.

If there is more than one instalment date, the amount due on the first instalment date is the lesser of the CT liability and the amount given by the formula:

3 x (CT liability/wm + wmd)

Where:

- 'wm' is the number of whole months falling within the accounting period
- wmd' is the decimal (calculated to two places rounded arithmetically where necessary) of the fraction R/30, where 'R' is the number of days in an accounting period outside the whole months represented by 'wm'

The amounts due on the second and third instalment dates are the lesser of the CT liability – B and the amounts given by the formula, B is the amount of the liability due to be paid on previous instalment dates.

The amount payable on the final instalment date is the CT liability – B.

Example 4

Working out instalment payments for a company with an accounting period 1 January 2028 to 31 July 2028 and Corporation Tax to pay of £3,100,000.

The formula becomes:

3 x (£3,100,000 ÷ 7) = £1,328,571

The smaller of company's total liability and company's total liability ÷ months in the accounting period x 3 is £1,328,571.

First payment:	£1,328,571
Second payment:	£1,328,571
Third payment:	£442,858

Guidance: Pay Corporation Tax if you're a very large company

Contributed by Joanne Houghton

UK property of non-UK resident companies (Lecture B1176 – 23.24 minutes)

HMRC's has issued guidance for the changes that are coming in this April.

From 6 April 2020, Non-UK resident companies including those who invest in UK property through collective investment vehicles will pay Corporation Tax instead of Income Tax on profits from UK property.

HMRC are automatically registering taxpayers for Corporation Tax who should be sent a Company Unique Taxpayer Reference (UTR). HMRC are advising that anyone who does not receive their UTR by 30 June 2020 or if they already have a Company UTR. Taxpayers must register with HMRC Online Services to file their Company Tax Return online. If using an agent or adviser, taxpayers will need to submit a new authorisation form to

Only taxpayers with a permanent UK establishment will need to register with Companies House.

Pre-6 April 2020 Income Tax losses

If the UK property business is reporting a cumulative loss that is chargeable to Income Tax, this will be carried forward for Corporation Tax and set off against future profits from the same UK property business or any Non-trade loan relationship profits relating to that UK property business.

Capital allowances

Any Capital Allowances pools as at 5 April 2020 will transfer to Corporation Tax without giving rise to a balancing allowance or a balancing charge. Capital allowances will need to be apportioned between Income Tax and Corporation Tax. (An example is given below)

Loan relationship rules

Remember, interest and other finance costs will now fall under the loan relationship rules, normally as a non-trading loan relationship deficit for the period.

Profits and losses from derivative contracts used as part of the UK property business are treated in a similar way to loan relationships. The credit and debit amounts of a derivative contract that have been entered into for the purposes of the UK property business are included in the calculation of the non-trading loan relationship profit or deficit for the period.

Corporate Interest Restriction will apply unless you are dealing with standalone companies or groups that have net deductible interest and other financing costs of less than £2 million per annum

Loan losses referable to a period before 6 April 2020

Taxpayers cannot claim relief for losses under a loan relationship where the loss is referable to a period where the company was not liable to pay Corporation Tax. This usually happens where a Non-UK resident company migrates to be a UK resident company.

Paying tax

A one-off transitional rule will apply so that the instalments for very large companies will not start until the second and next Corporation Tax accounting periods.

Where a company's only source of UK income after 6 April 2020 is expected to be income from the UK property business, no Income Tax payments on account for 2020/2021 and future tax years will be needed

Credit held on your company's Income Tax account

If a credit balance remains in the company's Income Tax account after all Income Tax liabilities for 2019/2020 and earlier years have been settled and the company's only source of UK income from 6 April 2020 is income from UK property, any credit balances will be repaid to the company. Taxpayers will need to tick the box on the 2019/2020 Non-resident Company Income Tax Return to claim a repayment of tax and provide the company's UK bank details to enable the repayment to be made securely.

www.gov.uk/guidance/paying-corporation-tax-if-youre-a-non-resident-company-landlord

HMRC example – Apportionment of writing down allowances

A company prepares accounts to 31 December each year. In the year to 31 December 2019 it made a UK property business profit of £150,000 and for the year to 31 December 2020, the company made a UK property business profit of £250,000. At 6 April 2019, the main Capital Allowances pool balance was £30,000.

On 6 April 2020, the company moves to the Corporation Tax regime and its first Corporation Tax accounting period runs from 6 April 2020 to 31 December 2020.

