Tolley®CPD

January 2023

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Personal tax

Car benefit: impact of Autumn Statement (Lecture P1352 – 20.25 minutes)

Updated car benefit figures were announced for periods up to 5 April 2028 as part of the Autumn Statement. We will consider the impact below but first, a brief refresher on car benefits.

A car benefit will arise if an employee, or a member of their family or household, is provided with a car by their employer which is available for private use. The calculation of the benefit is determined by rules which calculate the cash equivalent. There are exemptions for pooled cars.

The cash equivalent depends on the list price, the CO_2 emissions, electric range (where relevant) and in some cases, the date of registration of the vehicle. The cash equivalent can be apportioned if the vehicle is unavailable for part of the year (including where it is first made available or ceases to be made available part way through the year).

There is a separate benefit where fuel is provided by the employer for private mileage which is not fully reimbursed by the employee. This applies the percentage linked to the CO_2 emissions to a fixed figure. It should be noted that fuel does not include electrical charging.

Company cars can be caught by the optional remuneration provisions, other than where it is an ultra-low emission vehicle. If that is the case, the employee will be taxed on the higher of the cash equivalent of the vehicle or the salary foregone for the cost of providing the car and any related costs.

It is important to note that there is a difference in the benefit for cars and vans and it is important to ensure that you understand the nature of the vehicle. Any mechanically propelled road vehicle is a car unless it is a goods vehicle, a motorcycle or a vehicle of a type which is unsuitable for use as a private vehicle and not commonly used as such. A van is any goods vehicle which is not a motorcycle and weighs no more than 3.5 tonnes when fully laden. A goods vehicle is one whose primary construction purpose is to carry goods or burden. This has been subject to litigation recently.

Where a van is provided and does not meet the restricted private use condition (which would mean no benefit arises), then a fixed rate van benefit and van fuel benefit amount arises. No benefit arises if it is an electric van. The cash equivalent for the van can be apportioned between the users on a just and reasonable basis if there is shared use of the van.

The employer will pay 13.8% Class 1A National Insurance Contributions on the cash equivalent of the benefit (14.53% for 2022/23).

The cash equivalent of company car

The cash equivalent is calculated as a percentage of the car's list price. For most cars, that percentage is determined by the CO_2 emissions and electric range (for low emitting cars). The maximum percentage is 37%.

The list price means the full published price of the car inclusive of VAT, optional extras and accessories, when first registered. The price paid is irrelevant. This can be reduced by any capital contribution made by the employee up to a maximum of £5,000.

The measure of emissions changed from 6 April 2020 so there are two scales of percentages, depending on whether the car was first registered before or after that date.

For a diesel car, a 4% supplement is added unless the car meets the RDE2 standards for emissions of nitrogen oxide, commonly known as Euro 6d. The maximum remains at 37% even if the 4% supplement applies.

Finally, the cash equivalent is reduced by payments made by the employee to the employer for the private use of the vehicle where this is required by the employer.

The percentage tables are published regularly and there were updated figures published as part of the Autumn Statement to give us the benefit figures applying up to 5 April 2028.

For cars registered on or after 6 April 2020, the current figures (applying up to 5 April 2025) are as follows:

CO_2 emissions	Electric range	Relevant percentage
0	N/A	2
1 – 50	>130	2
	70 – 129	5
	40 – 69	8
	30 – 39	12
	<30	14
51 – 54	N/A	15
55 – 59	N/A	16
60 – 64	N/A	17
65 – 69	N/A	18
70 – 74	N/A	19
75 – 79	N/A	20
80 – 84	N/A	21
85 – 89	N/A	22
90 – 94	N/A	23
95 – 99	N/A	24
100 – 104	N/A	25
105 – 109	N/A	26
110 – 114	N/A	27
115 – 119	N/A	28
120 – 124	N/A	29
125 – 129	N/A	30
130 – 134	N/A	31
135 – 139	N/A	32
140 – 144	N/A	33
145 – 149	N/A	34
150 – 154	N/A	35
155 – 159	N/A	36
160 and over	N/A	37

The figures that have been announced for later years are as follows:

CO_2 emissions	Electric range	2025/26	2026/27	2027/28
0	N/A	3	4	5
1 – 50	>130	3	4	5
	70 – 129	6	7	8
	40 – 69	9	10	11
	30 – 39	13	14	15
	<30	15	16	17
51 – 54	N/A	16	17	18
55 – 59	N/A	17	18	19
60 – 64	N/A	18	19	20
65 – 69	N/A	19	20	21
70 – 74	N/A	20	21	21
75 – 79	N/A	21	21	21
80 – 84	N/A	22	22	22
85 – 89	N/A	23	23	23
90 – 94	N/A	24	24	24
95 – 99	N/A	25	25	25
100 – 104	N/A	26	26	26
105 – 109	N/A	27	27	27
110 – 114	N/A	28	28	28
115 – 119	N/A	29	29	29
120 – 124	N/A	30	30	30
125 – 129	N/A	31	31	31
130 – 134	N/A	32	32	32
135 – 139	N/A	33	33	33
140 – 144	N/A	34	34	34
145 – 149	N/A	35	35	35
150 – 154	N/A	36	36	36
155 and over	N/A	37	37	37

It can be seen that the focus is very much on increasing the benefit levels for lower emitting vehicles and that is an interesting policy approach by the Government. What does this mean in practice? We are going to look at the increase in the cash equivalent and associated tax cost for a range of vehicles. For comparison purposes, the 2022/23 Class 1A has been calculated at 13.8%, rather than 14.53%.

Example 1

A Tesla Model Y RWD 5Dr Auto has a list price of £51,935. It has emissions of zero as it is a fully electric car. The cash equivalent and tax cost will be as follows:

Tax year	%	Cash equivalent (£)	Tax cost for higher rate taxpayer (£)	Class 1 NICs (£)
22/23	2	1,027.90	411.16	141.85
23/24	2	1,027.90	411.16	141.85
24/25	2	1,027.90	411.16	141.85
25/26	3	1,541.85	616.74	212.77
26/27	4	2,055.80	822.32	283.70
27/28	5	2,569.75	1,027.90	354.63

Example 2

A Range Rover Sport D300 is a diesel vehicle with emissions of 200g/km and which costs £83,325 for the basic model.

The cash equivalent and tax cost will not increase as the percentage applicable to a car which is this polluting will remain at 37% for the entire period under review. The cash equivalent will be £30,830.25 and the higher rate tax on that would be £12,332. The Class 1A NICs would be £4,254.57.

Example 3

A BMW 3 series 330e is a petrol hybrid vehicle with emissions of 31g/km and electric range of 34 miles. The list price is £41,375.

Tax year	%	Cash equivalent (£)	Tax cost for higher rate taxpayer (£)	Class 1 NICs (£)
22/23	12	4,965	1,986	685.17
23/24	12	4,965	1,986	685.17
24/25	12	4,965	1,986	685.17
25/26	13	5,378.75	2,151.50	742.27
26/27	14	5,792.50	2,317	799.37
27/28	15	6,206.25	2,482.50	930.94

Comparison of different options

One question that is often asked by clients is the cost of providing a company car versus providing additional salary as a ‘car allowance’.

To be honest there are many variables which have to be taken into account but we can look at a very simple example which shows how you might start to do a very simple calculation of the different options.

Let’s say you have someone who is going to offer a client a car which has a list price of £31,850 with CO_2 emissions of 121g/km. The business is going to lease the vehicle at a cost of £410 per month. There is business mileage of 25,000 per year and private mileage of 6,000 miles per annum. The estimated fuel cost is around £6,000 per year and this is paid by the employer. The insurance and road tax are going to be around £1,100 per year. The lease contract includes all maintenance and servicing. It has been suggested that the employer would be prepared to pay £500 per month extra as an alternative car allowance. The individual is a higher rate taxpayer.

What are the relative costs to the company and the employee? These calculations ignore the VAT cost and all prices quoted above are net of VAT.

Benefit in kind

The percentage relevant to a car with these emissions is 30%. The car benefit is going to be £31,850 x 30% = £9,555 and the cost in tax terms is £9,555 x 40% = £3,822.

The car fuel multiplier for 2023/24 is £27,855. The car fuel benefit will be £8,356.50 at a tax cost of £3,342.60.

The total cost to the individual is therefore £7,164.60.

The Class 1A cost will be £1,318.59 for the car benefit and £1,153.20 for the fuel benefit.

Cost to company

The company has the following costs:

Lease cost	410 x 12	£4,920
Class 1A		£2,471
Fuel		£6,000
Other costs		£1,100
		£14,491
Less CT relief (main rate)		(£3,622)
Total cost		£10,869

Provision of additional salary

The company will pay business mileage of (10,000 x 45p) + (15,000 x 20p) = £8,250.

If the additional salary is £6,000 per annum the cost to the company will be this amount plus the Class 1 NICs, so a total of £6,000 x 113.8% = £6,828.

Both of these amounts will be allowable for corporation tax purposes, so the net cost would be (£8,250 + £6,828) x 75% = £11,308.50 assuming this is paying tax at the main rate.

For the individual, they will pay tax and NIC (at 2%) on the salary so will be left with a net amount of £6,000 x 58% = £3,480 plus the mileage they receive of £8,250 which is a total of £11,730.

The individual will have to pay for fuel (£6,000) and other costs (£1,100) = £7,100. This leaves them with a net amount of £4,630 per annum towards paying for the cost of the car itself. This is slightly less than the leasing cost although they may not be able to lease on such favourable terms.

Conclusion

The decision as to whether to offer a vehicle or an allowance will often be more down to the preference of the employer rather than the cost of the different options. From a planning perspective, it might be worth looking at whether or not the fuel benefit charge needs to be paid. Let us say that the advisory fuel rate for the vehicle is 17ppm.

If the individual is undertaking 6,000 miles per annum it would cost them £1,020 to reimburse their employer for the private miles rather than having to pay £3,342 in tax for the fuel benefit. The employer would also save the Class 1A NICs on this benefit.

The downside is having to keep accurate records to determine the exact level of the private miles!

Contributed by Ros Martin

Compensation under a settlement agreement (Lecture P1351 – 17.54 minutes)

Summary – a compensation payment made to an employee was taxable as a payment for a restrictive undertaking confirming that the employee would not pursue claims against her employer arising out of her employment or its termination.

Mrs A had worked for her employer since May 2007. In October 2017, she wrote a formal grievance letter against her employer alleging, among other things, harassment on the grounds of sex, bullying, victimisation and intimidation.

Unhappy with the employer's grievances processes, she took the case to the Employment Tribunal but in return for a compensation payment of £1,055,000, she withdrew her claim. The settlement sum was paid to cover various confidentiality and non-disclosure obligations that she agreed to.

