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Personal tax

Employed or self employed (Lecture P1411 – 23.43 minutes)

Summary –The First Tier Tribunal concluded that the hypothetical contract between worker and the BBC was one of self-employment.

This case has been to the Court of Appeal and back, with the lower Tribunals having previously found in the taxpayer's favour.

As a refresher, Kaye Adams worked as a TV presenter, supplying her services to the BBC via her personal service company, Atholl House Productions Ltd. HMRC raised income tax and national insurance assessments for just under £125,000 under the IR35 rules.

Having lost at the First Tier Tribunal, HMRC appealed to the Upper Tribunal who considered the content of the actual contract as well as that of a hypothetical contract. Applying the Ready Mixed Concrete tests, the Upper Tribunal concluded that mutuality of obligation existed and that the BBC had sufficient control over when, where and how work was carried out.

Moving to the third test, the Upper Tribunal considered whether there were sufficient other factors that would override mutuality of obligation and control. Namely, was Kaye Adams in business on her own account? Accepting that she was already carrying on similar activities on her own account prior to working for the BBC, the Tribunal concluded that the BBC work was part of her existing sole trade and this was not a contract of employment. The intermediaries' legislation did not apply.

The case moved to the Court of Appeal who accepted the hypothetical contracts satisfied both mutuality of obligation and control but disagreed with the approach taken when deciding whether under the hypothetical contract, Kaye Adams was in business on her own account. Just because she undertook other similar work in business on her own account, did not automatically mean that the BBC work was part of that business and so fell outside of the IR35 rules. The case was remitted back to the Upper Tribunal to apply the correct test. The Tribunal was asked to analyse the specific circumstances that applied in this case, taking into account new facts that could be presented.

The Upper Tribunal decided the First Tier Tribunal was best suited to revisit the case.

Decision

The First Tier Tribunal confirmed the Court of Appeal's finding that the terms of the actual contracts between Kaye Adams and the BBC should reflect the terms of the written agreements between them.

Moving to the hypothetical contract, the First Tier Tribunal stated that this should be determined by considering the terms of the actual contracts as well as how those contracts were actually carried out. Having done so, the Tribunal decided the terms of the hypothetical contracts were the same as those found by the Upper Tribunal.

The Tribunal confirmed that for there to be an employer and employee relationship, there must be:

1. mutuality of obligations;

2. a degree of control over “employee”; and

3. the other terms of the contract must be consistent with there being an employment contract.

The First Tier Tribunal decided that previous findings on mutuality of obligation and control remained unchanged, pointing towards employment.

The final question to answer was whether the hypothetical contracts would have been employment contracts or, under those contracts, would Kaye Adams be seen as someone acting in the course of a business on her own account.

The Tribunal reviewed the terms of the hypothetical contracts and stated that these tended to " indicate that the relationship between the BBC and Ms Adams ….. would have been one of employment".

However, with other areas pointing away from employment, the Tribunal reached a "finely balanced” decision, finding that under the hypothetical contracts Kaye Adams was self-employed and not employed. There were a number of points in her favour:

- she had her own brand as a presenter, with a history of working as a freelancer;

- it was common practice for the BBC to treat presenters as self-employed independent contractors;

- there was an absence of control over her other engagements and there was a meaningful amount of time available for her to undertake such work;

- there was a distinct lack of training and she had to use her own equipment;

- unlike other employees, she had no entitlement to sick pay, paid leave or pension entitlement; further she could not apply for other roles within the BBC.

Atholl House Productions Limited v HMRC (TC/2018/02263)

HICBC nudge letters **(Lecture P1411 – 23.43 minutes**

In both of the following cases a nudge letter was sent to the taxpayer concerning the need to pay the High Income Child Benefit Charge (HICBC). What was the outcome when both taxpayers claimed ignorance of the law?

Michael Barrett v HMRC (TC08970)

HMRC sent letters regarding the HICBC to Michael Barret dated 29 November 2019 and 4 June 2021 at an old address, where he had not resided since May 2019. He had set up a re-direct of mail, but these letters were not received. Finally, on 14 September 2022, he received a letter at his current address.

As an employee, taxed under PAYE, he had never been asked to complete a Self Assessment tax return. With his children born before the introduction of the HICBC legislation and HMRC failing to sufficiently communicate the changes to the law, he did not realise that he needed to do so to report liability to the HICBC.

The taxpayer appealed against the penalty for failing to notify his liability to the charge but accepted his liability to the assessment.

The First Tier Tribunal accepted the taxpayer's argument that he had not received the first two letters. Once he was aware of the issue, he promptly sought to resolve it.

Deciding that he had an 'objectively reasonable excuse' for the failure to notify, the penalty was cancelled.

Douglas Lakeland v HMRC (TC08997)

As in the previous case, Douglas Lakeland was an employee, who was not required to submit a Self Assessment return. His wife had been claiming child benefit since 2001.

The couple claimed that neither of them was aware of the HICBC, although according to HMRC's records, Douglas Lakeland had been sent a generic letter, SA252, in 2013 about its introduction.

In January 2021, HMRC sent Douglas Lakeland a nudge letter about the charge, which he claimed not to have received.

In July 2021, with income exceeding the £50,000 limit, HMRC issued assessments for the years that the couple had failed to pay the HICBC.

On appeal, the First Tier Tribunal confirmed the assessments, accepting that the taxpayer and his wife were 'honest and honourable people who were very upset that they had fallen foul of the tax authorities and were very keen to rectify things'.

The Tribunal found that on the balance of probabilities, Douglas Lakeland had not received either the SA252 or subsequent nudge letter. Consequently, Douglas Lakeland had a reasonable excuse for failing to notify the charge based on ignorance of the law. The appeal against the penalties was allowed.

No transfer of assets abroad by individuals

Summary - The transfer of assets by a UK company to company based in Gibraltar was not caught by the transfer of assets abroad legislation, which applies to individuals transferring assets and not companies.

The Fisher family, Stephen, Anne, their son Peter and daughter Dianne, owned and ran a betting business through Stan James (Abington) Ltd.

In 1999, to take advantage of the lower betting duty rates in Gibraltar, one of the company's competitors relocated to Gibraltar. Stan James (Abington) Ltd concluded that to remain competitive in the tele-betting market, it too would need to relocate.

A new company, Stan James Gibraltar Ltd, was incorporated and in February 2000, Stan James (Abington) Ltd's telephone betting business was transferred at market value to the Gibraltar based company. Only the UK betting shops remained within the UK company.

HMRC issued assessments taxing Stephen, Anne and Peter Fisher under s.739 ICTA 1988 arguing that they had transferred assets abroad, as a result of their overall controlling interest in the company, they had the 'power to enjoy' those assets and that the aim of the transfer was to avoid betting duty. As the daughter was not UK resident, she was excluded.

The Fisher family argued that transfer of the assets was made Stan James (Abington) Ltd, the legal owner of the assets, and that the company's actions could not be attributed to them as shareholders.

On appeal to the First Tier Tribunal, Anne's appeal was allowed. She was an Irish citizen and the transfer of assets abroad legislation was not compatible with rights under European Union law.

The Upper Tribunal found that the transfer of assets abroad legislation did not apply at all, as it was the company that had effected the transfer and further, the reason for the transfer was to defend the business, and not for tax avoidance purposes.

The case took another turn in the Court of Appeal who found that Stephen and Peter Fisher effected the transfer as they were heavily involved in the running of the business. Anne was excluded as she was not involved in the decision-making. The defence motive considered by the Upper Tribunal was not available as the avoidance of betting duty and the saving of the business were inseparable.

The case moved to the Supreme Court.

Decision

When considering the transfer of assets legislation, the Supreme Court summed up by saying:

> "The provisions only apply to impose a tax charge on individuals and it has been common ground throughout that "individuals" means natural persons and not bodies corporate. None of the Fishers held a majority interest in either the transferor or the transferee company. Does that mean that the Fishers cannot be caught by the code at all? "

The Supreme Court confirmed that the transfer of assets abroad legislation is limited to charging individuals. Being shareholders of a company that transferred assets abroad did not make them the transferors under the anti-avoidance legislation. Indeed, the legislation makes no mention as to when an individual should be treated as controlling a company for these purposes.

The Supreme Court found in favour of the Fisher family. They were not, singly or collectively, the transferors of the business and so were not caught by s.739.

HMRC v Fisher and another and HMRC v Fisher Respondent No 2 [2023] UKSC 44

Tax treatment of jointly owned assets (Lecture P1412 – 13.31 minutes)

Anticipating the abolition of the Office of Tax Simplification by what is now s.347 F(No2)A 2023, the Chancellor gave the following promise in a letter dated 20 March 2023 to the Chair of the Treasury Committee:

> 'Officials in the Treasury and HMRC have been given a clear mandate to focus on simplicity in tax policy design. This work will be delivered through an existing strategic function working across the Treasury and HMRC, concentrating on looking at opportunities to simplify existing tax rules, as well as new policy and administrative changes.'