The company's taxable profit before capital allowances for 2019/20 are:

	£
270/365 x £150,000 (profits of 12 month period ended 31 December 2019)	110,959
96/366 x £250,000 (profits of 12 month period ended 31 December 2020)	65,574
Total	176,533

The Capital Allowances for 2019/20 will be:

6 April 2019 to 5 April 2020	£
Main Capital Allowances pool balance at 6 April 2019	30,000
Capital allowances available (£30,000 x 18%)	(5,400)
Main Capital Allowances pool balance at 5 April 2020 (£30,000 – £5,400)	24,600

The taxable profits liable to income tax for 2019/20 will be:

6 April 2019 to 5 April 2020	£
Profit	176,533
Less: Capital Allowances	(5,400)
Taxable Profit	171,133

Moving to the corporation tax regime from 6 April 2010, the company's taxable profit before capital allowances for the accounting period from 6 April 2020 to 31 December 2020 is:

	£
270/366 x £250,000 (profits for the 12 month period ended 31 December)	184,426

The Capital Allowances calculation will be as follows:

6 April 2020 to 31 December 2020

Main Capital Allowances pool balance at 6 April 2020	24,600
Capital allowances available (24,600 x 18% x 270 days/366 days)	(3,267)
Written down value at 31 December 2020 (24,600 – 3,267)	21,333

The taxable profits liable to corporation tax for the period 6 April 2020 to 31 December 2020 are:

6 April 2020 to 31 December 2020	£
Profit	184,426
Less: Capital Allowances	(3,267)
Taxable Profit	181,159

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/857821/Apportionment_of_written_down_allowances_example_3.docx.pdf

Restricted consortium relief losses

Summary - CTA 2010 s 146B applied to reduce the proportion of losses that could be surrendered under consortium relief.

For consortium relief purposes, Devin, CKI1 and Eagle were all members of a consortium, and between them they owned UKPNHL. The surrendering company was Hutchison 3G and the link company was CKI1. Devin was owned by HEH; and CKI1 was owned by CKI2, itself owned by CKI3.

The consortium had completed the acquisition of a business and was restructured. As part of the restructuring, the articles of association of UKPNHL were amended so that: the CKI companies had 74.6% of the voting rights; the threshold to pass shareholder resolutions was increased to 75%; and CKI13 and HEH entered into a voting agreement by which CKI3 contracted not to exercise its vote without the consent of HEH.

The issue was whether CKI3 had been deprived of its voting power, so that the CKI companies no longer held 74.6% of the voting rights and CTA 2010 s 146B applied. The UT quoted the Budget statement which explained that the provision had been introduced 'to strengthen rules designed to ensure that access to consortium relief is only given in proper proportion to the member company's involvement in the consortium'.

Decision

The Upper Tribunal observed that s 146B(2)(b) applies where there are arrangements in place 'which enable a person to prevent the link company, either alone or together with one or more other companies that are members of the consortium, from controlling the claimant company'. It added that 'control' is defined as the power of a person to secure that the affairs of a company are conducted in accordance with his wishes. It concluded that arrangements might prevent a consortium company from '"controlling" a company in either of two situations. The first is if the consortium company holds sufficient voting power to pass resolutions under the company's constitution, but the arrangements impose an external constraint upon the exercise of that voting power so that the consortium company cannot be certain that its wishes will prevail… The second situation is if the arrangements operate internally under the company's constitution so that the voting power of the consortium company is inadequate to assure it of passing the resolutions necessary to give effect to its wishes.' The Upper Tribunal found that the existence of the 75% voting threshold enabled Eagle and Devin to prevent the CKI companies from having the power to secure that the affairs of UKPNHL were conducted in accordance with their wishes, because even with 74.6% of the voting power, the CKI companies could not be sure of being able to pass a resolution of UKPNHL.

Why it matters: Agreeing with the FTT, the Upper Tribunal found that the 'but for the existence of ' test in s 146B(3)(a) does not require a loss of pre-existing control or a factual investigation of the process by which arrangements were put into place. In the present case, the arrangements constituted by the 75% voting threshold satisfied the requirements in s 146B(3)(a) 'simply because, had that provision not been in the articles of UKPNHL, the CKI companies would, at the relevant time, have controlled that claimant company'.