The employer treated the sum as a termination payment, allowing £30,000 as being tax free, with the balance taxable under PAYE. However, Mrs A disagreed with the tax treatment, believing that the payment was wholly in consideration for her agreeing to enter into the confidentiality and non-disclosure obligations and was not connected with the termination of her employment. She sought to reclaim £467,684 of tax.

Following an enquiry, HMRC issued a closure notice for £461,588 on the basis that the compensation was a taxable termination payment or alternatively, it was a restrictive undertaking sum paid in connection with current, future or past employment, taxable as earnings under s.225 ITEPA 2003, with no £30,000 exemption.

Mrs A appealed to the First Tier Tribunal arguing that the payment had no connection to her employment being terminated. She claimed that the terms of the Settlement Agreement did not restrict her future employment in any way but merely required her not to disclose the facts and circumstances surrounding the grievance and the termination of her employment.

Decision

The First Tier Tribunal stated that the logical approach to take was to consider HMRC's alternative argument first, as the charge to tax under s.225 ITEPA 2003 takes priority over the charge to tax under s.401 ITEPA 2003, as this later section does not apply to payments that are otherwise chargeable to tax (see section 401(3)). If the entire compensation payment fell within s.225 ITEPA, 2003 it would be wholly taxable under that provision and there would be no need to consider whether s. 401 applied.

The First Tier Tribunal found that any undertaking restricting an individual's conduct or activities, given in connection with their employment, is within the scope of s.225 ITEPA 2003.

Both parties accepted that the agreement contained restrictive undertakings. It was not a payment for damages but rather paid for the restrictive undertaking that Mrs A would not make or pursue any claims against her employer relating to or arising out her employment or its termination. In this case, the payment was taxable as earnings under s s.225 ITEPA 2003.

The First Tier Tribunal went on to say that had s.225 ITEPA 2003 not applied, the payment would have been a termination payment taxable under s.401 ITEPA 2003, with no scope for apportioning part of it as consideration for the confidentiality and non-disclosure obligations agreed to.

The taxpayer's appeal was dismissed.

Mrs A v HMRC (TC08640)

‘Blocked’ dividends not taxable (Lecture P1351 – 17.54 minutes)

Summary - Dividends credited to a ‘blocked’ directors' account were not ‘paid’ and so were not liable to income tax.

Marcus and Karen Jays were shareholders of Questor Properties Limited, a property management company in which they jointly held the single issued share.

To be able to make property purchases, the company had taken out several loans with Lloyds Bank Plc as well as ten interest rate hedging products. The company was trading successfully at the operating level but due to debilitatingly high interest costs, the business was at risk.

Marcus Jays believed that by showing strong dividend declarations, the company could attract external equity investors. However, Lloyds Bank Plc was unwilling to permit the couple to extract substantial profit from the business and wanted to limit the dividends paid. Consequently, an agreement was reached that restricted the level of dividends which could be ‘paid’ to the shareholders. Dividends in excess of these amounts were ‘declared’ but the amounts were credited to a ‘blocked’ account on which the directors were unable to draw. When submitting their tax returns the couple did not include the ‘blocked’ dividends as these had not been ‘paid.

HMRC argued that crediting the ‘blocked’ directors' accounts represented payment of the dividends and so issued discovery assessments on the basis that the couple should have included the full dividend ‘declared’ as taxable dividend income and not just the amount that was drawn.

Marcus and Karen Jays appealed to the First Tier Tribunal.

Decision

The First Tier Tribunal stated that dividends are taxable when they are 'paid', which is the point when there is an enforceable right for the recipient to receive the declared amounts.

In this case, the ‘blocked’ dividends were not accessible until both the company and the bank reached agreement. If the agreement was breached and the ‘blocked’ dividends paid out, the bank could suspend the company’s borrowings.

With no right to receive the ‘blocked’ dividends, these sums were not ‘paid’ and not subject to Income Tax.

The appeal was allowed.

Mr Marcus Jays and Mrs Karen Jays v HMRC (TC08639)

Same dividend, different dates (Lecture P1351 – 17.54 minutes)

Summary – An interim dividend was treated as paid to two brothers on two different dates.

On 31 March 2016, the board of directors of Regis Group (Holdings) Limited resolved to pay an interim dividend of £40 million, split equally between Peter Gould and his brother.

For personal tax reasons, it suited the brothers to be taxed on the dividends in different tax years. By 2016/17, Peter Gould was non-resident for tax purposes and so he wanted his dividend to be taxed in that year, when no tax would be payable. By contrast, his brother was UK resident throughout but, due to changes introduced in FA 2016, being taxed on his dividend in 2015/16 would result in an effective tax rate of 30.56% rather than at 38.1% if it was delayed to the following year.

The brothers were advised that by declaring an interim dividend, the income would only become taxable when the dividend was actually paid. Consequently, the interim dividend declared was paid on two different dates:

- The brother's £20 million dividend was paid on 5 April 2016;
- Peter Gould's dividend was not paid until December 2016.

HMRC sought to tax Peter Gould's dividend on the earlier date, arguing that the two dividends must be treated as being due and payable on the same date, and that date was the day on which the earlier dividend was paid.

Peter Gould appealed.

Decision

The First Tier Tribunal concluded that Peter Gould had no enforceable right to be paid a dividend on the same day as brother. He only became entitled to his share of the interim dividend when it was actually paid.

The taxpayer's appeal was allowed.

Peter Gould v HMRC (TC08647)

Capital taxes

Claim for pre-deceased spouse's unused NRB (Lecture P1353 – 17.12 minutes)

The transferable nil rate band rules for IHT involving pre-deceased spouses (or civil partners) came into force for deaths occurring on or after 9 October 2007. The main details are set out in S8A IHTA 1984.

Although the date of the first (i.e., pre-deceased) spouse's death is irrelevant, it is necessary to calculate the amount of their nil rate band which was unused when they died. The date of 9 October 2007 above refers to the earliest date of the second (i.e., later) spouse's death.

The statutory calculation of the available nil rate band claimable on the second death can be summarised as requiring the following steps:

1. Establish the quantum of the unused nil rate band on the first death. This is expressed in s.8A(2) IHTA 1984 as:

   M – VT

   where:

   M = the maximum nil rate band available to the pre-deceased's estate; and

   VT = value actually transferred on the first death (or nil if no chargeable transfer was so made).

2. Work out the % specified in s.8A(4) IHTA 1984 which uses the formula:

   E/NRBMD x 100

   where:

   E = M – VT (i.e., the unused nil rate band on the first death); and

   NRBMD = the maximum nil rate band available on the first death.

3. The pre-deceased spouse's nil rate band, which is claimable by the survivor's personal representatives, is determined as:

   Prevailing nil rate band at time of survivor's death x specified % above

The transferred nil rate band of a pre-deceased spouse, which must be claimed via Form IHT402, can only be used against the IHT payable on the surviving spouse's death.

Illustration

Gail died on 1 December 2022, leaving an estate valued at £1,350,000 (which did not include any residential property, given that she had lived in rented accommodation for many years). Her late husband, Noel, had died several years earlier in November 2006 – at that time, the nil rate band stood at £285,000.

In his will, Noel left chargeable legacies totalling £57,000 to their two sons, with the residue of his estate passing to Gail.

Gail's personal representatives can therefore make a claim under S8B IHTA 1984 to utilise Noel's unused nil rate band as follows:

> The unused nil rate band on Noel's death was £285,000 – £57,000 = £228,000.
>
> The specified percentage is 228,000/285,000 x 100 = 80%.
>
> Given that the nil rate band at the time of Gail's death in December 2022 is £325,000, the claimable unused nil rate band from Noel's death is £260,000 (80% x £325,000).
>
> Thus, in addition to her own nil rate band of £325,000, Gail has a further £260,000 which can be set against the assets in her estate.

Contributed by Robert Jamieson

BPR – Excepted Assets (Lecture P1354 – 11.55 minutes)

Background

Business property relief (or BPR) offers inheritance tax (IHT) relief of 100% or 50% on a transfer of value attributable to 'relevant business property'. For example, unquoted company shares potentially qualify for 100% BPR.

Not all unquoted company shares qualify for BPR. Certain company activities can make the shares ineligible for relief, such as dealing in stocks or shares, land or buildings, or making or holding investments (IHTA 1984, s 105(3)). These exclusions are subject to certain exceptions (in s 105(4), (4A)), including where the company's business consists wholly or mainly of being a holding company of a group of companies whose business doesn't consist of excluded activities.

Purpose and effect

There is an important restriction in BPR in respect of 'excepted assets'. This restriction in IHTA 1984, s 112, is essentially an anti-avoidance rule.

For example, without the excepted assets provision, a wealthy individual shareholder of an unquoted trading company might try to secure BPR on his private wealth by using the cash to subscribe for additional shares in the company. Those funds might then be parked in the company without being needed or used in any business being carried on by the company.

Effectively, the individual would be treating the company as their personal ‘money box’, on the basis that the funds are sheltered from IHT (assuming 100% BPR is available on the company’s shares). Alternatively, the shareholder might be tempted to transfer (say) a vintage car into their company, hoping that the car will become sheltered from IHT.

If ‘caught’ by the excepted assets legislation, the value of the shares on which BPR is available would be subject to a potential restriction in respect of the non-business assets sitting in the company.

Is it ‘excepted’?

The definition of ‘excepted asset’ that applies to most categories of relevant business property is contained in IHTA 1984, s 112(2). This legislation broadly states that an asset is an excepted asset if either of two alternative tests (essentially a ‘past use’ and ‘future use’ test) is met:

> “(2) An asset is an excepted asset in relation to any relevant business property if it was neither—
>
> > (a) used wholly or mainly for the purposes of the business concerned throughout the whole or the last two years of the relevant period defined in subsection (5) below, nor
> >
> > (b) required at the time of the transfer for future use for those purposes;”

There is a relaxation of the excepted asset rules in respect of group companies, but our focus is on the single unquoted trading company.

Confusingly, HMRC’s guidance in the Inheritance Tax manual (at IHTM25341 and IHTM25351) indicates that for an asset not to be excepted, the asset in question must not be caught by either the ‘past use’ or ‘future use’ test. However, HMRC’s view does not seem to be in accordance with the legislation itself, which indicates that the asset is not excepted provided it is not caught by at least one of the tests. In any event, it should be remembered that HMRC’s manuals are not legally binding.

Excepted asset value

If ‘caught’ by the excepted assets legislation, the effect is broadly that a transfer of value for BPR purposes is restricted by the value attributable to the excepted assets. Only that part of a transfer of value which relates to relevant business property is reduced by BPR; the other part relating to the excepted asset is not reduced by BPR and is therefore chargeable to IHT in the normal way.