In line with this commitment, the Association of Taxation Technicians (ATT) produced a representation paper on 10 October 2023 in which they recommended that the Government should 'align the income tax treatment of assets which are jointly owned by co-habiting spouses and civil partners with that applying to any other joint owners.'

The ATT consider that these rules, which are mainly relevant for land and buildings but which also apply to other assets such as bank accounts, are unnecessarily complex and poorly understood. They have therefore selected this topic as an initial test to see whether the Government are really prepared to honour their pledge of earlier this year.

The rest of this chapter refers to marriage and married couples, but the notes should be understood as applying equally to co-habiting civil partners.

Background to the problem

For many years, property has been able to be held by two parties as tenants in common in unequal shares, usually to reflect the capital contributed by each when acquiring the asset. For example, if Patrick and Carole buy a freehold house together which they intend to rent out, they might be considered to own it in the ratio 75 : 25 in line with their respective capital payments. In a situation such as this, it makes no difference whether the joint owners are married or unmarried.

Having gone to the trouble of documenting their unequal ownership split (typically via a Declaration of Trust), Patrick and Carole are likely to assume that any subsequent income generated by their property investment will be shared in the same unequal proportions. However, this is not the case for married joint owners. S.836 ITA 2007 deems such income to be subject to an automatic split on a 50 : 50 basis between the two parties, although there are specific exceptions for income from:

- furnished holiday accommodation;
- partnerships; and
- shares in close companies.

In contrast, income derived by unmarried joint owners is divided for income tax purposes by reference to each party's actual beneficial ownership.

It is this inconsistency between married and unmarried joint owners which, in the opinion of the ATT, causes unnecessary tax complications.

There are some further implications which are considered below. For example, if unmarried joint owners such as Patrick and Carole subsequently marry and live together, any intended unequal division of their income is overridden. This is because of the 50 : 50 rule in s.836 ITA 2007. If, therefore, Patrick and Carole want their future income tax liabilities to reflect their unequal ownership shares, they must sign and submit Form 17 to HMRC within 60 days. This is the declaration required by s.837 ITA 2007. As a practical point, Form 17 must be filled in completely before it can be printed out.

The declaration cannot be backdated and so the couple need to sign the form as soon as they are married and return it to HMRC within 60 days of the date of signing in order to retain their current split of income.

Similarly, if a married couple buy property jointly in unequal shares, they need to submit a Form 17 in order to override the deemed 50 : 50 split of income in favour of taxation based on their beneficial ownership of the asset.

If a married couple subsequently modify their beneficial ownership shares, another Form 17 is required to be sent in so as to avoid a return of the deemed 50 : 50 split of income. No such requirement exists for unmarried joint owners, given that they simply have to report the appropriate amount of income which reflects their interest in the property after the change.

When a married couple, who have correctly disclosed their income from a jointly owned property on a 50 : 50 basis, come to sell the house or flat, they are likely to assume that the same 50 : 50 deeming provision will also apply for CGT purposes. However, this is not the case. On a sale, the share of any capital gain (or loss) arising will be determined in line with each party's beneficial interest in the property. In other words, the special 50 : 50 rule only applies for income tax, and not for CGT.

The ATT's recommendation

The ATT recommend that Ss836 and 837 ITA 2007 should be repealed so that a married couple who receives income from jointly owned property will be taxed in exactly the same way as unmarried joint owners of property, i.e. each owner's share of income should reflect their underlying beneficial ownership interest. As they put it:

> 'We consider this will simplify the income tax treatment of jointly owned property, with no significant disadvantages or transitional costs.'

This seems like a sensible and practical proposal.

Contributed by Robert Jamieson

Charitable giving from April 2024 (Lecture P1413 – 13.46 minutes)

There are many aspects to achieving charitable status for tax purposes:

- Gift aid becomes available meaning that:
    - A company can claim a deduction for the donation;

    - An individual can claim higher and additional rate tax relief on payments to charities;

- The charity can reclaim the basic rate tax deemed to be paid on an individual's donation;
- Capital gains tax reliefs are available of gift of qualifying assets to a charity;
- Any gift, either in lifetime or on death, is not liable to inheritance tax;
- The charity will not pay tax on most of its income and gains if it uses the money for charitable purposes;
- Discounts are available on business rates;
- No stamp taxes are paid on acquisition of property to be used for qualifying charitable purposes or where the income will be so used; and
- Special rules apply for VAT purposes.

Historically, a charity was defined as follows:

1. A body established for charitable purposes only which is defined in the Charities Act 2006;
2. It is located in a member state of EU or EEA and be within the authority of a UK court or be subject to control by a court in the corresponding jurisdiction in which it is located;
3. It must be registered in the relevant jurisdiction; and
4. It must be managed by persons who meet the 'fit and proper' test.

However, as part of the post-Brexit changes to tax legislation in the UK, this is now changing.

The ability to have a non-UK charity qualify was removed in FA2023 by alteration of the second condition above. There is a transitional period, so that a charity which had asserted its status before 15 March 2023 will continue to qualify until 1 April 2024 (for company donations) or 5 April 2024 (for individual donations). After that, no relief will be available where donations are made to non-UK charities. This will be the case even if those overseas charities have UK activities.

Whilst we have no real information about whether any issues are arising about the charities which have asserted their status before the above date, HMRC have stated that only 20 EU or EEA charities are in that position so they are not expecting many to fall within the transitional provisions. UK taxpayers will need to obtain evidence of asserted status in order to claim any relevant UK tax reliefs.

Charities situated outside the EU or EEA have never been able to benefit from these reliefs so will be unaffected by the change.

Similar reliefs as are outlined above are available for Community Amateur Sports Clubs (CASCs) and they will also be affected by the changes. For CASCs, the change means that it

must be based in the UK and provide facilities for eligible sports in the UK. As for charities, these changes take effect from 15 March 2023 unless the CASC has asserted its status and then the change is delayed until the dates indicated already.

It should be noted that it was not always straightforward to get HMRC to accept that a non-UK charity qualified under the above provisions, as is probably illustrated by the small number which have asserted their status. The definition of charitable purpose is wide (including relieving poverty, education, religion, health, art, human rights, environmental protection and animal welfare) but it has not always been easy to prove this point in relation to an overseas charity. There is also an overriding concept that a charity must exist for the public benefit.

This has given rise to an interesting case seen by the author in relation to IHT planning.

An individual is resident in the UK and is assumed to have acquired a domicile of choice in the UK although their domicile of origin is outside the UK. On this basis, the worldwide assets are liable to IHT in the UK.

One asset held by the individual is a house in the country of origin. This will be liable to IHT in that country although there will be double tax relief available.

The individual is intending to donate all of the proceeds from the sale of the house to charity which will leave no actual IHT payable in the overseas jurisdiction. However, the charities which will benefit are within the overseas country rather than the UK so will not be eligible for IHT exemption in the UK. This will apply after 5 April 2024 and may already apply if those overseas charities have not asserted their charitable status in the UK. It is our understanding (having taken local advice) that there may be problems with the relief in the overseas jurisdiction if the money is brought to the UK and paid to UK charities.

There is a treaty between the relevant country and the UK with regards to IHT. However, there is no reference to any relaxation relating to charitable donations. It states, 'in determining the amount on which tax is to be computed, deductions shall be allowed in accordance with the law of the State in which the tax is imposed'. This means (effectively) you only get a deduction in the UK if their laws allow it but if it doesn't (which is the likely case), then you can't get the deduction.

Contributed by Ros Martin

Capital taxes

Chargeable gains for non-residents (Lecture B1414 – 16.40 minutes)

NRCGT history

Until 6 April 2015, non-residents were not liable to UK CGT, even on UK assets, unless it was a non-resident company realising a gain through a UK permanent establishment.

From 6 April 2015, non-residents disposing of UK residential property became liable for UK CGT (or corporation tax on the chargeable gains).

Calculation of the gain or loss

To calculate the gain, either time-apportion the total gain to find the post-6 April 2015 gain or rebase the cost to the market value on 6 April 2015.

From 6 April 2019, non-residents disposing of non-residential property, or indirect interest in UK property became liable to UK CGT (or corporation tax on the chargeable gains).

For direct disposals, the base cost is the market value on 6 April 2019 unless an election is made to use original cost. Time-apportioning is not permitted for these gains.

For indirect disposals, the calculation is the same as for direct disposals but any loss arising if using the original cost is not allowed.

Mixed use properties

For disposals between 6 April 2015 and 5 April 2019, the vendor is only liable on the residential part. This will require an apportionment of the proceeds. The base cost will either need to be apportioned, or the vendor can use the market value of the residential part at 6 April 2015.

For disposals from 6 April 2019, the gain on the residential part since 6 April 2015 is taxable. The gain on non-residential part since 6 April 2019 is also taxable.

Indirect disposals

From 6 April 2019, a non-resident is chargeable on a disposal of an entity that substantially derives its value from UK immovable property, whether commercial or residential in nature.