HMRC v South Eastern Power Networks and others [2019] UKUT 367

Tax Journal (10 January 2020)

Google to end 'double Irish' structure

Google's parent company, Alphabet, has announced a restructure which will see the end of its intellectual property licensing scheme, often referred to as the 'double Irish, Dutch sandwich', which uses Irish and Dutch subsidiaries to shift profits away from the US and to a large extent from the EU. According to Reuters, filings by Alphabet in the Netherlands indicate the ending of these arrangements 'as of 31 December 2019 or during 2020'.

The change has been brought about by a combination of Ireland's decision in 2014 to phase out the 'double Irish' structure under which Irish companies were permitted to hold tax residence in low-or no-tax jurisdictions, and the US Tax Cuts and Jobs Act, which since January 2018 has enabled US companies to repatriate profits taxed overseas without suffering further US taxation.

Tax Journal (10 January 2020)

VAT

Digital newspapers (Lecture B1176 – 23.24 minutes)

Summary – Digital editions of The Times and The Sun are newspapers that qualify for zero rating.

News Corp UK & Ireland Limited is the representative member of a VAT group that publishes, principally, The Times, The Sunday Times, The Sun and The Sun on Sunday.

The main issue in this appeal was whether digital versions of newspapers published by News Corp UK & Ireland Limited were 'newspapers' under Item 2, Group 3 Schedule 8 VATA 1994 and were therefore zero rated for VAT purposes.

This appeal concerned a number of digital versions including an e-reader edition, a tablet edition, a website edition and a smartphone edition. Additional content is available with each of the editions including a number of news and sports videos and links to podcasts.

It was common ground that it is an essential characteristic of a newspaper that it is produced in periodic editions rather than being rolling news such as is available on websites such as the BBC or competitors such as The Guardian, which are updated continually throughout the day. The First Tier Tribunal concluded that the content of the digital editions was "fundamentally the same or very similar" to the printed editions.

It was also common ground that the digital editions constituted a supply of services.

The First Tier Tribunal found in favour of HMRC concluding that, although the content of the digital and printed editions was 'fundamentally the same or very similar', the digital editions provided services rather than goods and the legislation relating to zero rating was confined solely to goods.

News Corp UK & Ireland Limited appealed to the Upper Tribunal.

Decision

The Upper Tribunal concluded that, properly interpreted, there was nothing in Group 3 to indicate that it applied only to goods. What mattered was the digital versions met the description of "newspaper" but also did the "always speaking" doctrine apply.

The Upper Tribunal agreed with the First Tier Tribunal that the digital versions "were essentially …….the same as or very similar to the newsprint editions". They went on to state that the purpose of the legislation was to 'promote literacy, the dissemination of knowledge and democratic accountability by having informed public debate'. The digital versions satisfied this requirement. When drafted back in 1972, digital newspapers did not exist but such products now carry out the same or very similar functions as a printed version. The introduction of a digital newspaper was exactly the type of technological development, not contemplated when the legislation was passed, which the 'always speaking' doctrine was intended to address.

The Tribunal concluded that the digital editions not only fulfilled the legislative purpose of zero-rating but also had the essential characteristics of a "newspaper". They were therefore "newspapers" and so were zero-rated.

The appeal was allowed.

News Corp UK & Ireland Limited v HMRC [2019] UKUT 0404 (TCC)

Church bar (Lecture B1176 – 23.24 minutes)

Summary – A member of the congregation *who ran the church's social bar, was in business on her own account and liable to register for VAT.*

Marites Salabit and her mother were members of the congregation at their local church. The parish priest and her mother told her that somebody needed to operate the bar of the church social club. She agreed to do this to help the church and its wider congregation.

The then parish priest said that the arrangement needed to be put on a formal basis and gave Marites Salabit a document titled "management contract" to sign. She signed this on 28 February 2013 agreeing that she would pay rent of £625 a week to the church and that she would be responsible for paying suppliers, staff as well as the TV licence and Sky TV. She understood that she was responsible for repairs/maintenance to the bar and that she would be liable if anything went wrong. The premises licence was transferred to her in October 2013;

The bar was open 7 days a week from midday to 10pm serving drinks and light meals. Marites Salabit would open up on most days. On weekdays, she would then go to work as a housekeeper and paid parishioners would serve behind the bar. Marites Salabit would then return to the bar to "close up". Throughout the day, she would monitor the bar by way of a camera. At weekends, she would serve behind the bar.

Marites Salabit did not receive any wage from the church for operating the bar. She understood that if the bar made a profit that was hers to keep. Bar takings were paid directly into her personal bank account.

