Tolley®CPD

January 2018

Disclaimer

Tolley CPD takes every care when preparing this material. However, no responsibility can be accepted for any losses arising to any person acting or refraining from acting as a result of the material contained in these notes.

CONTENTS

Personal tax

Mileage allowance relief

Summary – A lack of supporting documentation left the Tribunal with little choice but to dismiss the taxpayer's claim for mileage relief.

This case has taken a number of years to be heard with the first listing being in January 2011. After a number of failed attempts due ill health, this case has finally been heard in 2017.

On 27 July 2006, Eamon O'sullivan's 2005-06 self-assessment return was submitted online. He recorded that his only source of income was from his employment with Westley Plant Ltd, for which he received gross total of £65,652, after tax deducted under PAYE of £18,218. The return recorded under box 1.32 "travel subsistence" of £9,914. Box 1.40 (entitled "Additional information") included an explanation that:

> "Box 1.32 represents the cost of travel to temporary workplaces using privately owned vehicles – please see the additional information attached to this tax return for details of mileages/sites/vehicles used etc"

Following an enquiry into Mr O'Sullivan's affairs who failed to deliver requested supporting documentation, HMRC looked to disallow all of the mileage claims in two tax years as:

- 2005-06 - £9,914;
- 2004-05 - £11,912.

They claimed that the business records maintained by Mr O'Sullivan that formed the basis of the figures reported in his returns were inadequate, and so the claim for travel and subsistence costs could not be substantiated.

Mr O'Sullivan appealed. The grounds of appeal as stated on the Notice of Appeal are stated as follows:

> "The decision is wrong because I did use my own transport to go [sic] work the company I was working for (Westley Plant Ltd) have told the Revenue lies because they unfairly dismissed me and I went to tribunal and the [sic] paid me a settlement as the [sic] acted unlawfully. This is there [sic] way of getting back at me. I have appealed on a number of occasions every time Mr Baines ignored my appeals."

Decision

Since the main ground of appeal was that Westley Plant had lied and provided false information, the Tribunal decided the only way to dispose of the main ground of appeal was to set aside any information provided by Westley Plant in the course of the enquiry. The decision reached was based on examining the evidence provided by Mr O'Sullivan alone in the course of the enquiry, and the subsequent representations after the lodgement of the notice of appeal.

Mr O'Sullivan asserted that he used his own transport to go to work. At each juncture when he was asked for supporting evidence for his claims, assertions were made instead of production of evidence. He had had been given many opportunities over a protracted period to supply the evidence but failed to do so.

The Tribunal found that he had failed to meet the burden of proof at the minimum level to produce evidence that the expenses so claimed had in fact been incurred. Given that they could not establish that the travel expenses so claimed had been incurred as a matter of fact, the claim of mileage allowance relief had no factual basis and the appeal dismissed.

Eamon O'sullivan v HMRC (TC06222)

Company cars - advisory fuel rates from 1 December 2017

HMRC has published revised advisory fuel rates for company cars, applying from 1 December 2017. The rates are to be used only where employers either reimburse employees for business travel in their company cars, or require employees to repay the cost of fuel used for private travel.

Employers can use the old rates for up to one month from the date the new rates apply.

Engine size	Petrol - per mile	LPG - per mile
1400cc or less	11 pence	7 pence
1401cc to 2000cc	14 pence	9 pence
Over 2000cc	21 pence	14 pence

Engine size	Diesel
1600cc or less	9 pence
1601cc to 2000cc	11 pence
Over 2000cc	13 pence

Hybrid cars are treated as either petrol or diesel cars for this purpose.

www.gov.uk/government/publications/advisory-fuel-rates

Footballers' termination payments

Summary - Payments made on termination of employment were not earnings from employment.

On 9th March 2009, Mr Palacios entered into a fixed term contract of employment with Tottenham Hotspur Football & Athletic Co. Limited that was due to expire on 30th June 2014.

On 28th July 2009, Mr Crouch entered into a fixed term contract of employment with Tottenham Hotspur Football & Athletic Co. Limited that was due to expire on 30th June 2013.

Provisions permitting early termination only by mutual agreement of the parties were imported into both players' employment contracts under FIFA and FA rules.

In 2011, Tottenham Hotspur needed to reduce its wage bill, as its commercial income had declined since it had not been involved in the Champions League that season. As a result, it sought transfers for the players. Both ultimately agreed to transfer to Stoke City, in return for lump sums to be paid to them by Tottenham Hotspur.

The question was whether these payments were general 'earnings from an employment' ss 9 and 62 ITEPA 2003 so that they were taxable and subject to NICs, or payments 'received directly or indirectly in consideration or in consequence of, or otherwise in connection with the termination of a person's employment' under s 401 ITEPA 2003 so that the first £30,000 was exempt and no NICs were due.

Did the fact that the players' employment contracts included express clauses allowing for the early termination of their fixed terms by mutual consent mean that the agreed termination payments were 'from an employment'?

Decision

The Upper Tribunal said that the real question was whether it would be right to regard an express clause in an employment contract allowing consensual termination of a fixed term, but not providing expressly for any payment as part of such an arrangement, as being equivalent to a 'payment in lieu of notice' clause like that found in EMI. The Tribunal thought not.

The true distinction was between cases where the entire contract of employment was abrogated in exchange for the termination payment (as in Henley [1950] 1 All ER 908), and cases where the payment was made in pursuance of a pre-existing obligation to make such a payment arising under a contract of employment.

The Upper Tribunal noted that, under HMRC's view, any contractual provision allowing early consensual agreement for a termination is sufficient to make the termination payment made under the resulting agreement 'from an employment'. This would mean that almost every termination payment agreed in respect of a fixed term contract would be caught, as the contract would always contain an express or implied right to agree an early termination.

Finally, the Upper Tribunal firmly rejected the contention that the position may be different if one of the parties is under pressure to agree the termination, adding that such pressure will always be present in such negotiations.

HMRC v Tottenham Hotspur Limited UT/2016/0157

Ordinarily resident for tax credits

Summary - The First Tier Tribunal had applied the correct legal test when deciding that the appellant's husband had been 'ordinarily resident' in the UK.

In 2008, Henrietta Arthur married her husband, Eric, in Ghana. At the time, she was living in Cheshire while her husband was living in Ghana.

She visited him there in August 2009 and became pregnant with their first child. Mr Arthur joined his wife in the UK a few weeks before the birth but returned to Ghana in June or July 2010,

In August 2010, Mr Arthur said that he had obtained indefinite leave to remain in the UK when he received a ‘Family Member of an EEA National resident’ document. In October 2010, he came back to the UK. His witness statement stated that he came back to the UK to assist his wife in moving to London. She became pregnant again. On 4 June 2011, their second child was born.

Mr Arthur went back to Ghana on 16 July 2011, but he was in this country again from the beginning of October. He continued to live with Mrs Arthur in London into 2012, claiming Jobseeker's Allowance between January and March.

On 3 March 2012, however, he returned to Ghana. He explained in his witness statement that this was "after months of job searching without success".

Mr Arthur was shown as being registered to vote at the Cheshire address from October 2010 and at the London address from October 2011.

Henrietta Arthur sought to make individual claims for tax credits and not to make a claim for tax credits jointly with her husband for the tax year 2011-2012. The success of such a claim depended on whether her husband was 'in the United Kingdom' within the meaning of s 3(3)(a) of the 2002 Act on 6 April 2011, the start of the relevant tax year, which turned on whether the husband was 'ordinarily resident' in the UK under reg 3(1) of the Tax Credits (Residence) Regulations 2003 SI 654/03.

The First-tier Tribunal concluded that he had been 'ordinarily resident' in the UK on 6 April 2011, and so she was not entitled to tax credits as a single claimant. The Upper Tribunal upheld the decision and so Mrs Arthur appealed.

Decision

The Court of Appeal said that the First Tier Tribunal had not misdirected itself as to the legal test it had to apply and actually had in mind and had sought to apply the guidance as to the present law.

By 6 April 2011, the husband had been living with the claimant and daughter in the UK for about six months. For most of that time, he had also had a job in the UK and, although he was in the event made redundant a couple of months later, there no evidence that he knew that that was in prospect on 6 April. He had obtained indefinite leave to remain in the UK and was included on the voter's roll. The Court of Appeal concluded that there was sufficient material before the First Tier Tribunal to have reached the conclusion that the husband had been 'ordinarily resident' in the UK.

The appeal was dismissed.

Mrs Henrietta Arthur v HMRC [2017] EWCA Civ 1756

Capital Taxes

Falling share price causing insufficiency of funds

Summary – The taxpayer failed to discharge his CGT liability by the relevant date due to an insufficiency of funds "attributable to events outside [his] control" but remedied his failure without unreasonable delay.

Mark Pearson was the CEO and majority shareholder in Global Voucher Group Limited. In June 2014, he sold his shares to Monitise plc in exchange for shares in Monitise plc that were to be issued to him over a two year period. Assuming that all contingencies were satisfied, the value of the shares was approximately £55 million.

Under the sale and purchase agreement Mark Pearson was required to maintain an escrow account to provide security to Monitise plc for certain contingent liabilities. Those agreements required Mark Pearson to sell such number of his initial consideration shares as would generate aggregate net proceeds of £13 million and then for those funds to be held in escrow pending their release in specified circumstances.

Between June and September 2014, he sold a little under half of his initial consideration shares raising proceeds of approximately £6 million which were placed into the blocked account. He did not sell any further shares because the Monitise plc share price had begun to fall dramatically, falling in total by over 90%. He had planned to sell sufficient shares to generate the £13 million required under the contract plus enough to settle his CGT liability.

The share disposals gave rise to a CGT liability of £1.8 million that was due on 31 January 2016 but which was not discharged until July 2016 as Mark Pearson did not have access to funds until this time. As a result of failing to make the above payment within 30 days of the date when it became due, he became liable to a penalty of £91,644.00 unless he could satisfy the Tribunal that there was a reasonable excuse for his failure.

At the hearing, he outlined the various steps that he took in the period after September 2014 to acquire the funds by which he could discharge his capital gains tax liability. In summary, those steps involved prolonged negotiations with Monitise in which he sought to obtain the release of the monies in the blocked account or to repurchase his company from Monitise using borrowed monies. The negotiations with Monitise followed a tortuous path and led to him incurring significant legal fees. In order to pay those fees and discharge an earlier tax liability, he was ultimately forced to sell his house in December 2015 and, since then, he has been living in rented accommodation.

The dispute in this case turned on whether Mark Pearson's failure to discharge his CGT liability by the relevant date can be said to be the result of an insufficiency of funds "attributable to events outside [his] control" and, if so, whether, once that ceased to be the case, he remedied his failure without unreasonable delay. (s16 (2) Schedule 56 FA 2009).

Decision

The Tribunal said that it was clear that Mark Pearson's failure to discharge the relevant liability on or before the date when the penalty arose was due to an insufficiency of funds.

The Tribunal concluded that this insufficiency of funds arose as a result of events outside Mark Pearson's control – namely, the catastrophic fall in the Monitise share price after he entered into the escrow arrangements. If that had not occurred, he would have been able to top up the blocked account and realise sufficient proceeds from the disposal of Monitise shares to meet the CGT liability in question.

They said that it was clear that over the period between September 2014 when the share price began to fall and the date when the CGT liability was discharged, Mark Pearson was using every means at his disposal to free himself from the consequences of the obligations into which he had entered at the time of the sale. He was able to complete his settlement with Monitise in July 2016 and paid the tax in question immediately following that settlement. Thus he discharged his liability immediately after his reasonable excuse ceased to exist so that the language in sub-paragraph 16(2)(c) Schedule 56 FA 2009 was satisfied.

The Tribunal upheld Mark Pearson's appeal against the penalty.

Mark Pearson v HMRC (TC06187)

Selling off your garden

House owners with large gardens may be tempted to sell off or develop part of their property but what is the tax implication of such action?

Permitted land

Principal private residence (PPR) relief will often apply to exempt the gain as land, including that occupied by the house, of up to half a hectare is automatically exempt. It may be that more land qualifies for relief but this must be justified as being 'required for the reasonable enjoyment of the dwelling house' (S222(3) TCGA 1992) with the permitted area being the land 'most suitable for occupation and enjoyment with the residence' (S222(4) TCGA 1992). The land must be part of the garden at the time of sale, otherwise PPR relief will be lost (s222(1)(b) TCGA 1992). This view was upheld in the High Court in the case of Varty v Lynes [1976] STC 508 where the house and part of the garden was sold before the sale of the remainder of the garden.

Timing of the sale

The date of sale is the date of the unconditional exchange of contracts rather than of completion, if later. It would be possible to exchange contracts to sell the house and some land and later exchange contracts to sell the remaining land as long as the first contract had not been completed at the time of the second sale. It is important to avoid separating the land from the house by fencing it off, creating a separate title or starting development work until after unconditional contracts have been exchanged.

Transfer to trading stock

If the owner develops the property for sale, the land is appropriated to trading stock triggering a deemed disposal at market value for capital gains tax (s 161(1) TCGA 1992).

If the development is to be undertaken by a company, the owner may wish to sell the land to the company at market value to trigger PPR relief but remember to take into account the stamp duty land tax cost that may arise. (See article in December 2017 notes). To avoid the Stamp Duty Land Tax, a possible strategy to adopt might be as follows:

1. Start the development as a partnership with a spouse;
2. Appropriate the land to trading stock, electing to transfer at cost;
3. Sell the business with the land at cost to a company electing to transfer the land at cost under s178 ITTOIA 2005.
4. The company develops and sells the land, generating profits to be taxed at the corporation tax rate (currently 19%).
5. The original cost of the land can be withdrawn tax-free, leaving the balance to be dealt with as the shareholders see fit. They would probably liquidate with the benefit of 10% capital gains tax if no other development is planned within the following two years and the company has traded for at least 12 months.

The tax saving here may be modest. A personal capital gain at 28% matches against corporation tax at 19% plus capital gains tax at 10% on the remaining 81%; in other words, 27.1% overall. There should be a timing benefit as well. The decision here may turn on what is planned for the company post-development.

Self-development to occupy

Sometimes landowners wish to build a new house in their garden for their own use with the intention of selling or renting out the old property.

Watch out when the new house is eventually sold as the gain will be time-apportioned between the period the new house was completed and the period going back to when the old house was purchased. The gain attributable to the earlier period will not be eligible for PPR relief despite the land being part of the old residence.

Ideally the owner should look to create a disposal of the building plot while it remains part of the garden of the old house, by transferring the land into a trust for the benefit of the landowner. The trust will then have an acquisition date immediately before the new home is built. The trust could be wound up later by appointing the property back to the settlor or the trust could continue to hold the property and rely on s 225 for PPR relief in due course.

Adapted from an article in Taxation (30th November 2017) by Graham Buckell

Grant of a sub-lease

Summary - The grant of a sublease to one of the two joint owners of the headlease was a part disposal subject to capital gains tax.

Mr Robert Wright and his son had jointly acquired a 999 year lease over the upper floors and airspace of a building and paid an unconnected LLP to carry out development works to create four residential flats.

Two flats were sold to third parties, one flat was sold to one of the partners in the LLP and a 999 year lease, less the period of the headlease expired during the development, over Flat 2 was granted to Mr Wright.

Robert Wright argued that no gain was chargeable as there had been no disposal but HMRC argued that a deemed disposal had taken place under s29 TCGA 1992.

Decision

The First Tier Tribunal found that the necessary variation of rights under the lease, which would have shifted its value, had not taken place and so s 29 did not apply.