Indirect interests include:

- Any shareholding in a company deriving its value directly or indirectly from land;
- Any partnership interest deriving its value directly or indirectly from land;
- Any interest in settled property deriving its value directly or indirectly from land;
- Any option, consent or embargo affecting the disposition of land.

The gain is computed by reference to the gain on the interest in the entity that derives its value from land, not by reference to any increase in value of the land itself.

To calculate the gain, compare the proceeds on disposal to either the 6 April 2019 market value of the interest or the original cost (but if this gives rise to a loss, take as a zero gain).

For a disposal to be within the scope of these rules, the entity being disposed of must be "(UK) property rich" and the non-resident hold at least a 25% interest in the entity, or have held 25% or more at some point in the two years ending on the disposal date.

Related parties

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

This will include situations where persons come together as a group with a common objective in relation to the envelope entity.

UK property rich?

The rules apply only where, at the time of disposal, more than 75% of the value of the asset disposed of derives from UK land, directly or indirectly (e.g. we include interests the entity holds in other entities which comprise UK land).

The calculation is based on the market value of the gross assets (ignoring liabilities) at the date of disposal.

All UK land (both residential and non-residential) held in the envelope entity is taken into account, but non-UK land is not counted toward the 75% limit.

Where it is necessary to trace value, the rules allow this to be done (for example, through layers of ownership or through entities, trusts or other arrangements)

Example 1

NRC SARL holds 100% of the share capital in newly incorporated company C1.

NRC paid £3m to acquire the shares in C1 when C1, giving C1 £3m in cash as its only asset so it is clearly not UK property rich at this point.

C1 later borrows £1.5m from a third party and purchases offices in the UK for £2m and land investments outside the UK for £2.5m.

The company is still not property rich, as the UK immovable property does not represent 75% or more of its gross asset value.

NRC disposes of the shares later for £7.5m.

At this time, the market value of the company's assets were:

- £8m for the UK offices, and

- £2m for the property outside the UK

The loan liability of £1.5m was still outstanding.

The UK property-richness test is met, as 80% of the gross value of C1 is represented by UK immovable property.

The gain will be calculated on the basis of the shares, so will be the disposal proceeds of £7.5m less the cost of £3m. NRC SARL has a chargeable gain of £4.5m

Example 2

NRC SARL holds 25% of the share capital in company C2.

NRC originally paid £3m to acquire 25% of the shares in C2 which had a property portfolio at acquisition that included:

- £10m of UK commercial property, and
- £2m of other assets.

  i.e. The company is property rich.

NRC disposes of a 5% interest in C2, for £820,000. On this date, the asset values of C2 are:

- £15m for the UK commercial property, and
- £4m for its other assets

The property-richness test is again met (15/19 = 78.9%).

NRC SARL has a chargeable gain of:

Proceeds	820,000
Cost (5/25 x £3m)	600,000
	£220,000

18 months later, NRC disposes of its remaining 20% shareholding in C2. NRC does not meet the 25% ownership test at this time but has done so within a period of two years before this disposal.

If C2 remains UK property rich at that point, any gain will be chargeable.

Contributed by Malcolm Greenbaum

PPR relief on four properties sold **(Lecture P1411 – 23.43 minutes)**

Summary – The taxpayer was found not to be trading but the decision as to whether the profits on sale of his properties were exempt from CGT has been remitted back to the First Tier Tribunal.

Between 2010 and 2015, Mark Campbell bought and sold four properties:

- 10 Woodhouse Close, purchased on 17 December 2010 for £80,000 and sold on 24 April 2012 for £116,000;
- 28 Bramhill Close, purchased on 12 October 2012 for £95,000 and sold on 22 January 2015 for £125,000;
- 2 Bramhill Close, purchased on 8 February 2013 for £100,000 and sold on 20 June 2014 for £147,000;
- 8 Wigshaw Lane, purchased on 17 June 2015 for £95,000 and sold on 31 March 2016 for £245,000.

He did not notify any of the properties to HMRC.

HMRC issued assessments charging income tax on his trading transactions or, alternatively the transactions were capital in nature but not covered by main residence relief. Further, HMRC charged penalties on the basis of deliberate failure to notify his liability.

Mark Campbell appealed, arguing that he intended to live in each of properties as his main residence but was unable to do so due to his father's ill health. He claimed that he was employed as his father's full-time carer, residing at his home. Consequently, any gains on the property were covered by the job-related accommodation exemption within s.222(8) TCGA 1992.

Despite the presence of a number of badges of trade, the First Tier Tribunal rejected HMRC's claim that Mark Campbell was trading, The Tribunal identified factors which it considered pointed away from a trade.

However, the Tribunal did not accept that he was living in job-related accommodation it did "not accept that the accommodation was provided for the purposes of employment".

Mark Campbell appealed to the Upper Tribunal. HMRC cross-appealed on the ground that the taxpayer was trading.

Decision

The Upper Tribunal found that the First Tier Tribunal's decision that there was no trade had been appropriately reached. It had 'correctly directed itself as to the law' and none of the factors considered by the First Tier were irrelevant. Further, a "checklist" approach based on the badges of trade was not necessary. With no error of principle involved, the First Tier Tribunal had reached a decision that "was within the range of decisions open to it". HMRC's appeal was dismissed.

Moving to the job-related accommodation issue, the First Tier had made errors in law by failing to:

1. Consider whether the accommodation was provided 'by reason of the employment'; the Tribunal had concluded that it had not been provided 'for the purposes of the employment'.

2. Take into account the medical evidence that was directly relevant to the question of whether the accommodation was necessary for the performance of the employment duties.

The Upper Tribunal remitted the case back to a differently formed First Tier Tribunal and also remitted the penalty appeals back for that Tribunal to apply the correct tests to determine deliberate behaviour and provide reasons which would justify their finding.

Mark Campbell v HMRC [2023] UKUT 00265 (TCC)

Renovated properties as main residence (Lecture P1411 – 23.43 minutes)

Summary – Due to the circumstances, buying, renovating and selling three properties at a profit did not amount to trading. The taxpayer had occupied all three properties as his home, meaning that no CGT was payable either.

Gary Ives had bought and sold three properties:

- 27 Ringmer Avenue, Fulham: Bought in November 2008 as two flats for £760,000 and sold as a single dwelling in August 2010 for £1.775 million;

- 69 Wandsworth Bridge Road: Bought October 2010 for £750,000 and sold in January 2012 for £1.5 million;

- 24 Crondace Road, Fulham: Bought for £1.731 million in July 2012 and sold in December 2013 for £3.25 million.

All three properties needed to be renovated and during this time, he lived in them with his wife as their main residence, meaning that no CGT was payable on sale.

Throughout this period Gary Ives also owned a fourth residential property, that was his original family home. This was occupied by some of Gary Ives' adult children.

HMRC argued that they were trading transactions and so the profits on sale were liable to income tax. Alternatively, they were capital in nature, with no principal private residence relief available as they were not his main residence.

Decision

The First Tier Tribunal considered the badges of trade, and commented that a number of these were satisfied, which might indicate trading. With three profitable transactions having taken place in a short period of time, after having completed renovation work, it was easy to see why HMRC would want to conclude that Gary Ives was trading.

The First Tier Tribunal found that the property transactions did not amount to trading, as all three sales were carried out for personal, non-trading reasons.

The First Tier Tribunal considered the scope of the closure notices HMRC had issued to the taxpayer, deciding they did not preclude them from considering the potential capital gains outcome.

Although Gary Ives worked in the building trade, he was more of a small project or odd jobs man.

Based on the witness statements provided, it was clear that all three properties had been intended to be used and, for a short period, were actually enjoyed as family homes. There was no evidence to suggest that Gary Ives intended to resell the properties at the time of purchase. However, for various family reasons and changes in circumstances, the couple needed to move on sooner than intended.

The First tier Tribunal found that Gary Ives was entitled to principal private residence relief.

Gary Ives v HMRC (TC08989)

Informal grazing arrangement and mixed use

Summary – The purchase of a property, with gardens, paddock and eight-acre field were liable to Stamp Duty Land Tax at the higher residential rates.

On 12 April 2018, Sangeeta Modha bought Fir Farm for £1,440,000, which included a five-bedroomed property with landscaped gardens, a paddock and an eight-acre field.

She initially submitted and paid Stamp Duty Land Tax (SDLT) on the basis that the purchase was wholly residential but later submitted an amended return, on the basis that she had bought a dwelling and non-residential land on which SDLT should be charged at lower rates.

HMRC disagreed.

Sangeeta Modha appealed, arguing that at the time of the purchase there was an arrangement in place whereby a third party, Mr Nourish, mowed the grass and return was allowed to sell the resultant hay. However, no money changed hands.

Further, there was a second arrangement under which Sangeeta Modha received £25 per month from another third party, Mr Vyas, for access to the field for grazing and sheepdog training, subject to an area reserved for Sangeeta Modha to grow vegetables.