This could raise some interesting valuation issues, especially when valuing a minority shareholding.

Practical issues

One of the categories of assets potentially eligible for BPR is land or buildings, machinery or plant which, immediately before the transfer was used wholly or mainly for the purposes of a business carried on by a company of which the asset owner had control (IHTA 1984, s 105(1)(d)).

The excepted assets 'past use' test and 'future' use tests do not apply to such assets. However, for the asset not to be excepted, it must either have been used for business purposes throughout the immediately preceding two years or have replaced another eligible business asset where the periods of ownership combined were two out of the five immediately preceding years. This might apply if (say) an unincorporated business is transferred to a company on incorporation, and the asset remains held outside the company but continues to be used in the business.

There is a similar rule where the 'successive transfer' provision applies in IHTA 1984, s 109 (which provides an exception from the normal two-year asset holding requirement for BPR purposes where one of the transfers in question was made on death, and certain other conditions are met) (IHTA 1984, s 112(3)).

There is also a helpful relaxation in the excepted asset rules in respect of land and buildings (IHTA 1984, s 112(4)). It broadly applies where part is used exclusively for business purposes, but the whole of the land and buildings is not used wholly or mainly for business purposes. In those circumstances, the part used exclusively for business purposes and the rest of the property are treated as separate assets, and the value of the land and buildings as a whole is apportioned between the two parts.

It is important to watch out for assets used wholly or mainly for the personal benefit of the shareholder or a 'connected person'. For excepted asset purposes, such assets are deemed not to have been used wholly or mainly for the purposes of the business concerned during those periods of personal use (IHTA 1984, s 112(6)). This would prevent BPR on as asset such as a yacht held by the company which is commercially rented out to third party customers for part of the time to create the illusion that it is a business asset, when in fact for the majority of the time it is used by the shareholder and family members for private purposes. No BPR would be due on the value of the yacht in those circumstances.

Contributed by Mark McLaughlin

Distribution in specie and SDLT **(Lecture P1351 – 17.54 minutes)**

Summary – An SDLT scheme whereby a company bought a property that was subsequently distributed in specie to its shareholders failed.

On 2 July 2007, an unlimited company was incorporated on 2 July 2007, with Michael and Bridget Brown subscribing for 47,751 £1 shares each. The company used this money to pay the £95,000 deposit on a property that it was buying.

Soon after, the couple subscribed for further shares so that the total nominal value of the company's shares in issue was £960,002.

In August 2007, the company:

- used the balance of the money from the share subscriptions to complete the purchase of the property;
- resolved to reduce its share capital to £2, to be achieved by a distribution in specie of the property to the taxpayers.

The arrangement sought to take advantage of the "sub-sale relief" for SDLT contained in s.45 FA 2003 (as it was then in force). The case report neatly summarises the effect of s.45 by stating:

> "S.45 made provision for the situation in which land was contracted to be sold by A to B, but there was an assignment, sub-sale, or other transaction as a result of which C became entitled to call for a conveyance. Broadly, in such a case the section provided that the first contract between A and B was to be disregarded and SDLT was to be charged only by reference to C's acquisition under a notional ("secondary") contract."

In this case, with the property purchase and distribution in specie occurring on the same day, the couple argued that the effect of s.45 FA 2003 was that the purchase by the company should be disregarded and further, as a result of the distribution in specie, there was no consideration. As a result, no SDLT return was filed.

HMRC disagreed and in August 2011 HMRC issued a notice of determination to collect SDLT, calculated as 4% of £955,000, the relevant rate at that time.

On appeal, the First Tier Tribunal found that applying s 45(3)(b), there was consideration for SDLT purposes, which was the subscription monies paid to the company.

The couple appealed to the Upper Tribunal.

Decision

The Upper Tribunal found that the consideration should be £955,000.

In this case, the share subscription money was the money paid indirectly by the Browns to enable the company to buy the property, effectively for them. The amount of the consideration was equal to the purchase price of the property under the original contract and was liable to SDLT. This was slightly less than the total subscription sums as these also covered conveyancing fees.

The Upper Tribunal rejected the Brown's argument that 'consideration' is limited to amounts provided for under a contract. This would have meant that there could be no consideration in respect of a distribution in specie which was a gratuitous transaction. The Tribunal stated that it was clear that purchases outside of 'a binding and enforceable contract but in respect of which value in money or money's worth is provided' was liable to SDLT.

The appeal was dismissed

Mr Michael Brown and Mrs Bridget Brown v HMRC [2022] UKUT 00298 (TCC)

Buildings not yet constructed (Lecture P1351 – 17.54 minutes)

Summary – Planning permission to build homes on land with boreholes did not mean dwellings were 'in the process of being constructed'. Multiple Dwellings Relief (MDR) was denied.

Ladson Preston Ltd and AKA Developments Greenview Ltd each acquired plots of land with planning permission in place to build multiple dwellings on that land. Ladson Preston Ltd acquired bare land, while AKA Developments Greenview Ltd bought land with commercial buildings on that were to be demolished.

Subsequent to purchase, both companies:

- built properties in line with the planning permission that had already been granted;
- claimed MDR, arguing that planning permission meant they satisfied Para 7, Sch 6B FA 2003 that dwellings were 'in the process of being constructed' on the land at the Effective Date.

Initially:

- Ladson Preston Ltd treated its acquisition as an acquisition of non-residential property but subsequently amended its return to claim MDR;
- AKA Developments Greenview Ltd computed its SDLT liability on the basis that the property acquired was "residential" but later claimed MDR.

HMRC denied the relief and so the companies appealed to the First Tier Tribunal who denied MDR, as it was land that had been acquired, with no interest in dwellings.

Decision

The Upper Tribunal stated that MDR is available where more than one residential dwelling is acquired or where residential dwellings which are in the process of construction are acquired.

The Tribunal found that it is not enough to have planning permission and intend to construct dwellings in the future. There must be some physical existence of the dwellings.

With no actual construction, other than some boreholes dug at one of the sites to test the ground, no building was in the process of being constructed.

The Upper Tribunal concluded that, there was no building in the course of construction, so no MDR relief was denied and the appeal dismissed.

Ladson Preston Ltd and AKA Developments Greenview Ltd v HMRC [2022] UKUT 301 (TCC)

Husband and wife joint property scheme

Summary – The transfer of a property from wife to husband under an SDLT avoidance scheme failed as the couple were connected and the husband was liable for the entire SDLT due.

Initially, Mr and Mrs Fox had considered buying a property jointly. However, under an SDLT avoidance scheme, Mrs Fox (his then wife) bought the property from the vendors for £1,075,000, selling it immediately to her husband for £10,000. These two contracts were completed by the seller transferring the property directly to Mr Fox, with Mr Fox reporting SDLT consideration of £10,000.

Following an enquiry by HMRC, Mr Fox accepted that the scheme did not work as he was connected to his wife. This meant that consideration for both transactions needed to be amalgamated, giving total consideration of £1,085,000.

Mr Fox argued that he was only liable for half the SDLT liability as he held the property in trust for himself and his wife following acquisition. His then wife was liable to the other half.

Losing at the First Tier Tribunal, Mr Fox appealed to the Upper Tribunal.

Decision

The Upper Tribunal found that the scheme had sought to reduce the chargeable consideration to £10,000. This relied on the property passing from his wife into Mr Fox's sole name, with sole name bank accounts set up, showing the intention for consideration to be paid between them.

The First Tier Tribunal was right to conclude that Mr Fox alone was liable to pay the SDLT chargeable in respect of the full consideration of £1,085,000 as he was the transferee under the conveyance, with the property vesting legally and beneficially in his name.

The appeal was dismissed.

Stuart Fox v HMRC [2022] UKUT 00310 (TCC)

Administration

Return deliberately withheld (Lecture P1351 – 17.54 minutes)

Summary – Having made a conscious decision not to file his tax return on time, this was a taxpayer who had decided to default. Subsequent financial difficulties and health problems provided neither a reasonable excuse nor special circumstances.

Neal Futcher was issued a Notice to File his 2015/16 Self Assessment return on 6 April 2016.

By 1 July 2019, with no return submitted and based on information obtained from other sources, HMRC raised a determination for £253,341 under s.28C TMA 1970.

Finally, on 16 August 2019, Neal Futcher filed his 2015/16 return, 927 days late, showing a tax liability of £171,137.82.

This appeal is against the tax-geared penalty of £51,324.23 imposed by HMRC under s.55 FA 2009 for the late filing of his 2015/16 self-assessment tax return. Neal Futcher disputed the penalty was chargeable “on the grounds that the late filing was not as a result of deliberate behaviour and that there are mitigating circumstances”.

In summary, Neal Futcher claimed that he delayed submitting his 2015/16 return as it showed a large tax liability that he could not afford to pay. He believed that his business would shortly generate the necessary cash as sales and cash flow were forecasted to improve by April/May He claimed that he only intended to delay the submission for a few months. However, that delay was extended when in 2017 and 2018 he experienced major financial problems with his business and then in 2019, he suffered severe health problems.

Decision

The Tribunal found that at the filing date, Neal Futcher was aware of his obligation to file his 2015/16 tax return by 31 January 2017. His severe business problems did not start until much later in 2017 and 2018. Further, there was no evidence to suggest that he was suffering from his health conditions at that time. Indeed, in a letter dated 16 October 2019, he made it clear that he did not file his return as he had decided not to.

The Tribunal noted that at a time when he was seeking help for his medical problems, he managed to file his tax return. When pressed as to what caused him to submit the return in August 2019, he stated that “he had taken a week off to catch up with “mundane things” and it had been on his mind to do this.” When prompted, he agreed that receiving HMRC’s determination in July 2019 probably prompted him to do it. The Tribunal recorded that it was far from satisfied that his health and business difficulties ever prevented him filing his return.

With no reasonable excuse or no special circumstances, the appeal was dismissed.

Neil Futcher v HMRC (TC08629)

Reliance on adviser

Summary – Having considered the length and reason for the delay, as well as all the circumstances in the round, application for a late appeal was rejected.

On 22 March 2019, HMRC issued a discovery assessment for the tax year 2014/15 for approximately £2.1 million.

Having missed the appeal deadline, Professor Barret applied to the First Tier Tribunal for permission to make a late appeal. He stated the reason for the delay was due the law firm acting on his behalf who had advised that the case would be settled out of court and if not, HMRC would not object to a late appeal. The best approach was to 'delay as much as possible'.

Later, when the taxpayer received an email from HMRC he realised HMRC was not likely to allow a late appeal but was still advised not to worry.