However, the First Tier Tribunal highlighted that Mr Wright had originally owned a half share in the property that included Flat 2 (the headlease) but by the end of the project, he owned the entire Flat 2 lease. As joint owners of the headlease, Mr Wright and his son had created a new asset, the new Flat 2 lease. The transfer of Flat 2 was therefore a part-disposal under s21 TCGA 1992 and the consideration was deemed to be market value as Mr Wright and his son were connected persons.

Mr Robert Wright v HMRC TC 06211

Spouses with houses **(Lectures P1051/ P1052/ P1053 – 14.11/ 18.35/ 13.43 minutes)**

This article will look at principal private residence (PPR) relief and specifically at how the relief works in the context of a husband and wife. The article will review some general principles in relation to PPR relief and then look specifically at the following scenarios;

- Couples getting married and the impact it has for PPR relief in relation to their respective houses;

- Spouses “inheriting” PPR periods from each other on the transfer of a residence during lifetime and on death; and

- The effect of separation and divorce on PPR relief.

Statutory references in this article are to the Taxation of Chargeable Gains Act (TCGA) 1992.

References to married couples, husbands and wives and spouses also apply to civil partnerships and civil partners. References to marriage include the registration of a civil partnership. References to divorce include the dissolution of a civil partnership.

Some background rules…

Gains made on the disposal of a dwelling house (and its garden and grounds) that at some point had been occupied by the taxpayer as his only or main residence are eligible for PPR relief. Without delving too deeply into the intricacies of the rules, the relief is a percentage of the gain with the percentage determined by the ratio of occupation to ownership. “Occupation” can include some periods during which the taxpayer was absent from the property and will always include the final 18 months of ownership as long as the property has been occupied by the owner as a residence at some stage.

A taxpayer can normally have only one property at any given time which qualifies for PPR relief. Whilst the “final 18 months” rule means that two properties can be simultaneously exempt from CGT in this period, in general if an individual has two residences, gains accruing on one of them will be chargeable to CGT.

If a person has more than one property concurrently used as a residence, relief is given on the “main” residence determined as a question of fact. [S.222(1)(a)]. This is commonly (but not always) the property in which the taxpayer spends the majority of his time although the facts and circumstances of each case must be considered.

An individual can override this by nominating which of his dwelling houses is to be treated as the main residence for PPR purposes. [S.222(5)]. The nomination therefore allows a property which is not in fact being used as the main residence of the taxpayer to be the one which is eligible for PPR relief. Typically this is advantageous where the “second” home is standing at the largest gain or is most likely to appreciate in value. A dwelling house can only be validly nominated if it is, as a question of fact, being used by the taxpayer as a residence for at least some of the time. So a let property, for example, cannot be the subject of a nomination.

The nomination must be made within two years of acquiring a second residence. Each time there is a change in the individual’s combination of residences, a new 2-year period begins thereby creating a new opportunity to make a nomination.

No return is required if a gain is fully covered by PPR relief (in this case the CG supplementary pages do not need to be completed). However in complex cases, taxpayers might consider it prudent to make at the very least a “white space” disclosure even where full PPR relief is considered to be available. This might offer protection against the possibility of a discovery assessment further down the line. If partial relief is available, the taxpayer should disclose the address of the property together with a computation of the gain or loss.

The effect of marriage on PPR relief

A married couple who are living together is treated as a single person for PPR relief and is only allowed one qualifying residence between them. [S.222(6)]. It is not possible for (say) a wife (W) to own the main home and for her husband (H) to own their second home and for both W and H to each then claim PPR relief on the disposal of their respective properties. For the period during which the couple were married, only one of the dwelling houses will be a qualifying property.

This puts spouses at a CGT disadvantage compared to unmarried couples who can each have their own qualifying residence. An unmarried couple can have two residences simultaneously qualifying for PPR if those properties are concurrently used as residences (even on a part-time basis). In this instance it is advisable for each party to make a S.222(5) nomination in respect of the property they own as this avoids any argument that the other property – ie, the one owned by their partner which they could be said to occupy under gratuitous licence – is in fact their main residence.

If, at the date of marriage, the two parties each own a residence and the couple thereafter continues to use both properties as residences, they can jointly nominate which of the properties is to be treated as their qualifying residence for PPR purposes. The two year period for making the nomination commences on the date of marriage.

The effect of marriage is therefore that one property ceases to qualify for PPR relief and becomes exposed to CGT. The final 18 months of ownership of the now exposed property will be eligible for PPR relief. A disposal of that property within 18 months of marriage will normally ensure that no chargeable gain will accrue.

Illustration 1

Andrew and Beth married on 1 December 2014. Andrew owned a house in Dorset (cost £500,000 on 1 May 1992) and a flat in London (cost £400,000 on 1 June 2012). He typically used the flat in London on 2 or 3 occasions during the week (depending on his work commitments). Andrew had made a valid nomination in September 2012 for the flat in London to be his main residence for PPR purposes (as this was considered the more likely property to yield a substantial gain). The election was stated to take effect from 1 June 2012.

Beth owns a house in Surrey in which she has always lived. After marriage the couple lived in Beth's house in Surrey. Andrew thereafter commuted from Surrey to London for work and ceased to use the London flat. The flat was redecorated then let to tenants from 1 June 2015. The couple continued to use the house in Dorset as a weekend retreat. Andrew sold the London flat on 1 December 2017 for £840,000 (net of selling costs).

Andrew's chargeable gain in 2017/18 is:

		£
Sale proceeds		840,000
Less: Base cost		(400,000)
Gain		440,000
Less: PPR relief	£440,000 x 48/66	(320,000)
Less: Lettings relief	£440,000 x 12/66 (capped at £40,000)	(40,000)
Chargeable gain		80,000

PPR relief:

	Qualifying	Non-Qualifying	Let
1 June 2012 – 1 December 2014	30		
1 December 2014 – 1 June 2016		18	12
1 June 2016 - 1 December 2017 (18m)	18	__	__
	48	18	12

The London flat ceased to be eligible for PPR relief from the date of the marriage. As it was not sold within 18 months of becoming a non-qualifying property, a chargeable gain accrued. This is partially alleviated by lettings relief that gives additional PPR relief if a property is let during a non-qualifying period. The chargeable gain may then be reduced by Andrew's annual exempt amount.

If Andrew has other chargeable gains in the year, it is advisable to use the annual exempt amount against the gain on the sale of the flat as this gain, being on a disposal of residential property, will be charged at the upper CGT rate of 28% (or 18% if Andrew does not pay income tax at the higher rate).

Transfers between spouses

Where a husband and wife are living together for any part of a tax year, transfers between them of chargeable assets in that year automatically take place at no-gain-no-loss. [S.58]. The effect of this provision is that the donee spouse inherits the historical CGT base cost of the donor spouse for the purposes of calculating a gain on a future disposal. The value of the asset at the date of the transfer is irrelevant and no formal valuation exercise is necessary.

A husband and wife are "living together" until they are separated in such circumstances that the separation is likely to be permanent. The no-gain-no-loss rule therefore applies until the end of the tax year in which the couple separates. A transfer of an asset after the end of the tax year in which separation occurs will generally take place at market value.

PPR relief on inter-spouse transfers

Even though the transferee spouse (H) takes over the historic base cost of the transferor spouse (W), it does not automatically follow that H also inherits W's PPR history. This depends on whether the provisions of S.222(7) are satisfied.

Under S.222(7)(a), if the husband and wife are living together and the property subject to the transfer is their only or main residence at the date of the transfer, for PPR purposes the donee spouse (H) is deemed to have acquired the part transferred at the date when it was acquired by the donor spouse (W). In addition, any periods during which W had occupied the property as her PPR are similarly deemed to be PPR periods for H. [S.222(7)(b).]

This is the case even if W had acquired the property before the date of the marriage. This means that if one party had a PPR prior to marriage and transferred all or part of that property to their spouse after marriage at a time when they were occupying the property as their main residence, the receiving spouse will inherit the PPR history of the transferor.

However, care must be taken as this rule only applies if the property transferred is the couple's only or main residence at the date of the transfer (note the use of the present tense). If this is not the case – for example, if the transfer is made between the spouses during a period in which they are living elsewhere - the donee spouse is deemed to have acquired his/her interest in the property at the date of the transfer. Any PPR entitlement for the donee from that point would then be based on his/her own occupation and the PPR history of the donor spouse falls away.

Note also that even if a donee spouse (H) inherits the PPR history of the donor spouse (W) by virtue of S.222(7), this does not automatically give H an entitlement to lettings relief for a period when the property was previously let by W. This is because S.223(4) permits lettings relief where a dwelling house "has at any time in his period of ownership been wholly or partly let BY HIM as residential accommodation" (author's capitalisation). In this instance, the property would not have been let by H, so even though H inherits W's PPR history, lettings relief would be denied.

This provision prevents spouses from potentially "doubling-up" lettings relief from £40,000 to £80,000 by means of an inter-spouse transfer immediately prior to the sale of the property. Transferring the property immediately prior to a period of letting would however give access to lettings relief for both spouses on a future disposal. Achieving £80,000 of residential lettings relief is therefore possible with careful planning.

Illustration 2

Kate bought a house in Leeds for £60,000 in June 2008. In June 2010 Kate married Luke and they lived together in the property owned by Kate. In June 2013 the couple moved to a rented house in Newcastle so that Luke could be nearer to his mother who was sick. After some repair and redecoration work, the house in Leeds was let to tenants from June 2014. In December 2014 Kate transferred a 50% interest in the house in Leeds to Luke. The house was worth £180,000 at that date.

Luke's mother has recently died and Kate and Luke are now considering their next move. The house in Leeds is still let but the current tenants have offered to buy the house for £250,000. Kate and Luke wish to know their CGT position assuming the offer is accepted and the sale is completed in December 2017. They have also asked if there is anything they can do to mitigate any liability.

Kate's chargeable gain will be as follows:

		£
Proceeds (50%)		125,000
Less: Cost (50%)		(30,000)
Gain		95,000
Less: PPR relief	£95,000 x 78/114	(65,000)
Less: Lettings relief	£95,000 x 24/114	(20,000)
Chargeable gain		10,000

PPR relief:

	Qualifying	Non-Qualifying	Let
June 2008 - June 2013	60		
June 2013 - June 2016		36	24
June 2016 - December 2017 (18m)	18		
	78	36	24

The transfer of a 50% interest in December 2014 is a no-gain-no-loss transfer. Lettings relief is limited to the gain arising in the non-qualifying period during which the property was let (in this case June 2014 to June 2016 being 24 months). Luke's chargeable gain will be as follows:

	£
Proceeds (50%)	125,000
Less: Cost (50%)	(30,000)
Gain	95,000
Less: PPR relief	(Nil)

The house in Leeds was not the couple's main residence at the transfer date as they were then living in Newcastle. S.222(7) does not apply and does not therefore impute Kate's ownership period and PPR history to Luke's half share of the property. Luke is therefore deemed to have acquired his 50% share of the property in December 2014 for the purposes of calculating PPR relief. As there have been no actual periods of occupation of the Leeds house by Luke since he acquired an interest in the property in December 2014, there is no PPR relief in relation to his own gain. Note that even though Luke did actually occupy the property between June 2010 and June 2013, as he did not have an interest in the property before December 2014, this period of occupation will not have any bearing.

This problem can be partially alleviated if the couple reoccupies the house in Leeds as their main residence before a sale is completed. Whether residence is established is a question of fact. A minimum period of occupation is not specified and neither HMRC nor the Courts attempt to impose one. The term "residence" implies a degree of permanence, so as a question of fact the property must actually become their home. It is the quality of occupation rather than length of occupation that determines whether a dwelling-house is the owner's residence.

If the Leeds property is in fact occupied as a home for (say) 6 months and the house is then sold in June 2018 (again for proceeds of £250,000 for comparative purposes), the chargeable gains would be as follows:

		Kate	Luke
		£	£
Proceeds		125,000	125,000
Less: Cost		(30,000)	(30,000)
Gain (as before)		95,000	95,000
Less: PPR relief (Kate)	£95,000 x 114/120	(90,250)	
Less: Lettings relief (Kate)	£95,000 x 6/120	(4,750)	
Less: PPR relief (Luke)	£95,000 x 18/42		(40,714)
Less: Lettings relief (Luke)	£95,000 x 24/42 (capped)	__	(40,000)
Chargeable gain		Nil	14,286

PPR relief (Kate):

	Qualifying	Non-Qualifying	Let
June 2008 - June 2013	60		
June 2013 - June 2016 (deemed occupation)	36		
June 2016 – December 2016		6	6
December 2016 - June 2018 (18m)	18	_	_
	114	6	6

The 3 year period of absence between June 2013 and June 2016 will qualify as deemed occupation for Kate under S.223(3)(a) because Kate had lived in the house before the absence and subsequently reoccupied the property as her main residence. The combination of PPR relief and lettings relief exempts the whole of her gain from CGT.

PPR relief (Luke):

	Qualifying	Non-Qualifying	Let
December 2014 - December 2016		24	24
December 2016 - June 2018 (18m)	18	__	__
	18	24	24

For PPR purposes, Luke is deemed to have acquired his share of the property in December 2014. As Luke does eventually occupy the property as his main residence, the final 18 months of ownership will qualify for PPR relief. This in turn triggers eligibility for lettings relief as the property had been let by Luke in the period since he acquired an interest in the property in December 2014. Lettings relief in this instance is capped at £40,000.

Kate and Luke's reoccupation of the house (even for a relatively short period) will therefore reduce their joint chargeable gains from £105,000 to £14,286. The CGT saving (potentially over £25,000) is possibly enough to justify the personal upheaval and inconvenience of moving into the house for a short period and the probable loss of a willing purchaser (giving that the tenants who have made the offer to buy would now be moving out).

Planning to avoid inheriting PPR periods

It can be advantageous for spouses to deliberately fail to satisfy the conditions of S.222(7) such that the donee spouse does not inherit the PPR history of the donor. If the inter-spouse transfer takes place just before the spouses reoccupy the property as their main residence, S.222(7)(a) would not then be satisfied as the property subject to the transfer was not at that time the couple's main residence. The donee spouse would therefore start to accrue PPR relief from the first day he/she occupies the property as their main residence and the previous unfavourable PPR history of the donor spouse would be permanently washed-out.

Illustration 3

Wendy bought a house in south Wales in March 1985 that she used as her main residence. In March 1986 she moved out of the house and into rented accommodation. The house in Wales was subsequently let as residential accommodation. In September 2017 Wendy married Harry. Harry is soon to start a job in Cardiff so the couple intends to return to live in Wendy's house in south Wales when the current tenancy expires in June 2018.

If Wendy retains the property, the period from March 1986 to March 2018 (32 years) will be a period of absence for PPR relief. It is possible for 3 years of this period to be treated as a period of deemed occupation, but 29 years would still be non-qualifying. Wendy will be entitled to lettings relief although this will be restricted to the PPR relief or £40,000 (whichever is lower).

If Wendy transfers the property to Harry after June 2018 – i.e. at a time when it is being used as the couple's main residence – Harry will inherit Wendy's PPR history (being 29 non-qualifying years). In addition Harry will not be entitled to lettings relief as the property was not let by him during this period (it was let by Wendy).

If Wendy transfers the house to Harry before June 2018 – ideally just before the couple occupies the house - Harry will not inherit Wendy's PPR history as the property would not be transferred at a time when it is the couple's main residence. Instead Harry's ownership period for PPR relief purposes starts at the date of the inter-spouse transfer and his PPR relief entitlement will be determined solely by his occupation of the property during his ownership. This acts to wash-out Wendy's long non-qualifying period for PPR and means that if the couple thereafter remains in occupation of the house until the date of sale (or until 18 months beforehand), no chargeable gain will arise.

PPR relief on non-spousal transfers

If an interest in a PPR is transferred between non-spouses – for example where the transfer takes place before marriage – the CGT implications are as follows.