Decision

The First Tier Tribunal accepted that there was a field 'maintenance' arrangement in place on 12 April 2018, the purchase date, which was mutually convenient but this did not represent commercial use but was instead a "barter of convenience".

Whilst the agreement with Mr Vyas for grazing and sheep dog training did represent commercial use, it was not in place on the date of acquisition. Indeed, it had been signed over a month after the property purchase date. Consequently, it was not relevant in deciding the SDLT status of the land at purchase.

With no other evidence to support the claim that the only permitted planning use of the field was agricultural, there was nothing to prevent the field being used as an extension of the garden. The Tribunal concluded that the plot was available for use with the dwelling, and part of the grounds. SDLT was payable on the bass that it was residential in nature.

Sangeeta Modha v HMRC (TC08936)

Inadequate facilities for MDR (Lecture P1411 – 23.43 minutes)

Summary – With no cooker, hob or washing machine, the detached annexe bought with the main house was not suitable for use as a dwelling and Multiple Dwellings Relief was denied.

Jonathan Ralph, a wealthy South African businessman, owned a flat in London. In September 2020, he started working in London on 1 September 2020 and wanted to relocate his family to the UK.

On 6 November 2020 he exchanged contracts to purchase a property for a £3,300,000 and competed the purchase the following month.

He filed his Stamp Duty Land Tax (SDLT) return, claiming Multiple Dwellings Relief (MDR) on the basis that the property's detached annexe had been lived in by the previous owner's son, just before the COVID lockdown.

Following an enquiry, HMRC denied the MDR and Jonathan Ralph appealed.

The property was a large house, sitting in some 40 acres of land and included a detached three bay garage with rooms above on the first floor (the annexe).

The annexe included a bathroom with toilet, basin, shower and had central heating, fibre broad band, mains electricity, gas, water and a separate zone on the house alarm system. The utilities did not have separate meters and the annexe was not separately registered for Council Tax. The kitchen consisted of a microwave, kettle, toaster, fridge, table and a bench. There was no cooker as the annexe did not have the high voltage electricity connections needed to fit a cooker, electric oven or hob. The main room was fitted out with gym equipment, TV and sofa.

Following completion, the annexe was refitted to include an oven and electric hob, with the necessary high voltage power connections. However, in the two years since the alterations despite the annexe being used regularly by family and visitors, the oven and hob were never used and the high voltage connection never switched on.

A washing machine and tumble dryer had been bought, but the necessary plumbing connections had not been fitted. The taxpayer argued that the necessary water connections would be easy to carry out due to the existing infrastructure.

Jonathan Ralph and his family lived in the annexe for 6 months after completion while the main house was being refurbished but claimed that they never used cooker or hob, preferring to eat out or use the convection microwave. Washing clothes was not a problem as the family preferred to send their laundry out to be cleaned.

The issue to decide was whether the annexe suitable for use as a dwelling at the time of purchase?

Decision

The First Tier Tribunal accepted that the family's lifestyle did not require the use of a conventional cooker or a washing machine. However, it disagreed with Jonathan Ralph's argument that these days people had a different approach to cooking, often not requiring a hob or oven.

The First Tier Tribunal stated that the test was that of 'occupants in general' and if looked at objectively would they "find the property suitable for use as a dwelling"?

The Ralph family's lifestyle was not representative of people in general who would need a cooker, hob and plumbed in washing machine.

The appeal was dismissed.

Jonathan Ralph v HMRC (TC08969)

Administration

Tax and penalties following HMRC advice (Lecture P1414 – 11.59 minutes)

HMRC frequently offer advice or information to taxpayers. This could be given to a single taxpayer based on their own circumstances, or to the wider body of taxpayers. If the advice is case specific, it may be given in writing, or it might be given face-to-face, or possibly by phone. HMRC has published guidance on its website, entitled: 'How HMRC advice and information can help you' (www.gov.uk/guidance/when-you-can-rely-on-information-or-advice-provided-by-hm-revenue-and-customs).

Incorrect HMRC information and advice

What happens if an HMRC officer gives the taxpayer incorrect advice or information? HMRC accepts that in exceptional circumstances its incorrect advice and information can be binding, provided (among other things) that it is reasonable for the taxpayer to expect to rely on the incorrect advice, that the taxpayer would suffer real and significant detriment if the correct tax position was applied, and that it would be so unfair for HMRC to act in a different way from the advice and information given that it would amount to an abuse of power (see HMRC's Admin Law Manual at ADML1300 for a full list of tests).

CRCA 2005, s 5 sets out HMRC's responsibility for the collection and management of taxes. HMRC's view (at ADML1200) is that this legislation offers some discretion. However, HMRC considers that the legislation only permits collection of taxes which are properly due to be foregone if HMRC would obtain a higher net return for the Exchequer by honouring the incorrect advice.

Applying to the court

If sought HMRC to correct its advice or information to the taxpayer's detriment, the taxpayer could consider applying to the High Court for judicial review of HMRC's actions. For example, where HMRC has given incorrect advice, the courts might rule that to apply the strict letter of the law would be so unfair as to amount to an abuse of HMRC's power. However, the circumstances would need to be exceptional for a court to consider HMRC's conduct to be an abuse of power.

There is also a legal principle of 'legitimate expectation'. This principle broadly states that if an individual's reliance on promises, representations or established practices of a government body such as HMRC is legitimate or reasonable, there is an obligation on the public body to fulfil rather than frustrate those legitimate expectations. However, court cases can be very expensive and time-consuming, and the outcome is often very unpredictable.

New case law and legislation

Aside from applications to the court, and whilst there is no express statutory obligation to do so, HMRC might consider allowing the taxpayer to rely on the incorrect advice and information given. This is provided: firstly, that the taxpayer gave HMRC all the relevant facts; secondly, that HMRC's advice and information was clear and uncertain; and thirdly, that the taxpayer had already relied on the advice and information and would be worse off if HMRC didn't act in line with it.

What happens if a taxpayer is given advice based on HMRC's understanding of the law at that time, and the advice is favourable to the taxpayer and is followed, but that advice later turns out to be incorrect following a subsequent decision by the courts? HMRC's position in those circumstances is that its obligation to collect the 'right' amount of tax may mean that it can no longer be bound by the advice, information or guidance it has previously given. However, HMRC may decide not to apply the new understanding of the law retrospectively, and might only apply it going forward instead. Of course, if HMRC's advice was correct at the time it was given, but is later rendered incorrect by new legislation, if that new legislation is introduced retrospectively HMRC will not be bound by any advice previously given by HMRC covering the period of retrospection.

HMRC guidance (at ADML1000 and following) includes guidance to help its officers decide when HMRC is bound by incorrect case-specific advice.

Clearance applications to HMRC

Very often, a taxpayer's request to HMRC for advice or guidance will take the form of a clearance application. Tax law provides for applications to HMRC for advance clearance on the tax treatment of certain transactions or events. Common examples of 'statutory clearance' applications include: seeking HMRC's assurance that business disposals will not be subject to a counteraction notice under the 'transactions in securities' income tax anti-avoidance rules (ITA 2007, s 701 and CTA 2010, s 748); or for HMRC's agreement that share exchanges or business reconstructions will not be challenged on avoidance grounds for capital gains relief purposes (TCGA 1992, s 138(1)); or that capital treatment would be considered to apply to a company purchase of its own shares (CTA 2010, s 1044).

In addition to statutory clearances, HMRC also offers a 'non-statutory clearance' service in some other areas of uncertainty (www.gov.uk/guidance/non-statutory-clearance-service-guidance).

The taxpayer must make it clear that they are seeking fully considered advice and must indicate what the advice will be used for. A clearance is broadly a written confirmation of HMRC's view on the application of the law to a particular transaction or event, which the taxpayer can generally rely upon. However, this is conditional on the information supplied to HMRC being complete, accurate and correct to the best of the applicant's knowledge and belief; clearance applications need to be drafted very carefully. A principle was established in R v IRC, ex p. MFK Underwriting Agencies Ltd [1989] STC 873 that the taxpayer "…should have put all his cards face upwards on the table". The transactions must also be carried out exactly as described in the clearance application. Otherwise, HMRC are likely to regard a clearance previously given as being null and void.

Care is needed with clearance applications where transactions involve subjective matters such as share valuations, which can vary widely from one valuer to another. For example, in Boulting & Anor, R (On the Application Of) v Revenue and Customs [2020] EWHC 2207 (Admin), HMRC gave advance clearance that capital gains tax treatment would apply on a company purchase of own shares from a shareholder. However, HMRC later treated the clearance as void because the shares were each worth £66,900, not £600,000 according to the valuation used in applying for the clearance. The High Court held that given the very wide disparity between the parties, the share valuation may potentially have a bearing on whether the purchase of the shares was wholly or mainly for the purpose of benefiting the company's trade.