Eventually an appeal was filed but more than four months after the deadline.

Decision

In his introduction, the judge decided not to name the law firm, or the specific partner concerned stating that it was “unnecessary to do so and unfair in circumstances” as they were not present at the appeal and so had no chance to respond to the matters raised during the hearing. As a result, the firm of solicitors was referred to as “X LLP” and the partner concerned as “Mr Y”.

In reaching their decision, the First Tier Tribunal applied the three-stage test from Martland v HMRC [2018] UKUT 178 TCC.

Looking at the length of the delay (stage 1), the Tribunal found that this was a 'serious and significant' delay.

Moving to stage 2, the reasons for the delay were not good. The solicitor acting on Professor Barrett’s behalf, was not a litigation expert, and was busy with another case. He “assumed that it was open to HMRC to agree an extension” and that HMRC would do so. Further, he considered there was an advantage to not filing an appeal.

Finally looking at stage 3, the Tribunal evaluated all the circumstances in the round.

Katib v HMRC [2019] STC 2106 makes it clear that generally failures by a taxpayer’s adviser should be treated as if they are failures by the taxpayer. Failure by his adviser to submit a timely appeal on behalf of Professor Barrett did not provide him with a good reason for missing the appeal deadline. Indeed, it is up to the taxpayer to act on any warning signs and so, although his expert advised him to wait, through correspondence, Professor Barrett was well aware of the statutory deadline and should have acted sooner; he was 'not himself without some blame'.

The Tribunal acknowledged that both parties would be prejudiced by their decision:

- For HMRC, if the late appeal were allowed, there would be significant cost and resource implications as Professor Barrett’s case involved foreign law.

- For Professor Barrett, if permission were not given, he was left with a large bill.

The Tribunal decided that, on balance, the circumstances of the case did not justify the late appeal and the application was dismissed.

Professor David Barrett v HMRC (TC08642)

Tax enquiry cases update (Lecture P1355 – 17.46 minutes)

This article considers four recent tax tribunal cases that are relevant to tax enquiries. Practitioners need to remember that each case that reaches the tribunal is decided on the facts of that case. However, tribunal decisions can give practitioners an indication of how the tribunal may deal with a particular situation.

Newpier Charity Limited v HMRC [2022] UKFTT 373 (TC)

This case related to an application for charity tax relief in the charity's accounts, and the HMRC enquiry into those accounts. HMRC issued various information requests to the taxpayer. Over a period of time, the taxpayer supplied various information to HMRC, but there came a point where nothing further could be provided. The situation is one that practitioners will be familiar with. HMRC continued to seek information and said they could not close the enquiry without it.

The taxpayer applied to the tribunal for a closure notice. The burden of proof in such applications is for HMRC to demonstrate why the enquiry should be allowed to continue. HMRC stated that it needed further information, without which it would be unable to reach a conclusion of the deductibility of certain items as it still had concerns.

The tribunal reviewed the position and accepted that no more evidence was available. The tribunal directed HMRC to close the enquiry (within four weeks) and base its conclusion on the evidence it had. The next step would be for HMRC to issue a closure notice denying the relief claimed. The taxpayer will be able to appeal against the notice and will have the burden of proof of showing that the closure notice is incorrect.

The result may be something of a Pyrrhic victory for the taxpayer. The case is a reminder that there is a process for breaking an impasse where HMRC continues to seek information, and that information is not available. The issue of a closure notice does not resolve the underlying dispute, but it does enable the case to progress to the next stage.

Dominic Kiernander v HMRC [2022] UKFTT 337 (TC)

This case concerned an application to the tribunal for the admission of a late appeal (against amendments made under section 28A Taxes Management Act 1970). One of the grounds of appeal was that delays by the taxpayer's agent in dealing with the appeal had been brought about by the coronavirus.

There was a delay in excess of seven months in submitting the relevant appeal. The appeal referred to a disruption to the firm's "working practices". The judge considered the three-stage approach to be applied to the facts and evidence in accordance with the judgment in Martland v HMRC [2018] UKUT 178 (TCC) to determine whether the time limit to submit the appeal should be extended by the tribunal.

In the Kiernander case, the judge acknowledged that there might be reasons why coronavirus had created delay but commented on the absence of any specific circumstances or detailed effects of coronavirus that caused the delay. The judge said ”…there is an absence of evidence in this case to demonstrate any specific circumstances or detailed effects of the pandemic that gave rise to this delay. On the basis of objective reasoning and taking into consideration all of the circumstances of this case, I do not accept the generic pandemic excuse given to be a good reason for such a delay”.

Practitioners are reminded of the need to provide specific details, with evidence, of why a delay occurred when submitting an application for a late appeal, to increase the likelihood of that application being accepted. That applies, as noted in this case, where the pandemic is cited as the reason for the delay.

Clive Kingdon, Terry Stead and Anne Kingdon v HMRC [2022] UKFTT 407 (TC)

This case, at its simplest, concerned the date that a partnership incorporated its business. The position was complicated because the taxpayers’ former accountant was convicted of cheating the public revenue, and there was a lack of evidence. Significant delay by HMRC in dealing with the enquiry into the taxpayers’ affairs hampered the value of the appellants’ oral evidence.

HMRC had opened an enquiry into the 2005/06 partnership return, and subsequently closed the enquiry without any amendments. Following the discovery of new evidence after a raid on the taxpayers’ former accountant, HMRC assessed the appellants to partnership income for 2005/06.

There was conflicting information about the relevant date, although very little direct evidence. There were only three letters, which contradicted each other. The tribunal was dismissive of the evidence which came from the former agent and determined that it could not be relied upon.

The taxpayers’ oral evidence was, given the various delays and the criminal investigation into the former agent, of little value for the tribunal. However, the appellants, as the partners who were carrying on the business, were deemed to be the best source of information.

The tribunal determined that the transfer had taken place at the end of March 2005 or 1 April 2005, rather than the later date of 2 August 2005, contended by HMRC. The tribunal accepted the taxpayers’ appeals against the assessments and penalty determinations for 2005/06, which were the subject of the hearing.

The tribunal determined that the taxpayers did not act negligently. They had put their financial and tax affairs in the hands of an ostensibly competent firm of local accountants and tax advisers, who initially demonstrated no lack of competence or ability. When the appellants determined that their accountants were not acting in their best interests, following a General Commissioners hearing in January 2009, they sacked them. The tribunal noted that by placing those matters in the hands of their agent, they were “behaving wholly responsibly”, and that behaviour continued when they sacked their agent.

The case highlights the need for relevant business events to be documented (in this case there were not any board minutes, or similar documents, to evidence the date of the transfer of the business to the company). In addition, there cannot be any doubt that the taxpayers had helped their credibility by sacking their agent when they determined, following the General Commissioners hearing, that he was not acting in their best interests.

Mr Patrick Dowds v HMRC [2022] UKFTT 402 (TC)

There are very few cases concerning HMRC's Code of Practice 9 procedure, the Contractual Disclosure Facility, that reach the tribunals. The Contractual Disclosure Facility is HMRC's civil process for the investigation of cases where they suspect fraud.

In this case, HMRC had issued assessments for several years relating to income tax, PAYE, NIC and VAT, together with associated penalties. HMRC were seeking significant penalties, partly because of the taxpayer's failure to engage with the process and accept that the underpayment of tax arose from his deliberate conduct. The taxpayer accepted the figures on which the substantive assessments and determinations were based, as they were contained in a Disclosure Report prepared on his behalf.

The tribunal did not accept any of the representations made by the taxpayer, and upheld HMRC's assessments and penalties on the basis of deliberate or fraudulent behaviour.

The taxpayer had admitted to fraudulent conduct during a previous HMRC enquiry and agreed to a settlement with HMRC in September 2002 (£20,000). HMRC later started another enquiry into the taxpayer's affairs, initially using the Self-Assessment enquiry provisions and subsequently escalated to their civil fraud process. The taxpayer declined the offer to participate in the Contractual Disclosure Facility, on the basis that he had not committed any fraud but said that he would co-operate with the HMRC investigation. The taxpayer subsequently commissioned a Disclosure Report, which was submitted to HMRC with details of additional tax liabilities.

The taxpayer had put forward various grounds for appeal as to why the errors eventually disclosed by him did not arise as a result of his fraudulent conduct, such that a lesser penalty would be due.

The taxpayer had suggested that the inaccuracies were connected to his time spent as an informant for HMRC. The taxpayer referred to the actions of a particular HMRC officer, subsequently dismissed and convicted of dishonesty in the criminal court. The taxpayer blamed HMRC for the concealment and diversion of his income.

The taxpayer contested that, following his exposure, he was forced to make protection payments and had to conceal his income in order to divert the hidden monies to make the payments. The tribunal rejected the taxpayer's contention, because the taxpayer had mentioned the informant activities only at a late stage and the taxpayer had not been able to provide any supporting evidence. The taxpayer had also made conflicting statements about the effects on his tax returns. In addition, the HMRC officer was dismissed in 2003, and Mr Dowds' fraudulent activity continued until 2013.

Another ground for appeal provided by the taxpayer was that he was not well enough to attend the hearing. The taxpayer supplied medical reports which indicated that he was suffering from a “generalised anxiety disorder”. The tribunal also rejected this contention, as the medical condition related to his current health rather than the period during which the inaccuracies had continued, which exceeded ten years.

The case serves as a reminder of the need to evaluate the taxpayer’s position before proceeding to the tribunal, and to ensure that any evidence supports the contentions being made.

Contributed by Phil Berwick, Director at Berwick Tax

Deadlines

1 January 2023

- Corporation tax for periods to 31 March 2022 (SMEs not liable to pay by instalments)

14 January 2023

- Forms CT61 to be submitted and tax paid for the quarter ended 31 December 2022

19 January 2023

- PAYE, NIC, CIS and student loan liabilities for month to 5 January 2023 (by cheque)
- File monthly CIS return
- PAYE for quarter to 5 January 2023 if average monthly liability is less than £1,500

21 January 2023

- Supplementary intrastat declarations for December 2022
  - arrivals only for a GB business
  - arrivals and dispatch for a Northern Ireland business

22 January 2023

- PAYE, NIC, CIS and student loan liabilities (online).

31 January 2023

- Electronic filing for 2021/22 personal, partnership and trust SA tax returns
- Pay
  - balance of 2021/22 SA liabilities
  - first instalment of 2022/23 SA liabilities including class 2 NICs
- Amend 2020/21 SA tax returns
- 'Vulnerable person election' by trustees where effective date is during 2020/21
- Elect to opt out of pre-owned assets charge if this would first arise during 2021/22
- Repayment claims for 2021/22 class 2 NICs if a small earnings election was possible
- Final 2022/23 tax credit claims assuming estimates provided by 31 July 2022
- Reinstatement of 2022/23 tax credit claim if 'good cause' for missing 31 July 2022 deadline
- Submit CTSA returns for companies with periods ended 31 January 2022

News

Scottish Budget

The Scottish government's 2023/24 Budget was delivered on 15 December 2022 and the key announcements are summarised below.