The transfer does not take place at no-gain-no-loss. Instead, as this is not an arm's length transaction, the disposal will take place at market value. [S.17]. This is despite the parties not being "connected persons" for CGT purposes. "Market value" in this instance will be the discounted value of a part share in a property (as opposed to being a percentage of the whole). Discounts for part-shares can be substantial reflecting the difficulty in being able to sell a part of a house on the open market. While this reduces the chargeable gain for the transferor, it will in turn leave the transferee with a low CGT base cost.

No taxable gain is likely to arise for the transferor as PPR relief will apply (assuming full occupation until the date of the transfer).

The transferee acquires his/her share of the property at market value (as computed for the transferor).

The transferee's PPR period will begin from the date of the transfer and cannot be backdated (S.222(7) does not apply to non-spousal transfers).

Inter-spouse transfers on death

The principle of the transferee spouse taking-over the PPR history of the transferor spouse also applies if a residence passes from one to the other on death. The couple must have been living together and the residence must have been their only or main residence before the death of the transferring spouse.

The only difference is that the transfer on death does not take place at no-gain-no-loss. Instead the transferee spouse will inherit the property with a base cost equal to its probate value. [S.62].

Illustration 4

Eric bought a house in June 1984 for £95,000 that he used as his residence. In March 1986 he married Freda and they lived in the house until Eric died in August 2015.

The house was valued at £850,000 for probate purposes. Freda soon realised that the house was too big for her to manage on her own, so in September 2015 she moved in with her daughter. The house remained empty until it was sold in September 2017 for £950,000.

Freda's chargeable gain is:

		£
Sale proceeds		950,000
Less: Probate value		(850,000)
Gain		100,000
Less: PPR relief	£100,000 x 393/399	(98,496)
Chargeable gain		1,504

PPR relief:

	Qualifying	Non-Qualifying
June 1984 - August 2015	374	
August 2015 - September 2015	1	
September 2015 - March 2016		6
March 2016 - September 2017 (last 18m)	18	_
	393	6

Note that even though the gain is calculated by reference to the probate value in August 2015, Freda is deemed to have acquired it in June 1984 for the purposes of calculating her PPR relief.

In some circumstances the application of this rule will not be to the advantage of the transferee. For example, assume a house passes from a wife (W) to her husband (H) on her death. Before W died the house was only used as the couple's only or main residence for part of her period of ownership. Following W's death, H occupies the house as his only residence. He sells it several years later.

The gain on the property is calculated by reference to the probate value and will be eligible for PPR relief. If we looked only at the use of the house during H's period of ownership, there would be full PPR relief and the gain arising would be fully exempt. However, when calculating H's PPR relief we must look back at the PPR history of W which H now inherits (whether he wants to or not!). In this case H will inherit a non-qualifying period which will restrict the PPR relief on the sale of the property. This rule cannot be disapplied.

Separation & divorce – effect on PPR relief

A husband and wife who are separated are no longer treated as a "single person" for PPR purposes (the "spousal unit" for PPR is typically broken when one spouse leaves the family home as this causes a separation likely to be permanent). Each party is thereafter entitled to PPR relief on their own main residences.

A previously non-qualifying property that is then occupied by one of the spouses (H) after the date of separation will duly become a qualifying property. If H only owns one property and uses that property as his main residence, no nomination is necessary as the property now being occupied by H becomes his PPR as a question of fact. However if, after the date of separation, H has more than one property available for him to use as a residence (and he concurrently resides in both) he is entitled to make a nomination. The 2 year time limit for nominating runs from the date of separation.

Separation (or more likely divorce) will often bring about the sale or transfer or all or part of a property which had at some point been the main residence of the divorcing parties. This will constitute a disposal by the party (or parties) giving up their interest(s).

In the event of a third-party disposal of a jointly-held property, the capital gain on each owner's share of the property should be computed and reported separately. The sale proceeds, costs of sale, costs of acquisition (including enhancement costs) and incidental expenses of acquisition should be divided between the parties in the ratio of their respective "equitable interests". This ratio is applied irrespective of which spouse actually received the proceeds or incurred the expenditure.

It is important to note that a person can have an "equitable interest" in a property even though he or she may not be the legal and/or registered owner. Case law has determined that if one person contributes towards the costs of acquiring the property or towards the mortgage payments without being a registered owner, he/she acquires an equitable interest in the home proportional to those contributions.

Therefore where a couple become permanently separated or divorced, it is important for them to establish what equitable interest each of them has in the matrimonial home as this will influence the CGT computations. This may be done by mutual agreement or it will be determined by the Courts. Where such an agreement is reached, both parties will be considered to have held their equitable interests in the home from the outset.

After one spouse has moved out of the matrimonial home, there may subsequently be a transfer of an interest in that residence as part of a settlement. The transfer may be ordered by the Court or may be voluntary. The transfer is a disposal for CGT purposes. The CGT treatment of the transfer depends on when the transfer takes place.

If the transfer takes place in the year of separation, the disposal takes place at no-gain-no-loss (as already discussed). If the transfer takes place between separation and divorce, the consideration for the disposal is deemed to be the market value of the interest transferred at the date of transfer (the parties still being connected persons for CGT by virtue of their legal marital relationship).

If the transfer takes place on or after the divorce (the decree absolute), the parties are no longer connected persons. HMRC normally then accepts that a subsequent sale of a property by one party to the other is a transaction at arm's length.

No deemed market value is therefore imputed and the disposal consideration is accepted as being the money (or money worth) changing hands.

However if the disposal between them is in pursuance of a Court Order, HMRC practice is to deem the disposal consideration to be equal to the market value of the asset at the date of disposal. This is because an order of the Court is not a "bargain" between the parties as it is the Court which decides the terms of the agreement, not the parties themselves. As such, the transaction cannot be a "bargain at arms' length" and S.17 therefore applies to impute market value. However, it should be borne in mind that the open market value of an interest in the matrimonial home is normally heavily discounted to take account of the rights of occupation of the spouse residing in the home under the Matrimonial Homes Act 1967 (so very often a substantial discount may be in order to reflect these rights). The basis of the valuation should be disclosed in the tax return and might thereafter be referred to the HMRC Valuation office.

Illustration 5

Gareth and Helen married in July 2002. In October 2002 they bought a house in Bristol, in joint names, for £162,000. The house was occupied as their main residence from October 2002 until they separated in April 2014 at which point Gareth left the marital home.

Helen continued to reside in the house after the separation. The couple divorced in June 2017. In September 2017 the Court ordered Gareth to transfer his half share in the matrimonial home to Helen. The interest was conveyed to her in October 2017.

The house was valued at £850,000 in October 2017 with a 50% interest in the property valued at £350,000 with vacant possession. HMRC Valuation Office accepted that the value of a 50% interest subject to Helen's rights of occupation would be £225,000.

Gareth's chargeable gain in October 2017 is as follows:

		£
Proceeds		225,000
Less: Cost	1/2 x £162,000	(81,000)
Gain		144,000
Less: PPR relief	£144,000 x 156/180	(125,800)
Chargeable gain		19,200

PPR relief:

	Qualifying	Non-Qualifying
October 2002 – April 2014	138	
April 2014 – April 2016		24
April 2016 - October 2017 (18m)	18	
	156	24

Note here that there can be no argument put forward that during the 24 month non-qualifying period Gareth is letting his share of the house to Helen and is therefore entitled to residential lettings relief. Letting means granting the temporary possession and use of a property in consideration of rent or hire. Helen could not be said to be renting or hiring Gareth's share of the property and no consideration is paid.

The CGT charge can be mitigated in appropriate cases by S.225B (formerly ESC D6). S.225B allows the former matrimonial home to be treated as the only or main residence of the transferring spouse (Gareth) from the date his occupation ceased (April 2014) until the earlier of a) the date of transfer and b) the date on which the property ceased to be the only or main residence of the spouse to whom the property is transferred (Helen). The effect of a S.225B claim in this instance would be to treat the period from April 2014 to the date of the transfer to be a period of deemed occupation for Gareth thereby extinguishing his chargeable gain.

A S.225B claim can only be made if the departing spouse (Gareth) has not made an election for a different property to be his qualifying residence. A S.225B claim may not therefore be beneficial if Gareth had acquired a property after the date of separation and that property is appreciating in value. Gareth may therefore choose to bear a small CGT liability in respect of his former matrimonial home in order to preserve full PPR relief on his new property.

S.225B claims are only possible if a transfer is made from one former spouse to another. The election is not available if the property is instead sold to a third party, even if sales proceeds are divided between the former spouses. The election is not available on transfers between unmarried couples.

IHT and a livery stable business (Lecture P1054 – 18.17 minutes)

A recent First-Tier Tribunal decision, which considered the availability of IHT business relief for a livery stable, could have important implications for landholders operating in other areas as well. In Vigne v HMRC (2017), the tax authorities, following the death of the owner, sought to disallow relief on a livery stable business that needed 30 acres of land in order to be viable.

In HMRC's view, the facts of the Vigne case suggested that the landowner was letting the land for the use of others, that there was insufficient activity and expenditure of a business nature and that, because the business was only modestly profitable, this could not indicate anything other than an investment in land.

However, as the First-Tier Tribunal pointed out, the statute simply requires that a business exists and that the business must not consist wholly or mainly of the making or holding of investments. It was clear in this instance that a business was being carried on and that valuable services were being provided to users of the livery that prevented that business from being one of holding investments.

In order to appreciate the impact of this case, it should be mentioned that, in the equestrian world, there are commonly four levels of livery:

1. grass livery, ie. where a horse has a right to reside in a field but is not provided with a stable;

2. DIY livery, ie. where the horse, in addition to having the right to reside in a field, is provided with a stable where its day-to-day care is undertaken by the owner of the horse;

3. part livery, ie. where day-to-day care for the horse is shared between the livery operator and the horse owner; and

4. full livery, ie. where the horse's day-to-day care, and any associated needs, are supplied by the livery operator.

In this case, the livery business did not appear to fit neatly into any of the four categories described above, the reason being that, following a reorganisation in 2008, a decision was made to try and give the business a competitive advantage over other livery businesses by introducing services in addition to those which would normally be included in a grass livery or a DIY livery. The First-Tier Tribunal accepted that this package included:

- the provision of worming products, including administering them to the horses when and where necessary;

- giving the horses a hay feed during the winter months when there would not be enough grass (a hay crop was grown on part of the land);

- removing manure from the fields in which the horses spent most of their time; and

- undertaking a daily check on the health of each horse.

The upshot was that the First-Tier Tribunal rejected HMRC's arguments, saying that no properly informed observer could have concluded that the business was that of holding investments. The two judges described the view of HMRC as an 'artificial' analysis.

It should be remembered that, in other cases where land has been involved, HMRC have been very keen on the following passage from the Upper Tribunal's decision in HMRC v Pawson (2013):

> 'The critical question, however, is whether these services were of such a nature and extent that they prevented the business from being mainly one of holding (the holiday property) as an investment.'

In Vigne, the First-Tier Tribunal asserted that this was the wrong test. It begins with the preordained idea that the business is wholly or mainly one of making or holding investments and then asks whether there are factors that point to the contrary. The proper starting point, the judges explained, is to make no assumption one way or the other but to establish the facts and then to determine whether the business is wholly or mainly one of making or holding investments.

So the taxpayer ultimately won on the grounds of common sense.

The decision recognises that business relief may now be available on activities where previously this would have been challenged, for example game shooting businesses operated by many landed estates. As long as it can be demonstrated that valuable services are provided, these businesses should benefit from this major IHT relief. Vigne v HMRC (2017) may well prove to be an unexpectedly significant case.

Contributed by Robert Jamieson

Influence of IHT reliefs and exemptions on estate planning

HMRC has published a report on how reliefs such as agricultural property relief and business relief affect how individuals make decisions on IHT matters. Does this signal the start of a reduction in these reliefs?

Three main factors underpinned most estate planning, namely:

1. tradition;
2. the succession of wealth; and
3. the preservation of a business.

Reducing the IHT payable on an estate was seen by many as important only insofar as it supported these primary objectives.

For agricultural assets, tradition played a major role, with testators unwilling to part with such assets during their lifetime. The objective of keeping the estate together was crucial. Agents reported higher levels of awareness of APR compared to BPR, which they attributed to coverage of APR in farming publications and among farming bodies.

For owners of business assets, many were driven by the desire not only to ensure the succession of wealth to provide financial security for their family, but also by an obligation to keep the business running beyond their death to financially support their staff. Overall, however, tradition and continuation of the business was less of a motivating factor outside agricultural businesses.

Agents felt the availability of APR/BPR and other reliefs was crucial and that without them many businesses would have to be sold on death to pay the IHT bill. It was a view widely shared among the interviewees that assets were rarely purchased specifically to make use of APR/BPR.

Trusts were used principally to ensure assets were managed in a specific way after death and to provide an equal distribution of wealth among beneficiaries. Where tax advantages were mentioned, these related mainly to CGT.

Testators who gifted business assets during their lifetime as a way of reducing IHT liabilities did so mostly with little knowledge or understanding of BPR, although gifting was also common among testators wanting to retire and pass over assets to beneficiaries interested in keeping a business running.

www.gov.uk/government/publications/research-into-the-influence-of-iht-reliefs-and-exemptions

HMRC guidance note - SDLT relief for first time buyers

This guidance note provides details about conditions to be met for the new SDLT relief announced at Autumn Budget 2017 for first-time buyers on properties.

The relief will apply from 22 November 2017 to purchases by individuals of residential property for £500,000 or less, provided the purchaser intends to occupy the property as their only or main residence.

Where the purchase price is over £300,000 but does not exceed £500,000 they will pay 5% on the amount above £300,000. Mixed-use properties do not qualify.

Linked transactions

If the purchase of a dwelling is linked to another transaction then no relief will be available unless the other transaction is the purchase of garden, grounds or interests or rights in land that subsist for the benefit of the dwelling, such as rights of way.

First time buyer

A purchaser must not, either alone or with others, have previously acquired a major interest in a dwelling or an equivalent interest in land situated anywhere in the world. This includes previous acquisitions by inheritance or gift, or by a financial institution on behalf of a person under an alternative finance scheme. Relief is not denied by virtue of a previous acquisition as a trustee unless the purchaser was also a beneficiary of the trust. Holiday homes and furnished holiday lettings are dwellings if suitable to be used as such.

Claiming the relief

The relief must be claimed on a land transaction return, or an amendment to a return, by entering code 32 in the appropriate field of the return.

www.gov.uk/government/publications/stamp-duty-land-tax-relief-for-first-time-buyers-guidance-note

Administration

HMRC extends Trust Registration Service deadlines for existing trusts

Having extended the Trust Registration Service deadline for new trusts to 5 January 2018, HMRC has now agreed to extend the deadline for existing trusts until 5 March 2018. Taxable relevant trusts registered after the strict 31 January deadline will not face penalties if registered no later than 5 March 2018.

Pension schemes - changes to administration of tax relief at source

HMRC is to reduce the time allowed for pension scheme administrators to file claims and annual returns of individual information when reclaiming tax using the relief-at-source method, with effect from April 2018.

The changes will enable HMRC to advise scheme administrators in good time of the correct rate of relief to be applied to Scottish taxpayers. The new filing date will be 5 July following the end of the tax year.

www.gov.uk/government/publications/pensions-tax-changes-to-administration-of-relief-at-source

Pension schemes newsletter 93

Changes to tax registration for Master Trusts

Legislation, originally published for consultation on 13 September 2017 will introduce changes to tax registration for pension schemes that are Master Trusts, or have a sponsoring employer that is a dormant company.

From April 2018 HMRC can refuse to register a pension scheme that is a Master Trust and does not hold authorisation by the Pensions Regulator, or where one of the sponsoring employers is a dormant company.