HMRC argued that Marites Salabit was operating the social club bar as a business in her own right, and should have been registered for VAT between 1 April 2014 and 31 December 2015. HMRC issued assessments to collect VAT of nearly £11,000.

Marites Salabit appealed, maintaining that she was simply a manager of the social club bar and, accordingly, was not liable to register for VAT and so had no liability to VAT. It was the church who should have been VAT registered.

Decision

The First Tier Tribunal found that, although her motivation for running the social club bar was to help the church and its congregation, the contract and the agreed arrangements showed that she was in business on her own account and so liable to register.

The appeal was dismissed.

Marites Salabit v HMRC (TC7450)

Special method denied

Summary - The school's claim for judicial review failed; HMRC were entitled to withdraw their agreement going forward as the original agreement gave HMRC a right to review and amend the agreed method in the future.

The School supplied home study distance learning materials that included the supply of training manuals. Viewed in isolation, the supply of the training manuals would be zero-rated while the supply of education or training services would be standard- rated.

Back in 1999, the school and HMRC agreed a method to apportion its fees between standard and zero-rated supplies and this method continued until 2009.

However, following the House of Lords decision in HMRC v The College of Estate Management where the supplies were held to be wholly taxable supplies, HMRC withdrew the agreed special method. Initially the withdrawal was made on a retrospective basis but HMRC came to accept that withdrawing the method retrospectively was unfair as the School had a legitimate expectation that the special method would not be withdrawn with retrospective effect.

The School appealed against the decision to remove the special method.

Decision

The Upper Tribunal stated that the school needed to establish that HMRC had made an unambiguous and unqualified representation that they would not collect tax that was due as a matter of law. The fact that there was a letter confirming the special method, or that HMRC had over the years confirmed the use of that method, was not enough.

The Upper Tribunal concluded that HMRC had made it clear from the start that, unless and until it withdrew from the arrangement, it would apply the special method that had been agreed. The Upper Tribunal confirmed that the agreement letter gave HMRC the right to review, amend or withdraw the arrangement at any time.

The Upper Tribunal found that the school did not have a legitimate expectation that HMRC would allow a transitional period on withdrawal of the agreement.

Given HMRC's express power to terminate the arrangement "at any time" , the Upper Tribunal denied the School's claim for judicial review stating that they considered that such a claim would have no realistic prospect of success.

The Queen on The Application Of Metropolitan International Schools Ltd v HMRC [2019] UKUT 0407 (TCC)

Chips as vouchers (Lecture B1176 – 23.24 minutes)

Summary – Chips bought by customers were face value vouchers to be treated as credit vouchers; dancer redemption charges were a taxable supply while employee charges were not.

The appellants in this appeal were separate companies within the same group, each with their own VAT registration. Each company operates as licensed "lap dancing" or "table dancing" clubs in various cities around the country.

This appeal is concerned with the correct VAT treatment for transactions involving what are known as "Chips".

In summary, this is how the system operates:

- Customers buy chips, from the clubs' Chip sellers, with a face value of between £10 and £100 each. The price paid for the Chips is face value plus a 20% premium.
- The customers then use the Chips to pay self-employed dancers for performing dances in VIP booths. The suggested rate charged is £500-600 per hour, the standard industry rate.
- Once the price is agreed, the dancer must notify the club of the length of time they wish to use a booth but is not required to notify the club of the amount she has negotiated as a fee. The dancer pays the club a flat rate fee for use of the booth.
- Dancers redeem the Chips for cash from the clubs. Most of the companies redeem Chips at face value. However, the London club charges the dancers 20% of the nominal value of the Chips. Club employees, such as bar workers and Chip sellers, who are given Chips by way of tips are charged a fee of 40% on redemption. (Clubs outside London are smaller and dancers are local. In London the club is much busier and dancers are more transient. It would not be practical to keep a check on dances being performed in London. This is also how the clubs' competitors operate both in and outside London).

There were two issues to decide in this case. In order to illustrate the issues and the arguments the tribunal helpfully referred to a £100 Chip issued to a customer. This would have cost the customer £120 on their credit or debit card, and would have been redeemed in the London club by dancers for £80 or employees for £60.