Income tax rates

From 6 April 2023, the higher and top rates will be increased to 42% and 47% respectively, while the starter (19%), basic (20%) and intermediate (21%) rates remain unchanged.

Income tax thresholds

The starter, basic, intermediate and higher-rate thresholds will be frozen

From 6 April 2023, the top-rate threshold will be brought into line with the UK rate by reducing it from £150,000 to £125,140

The personal allowance remains frozen at £12,570 until 2027/28.

Land and buildings transaction tax

The additional dwelling supplement will increase from 4% to 6% from 16 December 2022, subject to exclusions for transactions straddling that date.

Adapted from Tolley Guidance Daily Round-up (16 December 2022)

MTD for Income Tax delayed **(Lecture B1351 – 22.48 minutes)**

On 19 December 2022 the government announced that the start date for MTD for income tax will be delayed from April 2024, with the new start date set as April 2026. The announcement confirms that from April 2026, businesses, self-employed individuals, and landlords will be required to report under MTD for income tax if their income exceeds £50,000, a welcome increase from the previous £10,000.

From April 2027, those with income of over £30,000 will then be required to join the scheme. The government has stated that it will now review the needs of smaller businesses, particularly those under the £30,000 threshold. The announcement stated that this review 'will look in detail at whether and how the MTD for ITSA service can be shaped to meet the needs of smaller businesses and the best way for them to fulfil their Income Tax obligations.' The government confirmed that it remains committed to introducing MTD for income tax for partnerships but at a later date.

Further, the new penalty system, that brings the late submission and late payment penalties for Income Tax Self-Assessment into line with those for VAT, will come into effect when taxpayers become mandated to join MTD. The government will introduce the new penalty system for Income Tax Self-Assessment taxpayers outside the scope of MTD after its introduction for MTD taxpayers.

https://questions-statements.parliament.uk/written-statements/detail/2022-12-19/hcws465

Spring Budget 2023

The Chancellor has announced that the:

- the Spring Budget 2023 will be on 15 March 2023.
- Office for Budget Responsibility will prepare its second forecast in 24 months on the same date, as is required by legislation.

https://questions-statements.parliament.uk/written-statements/detail/2022-12-19/hcws458

CGT reporting threshold

Currently, if the total amount or value of the consideration for all 'chargeable disposals' of assets made by a taxpayer in the year exceeds four times the Annual Exempt Amount (AEA), s.8C TMA 1970 requires them to complete the CGT pages of their Self Assessment return.

From 6 April 2023, to prevent the proceeds threshold falling when the AEA is reduced next April, the threshold will be fixed at £50,000.

https://www.gov.uk/government/publications/reducing-the-annual-exempt-amount-for-capital-gains-tax

Business Taxation

New tax year regime issues (Lectures B1353/1354 – 20.22/20.10 minutes)

Year ends which are not coterminous with the tax year

HMRC have indicated that some 7% of sole traders and 33% of partnerships do not use an accounting date which coincides with 5 April (or 31 March). If these businesses, which are assumed to be mainly seasonal operations or large partnerships, continue to draw up their accounts to their existing year end date, it will be necessary for them to apportion the profits of two periods of account to establish their taxable profits for a given tax year from 2024/25 onwards.

This will be particularly problematic for businesses with accounting dates falling fairly late in the tax year (e.g., 31 December). In order for, say, a sole trader with such a year-end to establish his profits for 2024/25, it will be necessary to calculate (using months):

- 9/12ths of his profits for the year ended 31 December 2024; plus

- 3/12ths of his profits for the year ended 31 December 2025.

Given that he has to settle his income tax liability for 2024/25 by 31 January 2026, the latter profit figure is unlikely to have been determined at that stage. The taxpayer will then be faced with the requirement to submit a self-assessment tax return containing estimated figures. These will have to be amended when the accounts for the year ended 31 December 2025 have been finalised.

In Para SALF206 of their Self-Assessment: The Legal Framework Manual, HMRC say:

> 'There are occasions on which some information cannot be finalised within the formal self-assessment time limits despite the taxpayer's best efforts to do so. In such cases, the taxpayer should include a "best estimate" of the information in the tax return and, if appropriate, a corresponding provisional figure of the tax due. The provisional figures should be clearly identified as such in the tax return. A tax return containing a provisional figure should only be submitted once it is clear that a more accurate figure will not be available before the filing date.
>
> It helps HMRC to have a reason for the use of a provisional figure put on the tax return, together with an approximate time when the final figure is likely to be available. A tax return containing a provisional figure will not be regarded as unsatisfactory, but HMRC will consider whether to open an enquiry to look further at any provisional figure. A penalty for a careless or deliberate inaccuracy in a tax return could be charged if HMRC find there was no good reason for using a provisional figure or the amount was not estimated reasonably.
>
> Once the correct figure is available, it should be notified to HMRC without delay, together with any amended self-assessment. If there is unreasonable delay in submitting the correct information, and there is additional tax to pay, HMRC would be able to charge a penalty on the basis that the original estimate was

insufficient, even if the inaccuracy was neither careless nor deliberate when the original tax return was submitted.'

This means that, for all such taxpayers, they (or their advisers) will have to re-submit their self-assessment tax returns for each tax year once the final figures have been established. And this should be done without undue delay if a penalty is to be avoided.

In this regard, a recent article in 'Taxation' contained the following interesting piece of information:

'HMRC (are) currently considering how this process might be amended in future to accommodate the new basis period rules with a variety of options under review, including:

- amending the provisional return when the tax return for the following year is filed;
- extending the filing deadline for certain types of taxpayer more likely to be affected by this issue (e.g., seasonal trades and complex partnerships); and
- including the difference between the provisional amount and the final amount . . . in the return for the following year.'

As a result, it seems probable that many more businesses will conclude that a change of accounting date to, say, 31 March is the sensible path to follow.

Change of accounting date – but when?

It might be assumed that the logical time to effect this switch is during the transitional year which will involve producing accounts for the period ended 31 March 2024 – except that the accounts preparation will then have to be done simultaneously with the commencement of MTD when advisers and their clients are likely to be extremely busy.

The alternative is therefore to consider changing the accounting date during 2022/23 rather than 2023/24, but this gives rise to the unfortunate dilemma that profit spreading is only available for 2023/24 so that any additional profits brought into charge by changing the accounting date will be assessed in full in 2022/23 with no carry-forward facility.

Illustration 1

Trevor is an established sole trader who runs a seasonal business with a 30 November year end. He has, however, decided to change his accounting date to 31 March 2023 in an attempt to avoid the ongoing problems discussed above.

His profits for the year ended 30 November 2022 are £63,000. For the next four months, Trevor's profits total £29,000. His overlap relief carried forward is £4,800.

Given that Trevor has a 'relevant period' of more than 12 months (i.e., 1 December 2021 – 31 March 2023), his taxable profits for 2022/23 comprise:

	£
Year ended 30 November 2022	63,000

Four months ended 31 March 2023		29,000
		92,000
Less:	Overlap relief	-4,800
		87,200

If, instead, Trevor had changed his accounting date in 2023/24 (but using the same set of figures), his assessable profits for 2023/24 would be calculated as follows:

		£
Year ended 30 November 2023 (CYB)		63,000
Transition (1 December 2023 – 31 March 2024)		29,000
		92,000
Less:	Overlap relief	-4,800
		87,200

These profits exceed the profits determined under the current year basis by £24,200 (£87,200 – £63,000) and so Trevor can spread the excess over five years. The amount to be added to his 2023/24 assessment is £4,840 (24,200 ÷ 5).

Trevor's profits for 2023/24 are therefore £63,000 + £4,840 = £67,840. This is clearly preferable to being taxed on £87,200.

However, if, as may well be the case because of the continuing effects of COVID-19, a business has recently been running less profitably, an early change of accounting date can sometimes prove to be advantageous.

Illustration 2

Hector's profits for the year ended 31 July 2022 are £42,000. However, for the next eight months, his profits only total £10,000. His overlap relief carried forward is £22,000.

Given that Hector also has a 'relevant period' of more than 12 months (i.e., 1 August 2021 – 31 March 2023), his taxable profits for 2022/23 comprise:

		£
Year ended 31 July 2022		42,000
Eight months ended 31 March 2023		10,000
		52,000
Less:	Overlap relief	22,000
		30,000

Without the change of accounting date in 2022/23, Hector's taxable profits would have been £42,000. The change in 2022/23 gives Hector a better result.

One set of accounts or two?

Where an accounting date is changed in 2023/24 to 31 March, does it matter whether the trader uses one set of accounts or two to cover the change period? Do not overlook the fact that, because Para 65 Sch 1 FA 2022 applies to basis periods for 2023/24, the 18-month restriction in S217 ITTOIA 2005 is irrelevant. As one commentator has said:

‘This means that the taxpayer can prepare a single set of accounts and self-employment pages for any period up to 23 months (which would apply where the old accounting date is 30 April).’

Illustration 3

Matthew, an established sole trader, has always prepared accounts to 31 August each year.

Matthew's profits for the year ended 31 August 2023 are £72,000. He plans to change his accounting date to 31 March 2024 and his trading results for the seven months ended 31 March 2024 show a profit of £61,000. He has no overlap relief carried forward, given that he made a loss for his first two years of trading.

If Matthew prepares a single set of accounts covering the 19 months to 31 March 2024, his assessable profits will comprise:

	£
Standard part (12/19 x £133,000)	84,000
Transition part (7/19 x £133,000)	49,000
	133,000

These profits exceed the profits determined under the standard part by £49,000 (133,000 – 84,000) and so Matthew can spread the excess over five years. The amount to be added to his 2023/24 assessment is £9,800 (49,000 ÷ 5).

Matthew's taxable profits for 2023/24 are therefore £84,000 + £9,800 = £93,800. However, if Matthew prepares two separate sets of accounts for this period, the following calculation will apply:

	£
Standard part (year ended 31 August 2023)	72,000
Transition part (7 months to 31 March 2024)	61,000
	133,000

These profits exceed the profits determined under the standard part by £61,000 (£133,000 – £72,000) and so Matthew can spread the excess over five years. In this case, the amount to be added to his 2023/24 assessment is £12,200 (61,000 ÷ 5).