Other government bodies

Sometimes, an individual may be given advice by a government body other than HMRC about a transaction, which has tax implications for the individual. If the transaction involves disposing of an asset (e.g., a property), the taxpayer should seek tax advice before undertaking the transaction, because the non-tax government body will not be particularly concerned about the tax implications of the transaction.

For example, in Salokun v Revenue and Customs [2023] UKFTT 962 (TC), HMRC issued to a taxpayer capital gains tax assessments for undeclared property disposals, and penalties for the filing of inaccurate tax returns based on the taxpayer's disclosures being prompted and his behaviour being deliberate. The taxpayer appealed. His primary contention was that the properties were sold to raise funds to pay for the care of his wife, who was in extremely poor health, and that he'd been instructed by the government to sell his properties for this purpose. On that basis, the taxpayer believed he should not have to pay the tax or penalties. Unsurprisingly, notwithstanding the government's 'advice', the First Tier Tribunal held that the taxpayer had made a conscious decision not to disclose the relevant information about the property disposals. Consequently, HMRC's assessments were valid. Furthermore, the tribunal found that the taxpayer's non-declaration of the property disposals and capital gains was deliberate. The taxpayer's appeals were dismissed.

Contributed by Mark McLaughlin

Information notice requirements too wide

Summary – HMRC's information notice referring to a list of terms rather than specifying the documents it required was not invalid. However, the notice requirements were too wide, resulting in documents being produced that were not reasonably required.

Parker Hannifan (GB) Limited was a member of the Parker Group.

In June 2014 the:

- company refinanced earlier debt by issuing a £238m Eurobond to Parker Hannifan LLP;

- Parker Hannifan LLP borrowed the same amount from Parker Hannifan Global Capital Management Sarl ("PHGCM"), based in Luxembourg.

On 1 January 2017, the LLP transferred the Eurobond to Parker Hannifin Barbados Srl

Parker Hannifan (GB) Limited claimed tax relief on the interest paid on the Eurobond.

HMRC sought to establish whether the interest had an unallowable purpose (s.441/442 CTA 2009) and issued a schedule 36 information notice. That notice did not list the information or documents to be produced, but rather it required the company to deliver all of the resulting emails generated as a result of an email search using a list of specific terms.

PwC, on behalf of the company carried out that search which generated more than 11,000 results, of which 1,695 were considered relevant and so provided to HMRC.

Without reviewing any of them, HMRC demanded to see all 11,000 and so the company appealed, claiming that the information notice was invalid as it did not specify the documents needed.

Decision

The First Tier Tribunal found that information notice was valid but agreed that its requirements were too wide. Many of the 11,000 emails were not 'reasonably required'.

The Tribunal stated that had the company appealed the information notice prior to PwC carrying out the search, it would have set aside the notice on the basis that its requirements were too broad.

The appeal was allowed.

Parker Hannifin (GB) Limited (TC08992)

Adapted from the case summary in Taxation (7 December 2023)

Closure notices (Lecture P1415 – 12.38 minutes)

This article considers various issues relating to closure notices, which can be used by HMRC to settle an enquiry into a taxpayer's tax return (whether under Self-Assessment or Corporation Tax Self-Assessment), and which can be requested from the tax tribunal by a taxpayer. The article focusses on final closure notices, with partial closure notices covered in a separate occasion.

Background

A closure notice is one of the ways that an enquiry into a taxpayer's return may be concluded. The issue of the notices is covered by the following legislation:

- Taxes Management Act 1970, s28A and s28B (closure notices for personal, trustee, non-resident CGT and partnership enquiries);
- Finance Act 1998, Sch 18, paras 32 and 33 (closure notices for corporation tax)

Final closure notice issued by HMRC

Where there has been an enquiry into a tax return (under either the ITSA or CTSA provisions), the officer may, when he has considered the information and documents provided by the taxpayer, issue a final closure notice to formally conclude the enquiry.

When a final closure notice is issued by HMRC, the notice must, in accordance with TMA 1970, s 28A, para 2, "state the officer's conclusions and

a) state that in the officer's opinion no amendment of the return is required, or

b) make the amendments of the return required to give effect to his conclusions".

There is a similar provision at FA 1998, Sch 18, para 34 in relation to CTSA enquiries.

The final closure notice is usually issued after the position regarding the revised profits, etc, have been agreed with the agent. The officer will also issue any assessments, or other formal notices, that are required. In such circumstances, apart from checking the documentation issued by HMRC, and advising the client accordingly, it is unlikely that any further action will need to be taken by the adviser.

Where agreement has not been reached with the agent, the officer may issue a final closure notice in the figures which the officer believes to be correct, based on his conclusions of his review. The client has the right of appeal against the final closure notice, and may seek a statutory review of the decision, or follow other formal channels (Alternative Dispute Resolution or the tribunal) for resolution of the position.

Closure notice application by client

The statutory provisions noted above permit taxpayers to apply to the tax tribunal for the issue of a closure notice (full or partial). An application can be made at any stage of an enquiry, and there isn't a limit on the number of applications that can be made. HMRC's Enquiry Manual anticipates particular occasions when a taxpayer might seek the issue of a closure notice from the tribunal following:

- the issue of the opening letter and request for information (EM1981);
- the issue of a formal notice (see EM1982);
- contact with the taxpayer (see EM1983);
- delay by the enquiry officer (see EM1984).

There may be other instances where an adviser considers that it would be appropriate to seek a closure notice from the tribunal. Each case must be considered on its merits, and the tribunal will consider the particular facts of the case before reaching their decision.

HMRC officers are advised that, when a closure application is made, they should review the enquiry to date, and consider whether requests for information are reasonable and justified. Officers are also advised to consider whether they can close the enquiry, or whether a partial closure notice should be issued (see EM1980).

Advisers should note that making an application for a final closure notice, or indicating to the officer that one will be made, may focus the officer's attention on the case, such that he issues a closure notice, or takes other action which moves the case forward. A discussion with the enquiry officer to establish why they have not been able to close the enquiry may prove fruitful. However, that will not always be the case.

Where the application proceeds to the tribunal, the legislation provides that "The tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing the partial or final closure notice within a specified period" (TMA 1970, s28A (6), with a similar provision in FA 1998, Sch 18). Thus, the onus is firmly on HMRC to convince the tribunal why the enquiry should be allowed to continue.

Outcome at the tribunal

There are various potential outcomes when a final closure notice application is made.

The tribunal may direct that a full closure notice should be issued within a specified period, and as noted above, this is the default outcome under the legislation if HMRC are not able to persuade the tribunal that the enquiry should be allowed to continue. The period granted to HMRC will vary from case to case, and the officer could be given several months to issue the closure notice. The officer must base their conclusion and figures on whatever information is held.

Advisers should note that the issue of a full closure notice does not necessarily mean that the case is settled, as the officer will issue the notice based on his conclusions, which may not be the same as those of the adviser or client. In such circumstances, the taxpayer can appeal when the final closure notice is issued, so that the substantive issues can be resolved (whether by ADR or at the tribunal).

If the tribunal allows the enquiry to continue, the taxpayer can appeal a point of law against the tribunal's decision. Similarly, HMRC can appeal against the tribunal's decision to issue a closure notice if they consider that the tribunal has made an error in law in its judgment.

Where the tribunal does not direct that a closure notice be issued, the taxpayer can make further applications for a closure notice. Advisers should consider whether the circumstances have changed sufficiently to improve the chance of success. A succession of applications for a full closure notice in a short period of time is unlikely to be a prudent, or cost-effective, approach.

Another potential outcome is that the tribunal direct that a partial closure notice should be issued within a specified period of time, and that outcome will be considered in a separate session.

Practical considerations

There are various issues that the agent should consider when dealing with a final closure notice issued by HMRC, and these include the following:

- Check the conclusions, and any figures, contained in the final closure notice, and associated assessments or formal notices, to ensure that they agree with the outcome of negotiations with HMRC;

- Where the officer has used his own figures in the closure notice, the agent should consider the appropriate remedy (usually this will be one or more of the following - statutory review, Alternative Dispute Resolution or the tax tribunal).

Where the agent is considering whether the client should seek a direction from the tribunal for the issue of a final closure notice, the following points should be borne in mind:

- Advise the client as to the potential outcomes;

- If the tribunal direct HMRC to issue a final closure notice, that is not, necessarily, the end of the process, and it may be necessary to appeal against the notice, when issued, so that the substantive points can be heard at the tribunal;

- Timing of the application is crucial, as seeking a closure notice too early will reduce the chance of success;

- Where information has been submitted to the officer, it is prudent to allow a reasonable time for that information to be reviewed, before seeking a final closure notice direction;

- What is reasonable will vary from case to case;

- Consider seeking a final closure notice where the enquiry officer continues to ask questions beyond what is considered reasonable, and has embarked on a 'fishing expedition';

- Speak to the enquiry officer, if possible, before making an application to the tribunal, as that may help to focus his mind on the enquiry, and to move the case forward;

- There is a risk that if a final closure notice is sought prematurely, and HMRC subsequently establish a significant tax irregularity, your client may be exposed to higher penalties than would otherwise be the case.

