Tolley®CPD

July 2020

Disclaimer

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

CONTENTS

Personal tax

Returning office equipment (Lecture P1201 – 22.54 minutes)

As a result of working from home during the coronavirus, employers will have provided office equipment for their employees or, alternatively, may have reimbursed employees for the cost of items that they bought themselves. In anticipation that employees will be returning to work, HMRC has issued guidance as to how such equipment will be treated going forward.

Equipment provided by employer

Where employees were provided with office equipment to work from home, there is no tax charge provided that the equipment is returned. However, if ownership of the equipment is transferred to the employee, at any time, this will become an employee benefit. The charge will be on the market value of the equipment at the time of the transfer, minus any amount the employee may have paid towards the equipment.

Equipment reimbursed by employer

Any reimbursed home office equipment is owned by the employee. There will no benefit charge on the reimbursement or if the employee keeps the equipment as it is something that they already own.

https://www.gov.uk/guidance/check-which-expenses-are-taxable-if-your-employee-works-from-home-due-to-coronavirus-covid-19?utm_source=055d7327-38c3-4c2f-ac9d-b7c1657c05fe&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily#history

SSP/SMP and furloughed workers (Lecture P1205 – 22.04 minutes)

This article looks at amendments that have been made as a result of COVID-19 in relation to the operation of SSP and family related statutory payments. Let's start with SSP, currently payable at a rate of £95.85 per week, and remind us ourselves of the normal rules.

SSP in normal times

To be eligible for SSP:

- employees must have average weekly earnings of at least £120 over the eight-week period prior to the first day of sickness;
- there must be a period of incapacity for work (PIW) of at least four day, including bank holidays and weekend days;
- the employee must be sick for more than 3 normal contractual working days before they become entitled to SSP. These first three waiting days (WD) are not eligible.

Example

An employee phones in on a Monday morning saying that they will not be in to work as they have been ill since Saturday. From when are they eligible for SSP?

The four PIW days start running from the Saturday so by the end of Tuesday they will have the required four days to be eligible.

However SSP is not payable until the employee has been off work for three workings days. Assuming that they have a standard Monday to Friday working week, three days would take us to Wednesday and so SSP would be payable from Thursday. So if they return to work on:

- Tuesday, Wednesday or Thursday — No SSP will be due;
- Friday — Entitled to 1 day of SSP (Thursday);
- The following Monday — Entitled to 2 days of SSP (Thursday + Friday).

Change from 13 March 2020 due to COVID-19

If an employee is sick or self-isolating to due COVID-19, there is no requirement for the employee to satisfy the three WD requirement. SSP is payable from the first working day of absence provided they are off 'sick' for at least four consecutive days.

Change from 16 April 2020 and shielding

If an employee has received an NHS/ GP instructing them to shield for 12 weeks, again there is no requirement for the employee to satisfy the three WD requirement and SSP is payable from the first qualifying day (Standard working day) from 16th April 2020.

Example

In the following scenarios, assuming that employees work a Monday to Friday week, what is the earliest that they can be paid SSP?

Janet phones in sick on Monday 16th March 2020 and says that she has food poisoning:

- Normal rules apply and so SSP cannot be paid before the Thursday.

James phones in sick on Monday 16th March 2020 and says that he is self-isolating as his wife has COVID-19 symptoms:

- SSP can be claimed from 16th March 2020 as off work for more than four days.

On 1st April Debbie informs her employer that she has received an NHS shielding letter covering the next 12 weeks:

- SSP can be paid from 16th April 2020.

SSP Rebate Scheme

This online scheme was launched on 26th May 2020 and applies for small and medium sized employers.

The claim will count as State Aid but is unlikely to take the employer above the State Aid limits under EU Commission Temporary Framework (Euros 800,000 limit).

Under the scheme, provided that the employer is eligible, they can reclaim up to two weeks SSP per employee provided that the amount relates to periods of absence due to COVID-19.