They will also be able to withdraw registration from a scheme that is a Master Trust and loses its Pensions Regulator authorisation, or where a scheme is found to have a dormant company as a sponsoring employer.

Draft legislation: The Registered Pension Schemes (Relief at Source)(Amendment) Regulations 2018

The draft regulations make changes to The Registered Pension Schemes (Relief at Source) Regulations 2005 to make scheme administrators submit the annual return of individual information within 3 months of the end of the year of assessment.

The draft regulations also need administrators to submit the APSS106 annual claim within 3 months of the end of the tax year of assessment. They also introduce a process change and interest charge in respect of excess relief claims.

New Pensions Online Service

HMRC have written to all pension scheme administrators who have not logged onto the Pensions Schemes Online service since April 2015, to remind them to go online and update their details.

Practitioners acting on behalf of pension scheme administrators

New practitioners will need to register to use the new online service to send reports to HMRC, and this reporting facility will be delivered from April 2019.

Practitioners of existing schemes should continue to use the current Pension Schemes Online Service to manage these schemes and submit online reports in 2018 to 2019.

HMRC will provide guidance for practitioners wishing to act on behalf of a new scheme registered from April 2018 in future pension schemes newsletters.

Pension payments to trustees in bankruptcy or third parties

Members of registered pension schemes who are former bankrupts and have lost rights under pension schemes following bankruptcy remain members, regardless of who the payment is made to.

If HMRC told that a payment from a registered pension scheme is not a payment of pension or any other kind of authorised payment, they will treat it as unauthorised resulting in:

- an unauthorised payments charge of 40%;
- potentially the unauthorised payments surcharge of a further 15%;
- potentially the scheme sanction charge of 40%.

If however, the payment is a payment of pension:

- normal income tax rules apply, including any requirement to pay higher rate;
- contributing into other schemes may be subject to the money purchase annual allowance

Lifetime allowance service

The lifetime allowance online service is still unavailable through the personal tax account. This means that scheme members who log onto their personal tax account to apply for lifetime allowance protection won't be able to do this.

Members can apply to protect their pension savings using the link to the lifetime allowance online service in the guide Pension schemes: protect your lifetime allowance - GOV.UK.

Members can also view details of their protection using the link on the Pension schemes: protect your lifetime allowance - GOV.UK. The lifetime allowance scheme administrator look-up service is unaffected.

www.gov.uk/government/publications/pension-schemes-newsletter-93-november-2017

Assessment valid under TMA 1970 s 114

Summary - An assessment which did not comply with the requirements of s28A TMA 1970 was validated by s 114.

Mr Archer had claimed losses and consequential tax relief in relation to two well-known tax mitigation schemes: RDS and SHIPS. HMRC had opened enquiries into the relevant returns and the Court of Appeal had subsequently found that neither scheme worked.

HMRC claimed that Mr Archer owed it a debt under S59B(5) TMA 1970), which applied to the amount of tax payable as a result of amendments to the returns effected by closure notices (s 28A). Mr Archer denied the existence of a debt because the closure notices were invalid.

Decision

The letters sent by HMRC only stated: 'No relief is due for the loss you claimed.' HMRC claimed that since the amendments consisted of disallowing the claims for loss relief that Mr Archer had made, it followed that he and KPMG knew the amount of tax for which he was liable. The court observed that 'in functional terms', an amended self-assessment is an assessment; and where HMRC made the amendment, the onus did not lie on the taxpayer to work out his liability all over again.

However, the court found that s114 operated to validate the closure notices as amendments to Mr Archer's self-assessments. The test in TMA 1970 s 114 was objective but the reader of the closure notice should be taken to be equipped with the knowledge that Mr Archer and KPMG had, including knowledge of what had led to the enquiry and what HMRC's conclusions were.

The Queen on the application of Archer v HMRC [2017] EWCA Civ 1962

Adapted from the case summary in Tax Journal (8 December 2017)

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

This Brief explains the position following the Supreme Court judgment in Littlewoods Retail Limited and others [2017] STC 2413. It withdraws R&C Briefs 9/2015 and 20/2014.

Littlewoods case

Littlewoods Retail Limited and others claimed a refund of overpaid VAT for commissions on mail order sales. This VAT was repaid together with simple interest due under VATA 1994. They argued that the interest already paid to them was inadequate and that they were entitled to compound interest both as a matter of EU law and also as a matter of English domestic law.

The Supreme Court determined that simple interest at statutory rates is sufficient to vindicate the EU law right to an adequate indemnity.

What now?

Claims for compound interest on overpaid VAT or for any compensatory amounts other than simple interest under the provisions of the VATA 1994 will not be paid. HMRC will invite claimants to withdraw their claims and any related appeals to the Tribunal.

www.gov.uk/government/publications/revenue-and-customs-brief-5-2017-judgment-of-the-supreme-court

RTI post-implementation review report

HMRC has published a post-implementation review of the roll out of PAYE real time information (RTI). Key recommendations from stakeholders included requests for HMRC to:

- investigate unexplained discrepancies and duplicated employment records;
- enable agents and employers to view their accounts with a view of the full charge in real time;
- revisit the causes and concerns for employers who need to make amendments after the year end (EYU);
- investigate alternative ways and timing of reporting of information currently required through the EPS;
- review the 'disputed charges' process;
- consider the full end-to-end employer refund process and automate employer refunds;
- review code numbers in real time; and
- review whether the 'on or before' requirement is really need

Taxation Journal (15th December 2017)

Deadlines

1 January 2018

- Payment of corporation tax liabilities for accounting periods ended 31 March 2017 for small and medium-sized companies not liable to pay by instalments.

5 January 2018

- Extended deadline to register new trusts on HMRC's new Trust Registration Service (One –off extension from 5 October 2017)

7 January 2018

- VAT returns and payment for 30 November 2017 quarter (electronic payment).

14 January 2018

- Form CT61 to be submitted and tax paid for the quarter to 31 December 2017.

19 January 2018

- Pay PAYE, NIC, CIS and student loan liabilities for month ended 5 January 2018 if not paying electronically by this date.
- File monthly construction industry scheme return by this date.
- Payment of PAYE liability for quarter ended 5 January 2018 if average monthly liability is less than £1,500 is due by this date.

21 January 2018

- File online monthly EC sales list by this date.
- Due date of submission for supplementary Intrastat declarations for December 2017.

22 January 2018

- PAYE, NIC, CIS and student loan liabilities should have cleared with HMRC.

31 January 2018

- Electronic filing for 2016/17 personal, partnership and trust SA tax returns.
- Balance of 2016/17 SA liabilities now due.
- Due date for payment of first instalment of 2017/18 SA liabilities.
- 2015/16 SA tax returns have to be amended by this date.
- CTSA returns for accounting periods ended 31 January 2017.
- Filing date at Companies House for 30 April 2017 private companies and 31 July 2017 public companies.

1 February 2018

- Penalty charged for late 2016/17 ITSA returns.

14 February 2018

- Deadline to apply to defer Class 1 NIC for 2017/18.

News

Draft Scottish Budget 2018/19

Income tax

Changes announced increase the higher rate and additional rate of income tax by 1% each and split the basic rate band into three bands, giving a total of five tax bands in 2018/19 (up from three tax bands in 2017/18).

The tax rates below apply to the taxable non-savings income of Scottish taxpayers after deduction of the personal allowance (£11,850 in 2018/19):

Name of the tax band	Tax band	Tax rate
Starter rate	£1–£2,000	19%
Basic rate	£2,001–£12,150	20%
Intermediate rate	£12,151–£32,423	21%
Higher rate	£32,424–£150,000	41%
Top rate	£150,000+	46%

This means the Scottish higher rate threshold is £44,273 in 2018/19 (personal allowance of £11,850 plus intermediate rate band of £32,423), compared with the higher rate threshold in the rest of the UK of £46,350.

Mismatches remain for Scottish taxpayers in relation to the differences between the higher rate threshold in Scotland and the rest of the UK in 2018/19 - see below:

Mismatch	Commentary
Class 1 and Class 4 NIC	The upper earnings limit for Class 1 and the upper profits limit for Class 4 are aligned with the higher rate threshold that applies in the rest of the UK. Employed Scottish taxpayers will face a marginal rate of 53% on earnings between £44,274 and £46,350 (Scottish higher rate of 41% plus Class 1 primary rate of 12%). The marginal rate for the self-employed at this profits level will be 50% (Scottish higher rate of 41% plus Class 4 main rate of 9%).
Savings and dividends	Rates and thresholds for Scottish taxpayers are the same as in the rest of the UK so starting rate for savings, savings and dividend nil rate bands need to be considered for Scottish taxpayers, who may be higher rate taxpayers for non-savings income but basic rate taxpayers for savings income.

Capital gains tax	The rate of capital gains tax depends on the remaining basic rate band for income tax. As capital gains tax is reserved, the higher rate threshold for capital gains tax for Scottish taxpayers remains aligned with the higher rate threshold for the rest of the UK. Therefore, it is possible to be a higher rate taxpayer in Scotland but have remaining basic rate band for the purposes of capital gains tax.

However, the addition of new tax bands and the differences in rates adds further complexity and increases the number of Scottish taxpayers who will need to file Returns:

Issue	Commentary
Personal pension contributions	As the Scottish basic rate remains 20%, the relief at source rules should not be affected. However, for those paying tax at a rate above 20%, the relevant tax bands need to be extended by the value of the gross contribution. This means that taxpayers earning over £24,000 (personal allowance £11,850 plus basic rate band £12,150) may need to file a Return to claim relief. Note that the starter rate is not extended as the rate is lower than the Scottish basic rate. The UK basic rate, dividend ordinary rate, higher rate and dividend upper rate bands may also need to be extended if the Scottish taxpayer has any taxable savings income and dividend income.
Gift aid donations	Currently, these amounts are deemed to be paid net of 20% basic rate tax. Anyone paying tax at the starter rate of 19% who gives money to charity may find themselves with a need to complete a Return to pay over the difference. Anyone paying tax at a rate above 20% will need to extend the relevant tax bands as necessary to obtain relief, increasing the number of people who need to complete a Return.
PAYE settlement agreements (PSA)	Where Scottish taxpayers are included in the employer PSA from 2018/19 onwards, the employer will need to consider the marginal rate of these individuals more carefully to ensure the amount of the benefit is grossed up correctly.

Land and buildings transaction tax

The nil rate for first-time buyers of residential property is expected to be £175,000 (the nil rate band for all other buyers of residential property is £145,000). Assuming the full £175,000 relief is utilised on the purchase of a property, the saving would be 2% of £30,000 (or £600). It is expected that this will mean 80% of first-time buyers in Scotland will pay no LBTT.

The new nil rate for first-time buyers is expected to be introduced in April 2018, but it will be subject to consultation. If the definition of first-time buyer follows the definition for stamp duty land tax (SDLT), it will only apply to an individual who has never owned residential property before.

The Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Bill is currently progressing through Parliament. Its aim is to provide retrospective relief from the additional dwelling supplement (the 3% LBTT surcharge that applies to purchases of additional residential properties) where a couple purchase a property having sold a prior property they both occupied, but where only one party was named on the title deeds.

Adapted from summary by Tolley in association with Andrew Ford of Barr & Ford Limited

Gold bullion bonuses – GAAR Advisory Panel (Lecture P1055 – 18.29 minutes)

On 3 August 2017, the GAAR Advisory Panel published their first opinion. The Panel is an independent body of tax experts established to give their view on cases where HMRC consider that the GAAR legislation may be in point. Although the GAAR has been in force since the enactment of FA 2013, this is the first time that the Panel have issued an opinion on a specific case. Any previous commentary has been restricted to examples provided in the original GAAR Guidance.

The opinion relates to employee rewards provided in the form of gold bullion and covers the position of the employer company and the two taxpayers involved. The Panel was asked to decide whether or not the provision of gold bullion in a manner that was designed not to give rise to any charge to income tax or NICs was a reasonable course of action. The opinion is interesting in that it highlights the type of case referred to by HMRC, the process for making reference to the Panel and which parts of the GAAR legislation and the associated GAAR Guidance were considered by the Panel.

In examining the provisions of the GAAR, the Panel focused on the following questions:

1. Did what was done involve contrived or abnormal steps?

2. When looking at what was done, was this consistent with both the principles on which the relevant legislation was based and the policy objectives of that legislation?

3. Was there a shortcoming in the relevant legislation that was being exploited?

The tax at stake in this referral was relatively modest (the bonuses were in the order of £300,000), but it is not clear whether there were other ‘following’ arrangements. If so, HMRC’s reaction may be perceived as being rather more strategic. In the light of the tax planning referred to above, the Panel’s verdict was certainly foreseeable – they summed up the position as follows:

> ‘This is a clear case of associated taxpayers seeking to frustrate the intent of Parliament by identifying potential loopholes in complex interlinking anti-avoidance legislation and arranging a series of intricate and precise steps to exploit those loopholes so as to gain an unexpected and unintended tax “win”.

> It should not come as a surprise that we conclude the steps taken are not a reasonable course of action.'

In other words, the result was game, set and match to HMRC.

This case was referred by HMRC to the Panel to consider whether 'the arrangements entered into cannot reasonably be regarded as a reasonable course of action' (the so-called 'double reasonableness test'). Given that HMRC succeeded in convincing the Panel, the authorities will undoubtedly be issuing counteraction notices to nullify any perceived tax advantage.

However, even if the Panel had taken a contrary view, HMRC would not have been bound by this. They would be quite at liberty to disregard it and go ahead anyway with the issue of counteraction notices. The Panel's main rationale that the arrangements did not constitute a reasonable course of action stemmed from the fact that the company could simply have provided the two employees with an equivalent amount of cash (which would of course have been taxable). In the Panel's words:

> 'Had cash been used and gold not been involved . . . neither the company nor the employees would have been in a substantially different economic or commercial position.'

There are two other extracts from the Panel's opinion to which attention should be drawn. Both are quite short. The first one states:

> 'Merely because legislation deals with particular positions . . . does not mean that choosing a course of action to utilise that legislation is necessarily either a course of action that is not abnormal or a course of action that is not contrived.'

The second one makes the following point:

> 'The course of action taken by the taxpayer aims to achieve a favourable tax result that Parliament did not anticipate when it introduced the tax rules in question and, critically, where that course of action cannot reasonably be regarded as reasonable.'

As a result, HMRC and the Panel virtually have the power to decide that something which Parliament set down did not really mean what it says, simply because Parliament did not consider the matter properly. Had they thought about it more carefully, they would have enacted something a little different, ie. something which would probably correspond more closely to the HMRC point of view. As one eminent tax commentator has written:

> 'I am not sure that Parliament will be too happy about these people having the power to change the law that Parliament has enacted to something which they find preferable.'

Well said!

Contributed by Robert Jamieson

Three new opinions

The GAAR advisory panel has since published three new opinions on matters referred to it by HMRC. These were issued in November and published last month.

Two of the latest opinions relate to similar schemes set up by companies to reward key employees using a purchase and sale of gold bullion, with a future obligation to repay sums to an employee benefit trust. These two sets of arrangements were substantially the same as those involved in the first opinion released in August. The panel came to the same conclusion, namely: that the entering into and carrying out of the arrangements was not a reasonable course of action in relation to the relevant tax provisions.

The third opinion involved the use of offshore trusts to avoid the distributions legislation and close company loans to participators rules, routing a payment of £500,000 through the trusts to cancel out a loan of £460,000 owed by Mr A to a company of which he was the sole director and shareholder. The panel again reached the conclusion that the entering into and carrying out of the arrangements was not a reasonable course of action in relation to the relevant tax provisions.

www.gov.uk/government/collections/tax-avoidance-general-anti-abuse-rule-gaar

Trust registration service guidance revised

HMRC has updated their draft guidance, revising when trustees must report detailed information on individual beneficiaries, and when it is enough simply to report a class of beneficiaries. Where beneficiaries are defined as a class of persons, the individuals do not need to be identified until they actually receive a distribution from the trust.