Contributed by Phil Berwick, Director at Berwick Tax

Deadlines

1 January 2024

- Corporation tax for periods to 31 March 2023 (SMEs not liable to pay by instalments)

7 January 2024

- VAT returns and payment for 30 November 2023 quarter

14 January 2024

- Forms CT61 and tax for the quarter ended 31 December 2023
- Quarterly corporation tax instalment for large companies based on year-end date

19 January 2024

- Pay PAYE, NIC, CIS and student loan liabilities for month to 5 January 2024 (not online)
- File monthly CIS return
- PAYE for quarter ended 5 January 2024 if average monthly liability is less than £1,500

21 January 2024

- Supplementary intrastat declarations for December 2023
  - arrivals only for a GB business
  - arrivals and dispatch for a Northern Ireland business

22 January 2024

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

31 January 2024

- Electronic filing date for 2022/23 personal, partnership and trust SATRs
- Balance of 2022/23 SA liabilities/ payment of first instalment of 2023/24 SA liabilities
- Amendments to 2021/22 SA returns
- 'Vulnerable person election' by trustees where the effective date is during 2021/22
- Election under s.169Q TCGA 1992 to disapply s.127 TGGA for 2021/22 reorganisations
- Election to opt out of pre-owned assets charge if this would first arise during 2022/23

- Repayment claims for 2022/23 class 2 NICs (small earnings election)
- CTSA returns for companies with accounting periods ended 31 January 2023.

News

Spring Budget

The Treasury has announced that the Chancellor will deliver the 2024 spring Budget on 6 March.

It will include the government's tax and spending plans as well as new growth and borrowing forecasts.

https://www.bbc.co.uk/news/business-67826928

Finance Bill 2023

The Autumn Finance Bill 2023 and explanatory notes were published containing 38 clauses and 13 schedules.

It legislates for the key tax changes announced at the Autumn Statement, with most of the changes taking effect from April 2024.

https://bills.parliament.uk/bills/3514/publications

Scottish Budget

The Scottish Government published its 2024/25 Budget on 19 December 2023 and the key announcements are as follows.

Income tax

From 6 April 2024:

- there will be a new advanced tax rate of 45% that will apply to income between £75,000 and £125,140.
- the top rate of tax applying to income above £125,140 will be increased to 48%

The 19% starter, 20% basic, 21% intermediate and 42% higher rates will be unchanged.

The starter and basic rate thresholds will be increased by inflation to £14,876 and £26,561 respectively, with the higher rate threshold frozen at £43,662.

https://www.gov.scot/publications/scottish-budget-2024-25/pages/4/

Business Taxation

Entertaining for the whole Company (Lecture B1413 – 15.20 minutes)

It is that time of year when companies tend to provide entertainment for all of their staff in the form of the Christmas party. I will not deal with the HR complications which could fill many pages of interesting examples involving employer liabilities resulting from wild behaviour. Instead, I will look at the tax consequences of entertaining staff at the annual party.

Entertaining staff – the good news

When entertaining staff, companies can take the VAT and obtain a deduction for the input tax on the entertainment. The second piece of good news is that unlike client entertainment, staff entertaining is generally deductible for Corporation Tax purposes.

The bad news

The bad news is that the default position is that staff entertaining constitutes a taxable benefit in kind if it does not fall into one of the exemptions. This will either result in a tax liability for the employee, normally via a P11D charge, and then a class 1A charge on the employer. Many employers take the reasonable attitude that staff entertaining would hardly be motivating if the employees are left with a tax bill to pick up. So therefore, most companies where there is taxable staff entertaining would enter into a PAYE settlement agreement under which the company picks up not only the cost of the benefit but the grossed-up tax and class 1B national insurance on the lot.

Clearly, a grossed-up tax liability where there is a significant number of higher and additional rate taxpayer would lead to the cost to the employer almost doubling. Therefore, for companies that are likely to undertake lavish entertaining, this should be factored into the budget.

Exemptions

There are two significant exemptions from this benefit in kind charge. The first and arguably the more important at this time of year is the £150 exemption per person which is known as the annual function but is often deployed to cover the Christmas party. A few points should be made:

The £150 has not been increased since the millennium and therefore has fallen in value as inflation has taken its toll/particularly in the hospitality industry.

The exemption is per participant, not per employee, therefore if spouses/partners/significant others etc. and others, the amount spendable goes up by £150 per extra person.

The other side of this is that HMRC will sometimes ask for a list of attendees at these functions as if there are last minute cancellations, a reduction in the number of participants could push the expenditure above the £150 per person level. Accordingly, it is a good idea to leave some margin for no-shows.

The £150 includes VAT.

The annual function does not need to take place at this time of year. One could have an annual function at any time of year.

The annual function could be split into two functions e.g. with one costing £85 and the other costing £65.

HMRC have been known to look at the list of participants to see whether any contractors have been invited. Given that this is an employee type benefit, the inclusion of contractors could muddy the waters when it comes to any disputes over status. Generally, it is not advisable to invite contractors to what should be a staff function (unless they are a significant other to an employee!).

The £150 per person does need to include all the costs of running the function. This includes accommodation and travel. So, if more than a few people stay overnight, the £150 average is likely to be breached.

All employees must be invited to either the annual function or an equivalent, which means that if the parties are organised on a divisional or geographic basis, there needs to be an equivalent for all UK resident employees.

Trivial benefits

For those envisaging a more modest celebration, where the cost per person is £50 a head or lower, the trivial benefits exemption can be deployed. Again, this is based on an average of £50 so if one went to a restaurant and the total bill per person came to an average of £50 or less, one does not need to enquire as to whether one person had the desert and someone else didn't!

There is an additional requirement in terms of the trivial benefit that it is not seen as a reward for work performed. Therefore, there is no problem in linking it to a time of year, festival, holiday etc. but it cannot be seen as part of someone's earnings or reward for their efforts. It would be possible to use the trivial benefit rule to provide staff with a turkey, assuming that cost less than £50 or other items. Again, it must not be seen as a reward for effort.

Taxable entertainment

As stated above, most entertainment which is taxable will appear either on the P11D or the PSA, but most of it will appear on a PSA. The area that companies need to be very careful about is whether the expenditure is directly incurred between the company and the supplier or whether it is in the form of a reimbursement of an expense which an employee has laid out. If the employee has laid out the expense and it is a taxable element, then the amount reimbursed should go through payroll with PAYE being deducted and Class 1 NIC being applied on both the employer and employee.

Client vs Staff entertaining

It is often the case that it is difficult to immediately identify the tax treatment of entertainment. However, it is important to look at what the primary purpose of the entertainment is. The annual function is relatively clear. It is for the purposes of staff entertaining and is treated accordingly.

Where there is a mixture of staff and business entertaining, then one has potential significant challenges in determining the primary purpose of the entertainment and whether the staff were an extra or whether the business clients were the extra.

In addition, it is in those cases important to distinguish between subsistence which may apply to food consumed by individuals who are a significant distance away from their home base and drinks on their own. For example, if a conference was organised and everyone was invited to dinner, that would normally be seen as part of the conference subsistence expenses. Reasonable alcohol consumed within the meal (HMRC definition of half a bottle of wine per person) would be generally allowed, however once the dinner is finished and everyone repairs to the bar then this becomes pure staff entertaining and then taxable in full if it does not fall into either the trivial benefits exemption (unlikely) or the annual function.

The UK does offer significant tax reliefs for staff entertaining which reflect the work culture in the UK. However, the government could spread a bit more cheer to staff, companies and the hard-pressed hospitality industry by uplifting the threshold which has been the same for nearly a quarter of a century.

Contributed by Jeremy Mindell

Camping pods and capitals allowances **(Lecture B1411 – 20.23 minutes)**

Summary – Basic camping pods used by children on school trips were eligible for capital allowances, while those used by their teachers were not.

Acorn Venture Ltd was a tour operator, providing residential adventure holidays for school children, mainly in the UK. Originally accommodation was provided in a mixture of tents and portacabins. The plan was that camping pods would eventually replace both tents and portacabins.

Needing to replace its old portacabins which were at the end of their useful life, the company bought 26 pre-constructed camping pods for their Breacon Beacons site:

- 20 basic pods to be used by children, with beds built into the pod but no other facilities;

- 6 teacher pods for use by the accompanying adults, which had flushing toilets, washing facilities, a small “kitchen” area and two beds in each.

The pods were sited where the former portacabins had been, with their base frames resting by their own weight on the ground, with each pod then anchored to the ground. Electricity was supplied to all of the pods using the standard connection method adopted for mobile or static caravans. The pods had a lockable door, providing a greater level of security than a tent.

The company claimed an Annual Investment Allowance totalling £354,489, representing what the company considered to be the qualifying capital cost of all 26 pods.

Following an enquiry lasting almost five years, HMRC issued a final closure notice reducing the AIA claim by £285,997.