To be eligible to use the SSP Rebate Scheme the employer must have:

- A PAYE scheme set up and started by 28 February 2020;
- Fewer than 250 employees on 28 February 2020.

Where companies and or charities are connected, the 250 employee limit applies to the connected group.

Employees can be full, part time, flexible or zero hour employees as well as employees under agency contracts.

Both employers and their agents can make claims under this scheme and will need the following information:

- PAYE scheme reference number;
- Contact name and phone number to deal with any queries;
- UK bank/ building society account details;
- Total amount of SSP claim due to COVID-19 in the claim period;
- Number of employees covered by the claim
- Start and end date of the claim.

When making the claim, it can be made for multiple pay periods and employees at the same time and claims can be made for periods of sickness starting on or after:

- 13 March 2020 for employees who were off sick because they had the virus or were self isolating; and
- 16 April 2020 where employees were shielding.

Record keeping

Records must be kept for three years after the claim payment is received and include the dates that the employees are off sick, the qualifying days in the period of sickness, the reason that the employee was off work and the employee’s national insurance number.

Family related statutory pay

To be eligible for the various types of statutory pay the employee must satisfy the relevant 26-week employment period and average weekly earnings must be at least £120. This average weekly earnings is calculated over the relevant 8 week period before the qualifying week, matching week or, in the case of Statutory Parental Bereavement Pay, the last Saturday before the week of the death or stillbirth of their child.

If statutory leave is due to start on or after 25 April 2020 and the employee has been furloughed for part of the 8 week averaging period, then the employer must ensure that the pay used to calculate to statutory payment is not lower than the employee’s normal pay. This means that the employer should use the higher of:

- Furloughed pay actually received from the employer; and
- Pay that would have been received under normal circumstances.

This will be important for employees that receive variable weekly pay to make sure that we get the average weekly earnings right.

Created from a seminar recorded by Alexandra Durrant

Calculating holiday pay (Lecture B1202 - 26.58 minutes)

Holiday entitlement

Currently, all workers, except those who are self-employed, are entitled to 5.6 weeks of paid holiday a year. This will include part time, zero hour and flexible hour contracted staff. The actual entitlement is 28 paid days and normally consists of 20 workings days of paid leave under the Working Time Directive and EU law plus usually, the 8 UK bank holiday days. An employer may choose to enhance the number of days holiday that an employee is actually give, maybe as a reward for long service.

Entitlement to paid holiday starts to accrue from the first day of working and runs to the end of the contract period, including any periods of sick leave, maternity and other family related leave as well as the employee’s notice period. It also accrues while on furlough.

In some cases, employees may not be able to take all of their annual leave, but strictly speaking, the employer cannot propose or agree to pay for holidays not taken; equally an employer is not entitled to pay an employee not to go on holiday.

The 20 statutory days of holiday must be taken in the holiday leave year, unless the employee is on maternity leave or off sick. Provided that both the employee and employer agree, the additional 8 days may be carried forward into the next holiday year. By contrast, any enhanced holiday not taken can be paid or carried forward.

Where an employer requires the employee to take some of their holiday at a specified time of year, maybe because the factory closes down for a week at Christmas, this must be clearly stated in the employment contract.

Changes due to Covid-19

Special legislation has been introduced to amend the Working Time Regulations and allows unused holiday to be carried forward for up to two holiday years where it is not reasonably practicable to take time off.

Zero and casual hours staff

Holiday entitlement for these staff accrues and is calculated based on 12.07% of the hours worked calculated as 5.6 weeks/46.4 weeks (52 – 5.6). As it can be difficult to know when these staff may be needed for work, it is not uncommon for the employer to pay the holiday as they go through the year. Such payments must be shown separately on the payslip; holiday pay entitlement cannot be rolled up into an enhanced hourly rate of standard pay.

Employees leaving

When an employee leaves, including when they are made redundant, holiday entitlement is calculated up to the end of their contract. An employee leaving on 31 July would have unpaid holiday accrued to that date included on their final pay day;

Where an employee has taken too much holiday, the employer can only claw back the excess as a deduction from final pay if the employment contract states that this is allowed.