Other changes to the guidance first issued in October include:

- examples of trusts that do not need to register;
- confirmation of the extended deadline of 5 January 2018 for trusts first needing to register for self-assessment in 2016/17;
- allowing the use of a UTR in place of a NINO;
- further details on the workaround for a deceased settlor; and
- more on the 'look through' procedures when non-UK trusts holding UK assets indirectly need to register.

Tax Journal (1 December 2017)

Report on routes to VAT simplification

In its recent report, the OTS has highlighted:

- 8 core recommendations, which are the most significant and are set out in the Executive Summary

- 15 additional administrative and technical recommendations, included in the chapters which follow, which could also make a useful contribution to users

The 8 core recommendations are:

1. the government should examine the current approach to the level and design of the VAT registration threshold, with a view to setting out a future direction of travel for the threshold, including consideration of the potential benefits of a smoothing mechanism

2. HMRC should maintain a programme for further improving the clarity of its guidance and its responsiveness to requests for rulings in areas of uncertainty

3. HMRC should consider ways of reducing the uncertainty and administrative costs for business relating to potential penalties when inaccuracies are voluntarily disclosed

4. HM Treasury and HMRC should undertake a comprehensive review of the reduced rate, zero-rate and exemption schedules, working with the support of the OTS

5. The government should consider increasing the partial exemption de minimis limits in line with inflation, and explore alternative ways of removing the need for businesses incurring insignificant amounts of input tax to carry out partial exemption calculations

6. HMRC should consider further ways to simplify partial exemption calculations and to improve the process of making and agreeing special method applications

7. the government should consider whether capital goods scheme categories other than for land and property are needed, and review the land and property threshold

8. HMRC should review the current requirements for record keeping and the audit trail for options to tax, and the extent to which this might be handled on-line.

VAT registration threshold

The most striking recommendation is to drastically lower the VAT threshold from its current level of £85,000. Our VAT registration threshold is the highest in the EU, where the average is £20,000 and is often seen as a tax simplification measure in itself, Most businesses can operate without needing to be registered for VAT by remaining below this high threshold.

However, the report says there is clear evidence, from academic analysis of HMRC data and from submissions to this review, that the high level of the threshold is having a distortionary impact on business growth and activity with a significant ‘bunching’ of businesses whose turnover is just below the threshold.

The report does not make a specific recommendation, but it does question the consequences of lowering the threshold to a level that is around the national average wage of £26,000. This would bring around one million extra businesses into the VAT fold and also mean that the introduction of Making Tax Digital would become a concern for many more small businesses.

www.gov.uk/government/news/otss-first-review-of-vat-triggers-debate

Closure of certificate of tax deposit scheme

The certificate of tax deposit scheme has closed with effect from 23 November 2017. Existing certificates will continue to be honoured until 23 November 2023.

www.gov.uk/guidance/certificate-of-tax-deposit-scheme

International Tax

OECD action plan on tax crime

The 5th OECD Forum on Tax and Crime held in November identified five priorities for action:

1. Ensure that professional enablers play their part in tackling tax crime;

2. Step-up the level of international and cross government cooperation to build a comprehensive and global response to tax crime, drawing on the key report 'Effective Inter-Agency Co-Operation in Fighting Tax Crimes and Other Financial Crimes', launched at this Forum;

3. Learn the lessons from around the world about how best to respond to tax crime by implementing the OECD's 'Ten Global Principles', also launched at this Forum;

4. Strengthen our ability to collaborate globally and by building capacity to share intelligence and data quickly and securely;

5. Build capacity in all countries - including developing countries - to combat financial crimes so that there can be no hiding place for tax criminals.

www.oecd.org/tax/strengthening-the-global-response-to-tax-crime.htm

OECD approves 2017 update to model tax convention

The 2017 update primarily reflects changes developed through the BEPS project since last update in 2014. A revised version will be published in the next few months.

See http://bit.ly/2iMXVI1.

OECD releases further BEPS dispute resolution peer reviews

The OECD is gathering information for its fourth batch of mutual agreement procedure peer reviews under BEPS action 14, the framework for resolving tax treaty-related disputes.

The peer review process is in two stages:

- Stage 1 evaluates implementation of theaction 14 minimum standard for inclusive framework members;

- Stage 2 focuses on monitoring the follow-up of the recommendations resulting from stage 1 reports.

This batch involves 'stage 1' reviews of Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand and Portugal. Taxpayers are invited to make submissions on specific issues relating to the mutual agreement procedure by 22 December 2017, using the online taxpayer input questionnaire.

Country-by-country reporting extension in Jersey

The Jersey government has agreed a filing extension of one month to 31 January 2018, for entities required to file country-by-country reports locally whose first reporting deadline is 31 December 2017.

A number of jurisdictions do not currently have a CbCR competent authority agreement in force with Jersey, although agreements with the USA, UK, Guernsey, Isle of Man and Hong Kong are due to be signed by 31 December.

Local filing of CbC reports is required by any Jersey member of a multinational group of companies whose annual profits exceed €750m, where no CbCR competent authority agreement is in place.

OECD releases latest guidance on country-by-country reporting

The OECD has updated its guidance on the implementation of CbC reporting (BEPS Action 13) with additions concerning fair value accounting, treatment of negative figures for accumulated earnings, treatment of mergers/acquisitions/de-mergers and short accounting periods, and the definition of total consolidated group revenue.

www.oecd.org/tax/oecd-releases-further-guidance-for-tax-administrations-and-mne-groups-on-country-by-country-reporting-november-2017.htm

Finance Bill 2018 published

The government has published Finance Bill 2018, containing 50 clauses and 12 schedules, running to 184 pages. The second reading is scheduled for Monday 11 December, with a committee of the Whole House due to debate the Bill on Monday 18 and Tuesday 19 December.

The Bill includes a number of measures for which legislation was published in draft on 13 September and at the Autumn Budget on 22 November.

services.parliament.uk/bills/2017-19/financeno2.html

Explanatory notes on the clauses are available at *www.gov.uk/government/publications/finance-bill-2017-18-legislation-and-explanatory-notes*.

Budget timetable and tax policy process

In the Autumn Statement 2016 the Chancellor announced that going forward he would hold a single fiscal event each year: a Budget to be held in the autumn. Autumn Budget 2017 is the first Budget in this new cycle.

From Spring 2018, an annual Spring Statement will accompany an updated economic and fiscal forecast from the Office for Budget Responsibility. The Chancellor will not make significant tax or spending announcements at the Spring Statement, unless the economic circumstances require it.

The Spring statement has been announced for Tuesday 13 March 2018. The aim will be to consult on major or longer-term tax policy changes at an earlier stage, which could be at the Budget or in the Spring, and to announce most policies at least 16 months before they come into effect at the start of the next tax year.

The government also intends to re-introduce an online consultation tracker. Brexit legislation is likely to merit 'exceptional treatment' within the consultation timetable.

www.gov.uk/government/publications/the-new-budget-timetable-and-the-tax-policy-making-process

Tax havens blacklist

On 5 December, ECOFIN ministers published the EU's blacklist of 17 'non-cooperative' tax jurisdictions:

A further 47 countries are identified as having made a commitment to addressing deficiencies in their tax systems, and will be blacklisted if they fail to do so by the end of 2018.

The EU listing process will continue into 2018:

- A letter will be sent to all jurisdictions on the EU list, explaining the decision and what they can do to be de-listed.
- The Commission and Member States (in the Code of Conduct Group) will continue to monitor all jurisdictions closely, to ensure that commitments are fulfilled and to determine whether any other countries should be listed in the future. A first interim progress report should be published by mid-2018. The EU list will be updated at least once a year.

europa.eu/rapid/press-release_IP-17-5121_en.htm

Consultations

Taxing non-residents' gains on UK immovable property

In the Autumn Budget 2017 the government announced that, from April 2019, tax will be charged on gains made by non-residents on disposals of all types of UK immovable property, extending existing rules that apply only to residential property.

HMRC have published a consultation that will run until 16 February 2018 that proposes to bring all gains on non-resident disposals of UK property within the scope of UK tax and also considers the future of the rules applying to ATED-related gains.

Legislation will be introduced in a future Finance Bill. HMRC has published a technical note setting out the anti-forestalling rule applying to arrangements, entered into on or after 22 November 2017, which attempt to circumvent the changes proposed This note should be read alongside the consultation document.

The rules will create a single regime for disposals of interests in both residential and non-residential property, introducing a new charge for gains on disposals of commercial property and extending the rules for residential property to indirect sales and disposals made by widely-held companies.

Indirect disposal rules will apply where an entity is ‘property rich’, which is broadly where 75% or more of its gross asset value at disposal is represented by UK immovable property. Such disposals will trigger the charge only where the person holds, or has held at some point within the five years prior to the disposal, a 25% or greater interest in the entity. There will be a reporting requirement on certain third-party advisors who have sufficient knowledge of the transaction.

www.gov.uk/government/consultations/taxing-gains-made-by-non-residents-on-uk-immovable-property

Rent-a-room tax relief

The government has launched a call for evidence to find out the extent to which rent-a-room relief achieves its intended purpose of helping provide low-cost residential housing.

They are considering whether the relief should more explicitly support residential accommodation provided on a longer-term basis, subject to a ‘residential’ test.

The deadline for responses is 23 February 2018.

www.gov.uk/government/consultations/rent-a-room-relief

Disguised remuneration: technical note and draft legislation

HMRC's technical note outlines disguised remuneration measures now contained in Finance Bill 2018, including changes made to the draft legislation published in September.

It also covers the transfer of disguised remuneration liabilities from employer to employee in circumstances where HMRC cannot reasonably collect tax from the employer, including draft regulations to relieve UK clients and employees of liability for NICs.

HMRC has also published further draft legislation providing relief from a double NICs charge in specific situations.

www.gov.uk/government/publications/disguised-remuneration-transfer-of-liability-technical-note

Extending royalties withholding tax

The government is consulting until 23 February 2018 on the design of new rules announced at Autumn Budget 2017 for extending royalties withholding tax to payments in respect of UK intellectual property made to connected parties in low or no-tax jurisdictions from April 2019, regardless of whether the payer has a taxable presence in the UK.

The government's preferred approach is to target payments for exploitation of intellectual property and intangible assets of any description in the UK, rather than defining specific types of payment.

www.gov.uk/government/consultations/royalty-withholding-tax

Corporate interest restriction and lease accounting

The government is consulting until 28 February 2018 on three options for amending the corporate interest restriction rules to accommodate the new lease accounting standard, IFRS 16. The new standard does not classify leases as either operating leases or finance leases, whereas corporate interest restriction rules require identification of the finance element for payments to be recognised as 'tax-interest expense'.

The three options are, broadly, to:

1. follow accounting treatment;

2. keep a distinction between operating and finance leases; or

3. introduce a distinction between 'funding leases' and 'non-funding leases'.

The government is consulting separately on the impact of IFRS 16 on plant and machinery leasing and other areas.

www.gov.uk/government/consultations/corporate-interest-restriction-consultation-on-leases

Lease accounting changes for plant and machinery

Following consultation between August and October 2016 on options for changing the tax rules on plant and machinery leasing in response to the new lease accounting standard IFRS 16, the government has decided to maintain the current system of lease taxation by making legislative changes necessary to preserve the current tax treatment overall.

HMRC is now consulting until 28 February 2018 on those changes, and on the wider tax impact of IFRS 16, which has a mandatory implementation date of 1 January 2019.

HMRC is consulting separately on the impact of IFRS 16 on the corporate interest restriction rules.

www.gov.uk/government/consultations/plant-and-machinery-lease-accounting-changes

Transposing the EU vouchers directive into UK VAT law

HMRC is consulting until 23 February 2018 on transposing the new EU vouchers directive into UK law from January 2019.

The new rules aim to ensure that when customers pay with gift cards and vouchers, businesses account for the same amount of VAT as when other means of payment are used. The changes do not extend to discount vouchers or money-off tokens.

Draft legislation will be published in Summer 2018 and introduced in a subsequent Finance Bill.

www.gov.uk/government/consultations/vat-and-vouchers

Making tax digital interest and sanctions for late payment

HMRC is consulting until 2 March 2018 on options for aligning late payment interest and penalties across VAT, income tax self-assessment and corporation tax. This takes account of responses to the earlier consultation on sanctions for late submission under the making tax digital regime.

HMRC proposes a hybrid model for late payment penalties, to include a charge at 5% of the tax due, plus an additional element charged in an 'interest' type calculation.

www.gov.uk/government/consultations/making-tax-digital-interest-harmonisation-and-sanctions-for-late-payment

Making Tax Digital for VAT **(Lectures B1051/ B1052 – 13.44/ 12.48 minutes)**

Digital reporting and record keeping for VAT, included in the pre-Budget Finance Bill 2017 updates the powers contained within Schedule 11, VAT Act 1994 (administration, collection and enforcement), allowing the introduction of Making Tax Digital for VAT. Draft Regulations and a Draft VAT Notice were published for consultation on 18 December 2017 with comments invited by 9th February 2018.

From 1 April 2019 businesses with a turnover in excess of the VAT threshold (£85,000) will have to:

- keep their records digitally for VAT, and

- provide VAT return information through MTD functional compatible software.

This requirement will remain, even if they fall below the threshold at a later date. It will only cease when they deregister for VAT.

Businesses with turnover below the VAT registration threshold can choose to stay on the current system for VAT or they may elect for the relevant exemption not to apply.

Exemptions

The exemptions that already apply to electronic VAT returns will be extended to cover digital record keeping requirements and so includes a business:

- that is run entirely by practising members of a religious order whose beliefs are incompatible with the use of electronic communications;

- to whom an insolvency procedure applies;

- where it is not reasonably practicable to make a return using an electronic return system due to disability, age, remoteness of location or other reason.

Where HMRC commissioners refuse any of these exemptions, there is a right of appeal.

Functional compatible software

This is software that is required to meet MTD requirements. It will be used to:

- keep records in a digital form as required by the regulations;
- preserve digital records in a digital form as required by the regulations;
- create a VAT return and provide HMRC with this information digitally;
- provide HMRC with VAT data on a voluntary basis;
- receive HMRC information via the Application Programme Interface (API) platform.

HMRC have said that they will provide a list of compatible software in due course which is likely to include all of the current software providers (Xero, QuickBooks, SAGE, FreeAgent, KashFlow). Businesses are not restricted to using just one piece of software. However where more than one piece of software is used, they must be digitally linked to ensure that HMRC receive what they need.

HMRC VAT Notice Example 1

A business uses one piece of accounting software (A) to record all sales and purchases and electronically transfers the totals into a spreadsheet (B) that it uses to calculate the return. The information is then sent to a piece of bridging software (C) that submits the return to HMRC.

Altogether the three pieces of software maintain the mandatory digital records, calculate the return and submit it to HMRC. The links between the three pieces of software must be digital for the set of software to be functional compatible

There will be a one year soft landing period for penalties where there are manual links between (A) and (B). After that, they must be automated. This soft landing approach does not exist for manual links between (B) and (C) which must be automated from day one.

HMRC VAT Notice Example 2

A business uses one piece of accounting software to record all sales and purchases, this software then calculates the return and submits it to HMRC. As well as the records in the accounting software the business uses a spreadsheet to keep track of a fleet of cars and work out its road fuel scale charges.

The adjustment is not required to be kept in digital format so the business can type the adjustment into its accounting software.