Decision

The First Tier Tribunal noted that HMRC were not disputing that expenditure on the pods was capital in nature, incurred in relation to the company's business. The issue was whether the expenditure should be disallowed as a result of s.21 – 23 CAA 2001.

Consequently, the Tribunal needed to consider:

1. Whether the pods were buildings and so excluded under s.21 CAA 2001;

2. If buildings, could they qualify under s.23 CA 2001 as moveable buildings intended to be moved in the course of business (List C);

3. Alternatively, if not a building, were the pods fixed structures such that the exclusion from capital allowances in s.22 CAA 2001 applied.

The First Tier Tribunal found that the basic pods for the children were not buildings. Like tents, they simply rested under their own weight on the ground, with the anchoring being no different to that used for a tent. These pods provided an "outdoor adventure experience". They offered basic shelter only, with the same electricity supply as the tents. These pods were structures that were not fixed, meaning that capital allowances were available on these pods.

The teachers' pods were found to be fixed structures, which were also buildings. Due to the plumbing facilities being attached to the underground drain, the teachers' pods possessed a sufficient degree of permanence to become fixed. Further, they gave more facilities for living in, with greater comfort. Although these pods were moveable, the company had failed to show any intention to do so at the time of making the claim and so List C did not apply. Consequently, the expenditure on the teachers' pods did not qualify for capital allowances.

Acorn Venture Ltd v HMRC (TC09006)

Was it a distribution? (Lecture B1412 – 13.03 minutes)

Smith and Corbett v HMRC (2023) is a recent First Tier Tribunal decision dealing with the question of whether a company had made an income distribution to two taxpayers.

HMRC considered that the company – Simpsons Independent Financial Advisers Ltd (SIFA) – had made a distribution to the appellants which met the definition of that term in s.1000 CTA 2010 and which was therefore assessable to income tax under s.383 ITTOIA 2005. The distribution was said to have been in the form of goodwill which had been credited to the individuals' capital accounts in Simpsons Wealth Management LLP (SWM).

Background

SIFA was incorporated on 29 June 1999 on which date Mr Corbett was appointed a director of the company. The other appellant – Mr Smith – became a director on 1 January 2006. The two individuals had known each other for several years and, in 1995, Mr Smith started working for Mr Corbett who, at that time, operated as an independent financial services sole trader. There was no written evidence as to the terms of Mr Smith's employment when he commenced this job, but the judges accepted the evidence of both parties that Mr Smith's clients 'belonged' to him.

Indeed, they explained the position as follows:

> 'Whilst employed, it was expected that Mr Smith would cultivate and nurture professional relationships with the clients with whom he had historically worked and develop new relationships, usually by word of mouth from existing relationships. The propensity for (initially Mr Corbett and subsequently SIFA) to be able to derive income from those clients was founded in the relationship between the client and Mr Smith and his personal reputation with them, and not as a consequence of the reputation of his employer. As such, we find that, despite there being no formal written terms of employment for the period from 1995 – 1999, it was accepted and agreed between Mr Corbett and Mr Smith that, should Mr Smith cease employment with Mr Corbett, his clients would follow him together with the ability to obtain an income from advice provided to them. For the period from 1999, when the (sole trader business) was incorporated into SIFA, we find that there was a similar understanding/expectation between SIFA and Mr Smith.'

In due course, Mr Smith's employment arrangements were formalised with SIFA through a written contract. This was dated 24 June 2002 and, as mentioned above, Mr Smith became a director of SIFA on 1 January 2006.

The judges commented:

> 'We infer (though there was no direct evidence) that the terms of Mr Smith's employment which subsisted from 2002 continued whilst he was a director and accordingly find that the expectation regarding the ability to port clients on a change of employer continued.'

The same regime applied to Mr Corbett and no value was ever attributed to Mr Corbett's clients in the SIFA accounts.

Mr Smith became a one-third shareholder of SIFA on 1 October 2006. He paid £15,000 for his shares and this price was said to be determined simply by reference to the net book value of the fixtures and fittings owned by the business. No value for goodwill was attributed to Mr Corbett's client relationships.

In 2012, their tax adviser recommended that conversion from a company to an LLP would suit the business. Interestingly, the judges said:

> 'The reason underlying this advice was not clear to us. It was claimed that the underlying rationale was that the corporate structure did not permit fair remuneration for the shareholder directors through dividends.'

Why was this the case? The speaker is certainly in agreement with the judges' point.

However, the change went ahead and SWM was formed. Pursuant to a business transfer agreement dated 1 July 2012, SIFA's business was transferred to SWM. Mr Corbett's capital account in SWM was credited with £1,179,000 and Mr Smith's capital account was credited with £1,017,000. Both credits were recorded as 'goodwill introduced'.

The business transfer agreement provided for the transfer and assignment of the business of SIFA as a going concern, together with all assets used in the business including 'the goodwill and the trade name "Simpsons Independent Financial Advisers" and lists of customers, suppliers, agents and others and all subsisting records, lists and information'.

The equity members of SWM were Mr and Mrs Corbett, Mr and Mrs Smith and SIFA.

The arguments

On 24 December 2014, HMRC opened an enquiry into SWM's partnership return for 2012/13, contending that they had discovered income received by the two appellants which ought to have been assessed to income tax and, on 19 April 2017, the assessments were duly raised. In other words, HMRC were arguing that the taxpayers' goodwill must have originally belonged to SIFA so that the relevant seven-figure sums represented distributions from SIFA to Mr Corbett and Mr Smith respectively.

This was disputed by the appellants who stated that the goodwill had never belonged to SIFA and so the company could not have made those distributions.

As one commentator put it:

> 'The goodwill belonged to each of them as individuals because they had their own reputation and strong client relationships.
>
> The First Tier Tribunal noted that there were no statutory provisions determining what constituted goodwill or how its ownership should be determined. Here, the nature of the asset was not in dispute but rather to whom it belonged before it was contributed to the LLP.'

The decision

The judges agreed with this latter viewpoint. The goodwill never belonged to SIFA and so was not an asset capable of being transferred from SIFA to another party. Consequently, the question of there being a distribution did not arise. The taxpayers' appeal was allowed.

Let the last word go to the Editor-in-Chief of 'Taxation':

> 'In many ways, this is a surprising outcome: one would generally expect that, if a company is providing advice to customers, the goodwill that is built up belongs to the company and not the individuals providing it. But the evidence of how goodwill is treated in the financial services industry was enough for the First Tier Tribunal to decide that a different analysis applied here.'

Contributed by Robert Jamieson

Incorrect CIS status used **(Lecture B1411 – 20.23 minutes)**

Summary - The company had failed to take reasonable care to comply with the Construction Industry Scheme regulations.

Access Contracting Services Ltd provided a range of tradespeople from general labourers to crane drivers through contractor companies.

The company was run by Michael Byrne who held an 80% equity interest in the company and his two sons, who each held 10%.

Michael Byrne ran the back-office with the help of an office manager. Between them, they looked after company's general compliance obligations, including completing the company's CIS returns.

The sons worked as project managers on site with the subcontractors. Whilst they were aware of the company's CIS obligations, they had little knowledge of the back-office function.

In 2008 Michael Byrne retired and handed over the compliance and administrative duties to the office manager, he believed to be fully capable of running the compliance function of the business, including completing the respective CIS returns and conducting the required diligence checks on gross payment status.

In 2014/15, the company started working with three new companies and the office manager contacted HMRC to obtain the CIS status of these companies. All three companies should have been paid net of tax but were actually paid gross, returning the payments as gross payments on the CIS return.

Following an enquiry, HMRC sought to recover £447,000 of under-deducted CIS deductions from the company and charged £97,000 of penalties on the basis of a careless inaccuracy with prompted disclosure.

The company appealed, claiming that Regulation 9 of The Income Tax (Construction Industry Scheme) Regulations 2005 applied. This would be the case if condition A of Regulation 9(3) applied. Under this condition the contractor must satisfy HMRC that:

- reasonable care was taken to comply with the CIS Regulations
- the failure to deduct the tax was:
  - due to an error made in good faith, or
  - there was a genuine belief a deduction was not due.

Decision

The First Tier Tribunal stated that the term 'reasonable' must be looked at by considering the size of the business in terms of practical processes, checks for its size and the overall scale of the payments made.

The Tribunal found that in 2015/16, the payments totalled more than £700,000, a substantial sum. Systems should have been in place to ensure that compliance with legislation was adhered to. However, there was no evidence of checks or controls for CIS compliance and that the office manager did not document any CIS status checks performed.

The Tribunal concluded that the company had not exercised reasonable care and so the relieving provision potentially available under Regulation 9 could not apply.

However, as the company was in regular contact with HMRC and had provided all of the information needed by HMRC, the First Tier Tribunal found that the maximum penalty reduction for 'telling, helping and giving' should be applied.

The appeal was dismissed.