Holiday pay

Holiday pay should be paid at their normal pay rate and this must include any guaranteed overtime and any other guaranteed amounts including commission contained within the employment contract. Further, where a certain amount of overtime has become the norm on a voluntary basis, this must also be included.

For casual and zero hour employees, their pay will vary and so their pay is calculated by looking at the previous 52 paid weeks actually worked so this may involve looking back more than 52 weeks to find 52 weeks. If they have worked for less than 52 weeks for an employer, that shorter period is used instead.

Furloughed employees

While furloughed, holiday entitlement continues to accrue even if the employee is doing voluntary work or working for someone else. Employees are allowed to use up holiday entitlement while they are furloughed; it does not affect the Coronavirus Job Retention Scheme (CJRS) grant.

Any holiday taken must be paid at the rate that they would usually earn if not furloughed so 100% of their normal pay with the grant covering some of that cost.

Example 1

An employee is furloughed in June and their usual gross pay is £1,500 per month. Under the CJRS, 80% of that would be covered by the grant so £1,200. Assuming that the employer is not topping up to normal pay, the employee will receive £1,200.

What happens if the employee takes one week of holiday in June? The employee's pay is calculated as two amounts: 23 days as normal which will be covered by the CJRS grant and 7 days where the employer must top up to full pay.

Holiday pay for 7 days		
(1,500 x12/52)	346.15	CJRS covers 80%
Furloughed pay for 23 days		
(1,500 x 23/30 x 80%)	920.00	CJRS covers this
Total gross pay	£1,266.15	

Example 2

Let's now assume that the employee earns £5,000 a month. Under the CJRS, 80% of that would be covered by the grant but this is capped at £2,500.

If this employee takes a one-week holiday in June, their gross pay would be calculated as:

Holiday pay for 7 days		
(5,000 x12/52)	1,153.85	CJRS (2,500/30 = 83.34 x 7)
Furloughed pay for 23 days		
(23 days at 83.34)	1,916.82	CJRS covers this
Total gross pay	£3,070.67	

Grant covers £2,500 with the excess covered by the employer.

Holiday pay and redundancy

Any holiday not taken must be paid at this point, with the holiday accruing up until the contract is terminated.

The employee is entitled to take holiday during their notice period and should be paid at their normal rate of pay.

Where the employment contract is terminated with no notice period, they are still entitled to holiday accrued to that date so:

Example

On 30 June an employee is given notice that they are being made redundant on 30 September. Their contract states that they are due two months notice and entitled to 30 days holiday a year. At 30 June they had used 5 days holiday.

The holiday year runs to 31 December, so at 30 September their holiday entitlement is 22.5 days and as they have taken 5 days, they are still entitled to 17.5 days to be paid up to termination date.

If their salary is £5,000 a month, their holiday pay due to 30 September is £4,038.46 (5,000 x 12 / 260 x 17.5) based on 260 working days.

If the employee were made redundant and ceased employment on 30 June with no notice, so the contract is terminated on 30 June, holiday entitlement would be 15 days less the 5 already taken. Their holiday pay would be £2,307.69 (5,000 x 12 / 260 x 10).

Created from a seminar recorded by Alexandra Durrant

Employer Related Securities and COVID-19 (Lecture P1201 – 22.54 minutes)

Employment Related Securities Bulletin 35 (June 2020) includes new guidance on a number of COVID-19 related matters.

Save As You Earn (SAYE)

Where employees are saving under a SAYE scheme and are unable to contribute because they are furloughed or on unpaid leave during the coronavirus pandemic, HMRC will extend the payment holiday terms.

All employees with a savings contract in place on 10 June 2020 can delay the payment of monthly contributions, beyond standard 12 months, where those additional months are due to coronavirus.

Any temporary postponement of contributions will put back the 3 or 5 year maturity date by the total number of months missed, including any additional months missed as a result of the impact of coronavirus.