HMRC VAT Notice Example 3

A VAT group uses three different software packages to record the mandatory records for different parts of the group. Each piece of software calculates the amounts needed for the return from each part of the group. A common spreadsheet is used to compile the totals and create the return for the whole of the group. The information is then sent to a piece of bridging software, which submits the return to HMRC.

Altogether the five pieces of software maintain the mandatory digital records, calculate the return and submit it to HMRC. The links between the five pieces of software must be digital for the set of software to be functional compatible software.

HMRC Agent's example (Addendum to the VAT Notice)

In this example the client keeps their VAT records on an non- API enabled spreadsheet. The client emails the spreadsheet to their accountant who imports the data into their API enabled software, with any adjustments being filtered back to the spreadsheet. The accountant submits the VAT return from their API enabled software.

Digital record-keeping

The regulations will specify the information a business needs to keep and preserve digitally, and will include designatory data such business name, principle place of business, VAT registration number and details of any VAT accounting schemes used.

For <u>each</u> supply made, there must be a record of the time and value of the supply as well as the rate of VAT charged. Output value for the period must be split between standard rate, reduced rate, zero rate, exempt and outside the scope.

For supplies purchased, the business must record the time and value of <u>each</u> supply as well as any input tax claimed.

There is no real time requirement for MTD so data could be entered just before submitting a VAT return. Clients who are reluctant for whatever reason to move over to MTD, could task tax agents to do the work for them, handover over their manual cashbooks once a quarter and with the agent using their own software to meet the MTD record keeping and filing requirements. It should be noted that the accountants would have to enter each transaction into the software rather than totals.

Each VAT registered business must keep a VAT account providing the link between primary records and the VAT return; The VAT account will be used by the software to fill in and the taxpayer's VAT return and to calculate the VAT payable or repayable.

Retail schemes

Retail scheme users will be permitted to record electronically sales transaction data based on daily gross takings, rather than recording individual sales.

Flat Rate Scheme

Digital record keeping requirements for flat rate scheme users will mirror current record keeping requirements so scheme users will need to keep records of sales but the only records of purchases they must keep are those relating to capital goods with a VAT inclusive value of £2,000 or more.

VAT returns

The return will be produced and submitted digitally; there will be no option to manually input numbers for businesses over the £85,000 threshold. The functional compatible software should be able to produce a VAT return from the digital records that have been created. The user will be able to check the return and then submit it digitally to HMRC on a quarterly basis, unless monthly or annual returns are being filed. There will be no requirement to change VAT quarters to align them with the accounting or tax year end.

For agents to be able to submit the returns on the taxpayer's behalf, they will obviously need to have access to the functional compatible software, either the client's software or their own.

For the time being there will be no change to statutory VAT return or payment dates.

Voluntary updates

Taxpayers will have the option to voluntarily submit supplementary data. It seems likely that most will not use this facility and will stick with the standard nine-box return. If HMRC make an enquiry into a VAT return, information will need to be supplied digitally but, until that point, no additional information needs to be submitted.

VAT Return Example 1

A business uses one piece of cloud based accounting software to record all sales and purchases. They provides access to their agent. The agent calculates the business partial exemption adjustment on a spreadsheet and enters this into the software. The software then calculates the return and submits it to HMRC.

As the records in the spreadsheet are not required digitally, the agent can type the adjustment into their accounting software. However a digital link would reduce the chance of errors.

VAT Return Example 2

A business uses one piece of accounting software to record all sales and purchases and transfers the totals into a spreadsheet. The business sends this spreadsheet to their agent, who uses it to calculate the return, ideally by importing data into compatible software. The information is then sent to a piece of bridging software that submits the return to HMRC.

The three pieces of software maintain the mandatory digital records, calculate the return and submit it to HMRC. The links between the three pieces of software must be digital for the set of software to be functional compatible software.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/668776/Draft_VAT_Notice_on_Making_Tax_Digital_for_VAT.PDF

Business Taxation

Not taxable trading income

Summary – The taxpayer has demonstrated that, on the balance of probabilities, the monies in the bank account were not undeclared taxable earnings.

Mr Bekoe comes from Ghana but lives in the UK with his wife. During the week he lives in London with his brothers, Darryl and Cyril, but spent weekends at his property in Kent.

He works as an IT specialist. During the 2009/10 he had a full time job with a large IT company and also worked as a consultant for his former employer Mphasis also a large IT company.

Mrs Bekoe's mother is a teacher and in 2009, she decided to set up a school in Ghana. In May 2009, Mr Bekoe paid a total of £21,000 from his Halifax bank account to help set up the school.

HMRC took the view that cash payments of £6,740 and bank deposits of £14,160 which had been paid into a Barclays Bank account during 2009/10 were undisclosed taxable earning of Mr Bekoe because:

- The Barclays Bank account had been set up to receive Mr Bekoe's self-employment income;
- If these additional amounts were added to his reported self-employed income, the amount of his self-employed earnings looked more credible;
- the explanations of where the cash and money deposits had come from had not made sense and were not consistent with the facts.

HMRC issued tax assessments amounting to £29,312.38 and penalties amounting to £15,901 on the basis that amounts totalling £20,900 paid into a Barclays Bank account in the name of Mr Bekoe's brother during the 2009-10 period were undeclared taxable trading income of Mr Bekoe.

Mr Bekoe appealed, arguing that the payments were in fact loans from friends and family members including his father.

Decision

The Tribunal concluded that Mr Bekoe has demonstrated, on the balance of probabilities, that the monies in the Barclays Bank account were not undeclared taxable earnings:

- His explanation for the payments into the account was reasonable;
- They accepted that Mr Bekoe was not available or interested in type of one-off supply of IT services from which HMRC suggested the payments arose;
- They appreciated that he was prepared to do consultancy work for Mphasis at a low profit margin, hoping for potential gains in the future;

- HMRC had not provided any compelling evidence to suggest that the payments in the Barclays Bank account should be treated as self-employed income.

The appeal was allowed.

Mr Edwin Bekoe v HMRC (TC06181)

Partnership losses

Summary – HMRC were entitled to open an enquiry into the claims for relief from income tax, which the taxpayers had made in their tax return forms to carry back losses to earlier tax years, and, as a result, amend their tax returns to deny the taxpayers the full relief which they had claimed or had been given.

The taxpayers were limited partners in various limited partnerships established under the Limited Partnerships Act 1907. They took part in marketed avoidance schemes aimed to take advantage of tax incentives under s.42 of the F(No 2)A 1992(as amended) to encourage investment in the production and acquisition of qualifying films.

The taxpayers invested in the partnerships in part by using their own money but principally by taking out non-recourse or limited recourse loans. In the early years of trading a limited partner could use the provisions of ss380 and 381 ICTA 1988 to set off their allocated share of trading losses against general income for that year of assessment or any of the previous three years of assessment. The partner could therefore choose to set off the losses against taxable income in one or more of those years in a way that gave him the greatest advantage.

The relevant film partnerships lodged tax returns for the tax years 1998/99, 1999/2000, 2000/01 and 2001/02, in which the partnerships claimed that they had suffered substantial trading losses, in relation to which they claimed relief for film expenditure under s42 F(No 2)A 1992.

HMRC did not accept those claims, but initiated inquiries into the partnerships' tax returns under s12AC(1) TMA s 12AC(1). It disallowed the partnerships' claims for expenditure funded by the non-recourse or limited recourse loans to individual partners and also the expenditure paid as fees to the promoters of the schemes.

The partnerships appealed but those appeals and the partnerships' claims for losses and relief were compromised by an agreement dated 22 August 2011 under s54 TMA 1970 (the partnership settlement agreement) under which the partnerships' losses were stated at much reduced levels.

HMRC wrote to the taxpayers to intimate that their carry-back claims in their personal tax returns would be amended in line with the lower figures for the partnership losses that had been agreed in the partnership settlement agreement.

The taxpayers challenged HMRC's decision by a claim for judicial review. Relying on the Cotter case, they asserted that HMRC was obliged to give effect in full to their claims to carry back the partnership losses because they had not opened an enquiry into the claims under the Sch 1A TMA 1970 in order to challenge them and were therefore barred by the passage of time from doing so. The Upper Tribunal rejected their claim and the Court of Appeal dismissed the taxpayers' appeal.

The taxpayers appealed.

Decision

The taxpayers' assertion that their claims were stand-alone claims which were governed only by the Sch 1 TMA 1970and that HMRC, by failing to open an inquiry under para 5 had allowed the claims to become unchallengeable, was incorrect because of the provisions of the TMA 1970 which specified what a taxpayer had to include in his return.

HMRC could inquire into a return under s8 or 8A TMA 1970, if an officer gave notice of his intention to do so (TMA 1970 s 9A(1)) and that enquiry could extend to anything contained in the return, or required to be contained in the return, including any claim. HMRC was therefore empowered under s 9A to inquire into the taxpayers' carry back claims contained in their Year 2 tax returns. HMRC was not required to institute an enquiry under Sch1A TMA 1970 1A in order to challenge the taxpayers' claims.

HMRC had given notice under s 12AC(1) TMA 1970 of the opening of inquiries into the partnerships' tax returns for the tax years 1998/99, 1999/2000, 2000/01 and 2001/02. By virtue of s 12AC(6)(a), the giving of notice opening an enquiry into a partnership return was deemed to include the giving of a notice of enquiry 'under section 9A(1) of this Act to each partner who at that time has made a return under section 8 or 8A of this Act or at any subsequent time makes such a return'. There were therefore deemed inquiries into the partners' personal tax returns in respect of Year 2.

The compromise of the appeals by agreements under the s54 TMA 1970 had the same consequences as if the Special Commissioners had determined the appeal in the manner set out in the agreement. The agreement therefore operated as if it was a determination by the Special Commissioners under s 50(7). That deemed decision by the Special Commissioners had empowered HMRC, as set out in s 50(9), to alter the taxpayers' personal tax returns in the manner set out in the letters.

s.59B(5)(b) TMA 1970 provided for the payment by the taxpayer of sums payable as a result of the amendment of a partner's tax return under s.50(9) and para 11 Sch 3ZA TMA 1970 specified the time limit for that payment. Consequently, HMRC’s amendment of the taxpayers' individual tax returns and the decisions in the letters under challenge were lawful.

Cotter was concerned with a claim made by an amendment of a tax return form relating to Year 1 that had intimated a claim for a loss that would occur in Year 2. By contrast, in the present case, the taxpayers' claims had been made in their tax returns for Year 2. Accordingly, the Supreme Court concluded that Cotter gave no support to the taxpayers. The judicial review challenge failed.

The appeal failed Appeal dismissed.

**R (on the application of De Silva and another) v HMRC [2017] UKSC 74*

Adapted from summary in Tolleys Tax Guidance

Relief for decommissioning plant and machinery

Summary - the special allowance for decommissioning was not available where transactions had been implemented solely to crystallise the relief early.

The commercialisation of an oil or gas field typically involves four phases:

1. Exploration and appraisal;
2. Development;
3. Production; and
4. Decommissioning.

This case concerned the decommissioning phase where the infrastructure must be removed, shut down and made safe.

Marathon Oil Corporation was the parent company of the Marathon Oil group, resident in the US for all tax purposes. The Marathon Oil group was engaged in the exploration for and production of petroleum and natural gas around the world.

Marathon Oil UK was the main operating company of the group in the UK, and was a wholly-owned indirect subsidiary of Marathon Oil Corporation. Marathon Oil UK was incorporated in Delaware but resident in the UK for UK tax purposes.

Marathon Oil Decommissioning Services Ltd was incorporated in Delaware on 4 December 2007 as a wholly-owned subsidiary of Marathon Oil UK It was US incorporated but UK resident.

Under a decommissioning services agreement Marathon Oil UK paid $300m to Marathon Oil Decommissioning Services in December 2008. On filing its tax return, Marathon Oil UK claimed a 'special allowance' for the payment under s163/164 CAA 2001.

The only issue was whether the payment was qualifying “expenditure...incurred on decommissioning plant or machinery” within the terms of the Capital Allowances Act 2001.

Decision

The First Tier Tribunal referred to emails from Ernst & Young, which explained that relief for decommissioning at the time was only available when the expenditure was incurred and at a time when the profits should have declined at the end of the field’s life.

They stated that the real issue to be decided was why Marathon Oil UK had incurred $300 million of expenditure in December 2008, many years in advance of monies leaving the Marathon group to incur decommissioning costs. (They noted that between December 2008 and the end of 2016, less than $50m expenses had been incurred by Marathon Oil Decommissioning Services Ltd on behalf of Marathon Oil UK).

They found that the main reason for Marathon Oil UK entering into the arrangements was to control the group’s tax credit position in the United States. There was no reason other than taxation why Marathon Oil UK entered into the transactions.

So the 'only purpose of incurring $300m of expenditure in December 2008 was to accelerate the special allowance'. The fact that the $300m could only be used under the DSA for services, which satisfied the statutory code, did not mean that the payment was made for qualifying decommissioning services.

In response to industry lobbying, changes were introduced by FA 2008. Those changes assisted effective tax relief for decommissioning costs incurred during the life of a field rather than at its end—in industry terms, “mid-life costs”. The changes removed the condition attached to the tax relief that the decommissioning costs must have been incurred for the purposes of or in connection with the closing down of an oil field, and removed the requirement that the decommissioning must have been carried out to comply with an approved abandonment programme. However, the First Tier Tribunal considered that it could not be inferred from the FA 2008 changes that prior to their introduction Marathon Oil UK ‘s construction prevailed.

Marathon Oil UK v HMRC (TC 06217)

Adapted from summary in Tax Journal (1 December 2017)

Taxpayer unaware of Revenue guidance

Summary – Neither the taxpayer nor their advisor were aware of the Revenue’ manual/ guidance and the application for judicial review was dismissed.

Aozora UK was the wholly owned subsidiary of a Japanese parent, Aozora Japan. The UK company established a wholly owned subsidiary and resident for tax in the States (Aozora US). During accounting periods ending 31 March 2007 to 31 March 2009, Aozora UK made loans to Aozora US and received interest payments in respect of the funds advanced. The US imposed withholding tax at 30% on the interest received. Aozora UK was liable to corporation tax on the amount of interest received from Aozora US.

The Revenue issued closure notices, denying Aozora UK relief under s790 ICTA 1988 in respect of the withholding tax imposed by the US. They were issued on the basis that the s793A prevented the availability of relief under s 790. By a review decision, the Revenue confirmed the closure notices and suggested that the Revenue had given guidance which it subsequently believed was not correct and that it had given such erroneous advice because it had failed to understand the full meaning and scope of s 793A.

The claimant sought judicial review on the basis that the Revenue's international manual INTM151060 contained a representation by the Revenue that gave rise to a legitimate expectation that it would be taxed in accordance with the manual, whether or not the terms of the manual were accurate, and that it would be conspicuously unjust and an abuse of power for the Revenue to resile from the alleged representation.

Decision

It was correct that the manual had contained guidance that had been prepared for the Revenue staff. However, a general notice had also stated that the guidance was being published for the information of taxpayers and their advisers. It also stated that subject to qualifications, readers could assume that the guidance would be applied in the normal case.

The guidance had constituted a relevant representation that s 793A(3) had application only to the circumstances set out in art 24(4)(c) of the UK/USA Double Taxation Convention, which it was common ground had no relevance to the claimant.

Strictly speaking, the claimant had not yet existed at the relevant time, but Aozora Japan would be treated as a proxy for the taxpayer in the present context. However, it did not appear that Aozora Japan had even been aware of the manual or the guidance. It did not appear that any written tax advice had been provided to Aozora Japan. It was not even clear whether the adviser had known about the manual or guidance.

The application was dismissed.