Matthew's taxable profits for 2023/24 are therefore £72,000 + £12,200 = £84,200. This permutation produces a better outcome for 2023/24. Matthew should prepare two sets of accounts. It has been brought about by the fact that the profits have accrued at an uneven rate over the 19-month period to 31 March 2024.

As can be seen in Illustration 4 below, there will be a different end result if the business profits are declining.

Illustration 4

Yasmin has always prepared accounts to 31 October each year, but she is planning to change her accounting date to 31 March in 2024.

Yasmin's profits for the year ended 31 October 2023 are £94,000. Her trading results for the five months ended 31 March 2024 show a profit of only £4,600. Her overlap relief carried forward is £3,000.

If Yasmin prepares a single set of accounts covering the 17 months to 31 March 2024, her assessable profits will comprise:

	£
Standard part (12/17 x £98,600)	69,600
Transition part (5/17 x £98,600)	29,000
	98,600
Less: Overlap relief	3,000
	95,600

These profits exceed the profits determined under the standard part by £26,000 (£95,600 – £69,600) and so Yasmin can spread the excess over five years. The amount to be added to her 2023/24 assessment is £5,200 (26,000 ÷ 5).

Yasmin's taxable profits for 2023/24 are therefore £69,600 + £5,200 = £74,800.

However, if Yasmin prepares two separate sets of accounts for this period, the following calculation will apply:

	£
Standard part (year to 31 October 2023)	94,000
Transition part (5 months to 31 March 2024)	4,600
	98,600
Less: Overlap relief	3,000
	95,600

These profits exceed the profits determined under the standard part by £1,600 (£95,600 – £94,000) and so Yasmin can spread the excess over five years. In this case, the amount to be added to her 2023/24 assessment is £320 (1,600 ÷ 5).

Yasmin's taxable profits for 2023/24 are therefore £94,000 + £320 = £94,320. This permutation produces a significantly less attractive outcome for 2023/24. Yasmin should prepare a single set of accounts.

Establishing a taxpayer's overlap relief

The position with regard to establishing the quantum of overlap relief was neatly summarised by one commentator in these words:

> 'Overlap profits arise in the first two years of a business for businesses which commenced on or after 6 April 1994. The precise overlap period will depend on the commencement date and the chosen accounting date and will also depend on whether the business has previously changed its accounting date, as, in that event, some overlap profits may have been released (or additional overlap profits created) at that time.'

For businesses which started in the pre-current year basis era, the overlap profits were called 'transitional overlap relief', given that they arose during the transition from the preceding year basis regime to the current year basis regime. This form of overlap relief may therefore go back many years.

A significant number of businesses do not have a record of their overlap relief history, particularly many older ones, and so they will be looking to HMRC for the information which will enable the relief to be calculated. However, will HMRC be in a position to provide the relevant details?

A senior HMRC official recently informed the House of Lords Economic Affairs Committee that HMRC were working on a process to provide taxpayers with the information which they hold on to their overlap relief. He also implied that, even where the relevant figures are not immediately available, it may still be possible to calculate the relief from the records which they hold. However, it seems clear that, where the business started up many years ago, it is most unlikely that tax returns and other relevant records will be found by taxpayers, their advisers (who may well have changed over the years) or HMRC. In that case, it appears that taxpayers will unfortunately be unable to claim their relief. One cannot envisage HMRC granting relief where there is no evidence to support the claim.

Contributed by Robert Jamieson

Remuneration planning strategy **(Lecture B1352 – 13.54 minutes)**

When considering how to extract money from the company in a tax-efficient way, we are normally thinking about the difference between salary and dividends. There is a subsidiary issue involving loan interest (where money has been lent to the company by the individual) and rental income (where it is possible to purchase business premises outside the main company) but these are not really going to generate the main income for a household other than in a few cases.

Looking at the two options is superficially straightforward. Salary payments will be tax deductible in the company but attract tax and NICs for both the payer and the payee. Dividend payments are not tax deductible for the company but will only attract tax and not NICs. Given the changes in corporation tax rates and the various changes to the rates of tax and NICs this year, it is useful to revisit this situation.

The following calculations are very simplified, but are really to make a general comparison between the different options. We are assuming that the personal allowance has already been used as well as the dividend allowance. We are also ignoring any employment allowance that might be available at this stage.

In reality, most director/shareholders will already be paying up to the lower earnings limit for NI purposes in order to guarantee the year qualifies for state pension purposes so we are really looking at how we top-up the main income.

Calculations – basic rate taxpayer

Bonus	
Gross	100.00
Secondary class 1 NIC (13.8/113.8)	(12.12)
Gross salary	87.88
Income tax and NIC at 32%	(28.13)
Retained	59.75
Total tax and NI cost	40.25%

Dividends

For dividends, it is assumed that the dividend tax allowance has already been utilised.

Gross	100.00
Less corporation tax (19%)	(19.00)
Gross dividend	81.00
Income tax 8.75%	(7.09)
Retained	73.91
Total tax and NI cost	26.09%

Making this comparison for higher rate and additional rate taxpayer we can see the following figures:

	Basic rate taxpayer	Higher rate taxpayer	Additional rate taxpayer
Salary	41.98%	49.03%	53.42%
Dividends	26.09%	46.34%	50.87%

What about the changes in April 2023?

The figures then change again when the rate of corporation tax goes up in 2023 since the tax rate for dividends depends on the marginal rate of tax of the company as dividends are not tax deductible.

This change will not affect the marginal rate of tax for salaries as these are deductible for corporation tax purposes and so there is no impact if the corporate tax rate increases.

	Basic rate taxpayer	Higher rate taxpayer	Additional rate taxpayer
Salary	40.25%	49.03%	53.42%
Dividends			
19% CT	26.09%	46.34%	50.87%
26.5% CT	32.93%	51.31%	55.42%
25% CT	31.56%	50.31%	54.51%

This shows that once we have a company paying either marginal or main rates of corporation tax the salary route is actually more tax effective due to the increased benefit of the corporation tax deduction, other than for a basic rate taxpayer. This was seen before when the marginal rates of tax were higher – when we had a tiered corporation tax system. In that situation you might think it would be better to take salary to bring profits down to the small profits rate and then take dividends if you wanted to take more income.

However, when the calculations are done, it is an interesting situation. You have to do the calculations as it is not easy to predict the outcome. There may not be an overall tax saving or the overall tax may be reduced by this strategy but the amount of money extracted by the individual could be less, because you are reducing the corporation tax payable, not the individual tax.

For example, if you had a standalone company with profits of £75,000 after deduction of a salary at the level of the personal allowance (set at this level to make the calculation easier!). They want to pay £50,000 gross to the individual as either dividends or salary.

Option 1: pay salary of £50,000

Employers NICs = £50,000 x 13.8% = £6,900

Corporation tax = (75,000 - £50,000 - £6,900) x 19% = £3,439

NIC on director: salary of £12,570 already paid, so £37,700 @ 12.8% plus £12,300 @ 2% = £5,071.60

Tax on director: £37,700 @ 20% plus £12,300 @ 40% = £12,460

Total tax payable = £27,870.60

Net take home for director = £32,468.40 (out of £50,000)

Option 2: pay dividends of £50,000

No NICs due

Corporation tax = (£50,000 x 19%) + (£25,000 x 26.5%) = £16,125

Tax on director = (£1,000 @ nil) + (£36,700 @ 8.75%) + (£12,300 @ 33.75%) = £7,362.50

Total tax payable = £23,487.50

Net take home for director = £42,637.50

Option 3: pay salary to bring profits down to £50,000 and then balance as dividends

Want net deduction of £25,000 so 13.8/113.8 = £3,031.63 giving salary of £21,968

Balance as dividend = £50,000 - £21,968 = £28,032

Corporation tax = £50,000 x 19% = £9,500

NIC on director: £21,968 @ 12% = £2,636

Tax on director: (£21,968 @ 20%) + (£1,000 @ nil) + (£14,971 @ 8.75%) + (£12,300 @ 33.75%) = £9,848.81

Total tax payable = £25,022.44

Net take home for director = £37,515.19

Best outcome

In this situation, you can see that it still makes sense to pay dividends because so much of the income is being taxed at basic rate, where the difference between salary and dividends is so great. If you had the same individual who had other income so that they were being taxed at higher rates, the figures might be different. You just have to do the calculations.

Capital gains tax rates

Interesting, if no money was extracted on an annual basis but the funds were retained in the company and then extracted subsequently as a capital distribution, the following marginal rates of tax would apply:

	BADR	No BADR Basic rate	No BADR hHgher rate
19% CT	27.1%	27.1%	35.2%
26.5% CT	33.85%	33.85%	41.2%
25% CT	32.5%	32.5%	40%

Of course, this leads to many questions about the availability of capital treatment in various circumstances – for example, will retaining cash in the company lead to a situation where the BADR is prejudiced?

Contributed by Ros Martin

CT returns not matching computations (Lecture B1351 – 22.48 minutes)

HMRC has found discrepancies between information contained within CT returns and the amounts appearing in tax computations.

HMRC has stated that when the Corporation Tax loss reform rules were introduced on 1 April 2017, the treatment of brought-forward losses changed. In some instances, they have found that one or more boxes on the CT600 form have included brought-forward amounts, which is not in line with these rules.

The boxes which could be affected are:

- 805 and/or 810 UK property business losses – s.102 CTA 2010;
- 830 and/or 835 non-trading losses on intangible fixed assets – s.104 CTA 2010;
- 850 and/or 855 management expenses – s.103 CTA 2010.

HMRC have written to the companies and their agents to make them aware of the issue and that they will rely on the tax computations as the correct position. No action is required from companies, unless they disagree with HMRC’s approach, in which case they have 60 days from the date of the letter to contact HMRC.

https://www.tax.org.uk/hmrc-letter-differences-in-the-loss-position-of-company-tax-returns

List C capital allowances (Lecture B1351 – 22.48 minutes)

Summary – The Upper Tribunal had erred in law in setting aside the First Tier Tribunal's decision that expenditure incurred on the construction of nuclear deconversion facility did not qualify for capital allowances. It also found that a drafting error had wrongly narrowed the scope of list C of s.23 CAA, and that, on a proper construction of the provision, expenditure incurred 'on the provision of' list C assets should qualify for capital allowances.

Urenco spent £1billion constructing a 'tails management facility' for the processing of depleted uranium tails. The treatment for capital allowances of most of the expenditure was agreed but £192m was disputed by HMRC.

Decision

The Court of Appeal accepted the First Tier Tribunal's finding that some of the expenditure was not on plant (but on the premises or 'setting') and that, in any case, all the expenditure was on 'buildings' or 'items incorporated in or connected with buildings' and therefore not eligible for capital allowances by virtue of s.21 CAA 2001. Accordingly, it accepted HMRC's appeal against the Upper Tribunal's decision to set aside the First Tier Tribunal's decision.