Payments of Coronavirus Job Retention Scheme (CJRS) to employees furloughed during the coronavirus pandemic can constitute a salary and SAYE contributions can continue to be deducted from CJRS payments.

Share Incentive Plan (SIP)

Payments of CJRS to furloughed employees can constitute a salary and SIP contributions can continue to be deducted from CJRS payments.

SIP participants are already permitted to stop their deductions from their salary but participants will not be allowed to make up missed deductions if they stop due to coronavirus.

Company Share Option Plans (CSOP)

HMRC accepts that where employees and full-time directors, now furloughed because of coronavirus, have been granted options before coronavirus, those options will remain qualifying on the basis they were full time directors and qualifying employees at the time of grant.

EMI valuations

When EMI options are ready to be granted employers can agree an appropriate valuation with HMRC and in such such circumstances, the options currently need to be granted within 90 days.

Provided that there has been no change that may affect an appropriate value then any:

- EMI valuation agreement letters already issued, where the 90 days expires on or after the 1 March 2020, can be automatically treated as being extended by a period of 30 days;
- new EMI valuation agreement letter issued on or after 1 March 2020 will be valid for 120 days.

Scheme registrations and returns

HMRC recognises that some employers and agents may struggle to meet ERS tax obligations due to coronavirus.

Employers should try to meet their obligations such as registering new schemes and filing returns as soon as you can. However if they cannot and this is due to coronavirus, HMRC will consider coronavirus as a reasonable excuse for missing some tax obligations. Employers should explain how they were affected by coronavirus when they make their appeal.

Contacting HMRC

Due to the situation with coronavirus HMRC recommends that employers submit all enquiries by email.

If employers need to disclose sensitive information, and have concerns about sending this by email, they should send a short email:

- without any sensitive data;
- with details of how to be contacted.

https://www.gov.uk/guidance/employment-related-securities-bulletin-35-june-2020

Options as employment related securities **(Lecture P1201 – 22.54 minutes)**

Summary – Options granted to a company's advisor, at a time when they were director of the company, were employment-related securities under s471 of ITEPA 2003.

In 2006, as part of an exercise to raise equity funding for Vermilion Software Limited, Vermilion Holdings Limited was set up. The company was advised by specialist whose services were paid for by being granted an option (the "2006 Option") in favour of his nominee company, Quest Advantage Limited.

However, by January 2007 Vermilion Holdings Limited was in financial difficulty and likely to go under. Further capital and changes in management leadership were required to rescue the company. Precondition of the rescue funding were that the:

- adviser would be appointed as chairman of the company and would work for the company for a 12 month period;

- 2006 Option would be cancelled or amended.

Rather than amending the option, the advisor chose to cancel the “2006 Option” and on 2 July 2007 Vermilion Holdings Limited and Quest Advantage Limited entered into an Option Agreement (the “2007 Option Agreement”) granting a new 2007 Option with no consideration payable for the grant of the Option.

In June 2016 Quest Advantage Limited novated the 2007 Option to the adviser who then exercised the 2007 Option in anticipation of the sale of the entire issued share capital of Vermilion Holdings Limited to a subsidiary of a major listed US corporation on 8 November 2016.

On 17 August 2017 HMRC sought to assess Vermilion Holdings Limited for income tax under PAYE and Class 1 National Insurance Contributions in relation to the 2007 Option exercised in 2016/17 for a sum totalling £386,000. This amount is not disputed but what was disputed was how the transaction should be treated for tax:

Vermillion Holdings Limited argued that the options were not employment related securities under s471 ITEPA 2003, income tax and NIC did not apply but rather any gain on the subsequent disposal of the shares would be charged to capital gains tax.

The First Tier Tribunal found in favour of Vermillion Holdings Limited. The “2007 Option” was simply as a replacement for the non-employment related “2006 Option”.

HMRC appealed to the Upper Tribunal.