1. The VAT treatment on the supply of Chips to customers by the clubs. HMRC argued that they were taxable on the full amount paid by the customer. The companies argued that the Chip payments were exempt as security for money (Item 1 Group 5 Schedule 9 VATA 1994) or, were credit or face value vouchers (Schedule 10A VATA 1994) and so only the consideration of £20 over and above face value was taxable.
2. The VAT treatment on redemption of Chips by dancers and employees in the London club. HMRC sought to treat the20% or 40% fee charged to dancers and employees on redemption as consideration for a taxable supply of services The London company argued that there was no taxable supply.

Decision

The First Tier Tribunal concluded that Chips were security to receive services from dancers in the club, and not for the payment of money. Buying a Chip did not secure payment of money as the Chips were non-refundable by the clubs. On purchase, the Chip simply gave the customer rights to obtain entertainment from dancers. The buying of Chips by the customer was not an exempt supply.

It was accepted by both parties, up to 10 May 2012, that Chips were face value vouchers for the (10A VATA 1994) and also credit vouchers under paragraph 3 Schedule 10A. Para 3 treats only the excess above face value as a taxable supply. Hence it would only be the £20 in excess of the £100 face value of a Chip purchased by a customer using a card that was taxable.

From 10 May 2012, para 7A came into force for vouchers issued from that date. From that date, para 3 should be disapplied for “single purpose vouchers” and the whole £120 should be chargeable to VAT. The Tribunal stated that Chips were face value vouchers because they represented a right to receive entertainment from dancers taxable at a single rate of VAT. The fact that a Chips may also be used to tip a dancer or employee because it has a value in the hands of a dancer or employee did not affect that analysis.

The Tribunal concluded that Chips were face value vouchers, treated as credit vouchers:

- Up to 10 May 2012, output tax was due on the excess over face value paid by customers (£20);

- From 10 May 2012, Chips became single purpose vouchers and so output tax was due on the full £120 paid.

The Tribunal concluded that:

- The 20% redemption fee charged to dancers was consideration for a taxable supply of services. The 20% charged was how the company charged fees to dancers in return for providing facilities and services to enable dancers to earn money. It was only because it was impractical in the London club to charge dancers a fee per dance that a redemption fee is charged to dancers.

- The 40% redemption fee charged to employees was not consideration for a supply of services. Employees obtain access to the club as employees. The club did not provide facilities to employees enabling them to earn tips. The Chips were tips received in the course of their employment and as such were employment income. The charge, although high, was for the encashment services and inextricably bound up with the employment relationship. The deduction was not consideration for a supply of services by the employer to the employee. The appeal was allowed in relation to the employees.

Romima Limited, Platinum Lace Trading Limited, Bright Crew Limited, Rocco Mana Limited, The Aviary (Leicester) Limited v HMRC (TC07494)

Advice for paying directors' bonuses **(Lecture B1176 – 23.24 minutes)**

Summary - Input tax on remuneration tax planning fees was deductible as it was directly linked to the purposes of a business.

In March 2012, Taylor Pearson (Construction) Ltd rewarded its directors with bonuses of £50,000 each. Appreciating that this might not be the most tax efficient way to reward staff, the company engaged a tax adviser to advise on a more tax efficient approach.

The scheme suggested included an issue of shares to the directors and that share issue is the subject of a separate appeal.

HMRC denied a claim for input VAT on the advisory fees arguing that the services were not for the purposes of the company's business. HMRC claimed that the fees were for the exempt purpose of issuing share capital. In addition, they argued that the services had no direct and immediate link to Taylor Pearson's taxable supplies.

Decision

The First Tier Tribunal rejected HMRC's argument that the advice was used for the purposes of issuing share capital. The Tribunal concluded that the company's objective in using the scheme was to avoid the payment of Class1A NICs, and to reward and incentivise its directors in a tax-free manner. The services provided were thus tax advice in relation to the provision of employment rewards.

The Tribunal also rejected HMRC's argument that there was no immediate link with the purposes of the business. The Tribunal stated that the reward and incentivisation of employees is one of the more obvious overheads of a business that is treated as a cost component of the company's overall economic activities. The Tribunal highlighted that in the Doran Bros case the Tribunal held that the advice received was analogous to payroll services, which would be an overhead of the business. This case was very similar. HMRC has not appealed this case and not surprisingly this Tribunal came to the same conclusion. The incentivisation of employees, even though in this case they were directors and shareholders of the company, had a direct and immediate link to the purposes of the business.