Access Contracting Services Ltd v HMRC (TC08994)

VAT and indirect taxes

Live screening of plays (Lecture B1411 – 20.23 minutes)

Summary - Live screenings of plays around the country were not the same as attending the performance in person, meaning that the fee charged was standard rated.

Group 13 Schedule 9 VATA 1994 states that admission charges to cultural events like theatre performances are exempt provided certain are met. However, cinema screenings are subject to standard rated VAT.

Derby Quad Limited ran a visual arts and media centre, art exhibition and cinema. The company contracted with the National Theatre and Royal Shakespeare Company to screen live theatrical performances taking place around the country.

As an eligible body, no VAT was charged on the basis that the screenings were supplies covered by Item 2, Group 13, Schedule 9 VATA 1994. The company argued that they were making live screenings, which were simply an extension of actual theatre performance using digital technology.

All parties agreed that the company was an eligible body but HMRC argued that:

- "performance" is different to "showing" or "screening";
- A theatrical performance means "a live performance happening in a natural setting rather than a dramatic performance on a screen";
- A theatrical performance takes place in a single location and it could not take place in more than one location at any one time.

Consequently, HMRC argued that the screenings were not live performances, making them standard rated. and issued assessments for VAT periods 03/17 to 12/18 inclusive.

Derby Quad Limited appealed against the assessments for the under declared VAT on admission charges to live event performances broadcast to other locations. Further the company argued that even if the Tribunal found that VAT was due, HMRC were out of time to raise the assessments.

Decision

The issue to be decided was whether by supplying live screenings of theatrical events Derby Quad Limited supplied the right of admission to a theatrical performance.

The First Tier Tribunal found that, despite similarities, live events were not the same as being at an actual theatrical performance because the actors cannot hear the audience and there is no audience and performer interaction.

The screenings were not theatrical performances and so standard rated VAT applied.

When considering whether the assessments raised were out of time, the First Tier Tribunal stated:

> "HMRC require sufficient evidence, actually within their knowledge to justify making the assessment. The Tribunal should look at the last piece of evidence of the required facts that justified making the assessment."

On that basis, the Tribunal found that the assessments had been validly made.

Derby Quad Limited v HMRC (TC08972)

Historic claim for ex-demonstrator cars (Lecture B1411 – 20.23 minutes)

Summary – HMRC was entitled to reject a further overpaid VAT claim as an agreement reached under s.85 VATA 1985 precluded the claims from succeeding.

The two companies had originally accounted for VAT under the VAT margin scheme which was based on HMRC policy at the time.

Following the decision in Commission v Italian Republic (Case C-45/96), it seemed that motor dealers could submit claims for VAT to be repaid. However, HMRC initially rejected the companies' repayment claims and so they had appealed to the First Tier Tribunal. The claims were eventually settled by agreement under s.85 VATA, based on tables published by HMRC. Tables were needed to estimate the claims figure to be paid as business records dating back to 1973 were likely to be lacking.

It later transpired that the tables used to calculate the repayments made contained errors and so the two companies submitted further repayment claims for additional amounts of overpaid VAT based on the revised tables.

HMRC denied these claims and the First Tier Tribunal rejected the companies' appeals.

Arguing that the First Tier Tribunal had erred in law by concluding the s.85 agreement was the final settlement, the companies appealed to the Upper Tribunal.

Decision

The Upper Tribunal found that the additional claims were not 'new' claims, outside the scope of the s.85 agreement saying:

> 'On the taxpayer's assertion that the 2009 claims were based on a different method of calculation, the tribunal disagreed saying if that were the case 'every slight change in the method of calculation during the course of negotiation of a claim would technically result in a new claim, with all the risks highlighted in the case law of the supposedly new claim falling foul of statutory time limits'.

Did the s.85 agreement preclude the 'revised' additional claims from succeeding?

The Upper Tribunal considered it unlikely that parliament intended s.85 to permit a taxpayer to ignore that agreement if at a later date 'new facts which, if known to it earlier, would have enabled it to reach a more advantageous settlement'. On that basis, the original agreement precluded the companies from making amended claims in relation to the same period.

The appeal was dismissed.

Cambria Automobiles (South East) Limited and Invicta Motors Limited v HMRC [2023] UKUT 00249 (TCC)

Errors in assessments **(Lecture B1411 – 20.23 minutes)**

Summary – HMRC's best judgment assessment was adjusted to take into account errors made by HMRC who had excluded corporate sales from their workings.

Aleksander Vinni ran patisserie and sandwich bars from two premises in London. As well as the shop sales, there were a few bar stools for those wanting to eat on site and the business also provided sandwiches and other products to a small number of corporate clients.

VAT was paid under the Point of Sale VAT Retail Scheme (VAT Notice 727/3).

It was claimed that staff were trained to identify and record the different types of supply and always asked customers whether they intended to eat-in or take-away, and then record the sales in the tills as either standard or zero-rated sales for VAT purposes.

Aleksander Vinni's wife produce daily Z-reports from the till which were then used by the accountant to calculate the quarterly VAT returns.

HMRC's systems identified that the level of standard-rated sales for the business was "too low". This was on the basis that the historic records showed the proportion of standard-rated sales as being approximately 11%. Based on other businesses of a similar type, HMRC expected the figure to be between 25% to 35%. HMRC carried out an unannounced visit, which indicated a figure of 55% for standard-rated sales.

Aleksander Vinni was asked to carry out two weeks of self-invigilation, which indicated that standard rated sales represented 33.58% of total sales.

On the basis of the officer's best judgment, HMRC issued an assessment for £22,658 covering periods June 2014 to March 2018, with a six-month suspended penalty for £3,398 on the basis that:

- A list of standard-rated items should be displayed next to the tills and the staff's understanding of the VAT treatment would be checked every month;
- If the standard-rates sales in any VAT period fell below 29%, he would carry out a review of the Z reports to establish why this could be.

At the end of the suspension period, HMRC confirmed that the conditions for the penalty were met and so the penalty was cancelled.

At no point in this case did HMRC claim that takings had been suppressed.

Aleksander Vinni appealed to the First Tier Tribunal, claiming that the assessments were not made to the best of HMRC's judgment.

Decision

The First Tier Tribunal disagreed that the HMRC officer had acted 'dishonestly and capriciously' in arriving at HMRC's assessments. The Tribunal acknowledged that errors had been made and that "there were clearly some shortcomings in the approach of HMRC" but the "accusations of fraud and dishonesty …. were exaggerated and misplaced".

The First Tier Tribunal accepted that HMRC's figures did not take into account the effect of the corporate sales made by the business. Typically, these sales involved the supply of sandwiches and other cold food products, such as fruit, meaning that they would be zero-rated as supplies of food within Group 1 Schedule 8 VATA 1994.

The First Tier Tribunal acknowledged that the HMRC officer had made some arithmetical errors in her calculations but some of these errors favoured HMRC and others favoured the taxpayer.

In the Tribunal's view, the calculation for each period up to March 2018 should be recomputed such that the proportion of standard-rated sales applied to each period should be 26.72% being the proportion of standard-rated sales during the self-invigilation period if the corporate sales had been taken into account.

Aleksander Vinni v HMRC (TC08976)

Changes to the DIY Housebuilders Scheme (Lecture B1411 – 20.23 minutes)

The DIY Scheme allows an individual who either builds their own home, or converts a non-residential building into their own home to reclaim the VAT incurred on qualifying building materials.

Two changes have been made to the scheme, which became effective from 5 December 2023:

1. Individuals now have the option of submitting their DIY housebuilders VAT refund claim digitally, although those wishing to submit a paper-based claim will still be able to do so;

2. The time limit for such claims is extended from 3 months to 6 months after completion of the build.

https://www.gov.uk/government/publications/vat-diy-housebuilders-scheme-digitisation-of-claims-and-extending-time-limit/vat-digitisation-of-claims-and-extending-time-limit-for-diy-housebuilders-scheme

VAT change of intention (Lecture B1415 – 16.51 minutes)

Input tax is deductible based on the taxpayer's intention. So if they intend to make a taxable supply they can recover the input VAT in the quarter of spend. If their intention changes up to the date of first use, input tax adjustments will be needed under SI 1995/2518 Regulation 108 or 109.

The provisions of Regulations 108 and 109 apply if your intention changes within six years of the start of the quarter in which the VAT is initially incurred.

If the intention changes from taxable to exempt (or residual), Reg 108 will apply and the input tax originally recovered will be clawed back via a negative entry in Box 4 of the VAT return in which the intention changes. The same will apply if the original intent was mixed (so residual recovery) and the first use is exempt.

Regulation 109 is the mirror opposite to Regulation 108 and will result in a payback to the taxpayer where their intention changes from exempt to taxable (or residual) or from residual to taxable. The taxpayer simply adjusts their Box 4 in the quarter their intention changes.

Regulation 108 is often in point when professional fees are being incurred to secure planning permission on vacant land. Input tax is deductible if you have taxable intent BUT will be clawed back under Regulation 108 if that intention is not fulfilled.

Contributed by Dean Wootten