R (on the application of Aozora GMAC Investment Ltd) v Revenue and Customs Commissioners [2017] EWHC 2881 (Admin)

Adapted from Tolley Guidance

Corporate tax and the digital economy: position paper

The government has set out its approach to achieving reform of the international corporate tax framework, aimed at addressing the challenges posed by multinational businesses operating in the digital economy. The paper seeks views on a combination of coordinated reforms within the OECD context and unilateral measures. Comments are invited by 31 January 2018.

The government believes that a multinational group's profits should be taxed in the countries in which it generates value. In addition to embracing the Base Erosion and Profit Shifting (BEPS) project, the government believes that there is still more to be done. Countries must continue to work together to identify areas where the international tax framework still leaves them exposed to multinational tax planning, and consider how that framework is being challenged by changes in how global businesses are managed and structured. The international tax framework must be responsive to the changing nature of our economies in the digital age, and able to accommodate new digital businesses that operate and create value in different ways.

This paper sets out how the government intends to achieve this by:

- pushing for reforms to the international tax framework, to ensure that the value created by the participation of users in certain digital businesses is recognised in determining where those businesses' profits are subject to tax;

- exploring interim options to raise revenue from digital businesses that generate value from UK users, such as a tax on revenues that these businesses derive from the UK market. The UK will work with other countries to consider how such a tax could be targeted, designed and co-ordinated to minimise business burdens and distortion. However, the government stands ready to take unilateral action in the absence of sufficient progress on multilateral solutions;

- taking more immediate action against multinational groups, primarily in the digital sector, who achieve low-tax outcomes by holding their valuable intangible assets such as intellectual property in low-tax countries where they have limited economic substance.

The position paper takes account of feedback provided as part of the recent OECD consultation, and invites additional comments on this specific UK position by 31 January 2018.

The government hopes that the paper, and the debate it stimulates on this important issue, will inform the interim report being presented by the OECD Task Force on the Digital Economy to the G20 next spring. The government believes that the report needs to put forward bold multilateral solutions that build on the discussions taking place within the European Union, and help to ensure a more sustainable corporation tax framework for the future.

www.gov.uk/government/consultations/corporate-tax-and-the-digital-economy-position-paper

Corporate interest restriction adjustments

Two sets of regulations make consequential amendments to other legislation to ensure the new corporate interest restriction rules work as intended.

1. The Corporate Interest Restriction (Financial Statements: Group Mismatches) Regulations, SI 2017/1224, address three situations where accounting differences between the entity and group level could affect application of the new corporate interest restriction rules. These regulations will: (1) recognise a loan relationship on the amortised cost basis in the group accounts where it is recognised as such in the issuer company's financial statements and is subject to fair-value accounting; (2) on a debt buy-back of an external loan between two group members, spread the gain or loss on derecognition of the loan in the group accounts over the remainder of the loan term on a just and reasonable basis; and (3) include the finance charge arising on employer asset-backed pension contributions as an item of interest expense. The regulations come into force on 29 December 2017 and have effect for accounting periods beginning on or after 1 April 2017. HMRC consulted during April and May on a draft version of the regulations, to which have been added the provision in respect of asset-backed pension contributions.

2. The Corporate Interest Restriction (Consequential Amendments) Regulations, SI 2017/1227, aim to prevent the new corporate interest restriction rules having unintended consequences for collective investment vehicles and securitisation companies. They exclude distributions made by collective investment vehicles from the definition of 'tax-interest expense amount' and, for securitisation companies, treat the 'retained profit' figure as the net 'tax-interest income amount', adjusted for any management fees paid within the UK group. The regulations come into force on 29 December 2017 and have effect for accounting periods beginning on or after 1 April 2017. HMRC consulted on a draft version during March and April 2017.

Tax Journal (15 December 2017)

Corporation tax loss relief reform guidance

HMRC has published a third tranche of the draft guidance on changes to the treatment of carried-forward corporation tax losses from 1 April 2017. This part of the guidance covers the commencement provisions and includes worked examples. Comments are invited by 9 February 2018.

The first tranche of guidance was published in July, focusing on the core rules and other aspects where guidance had been specifically requested. The second tranche, published in November, covered group relief for carried forward losses and the relaxation of carried-forward non-trade losses.

Legislation for the changes is now contained in F(No. 2)A 2017 Sch 4.

Tax Journal (15 December 2017)

Share for share exchanges – how they work for tax (Lecture B1053 – 8.43 minutes)

Elton and Kiki own Heart Ltd equally. They have decided that they want to create an intermediate holding company to own Heart Ltd. To achieve this, Elton and Kiki sell their shares in Heart Ltd to a new intermediate holding company in exchange for shares in the holding company issued by that company. Elton and Kiki now own 50% each of the intermediate holding company.

Capital gains tax position

Elton and Kiki have disposed of their shares in Heart Ltd and normally we would expect a chargeable gain to arise. However, provided the share for share exchange is for bona fide commercial reasons, the transaction falls within s135 TCGA 1992 and share for share exchange relief is available. Under s135 TCGA 1992 no disposal occurs for capital gains tax purposes but instead the new shares acquired in the intermediate holding company are deemed to have been acquired for the same amount and at the same time as the original holding in Heart Ltd. This is sometimes referred to as the 'step into the shoes' rule. Thus a gain will only crystallise when the new shares are disposed of at some point in the future.

It is important that HMRC agree that the transaction is for bona fide commercial reasons and so taxpayers should seek clearance from HMRC in advance of the share for share exchange (s138 TCGA 1992).

Stamp duty

The intermediate holding company will have acquired shares in Heart Ltd. Under normal circumstances stamp duty would be payable at a rate of ½%.

However, provided that the proportions of the shareholdings of the original company and the proportions in which they are owned in the new of company are mirrored, then s77 FA86 relief applies. This relief must be applied for and, to be successful, certain conditions must be satisfied. The main condition is that the share for share exchange must be carried out for commercial reasons and not for tax avoidance purposes.

With Elton and Kiki originally owning 50% each in Heart Ltd and now owning 50% each in the intermediate holding company, the mirror image shareholding requirement has been satisfied and relief is available and no stamp duty is payable.

Taxpayers should be aware that S77A FA 1986 blocks the stamp duty relief if, at the time of the share for share exchange, there are arrangements in place whereby a change in control in the acquiring company is possible. (See the article that follows on capital reduction demergers)

Created from a lecture by Peter Rayney

Capital reduction demergers **(Lecture B1054 – 15.02 minutes)**

In a typical scenario, a company may be operating two divisions run by separate shareholder/ directors. For some reason they have decided that they want each of those divisions to be held by a separate company, perhaps due to the individuals falling out over how to take the businesses forward. By undertaking a capital reduction demerger, the owners avoid a liquidation.

Example

Elton and Kiki own Heart Ltd equally. The company operates two divisions – one covering the London and the South East and the other the rest of the UK.

Elton and Kiki have decided that they want to separate the businesses so that each takes ownership of the division that they currently run. When looking to use a capital reduction demerger, it is quite common to insert an intermediate holding company taking advantage of the share for share exchange rules in s135 TCGA 1992. Clearance should be sought from HMRC that the transaction is for bona fide commercial reasons. While capital gains are thus not an issue, stamp duty will be payable due to the change in control that will be triggered. S77 FA 1986 relief is not available.

Once the intermediate holding company had been created, one of the divisions, say the London and South East division, is hived up into this company by distributing the goodwill and net assets of that division in specie, thus reducing the value of Heart Ltd by the carrying value of those assets. Heart Ltd is left holding the goodwill and net assets of the second division, covering the rest of the UK.

At this point the share holdings of the intermediate holding company are recategorised. Typically, Elton's ordinary shares become A ordinary shares, with it stated in the Articles that these shares entitle him to profits, assets and votes relating to the London and SE division. Similarly, Kiki's ordinary shares become B ordinary shares, with the Articles stating that these was entitle her to the profits, asset and votes relating to the Rest of the UK division. Provided that the valuations of the respective divisions correspond to their 50% holdings, this represents a simple capital gains tax reorganisation at the shareholder level, with no value shifting involved.

When Elton and Kiki subscribed for their shares in the intermediate holding company , each of them gave up half of their shareholding in Heart Ltd, making the subscription value or 'price paid' for their shares in the intermediate holding company is half of the market value of Heart Ltd.

The next step is for the directors of the intermediate holding company to make a declaration of solvency and then pass a resolution to reduce the capital by a repayment of the shares in Heart Ltd to Kiki. To ensure that corporate reorganisation relief in s139 TCGA 1992 is available and no gains arises, the 'Rest of the UK' division is transferred within Heart Ltd to a new company, Kiki Ltd, and shares in the new company, Kiki Ltd, are issued to Kiki in exchange for her old B ordinary shares in the intermediate holding company. The B ordinary shares that Kiki no longer owns have no economic value and so would be cancelled.

Following the demerger:

- Elton owns A shares in what was the intermediate holding company but now just holds the London and SE division;

- Kiki owns shares in Kiki Ltd which is turn owns Heart Ltd which owns the Rest of the UK division.

Created from a lecture by Peter Rayney

VAT

Sale and leaseback – disposal of entire interest?

Summary – The Upper Tribunal upheld the decision that there had been a disposal of Balhousie Care's entire interest in the Huntly care home.

Balhousie Holdings Limited operates 25 care homes. It is also part of a VAT group with Balhousie Care and three other subsidiaries.

In 2010 Balhousie Holdings Limited decided to build three new homes including Huntly. The land and subsequently the new care home at Huntly belonged to a subsidiary of Balhousie, namely FC, which was not part of the VAT Group. Following completion of the build, Balhousie Care acquired the Huntly care home. This first sale to Balhousie Care was zero-rated for VAT purposes.

The issue to be decided was whether Balhousie Holdings Limited was liable to account for VAT on a self-supply that arose as a consequence of Balhousie Care's subsequent sale of the Huntly care home to a third party (Target) in March 2013, and the immediate lease back of the Huntly care home from Target to Balhousie Care.

The answer turned on the interpretation of Paragraph 36(2) of Schedule 10 VATA 1994 and the determination of whether or not, by virtue of those arrangements, Balhousie Care had "disposed of its entire interest" in the Huntly residential care home, within the meaning of that provision.

Unsurprisingly, Balhousie Holdings Limited claimed that Balhousie Care had not disposed of its 'entire interest' in the property because the arrangements with Target were a sale and leaseback but HMRC disagreed.

Decision

The First Tier Tribunal allowed the taxpayer's appeal but on appeal, the Upper Tribunal said it was necessary to look at each component transaction.

'The conventional transactional approach applied to VAT should not be subsumed into an approach that gives primacy to the "commercial reality" or the "overall effect" of a transaction, if the relevant taxing statute does not enjoin that approach.'

The judge decided there had been a disposal of Balhousie Care's entire interest in the Huntly care home. Crucially it no longer derived its right of occupation from the original supply but rather, from the lease. It was not relevant that it had acquired a similar interest under the lease.

HMRC's appeal was allowed.

CRC v Balhousie Holdings Limited UT/2016/0162

VAT Sheet 7/17: Construction services and zero-rated relief

Following the decisions in three Upper Tribunal cases (Astral Construction Limited, Boxmoor Construction Limited and J3 Building Solutions Limited), HMRC has revised its policy on when it will allow zero-rating for the construction of residential buildings, where part of an original building is retained.

Astral Construction Limited

An existing church was linked to a much larger structure, to form a nursing home. The Upper Tribunal found that the completed nursing home was so different from the existing church), that it could not be said to constitute an alteration, enlargement of or extension to the church. They held that if scale of the work was much more than an alteration, enlargement or extension and, the finished structure was now being used for an entirely different purpose, it must amount to the construction of a building.

Boxmoor Construction Limited

In this case, a house was demolished apart from the retention of a small portion of the front facade consisting of the lower part of a projecting bay. The Upper Tribunal held that as retaining part of the facade was not a condition of statutory planning consent and so did not amount to the construction of a building but was the alteration and extension of the original house.

J3 Building Solutions Limited

Work was undertaken on a coach house that involved the retention of several exterior walls and increasing the height and footprint of the overall building. The Upper Tribunal agreed with HMRC that alteration is a concept broad enough in scope to cover all works The significance of this case is that it limits Astral to exceptional cases. Although a project may involve conversion of the original building, in cases that are similar to Astral the work will be far too extensive for the term conversion to be an adequate description of what's taken place.

Revised policy

Zero-rating is permitted where an existing building is demolished completely to ground level but HMRC now accepts that it needs to take account of the nature of the work.

- Works on an existing structure may be so extensive as to amount to construction;
- 'Very minor' parts of a building retained above ground level may be 'de minimis';
- Where facades are retained, plans submitted to the planning authority must show evidence that their retention was a condition of planning consent.

www.gov.uk/government/publications/vat-information-sheet-0717-construction-services-and-zero-rated-relief

Distance learning courses - Single or multiple supply?

Summary – The provision of manuals as part of a distance-learning package was a single standard-rated supply.

Metropolitan International Schools Limited provided distance learning. Under a 1999 agreement between HMRC and the School, the supplies made by the school to its customers were treated as involving two separate supplies:

1. Supply of books (zero rated); and

2. Supply of educational services (standard rated).

Broadly, using an agreed method, roughly 75% by value of the supplies were zero rated and 25% as standard rated.

In 2009, in connection with the review of a claim for repayment of VAT made by the school for 2006, HMRC withdrew its agreement to the agreed method on the grounds that the supplies made by the school should be treated as a single supply of standard rated educational services following the decision of the House of Lords in College of Estate Management Limited v. HM Customs & Excise [2005] UKHL 62, [2005] STC 1597 ("CEM"). HMRC issued assessments for all open periods on 26th March 2010. Metropolitan International Schools Limited appealed to the First Tier Tribunal against the revised assessments and also applied for judicial review of HMRC's withdrawal of the agreement. The First Tier Tribunal found that the supplies made by Metropolitan International Schools Limited should be treated as a single zero rated supply of books (under section 30 and item 1 of Group 3 of Schedule 8 VATA 1994 and allowed the appeal by the School.

HMRC appealed to the Upper Tribunal.

Decision

Adopting the approach of the CJEU in Mesto [2014] STC 1703, the Upper Tribunal concluded that the school provided a 'blended course'. A typical student bought a package in which books were important, but did not predominate. The supply by the school was therefore not a zero-rated supply of books. The First Tier Tribunal had been wrong to view the transactions as involving the supply of manuals as a principal supply.

The school also claimed that it had a legitimate expectation that it would be permitted to continue to operate the previously agreed method in relation to contracts that had been entered into before HMRC's withdrawal. The Upper Tribunal agreed that HMRC's decision could not be applied retrospectively, it concluded that the school had not been entitled to a run-off period for long-term contracts.

Finally, the school claimed repayment supplements (VATA 1994s 79) in relation to payments of VAT for periods prior to 2009, which had been withheld following HMRC's initial decision that the agreed method should be withdrawn retrospectively. The UT observed that repayment supplements only applied where a taxpayer is entitled to a 'VAT credit'; and the school was not entitled to a VAT credit as its agreement with HMRC had not changed the legal position.

HMRC v Metropolitan International Schools Ltd [2017] UKUT 431

R&C Brief 3/2017: Pension fund management services

In ATP Pension Services [2014] STC 2145 (C-464/12) (ATP), the CJEU found that a pension fund which pooled investments from a number of defined contribution occupational pension schemes qualified as a special investment fund for the purposes of the VAT exemption for fund management services. This case specifically concerned defined contribution pensions and did not concern the VAT treatment of services supplied in connection with defined benefit pensions. Services supplied in connection with defined benefit pensions schemes were found by the CJEU in Wheels Common Investment Fund Trustees and Others [2014] STC 495 (C-424/11) to fall outside the fund management exemption on the basis that the investment fund which pools the assets of such a scheme was not a special investment fund.