The appeal was allowed

Taylor Pearson (Construction) Ltd v HMRC (TC07464)

VAT saving tips with group registration **(Lecture B1180 – 12.46 minutes)**

Sole traders and partnerships

The opportunities for group registration increased on 1 November 2019. In some cases, an unincorporated business can now join a group i.e. a sole trader or partnership business. Until this date, only the following entities could join a group:

- An incorporated business, including an LLP; and
- If it is established in or has a fixed establishment in the UK.

Note - there is no problem with a company incorporated outside the UK belonging to a VAT group as long as it has a fixed establishment in the UK. See VAT Notice 700/2, paras 2.2 and 10.4.

The two main conditions for non-corporate bodies being able to join a group from 1 November are as follows:

1. The business must be entitled to register for VAT as a stand-alone business, i.e. it is making or intending to make some taxable supplies. This is different to a corporate body where a dormant company can be included in a group or a company only making exempt supplies.

2. It must control all of the corporate bodies in the group, which usually means owning 51% or more of the share capital in the other companies i.e. similar to the parent/subsidiary company relationship for corporate bodies.

Example 1

Bill and Ben trade as a partnership, offering management consultancy services in the travel industry. They each own 30% of the shares in a travel agent Holidays Ltd.

The partnership and company cannot form a VAT group because Bill and Ben own the shares individually. If they owned 60% of the total shares as a partnership, it would be possible to apply for a group registration.

Example 2

Mary owns 100% of the shares in both ABC Ltd and DEF Ltd, earning dividends from both companies. She has no other income.

Mary cannot form a VAT group between herself and the two companies because she is not making any taxable supplies (or intending to make taxable supplies) so is not eligible to register for VAT as a sole trader. Dividend income is outside the scope of VAT. But the two companies could form a group because of Mary's control of them both. VAT Notice 700/2, para 2.9

Why form a VAT group?

Important control conditions need to be met before a VAT group is formed, which means that one member (or a non-group member) controls all of the other members. In many cases, this will be a typical parent company and subsidiary arrangement, but it is also acceptable if all members are controlled by an individual person or group of persons operating as a partnership.

Benefit 1 - save time and administration costs.

Only one VAT return is submitted for the whole group, saving the need for each company to submit its own VAT return. Under MTD, links between the VAT totals for each group member to the consolidated VAT return for the group should be done by electronic means i.e. rather than cut and paste.

Benefit 2 - trading between group members is ignored for VAT purposes.

No output tax is charged on inter-company supplies. This can produce a VAT saving if a member receiving goods or services from a group member is partly exempt.

VAT Notice 700/2, para 2.3

Example 3

ABC Ltd is partially exempt because it makes exempt supplies of financial services. DEF Ltd makes an annual management charge of £100,000 to ABC, as a contribution from ABC for shared overheads paid by DEF. If the two companies are not in a VAT group, the £20,000 VAT charge by DEF Ltd would be partly input tax blocked for ABC because it is a partially exempt business.

Note – for partial exemption purposes with a VAT group, it is necessary to check the link between an expense from a supplier and the third-party income it generates from customers outside of the VAT group, rather than any onward supply to a group member. Also, the partial exemption de minimis limits apply to the group as a whole i.e. each member does not get its own de minimis limit.

Benefit 3 – VAT saving opportunity for some charities

There is no problem with a company joining a VAT group that only has exempt or non-business income. And there is no problem if the only taxable supplies being made are within the circle of the group. This arrangement can produce a VAT saving for some charities.

Example 4

Good Causes Ltd is a registered charity which only receives income from legacies and donations, plus the profits made by its trading subsidiary, Raise Funds Ltd. The latter company makes an annual charge for management services of £100,000 to the charity for shared overheads.

Raise Funds Ltd has to register for VAT because its annual taxable sales exceed the registration threshold of £85,000. But if it forms a VAT group with Good Causes Ltd, the £100,000 recharge is outside the scope of VAT, avoiding £20,000 VAT being charged to Good Causes Ltd which it could not claim as input tax because it has no taxable sales.

In situations such as this, VAT returns submitted by the group will be 'nil' returns if the group earns no taxable income from customers outside the VAT group. VAT Notice 700/2, para 2.5

Warning - joint and several liability

A potential disadvantage of a VAT group is that each member is jointly and severally liable for the VAT debts of the group to HMRC. This might be a downside if, for example, one group member owns a big property asset. If a trading company in the group has financial problems and fails to pay its VAT liability to HMRC, the property could be at risk. (HMRC Notice 700/2, para 2.1).

Contributed by Neil Warren