The Court of Appeal also accepted a cross-appeal by Urenco in relation to the proper statutory construction of list C of s.23 CA 2001. List C contains 33 types of assets which are exceptions to the general rule that expenditure on buildings does not qualify for capital allowances.

Items 1 to 22 of list C simply list the assets; items 23 to 33, on the other hand, expressly refer to expenditure 'on the provision of' such assets. The latter is a wider formulation as it permits capital allowances to be claimed not just for expenditure 'on' the actual item itself but also for the ancillary costs of ensuring it can be safely used on site (for example, transport and installation costs).

Urenco argued that parliament cannot have intended to create this discrepancy within list C and that the wider formulation should apply to all the assets in list C. Accordingly, its expenditure 'on the provision of machinery and processing equipment' (items 1 and 4 of list C) should qualify for capital allowances and not just its expenditure 'on' those items. The Court of Appeal agreed. It considered it 'implausible' that parliament should have intended to draw a distinction between expenditure 'on' items 1 to 22 of list C and expenditure on their 'provision', with only the former qualifying for capital allowances.

Instead, it concluded that this distinction arose from an inadvertent drafting error that could be traced back to the tax law rewrite project. To remedy this error, the Court of Appeal held that expenditure 'on' list C assets should be read as meaning 'expenditure on the provision of' such assets. It remitted the case to the First tier Tribunal to decide the remaining issues based on this interpretation.

Urenco Chemplants Ltd and others v HMRC [2022] EWCA Civ 1587

Adapted from the case summary in Tax Journal (9 December 2022)

Management expenses were capital (Lecture B1351 – 22.48 minutes)

Summary - Expenditure on services relating to the proposed sale of a subsidiary qualified as management expenses but were disallowed as they were capital in nature.

Centrica Overseas Holdings Ltd was an investment holding company which had a Dutch subsidiary, Oxxio.

In 2009 the group decided to sell Oxxio and its subsidiaries, achieving a part sale in 2011 by means of a partial demerger. Between 2009 and 2011 the group incurred fees of £3.8 million which were paid to three firms for services relating to this transaction. The expenditure was recharged to Centrica Overseas Holdings Ltd, which claimed £2.5 million as management expenses deductible from its profits.

HMRC refused the claim on the basis that the expenses did not belong to Centrica Overseas Holdings Ltd 's investment business; rather they related to a decision already taken by a different company.

The First Tier Tribunal had found for HMRC, although it ruled that the expenses were management expenditure and not capital. The Upper Tribunal allowed the company's appeal. HMRC appealed to the Court of Appeal.

Decision

On HMRC's assertion that the expenses were not management expenses, the Court of Appeal held that the issue was not a 'pure question of law'. It followed that the role of an appellate court or tribunal was a limited one. The judge said the First Tier Tribunal had correctly directed itself as to the legal principles and applied them to the facts.

It was entitled to reach the conclusion that the disputed expenses were management expenses. HMRC's appeal on this ground was dismissed.

However, the second ground – whether the expense was of a revenue or capital nature – was a matter of law, therefore the court was free to arrive at its own decision. The judge said it was clear that s.1219(3) CTA 2009 was intended to exclude capital expenditure and should be interpreted in accordance with the case law on trading expenses.

The crucial feature was the commercial decision to dispose of the Oxxio business. The purpose of the expenditure was to decide how to carry that out. The previous tribunals had made errors of law by 'confusing the test for whether something is an expense of management with the distinct legal question of whether it is capital expenditure'.

The disputed expenditure was within the exception in s.1219(3)(a) CTA 2009.

HMRC's appeal on the capital expenditure issue was allowed.

HMRC v Centrica Overseas Holdings Ltd [2022] EWCA Civ 1520

Adapted from the case summary in Taxation (1 December 2022)

Loan relationships had unallowable purpose

Summary - The Upper Tribunal upheld the decision of the First Tier Tribunal that certain intra-group loan relationships had an unallowable purpose.

The appellant companies were members of the Kwik-Fit group. Following the acquisition of the group by a new owner, a reorganisation of the group's intra-group loans was carried out. Intra-group loans were assigned by the appellants to an intermediate holding company, Speedy 1 ('Speedy'), and three new intra-group loans were created. The interest rate on the assigned loans and one loan already owed to Speedy was substantially increased. The interest rate on intra-group loans that were not involved in the reorganisation was not increased. Speedy had a carried-forward non-trading loan relationship deficit of £48million and, as a result of the reorganisation, the deficit was expected to be utilised within three years rather than around 25 years, which was the estimate previously made by the group's tax manager.

The First Tier Tribunal had held that the loans had an unallowable purpose and disallowed interest on both the new and the pre-existing loans. In the case of the pre-existing loans, however, the First Tier Tribunal disallowed only the amount by which the interest had increased following the reorganisation, capped at the amount of the non-trading loan relationship deficit used by Speedy.

Decision

The Upper Tribunal agreed with the First Tier Tribunal that the interest debits claimed by the appellants were 'tax advantages' for the purposes of the unallowable purpose rule in s.441 CTA 2009 and that the use by Speedy of its non-trading deficit to offset against interest income was a 'relief from tax' and so also a tax advantage. It rejected the appellants' argument that utilisation of losses was not a tax relief; on a plain reading of the legislation there was 'no difficulty in regarding a provision under which a deficit is set off against profits as a relief from tax'.

The Upper Tribunal went on to find that it was open to the First Tier Tribunal, on the evidence before it, to find that the appellants had a main purpose to obtain a tax advantage. Their argument that there was no direct evidence for such a finding was rejected. The distinction which they attempted to draw between their accepted purpose of using Speedy's losses and their disavowal of purposes of seeking deductions for themselves flew in the face of the clear rationale for the reorganisation. For the losses to be used in the way intended, the deductions also had to be capable of being used.

Finally, the Upper Tribunal considered the amount of interest to be disallowed. Again, the Upper Tribunal upheld the decisions of the First Tier Tribunal.

Kwik-Fit Group Ltd and others v HMRC [2022] UKUT 314 (TCC)

Adapted from the case summary in Tax Journal (9 December 2022)

VAT and indirect taxes

Associated company lease (Lecture B1351 – 22.48 minutes)

Summary – A partnership could recover input VAT on property leases entered into by an associated company as the economic and commercial reality was that the partnership received the supply.

The appellant was a firm of solicitors. The partnership had been registered for VAT since 1 October 2011. As a result of a previous merger, the partnership had three offices and for a number of years had been looking for alternative premises in order to consolidate their operations.

Having found suitable premises, lease negotiations were carried out by, and on behalf of, the partnership and it was the partnership that signed the heads of terms. However, the Law of Property Act 1925 only allows a partnership to enter into a lease in the name of up to four partners. Consequently, the lease was agreed with Ashtons Legal Limited, a dormant shell company, acting as the partnership's nominee.

The landlord understood that the partnership would be the sole occupants of the premises and would pay the rent. However, under the lease, the rental invoices were addressed to the limited company but sent directly to the partnership for payment. The invoices were processed, paid and input VAT recovered on the partnership's VAT return.

HMRC denied the input VAT claim arguing that the supply was made to Ashtons Legal Limited, with a second supply of equal value made by that company to the partnership. As the company had not opted to tax, this supply was exempt from VAT

The partnership appealed, arguing that commercially there was one lease between the landlord and the partnership. The company's involvement was only needed because of the Law of Property Act restrictions.

Decision

The First Tier Tribunal considered it necessary to look at the economic and commercial reality of the deal.

The First Tier Tribunal found that the partnership used the premises and was liable pay the rent as it fell due. All parties knew that Ashtons Legal Limited was simply a dormant company, a 'mere cypher' inserted into the leases to deal with property law issue.

The judge concluded that *Airtours Holiday Transport Ltd v CRC* [2016] STC 1509 supported the partnership's view that the 'commercial and economic reality' was that the partnership had received the supply of rent and could therefore claim input tax.

The appeal was allowed.

Neil Warren, VAT consultant, commented:

> 'The legislation confirms that input tax can only be claimed by a business or person that receives a supply of goods and services. Although the lease was between the landlord and the company, the commercial reality was that the partnership was receiving the benefits of the lease and dealt directly with the landlord. HMRC's guidance in its *VAT Input Tax Manual* VIT13440 deals with the situation when a lease is recorded in the name of an individual director rather than a partnership or company – allowing input tax to be claimed by the partnership of company if certain conditions are met – perhaps the time is now right to extend this guidance to include other parties and not just individuals.'

Ashtons Legal (A Partnership) v HMRC (TC08641)

Transfer of a going concern or stock? (Lecture B1351 – 22.48 minutes)

Summary – Stock was transferred as part of a transfer as a going concern and so the input tax claim in relation to the stock was disallowed.

On 6 October 2015, Apollinaire Ltd was incorporated as a men's outfitters, and registered for VAT from that date. The company's sole director and shareholder was Benny Hashmi.

Benny Hashmi had a history of setting up companies, where he acted as director. The companies failed to submit returns and/or had unpaid tax debts and were then dissolved.

One such company was Snow Whyte Limited. The company traded under the name Benny Hamish but referred to as Snow. This was incorporated in November 2010 and was supposedly owned by a Mr Singh. A VAT deregistration form was submitted to HMRC stating that Snow ceased to trade on 30 September 2015 and the company was dissolved on 2 August 2016.

HMRC's Real Time Information for PAYE showed that until 30 September 2015, Snow had 6 full-time employees including Benny Hashmi and they all commenced employment with Apollinaire Ltd on 1 October 2015, with Apollinaire Ltd also trading under the name of Benny Hamish and operating from the same premises as Snow had done. Apollinaire Ltd submitted its first VAT return covering the period 6 October 2015 to 31 January 2016, seeking a repayment of £98,191.21, due mainly to input tax claimed on stock allegedly bought from Snow.

HMRC believed there had been a transfer of a going concern from Snow to Apollinaire Ltd. The input tax claim was denied. The return was adjusted for input tax claimed on stock purchases as well as output tax errors connected with retail scheme calculations.

Initially, the company's accountants confirmed there had been a transfer of a going concern but later, with new accountants appointed, the company argued that only stock had been bought and not the business as a whole meaning that the input tax was recoverable.

Further, with Benny Hashmi's history, HMRC issued a personal liability notice as they believed the errors on the return were deliberate and there was a risk that the company would become insolvent.

Apollinaire Ltd appealed to the First Tier Tribunal.

Decision

The First Tier Tribunal found Benny Hashmi's evidence lacked credibility and questioned whether Mr Singh ever existed.