Decision

The Upper Tribunal stated that there was more than one reason why the “2007 Option” was granted to the adviser:

1. Immediately prior to the rescue package, the existing “2006 Option” was worthless. The adviser had already lost the value he had earned through consultancy services;

2. The “ 2007 Option” was part of a package of measures that included the employment of the adviser. The grant of the “2007 Option” was conditional on the other conditions including the employment of the adviser being satisfied before it could go ahead.

The Upper Tribunal concluded that it was enough that one of the reasons was that of employment. Once the adviser became a director, the “2007 Option” was made available by reason of the adviser’s employment; s471(1) ITEPA 2003 applied. From 2007 onwards, the performance of Vermilion Holdings Limited and the value of the “2007 Option” both improved to such an extent that the gain on the exercise of the “2007 Option” in 2016 was in excess of £600,000

HMRC v Vermilion Holdings Limited [2020] UKUT 0162 (TCC)

Termination and foreign service

Summary – Foreign service relief was denied as the limited evidence that was available indicated a taxpayer who had a settled purpose in the UK, making them ordinarily resident in the UK for the period concerned.

Louis Da Silva was born in Portugal but has lived and worked in various countries around the world during his life. His UK wife and children initially travelled with him with his work, but moved back to the UK. In 2009, he separated from his wife, but continued to see his family.

In January 2012, Louis Da Silva entered into a contract of employment with Afferro Mining Inc but just under two years later, his contract was terminated under a compromise agreement and he received a payment of just under £1.5 million.

In his 2013/14 tax return he claimed £30,000 as exempt under s403 ITEPA 2003 and a further £252,923 was claimed as exempt as foreign service relief under s414 ITEPA 2003. In the white space of his tax return, he stated that he had concurrent employments and that the employers were associated, so the period of employment for the purposes of the termination payment was 2,513 days (01/02/07 to 19/12/13). He stated that he was non-UK resident in 2006/07, resident but not ordinarily resident in 2007/08, 2008/09 and 2009/10, and ordinarily resident in 2010/11, 2011/12, 2012/13 and 2013/14. The period of foreign service was 1,159 days (01/02/07 to 05/04/10).

Louis Da Silva claimed that from 2007 he spent about 70% of his time working outside the UK and that he only became:

- UK resident on 1 October 2007 when he purchased a property in Kent, and
- Ordinarily resident in the UK on 6 April 2010 when he became settled in the UK by virtue of his new role at Afferro and his home life with his new partner.

HMRC issued a closure notice that disallowed the deduction claimed under s414, on the grounds that Louis Da Silva was ordinarily resident in the UK between 1 February 2007 and 5 April 2010 and so not entitled to the foreign service relief.

Decision

The First Tier Tribunal stated that they had received very limited contemporaneous documentary evidence in support Louis Da Silva's claims. However, the evidence that they did receive was not consistent with Da Silva's claim that he spent 70% of his time outside the UK. Why would he buy an annual rail season ticket for travel if he was out of the country for well over half of the year? There were regular payments on his credit card and out of his bank account to UK golf clubs, clubs, bars and restaurants, a London gym as well as frequent cash withdrawals from London ATMs.

The fact that he continued to live in the UK, and eventually buy a house with his new partner, notwithstanding the end of his marriage and the termination of his employment, was consistent with his move to the UK having had a settled purpose from the outset.

The Tribunal found that during the period concerned, Louis Da Silva was present in the UK in 34 of the 40 months. His overseas trips were short and he always returned to the UK making his absences temporary nature. They found him to be ordinarily resident in the UK during that time.

The appeal was dismissed.

Louis Da Silva v HMRC (TC07600)

Unauthorised pension payments

Summary – The taxpayer had not been careless and so the unauthorised payment charge and surcharge was out of time and so set aside. The scheme sanction charge was upheld as a valid assessment under Regulation 4 of the Regulations.

Bella Figura Limited was the sponsoring employer and scheme administrator of a registered pension scheme, Bella Figura Pension Scheme. This scheme made a loan of £200,000 to Falken Ltd, a company connected with Bella Figura Limited.