Prior to the judgement in ATP, HMRC did not consider pension funds of any kind to be special investment funds, and therefore treated services provided in connection with all types of pension fund as falling outside the specific VAT exemption for the management of special investment funds. In light of the ATP judgement, HMRC now accepts that pension funds that have all of the required characteristics are special investment funds for the purposes of the fund management exemption, so that the services of managing and administering those funds are, and always have been, exempt from VAT. Pension funds that don’t have all those characteristics aren’t special investment funds and so aren’t within the scope of the exemption.

HMRC has decided to delay until 1 April 2019 the withdrawal of its practice of allowing insurers to treat their supplies of non-special investment fund pension fund management services as exempt from VAT. The withdrawal had originally been announced for 1 January 2018.

www.gov.uk/government/publications/revenue-and-customs-brief-3-2017-vat-treatment-of-pension-fund-management-services

New tools to combat VAT fraud

The European Commission has launched a set of tools to make the EU’s VAT system more fraud-proof and close loopholes which can lead to large-scale VAT fraud. The new rules aim to build trust between Member States so that they can exchange more information and boost cooperation between national tax authorities and law enforcement authorities.

Strengthening cooperation between Member States:

VAT fraud can happen in a matter of minutes, so Member States need to have the tools to act as quickly as possible. Today's proposal would put in place an online system for information sharing within 'Eurofisc', the EU's existing network of anti-fraud experts. The system would enable Member States to process, analyse and audit data on cross-border activity to make sure that risk can be assessed as quickly and accurately as possible. To boost the capacity of Member States to check cross-border supplies, joint audits would allow officials from two or more national tax authorities to form a single audit team to combat fraud - especially important for cases of fraud in the e-commerce sector. New powers would also be given to Eurofisc to coordinate cross-border investigations.

Working with law enforcement bodies

The new measures would open new lines of communication and data exchange between tax authorities and European law enforcement bodies on cross-border activities suspected of leading to VAT fraud: OLAF, Europol and the newly created European Public Prosecutor Office (EPPO). Cooperation with European bodies would allow for the national information to be cross-checked with criminal records, databases and other information held by Europol and OLAF, in order to identify the real perpetrators of fraud and their networks.

Sharing of key information on imports from outside the EU

Information sharing between tax and customs authorities would be further improved for certain customs procedures that are currently open to VAT fraud. Under a special procedure, goods that arrive from outside the EU with a final destination of one Member State can arrive into the EU via another Member State and transit onwards VAT-free. VAT is then only charged when the goods reach their final destination. This feature of the EU's VAT system aims to facilitate trade for honest companies, but can be abused to divert goods to the black market and circumvent the payment of VAT altogether. Under the new rules information on incoming goods would be shared and cooperation strengthened between tax and customs authorities in all Member States.

Information sharing on cars

Trading in cars is also sometimes subject to fraud due to the difference in how VAT is applied to new and used cars. Recent or new cars, for which the whole amount is taxable, can be sold as second-hand goods for which only the profit margin is subject to VAT. In order to tackle this type of fraud, Eurofisc officials would also be given access to car registration data from other Member States.

These legislative proposals will now be submitted to the European Parliament for consultation and to the Council for adoption.

Ebay trader registration

Summary – Given the taxpayer’s failure to register, supply supporting evidence and file any VAT return, HMRC were correct to assess VAT and the related penalty.

In February 2015 HMRC commenced an investigation into Ms Kaur’s tax affairs, and requested information for the period from April 2010 to February 2015.

In a letter dated 4 March 2015 Ms Kaur stated, “I have not been self-employed in any year.” Later in a letter dated 8 May 2015 she stated, “I do not have a PayPal account.”

On 25 June 2015 HMRC stated to Ms Kaur that they had reason to believe she had been conducting a trade involving sales through eBay and operation of a PayPal account. She replied in October stating, “... I had made no profit no money from the venture. I did not know or was aware that I had to keep any paperwork or accounts, as I did not, so I do not know what my liability will be as I made nothing from it.”

HMRC calculated her sales based on all 20,574 feedback postings. The turnover in the relevant period was approximately £278,000, with sales in Sterling, Euros, US Dollars and Australian Dollars.

HMRC concluded that Ms Kaur was liable to be registered for VAT from no later than 1 December 2010, and that she ceased trading on 17 July 2011. She was informed of this by letter dated 7 January 2016, and that the VAT liability would be assessed at £27,632.98. She had been given the opportunity to supply details of goods purchased by her business and any VAT incurred thereon; in the absence of any such information HMRC were unable to allow any credit for input VAT.

Decision

For clarity, the only matter before the Tribunal is the sch 41 FA 2008 failure- to-notify penalty of £6,908.24. There was no right of appeal against the VAT assessment of £27,632 which HMRC raised under s 73(1) VATA 1994: "Where a person has failed to make any returns required under this Act ... [HMRC] may assess the amount of VAT due from him to the best of their judgment and notify it to him." The tribunal concluded that if Ms Kaur wishes to challenge that assessment then she must first file a VAT return.

The Tribunal concluded that HMRC did make all reasonable investigations before issuing the s 73(1) assessment; also, that HMRC took into account the material disclosed by those investigations. They also agreed that the VAT calculation is likely to be favourable to Ms Kaur in that it assumes every customer left feedback – so any other sales were not been included.

As Ms Kaur repeatedly declined to produce any accounting information that could even start to justify her claim, the Tribunal agreed with HMRC that no account could be taken of the business purchases in calculating the potential lost revenue.

The Tribunal agreed with HMRC's basis of calculation in that disclosure of failure to register was prompted and accepted HMRC's view that it was not deliberate. The Tribunal believed that HMRC's mitigation percentages were generous and said that although that conclusion was open to us to substitute, they do not propose to disturb HMRC's conclusion.

Accordingly, they confirmed the penalty at 25% of the potential lost revenue and the appeal was dismissed.

Ms Parminder Kaur v HMRC (TC6210)

Freezing the VAT registration threshold **(Lecture B1055 – 12.47 mintes)**

Introduction

There was great excitement before Budget day that the Chancellor intended to slash the VAT registration threshold from £85,000 to £26,000. This speculation followed the publication of the OTS VAT report which identified that a large quantity of businesses were trading just below the threshold and that the £85,000 limit was a disincentive to trading growth. However, the speculation was unjustified, and the final announcement was that the £85,000 VAT registration threshold will be frozen until at least April 2020. You might think that this policy is not very exciting but I personally think the issues are very significant to many entities and advisers.

Case study – guest house

Jack and Jill Vera run The Hill Guest House in Blackpool as a partnership. Their annual turnover figure is £83,000 ie just below the VAT registration threshold – their gross profit is 80% of sales and net profit after expenses is £11,000. Expenditure that is standard rated for VAT purposes is only £6,000.

Jack and Jill close the hotel for three months a year (January to March) but think they could generate an extra £20,000 of sales if they opened in February and March as well.

Solution – if Jack and Vera progress with this strategy, then their gross profit will increase by £16,000 ie £20,000 x 80%. But the increased takings mean they will need to register for VAT at some stage and their annual VAT payment to HMRC will probably exceed this figure:

Output tax - takings £103,000 x 1/6 = £17,166

Input tax – standard rated expenses of £6,000 x 1/6 = £1,000

VAT payable = £16,166.

Price increases with a frozen registration threshold

We are hopefully all agreed that Jack and Vera will not be extending their opening hours because of the potential VAT problem but what will happen in March when they want to increase their prices for the new summer season? An inflationary increase of 3% would lead to anticipated turnover of £85,490 in the following 12 months, which is now above the VAT threshold because of the Budget announcement that it would remain at £85,000. So they might decide to freeze their prices for the year or restrict the increase to 1% or 2% but they will then have the same issue in April 2019 – and possibly April 2020.

Many experts predict that the threshold will probably be frozen at £85,000 for many years to come – 2020, 2021, 2022 etc. There are numerous examples of thresholds being frozen in the VAT world eg the annual joining threshold of £150,000 for the flat rate scheme has not been increased since April 2003! It is very hard to reduce the threshold by a significant amount because this would capture thousands of businesses and potentially convert them into a loss making position.

Alternative strategies – income splitting?

This is where I think the VAT issues will become very interesting: Jack and Jill will be faced with increases in their costs each year but we have identified how difficult it will be for them to increase prices on their sales when the VAT threshold is frozen for two or three years. And there are many thousands of businesses in the same position as Jack and Vera. I used to act for an architect who deliberately controlled his work level to avoid exceeding the VAT threshold in any rolling 12-month period. So I suspect that clients will start thinking about how they can have their cake and eat it ie increase their selling prices but still avoid a VAT problem.

Think about the following situation: Jack and Jill ask if they can avoid a VAT problem by asking their self-employed cleaner to invoice each guest for her services. So they would charge a guest £30 a night for the room and breakfast and the cleaner would separately charge the guest £5. The annual total of the £30 fees will be less than the VAT threshold, which might not be the case if the relevant figure was £35. As VAT enthusiasts will know, this strategy would be challenged by HMRC (almost certainly with success) because the reality is that the guest house is making all supplies to the guests, and the cleaner is working for the guest house. This outcome was reaffirmed in the case of Wendy Lane T/A Spot On (TC2909) a number of years ago.

Here are a few other suggestions that Jack and Jill might propose:

- There is a small bar in the guest house. Would it be possible for the bar activity to be organised by Jack or Jill as a sole trader ie a separate legal entity to the partnership guest house? This deflects taxable sales from the partnership to another business.

- How about if guests pay a ‘room only’ fee to the partnership – and then a separate payment of, say, £6 if they wanted breakfast? The breakfast service would be organised as a separate business to the partnership – say Jill as a sole trader.

- What would be the position if Jack and Jill ask their son Martin to organise either the bar or breakfast activity as a separate business ie separate characters are being introduced to part of the operation?

Business splitting

The powers of HMRC to treat separated businesses as one legal entity (a partnership) are given by paras 1A(1) and 2, Schedule 1(A), VATA1994. The key challenge is for HMRC to be able to prove that the two businesses have “financial, economic and organisational links.” The key word is “and” ie all three links have to be proved rather than one or two of them. The main outcome of a direction from HMRC is that the combined businesses will need to register for VAT as a single entity moving forward ie not retrospectively. But if HMRC decide there never was two separate businesses (such as in the example of the split between the room charge and the cleaning fee I gave), this will become a late registration issue. And don’t forget that HMRC have the power to go back up to 20 years to correct a late registration. For guidance about business splitting issues, see HMRC VAT Manual: VAT Single Entity and Disaggregation.

As a general tip, there is no doubt that the most precarious business splits are those that involve family members. There is not the same incentive to do things on an arms-length basis as there is with non-family structures eg for shared overheads that are recharged or goods that move from one entity to another. However, a First-tier Tribunal case I enjoyed reading recently involved separate trading operations in one building in Swanage. The case was MG and ND Stoner (TC6193) and there did not seem to be any HMRC concern about the business splitting issue and the case was all about input tax claims. (Note: A case summary follows this article)

Revised trading structure for some supplies

To share an example of a commercial arrangement that would work, see Example – mobile caterer. A plus point with this scenario is that the second caterer is not related to the first caterer, so there is a commercial incentive to do things correctly. And there is no doubt that the second caterer is clearly selling food and drink to the punters at the shows ie he is responsible for any VAT issues on the takings.

Example – Mobile caterer

Hot Dogs Ltd operates a mobile catering unit and has annual sales of £83,000. The company is not VAT registered. The director Steve would like to increase prices by 3% on 1 April 2018 but this will cause a VAT problem (£83,000 plus 3% = £85,490). The company provides catering services at three dog shows each year, achieving total sales of £4,500 and a net profit of £1,500.

As a change in trading strategy, he has decided to hire out his unit to a second caterer for these three events at a cost of £250 per event. The second caterer will be responsible for buying his own stock, arranging his own staff and selling the goods to customers. The taxable sales of Hot Dogs Ltd will be reduced by £3,750, but the company is still earning profit from the events (without any hassle) and has scope to increase its prices without creating a VAT registration problem.

Contributed by Neil Warren

Take away, restaurant and ice cream parlour refurbishment

Summary – An output tax assessment was required for the supply of alcohol and only one third of the input tax relating to refurbishment costs was recoverable.

The Storers were in partnership operating a seafood take away business in Dorset from premises known as Gee White Kiosk.

Freehold property was owned by one of the partners that was used as the business premises for the Kiosk, but also an ice cream parlour trading as Quay Desserts, operated by Mr Storer's son, and a waitress service fish and chip/seafood restaurant trading as Quay Hole, operated by Mr Storer's partner in life Ms Thomas.

In 2014 the building was completely demolished and rebuilt again housing the three businesses. The building had a single shared kitchen. Staff from the Kiosk prepared shellfish in the kitchen. Hot food was prepared and cooked in the shared kitchen by staff from Quay Hole but was served through both the Kiosk and the restaurant. Quay Hole also sold dressed crabs, oysters, lobsters.

Mr Storer who was clearly connected with the owners of Quay Hole and Quay Desserts and sought to operate in a way which was as commercially efficient as possible for all of them. This included him ordering and paying for all the alcohol and shellfish sold by both Quay Hole and the Kiosk. Ms Thomas would order and pay for all potatoes and white fish. Unfortunately there was no formal commercial agreement underpinning these arrangements nor were they reflected in formal recharges or accountancy adjustments.

The consequence was that purchasing was done within each business for the areas in which they had greatest experience but on behalf of both businesses with alcohol and shell fish in essence bartered for cooked fish and chips.

Mr Storer understood that he was not entitled to recover the VAT incurred by him in the demolition and reconstruction of the building but he believed that works to the fit out of the premises for the purposes of making it a take away kiosk, restaurant and ice cream parlour were costs that related to the businesses. He stated that invoices relating to the fit out were paid for by the partnership; recharges were made to Quay Hole though but not to Quay desserts.

HMRC identified that the partnership had claimed input tax in connection with the purchase of alcohol sold by Quay Hole in the course of its business and took the view that this input tax was not the Appellants' input tax as it related to a supply of goods by the vendor of the alcohol to another taxable person (i.e. Ms Thomas).

HMRC identified that the Storers had claimed input tax to the value of £12,966 in connection with the redevelopment of the premises over the period 1 December 2013 through to 28 February 2015.

Decision

The Tribunal found that the barter system described by Mr Storer resulted in a failure to record transactions adequately (or potentially at all). They considered that alcohol was purchased by the partnership for onward supply to Ms Thomas's business, the consideration for which was the supply of fish and chips prepared and purchased by Ms Thomas for sale in the Kiosk.

The Tribunal concluded that all input tax incurred was recoverable but the Storers should voluntarily disclose to HMRC or be the subject of an assessment in respect of the corresponding output tax due on supplies to Quay Hole.

The Tribunal considers that costs proper to occupant specific fit out are costs proper to the occupant and any VAT incurred in connection with such fit out would be recoverable by the occupant. However, it is clear that there were three occupants of which the partners were only one. Unless there was an on supply of the works on which output tax was accounted for (or would be due) the VAT suffered does not meet the definition of input tax as it is not VAT incurred on a supply to them but rather to or at least for the benefit of another business. At no time did the partners maintain that they had engaged the various supplies of fit out as agent for the three businesses. It was also acknowledged that as regards Quay Desserts there was no recharge or reimbursement of any kind.

Only two invoices were made available in connection with the refurbishment costs. The Tribunal considered that the works evidenced by these invoices were consistent with occupant specific works and it is reasonable to conclude these costs were proper to those occupants and not to the landlord. However there were three occupants and the partners were only entitled to reclaim their one-third share. They extended this finding to all refurbishment cost

MG & ND Storer v HMRC (TC06183)