The First Tier Tribunal found that there was a transfer of a business as a going concern between Snow and Apollinaire Ltd, with Benny Hashmi as director, or shadow director, controlling both companies. The trade before and after Snow ceased trading was unchanged, with the same trading name, employees and premises.

No input tax was recoverable on the stock transferred and the appeal was dismissed.

As stated by Neil Warren, independent VAT consultant:

> The director's previous history with dissolved companies highlights why it is so important that the legislation gives HMRC the power to issue a personal liability notice against a director or shareholder where deliberate errors have been made by a company that underpays VAT.'

Apollinaire Ltd and Zakir Hussain Hashmi V HMRC (TC08648)

Subway standard-rated sales calculation (Lecture B1351 – 22.48 minutes)

Summary – In arriving at their best judgement assessment, HMRC had done everything expected and the taxpayer had failed to provide any evidence to displace the figures arrived at.

Neoterick UK Limited operated a Subway in Suffolk, having commenced trading back in 2014.

Having reviewed the company's VAT returns, HMRC were concerned that the reported standard-rated sales of between 55% and 78% of total sales were low when compared to the 87% average for other Subway franchises across the country. Consequently, in August 2017 HMRC carried out two test purchases, with the till receipts showing the items as zero-rated, when some of the items bought were in fact hot food that should have been standard rated.

Following two further investigations in October, HMRC established that the percentage of standard-rated sales on these days were recorded as 88.97% and 93.3%. HMRC wrote indicating that a VAT assessment would be issued for the under-reporting of standard rated supplies. The letter invited the company to provide evidence if it thought that the assessment was incorrect. Having received no reply, a best judgment assessment was raised in November 2017 for £45,000 for the VAT periods 01/14 - 07/17.

Neoterick UK Limited appealed, arguing that the percentage of standard rated turnover was too high and could not be relied on as HMRC had only undertaken a relatively small sampling exercise. Apart from the two "one-off" purchases in August, they had only attended for part of one day and a whole of another and then extrapolated those results over a four-year period. The company argued that the assessment had not been issued on a 'best judgment' basis.

Decision

The First Tier Tribunal considered past tribunal cases on the principle of best judgment and stated that officers had a duty to use only the material available to them and then to calculate the tax underpaid with an honest and bona fide approach.

HMRC had done everything expected of it, having used evidence from four separate occasions combined with their experience of other Subway franchises.

Further, Neoterick UK Limited had not provided any alternative calculations or evidence to support their claim that the percentage used by HMRC was too high.

The company's appeal was dismissed.

Neoterick UK Limited v HMRC(TC08652)

Retail vouchers given to staff

Summary – Gifts of staff vouchers as a reward for performance were supplied for business purposes and did not result in a deemed supply.

GE Aircraft Engine Services Ltd*,* part of the General Electric group, operated in the UK in the aircraft engine manufacturing sector.

Under a programme called 'Above and beyond', employees could nominate colleagues deserving of a performance reward, with one such reward being retail vouchers.

Prior to January 2019, Article 26(1)(b) of the VAT Directive stated that transfers of retail vouchers should be treated as supplies of services subject to VAT and that a deemed supply applied when vouchers were made available with no charge for use privately, or otherwise outside the business. The provision sought to ensure equal treatment as between:

- a taxable person who applies goods or services for his or her own private use or for that of his or her staff; and
- a final consumer who acquires goods or services of the same type

GE Aircraft Engine Services Ltd *(*and 19 other members of the GE Group) argued that these provisions did not apply, as the vouchers were provided for business purposes. HMRC disagreed.

Decision

The CJEU stated that the retail vouchers gave employees the right to obtain goods or services from one of the referenced retailers, without intervention by the employer. Consequently, it might appear that the retail vouchers were being given for the employees' private use.

However, the company incurred the cost of the vouchers and then rewarded key staff in an attempt to motivate them further to increase turnover. The CJEU found that the 'Above &

Beyond' programme sought to improve the business profitability. The advantage gained by employees was merely incidental to the business benefits.

The CJEU confirmed that the provisions of Article 26(1)(b) did not apply to the retail vouchers in question.

Finally, the CJEU was satisfied that the principle of fiscal neutrality was not violated. When the vouchers were used by the employees to buy goods or services, the retailer would declare output tax at that time.

GE Aircraft Engine Services Ltd v HMRC (Case C607/20)

Reasonable excuse for non-payment

Summary – The evidence provided was inadequate to establish that the taxpayer had a reasonable excuse.

Mohammad Mirza was a VAT registered grocer. In February 2019, he submitted his 2/19 VAT return showing VAT due of £24,677.

Having failed to pay this by the due date, HMRC issued a default surcharge.

Key facts of the case included the following:

- Mohammad Mirza had been in the default surcharge regime in 2010 and he had not paid VAT since 2012.
- In 2015, HMRC and the police raided his business premises and seized documents and cash of about £550,200.
- Mohammad Mirza had made several repayment claims for input VAT dating back to 2012 and believed that these resulted in HMRC owing him about £190,000.
- In 2018, HMRC wrote stating that his outstanding tax debts exceeded the seized cash and that he should contact the debt management department.

Mohammad Mirza appealed the default surcharge arguing that the sum due had been set off against either the cash seized in the raid, or the sums claimed for repayment.

With the First Tier Tribunal dismissing his appeal, Mohammad Mirza appealed to the Upper Tribunal arguing that the First Tier Tribunal had erred:

- by proceeding without hearing oral evidence from him, and
- in finding the taxpayer's reliance on a professional adviser did not constitute a reasonable excuse.

Decision

The Upper Tribunal stated that had the taxpayer not been professionally represented, he would not have known that he could provide evidence. However, this was not the case, as

Mohammad Mirza was represented. The First Tier Tribunal was under no obligation to suggest to the adviser that their client would benefit from giving evidence.

The Upper Tribunal agreed that the First Tier Tribunal had taken the view that incorrect professional advice could not constitute a reasonable excuse. To challenge this, the taxpayer needed to provide suitable evidence to support his claim. However, the Upper Tribunal stated that there was insufficient evidence before the First Tier Tribunal concerning:

- the advice on the availability of set-off driving Mohammad Mirza’s decision not to pay his VAT liability for 02/19, and
- whether, even if he had relied on such advice, it was reasonable for him to do so.

The appeal was dismissed.

Mohammad Ameen Mirza v HMRC [2022] UKUT 00291 (TCC)

Refusal to register

Summary – The Upper Tribunal overturned the First Tier Tribunal’s decision on HMRC's application to strike out the appeal on the basis that there was no reasonable prospect of the taxpayer's case succeeding.

In August 2020, HMRC refused to register GB Fleet Hire Limited for VAT.

Back in 2017, with its registration was being used abusively, GB Fleet Hire Limited had been compulsorily deregistered. With this deregistration currently under appeal, HMRC had used this as the reason for not proceeding with its 2020 VAT registration application.

On appeal, the First Tier Tribunal had agreed to HMRC's application to strike out the 2020 appeal on the basis that there was no reasonable prospect of case succeeding as GB Fleet Hire Limited had not shown that it had addressed the abuse leading to the cancelled registration in 2017.

GB Fleet Hire Limited appealed to the Upper Tribunal.

Decision

The Upper Tribunal found that the First Tier Tribunal had been wrong to strike out the 2020 appeal.

The burden of proof to show that the 2020 registration was abusive was on HMRC. Simply relying on what had happened in 2017, without providing any new evidence, was not enough. On the face of it, the 2020 supplies obliged the company to register for VAT.

The Upper Tribunal accepted that there may well be evidence supplied by HMRC that the 2020 supplies would lead to some abuse of law/right potentially linked to the factors which had led HMRC to the deregistration in 2017. This evidence would be properly heard at trial, with a fuller investigation than that which could be conducted at a strike out application.

The appeal was reinstated.

GB Fleet Hire Limited v HMRC [2022] UKUT 00307 (TCC)

Dealing with a property slow down (Lecture B1355 – 22.33 minutes)

New builds

What if residential developers experience a slowdown in the next 12 months. They may be minded to temporarily let until the market recovers. Temporarily letting the property will be exempt from a VAT perspective and input tax on the build is at risk (subject to HMRC de-minimus rules).

To protect developers, we should always advise them to trade through a limited company. This will give them the greatest flexibility to deal with a downturn in the property market. If the developer needs to temporarily let the new homes, they could simply set up a letting subsidiary.

The property would then be sold to the newly formed letting subsidiary. This would be a zero-rated sale from a VAT perspective and input tax recovery in the development company is secured.

The sale would be free of SDLT due to the SDLT group exemption for supplies between a parent company and their 75% subsidiary. The subsidiary will be 100% owned but you only need 75% for the SDLT group exemption.

There will be a market value uplift in the development company for corporation tax purposes as the property needs to be appropriated before it is transferred NG/NL to the subsidiary company. With the corporation tax rate rising to 25% from 1 April 2023 it will be an advantage to have an uplift as the uplift is currently taxed at 19%.

The downside to using a letting subsidiary is that it creates an associate for the new corporate tax regime from 1 April 2023 with the upper and lower limits shared amongst associated companies. For larger companies this may not be an issue but for small businesses we would need to do a cost benefit analysis.

Converting property

There will be similar considerations when a developer purchases a commercial property with a view to converting the building to flats before making zero rated sales of the flats.

The purchase of the commercial property should be exempt although this would require a Form 1614D if the seller has opted to tax the property.

Once purchased the developer may engage sub-contractors to work on the conversion. The subcontractors' invoices will be subject to the 5% domestic reverse charge or 5% VAT where the developer confirms end user status.

The sale or long lease (>21 years) of the flats will be zero rated which allows input tax recovery on the conversion costs. The developer should be mindful of the blocking order within SI1992/3222 (6) which prevents input tax recovery on building materials not ordinarily incorporated into the conversion (e.g. white goods).

Where the developer is unable to sell the converted flats, they should consider transferring the flats to a subsidiary company so that they may let the flats. The transfer would be zero - rated so input tax recovery is secure for the developer. Transferring the flats will trigger a market value disposal for direct tax purposes but realising profits early is a positive step with increased corporation tax rates around the corner. The SDLT group exemption means there is no SDLT on the transfer to the letting subsidiary.

Once again, we would have an associated company for the purposes of the new corporation tax regime from 1 April 2023.

It should be noted that if the developer was planning to convert a house into flats the conversion work would still be at 5% but the sale of the converted flats would be exempt. In this instance it would be important to minimise the developers' exposure to VAT so that they only ever incur 5%. This may well involve contracting with one main contractor (connected or otherwise) to perform the conversion work.

Contributed by Dean Wootten