It was common ground that the loan was an unauthorised payment under FA 2004 s 160(4) and a scheme chargeable payment under FA 2004, s 241. The result was that Bella Figura Limited was liable, as scheme administrator, to a scheme sanction charge and, in its capacity as sponsoring employer, to an unauthorised payments charge and an unauthorised payments surcharge.

Decision

The Upper Tribunal had to consider three issues.

1. Did HMRC have the power to assess Bella Figura Limited to the scheme sanction charge? The First Tier Tribunal had held that HMRC had no such power and set HMRC's assessment aside. The Upper Tribunal concluded that there was a standalone power to assess the charge under Registered Pension Schemes (Accounting and Assessment) Regulations, SI 2005/3454, reg 4. The Upper Tribunal recognised that this conclusion gave rise to some difficulties of interpretation and so limited its decision to the specific charge arising in this case.

2. Were the assessments to the unauthorised payments charge and surcharge made in time? As the assessments were made outside the normal time limits, this issue depended on whether the loss of the tax had been brought about carelessly. The Upper Tribunal held that Bella Figura Limited had not been careless. It had taken reasonable care to engage a pensions administrator, PPCL, to navigate the constraints on pension schemes making loans and, although it did not obtain express advice that the loan was an authorised one, it was reasonable for Bella Figura Limited to rely on PPCL to produce documentation and make necessary filings to achieve that outcome. The assessments were therefore out of time and the Upper Tribunal set them aside.

3. Should Bella Figura Limited ‘s liability to the scheme sanction charge have been discharged following applications made under FA 2004 s 268 on the grounds that it would not be just and reasonable in all the circumstances of the case for Bella Figura Limited to be liable to the charge. Because Bella Figura Limited had escaped the unauthorised payments charge as a result of HMRC's failure to assess it in time, the Upper Tribunal considered that it would not be appropriate to set aside the charge because that would leave Bella Figura Limited liable to no charge at all despite making a significant unauthorised payment. The Upper Tribunal therefore upheld the assessment.

HMRC v Bella Figura Limited [2020] UKUT 0120 (TCC)

Adapted from the case summary in Tax Journal

Transfer of assets to SIPP (Lecture P1201 – 22.54 minutes)

Summary – Tax relief on pension contributions is available on cash contributions but not transfers of other assets.

Four individuals were members of a self-invested personal pension scheme (SIPP) that was administered by Sippchoice Limited. The individuals completed Contribution Forms agreeing to make in-specie contributions intended to be treated as net contributions to the SIPP. This notification constituted an irrevocable and binding obligation to make the stated contribution. The individuals later confirmed that their contribution would be made in the form of shares.

HMRC sought to deny tax relief on the contributions arguing that s188(1) FA 2004 only gives relief for payments of money and not for transfers of assets, even if made in satisfaction of a money debt.

Sippchoice Limited argued that “contributions paid” includes the transfer of assets in satisfaction of a money debt and the four individuals each transferred their shares to the SIPP in satisfaction of such a debt. Sippchoice’s alternative contention was that transfers of non-cash assets are nevertheless “contributions paid” within s188(1) even if they are not in satisfaction of a money debt.

The First Tier Tribunal had found in favour of the individuals, agreeing that the share transfers were ‘contributions paid’ under the legislation, and allowed the tax relief. The Tribunal rejected HMRC’s submission that the normal meaning of “contribution paid” is confined to a payment of cash. Satisfaction of a monetary obligation or debt in cash or kind amounts to “payment”.

HMRC appealed to the Upper Tribunal arguing that s188(1) could easily have said “contributions made” or just “contributions” but it said ‘contributions paid, meaning that they had to be made in cash. Further, HMRC submitted that s195 FA 2004 provides that “contributions paid” in s188 includes contributions made by transferring shares but only if certain conditions are met. In this situation, the shares must be “eligible shares” and transferred within 90 days of acquisition by the individual. Why was this legislation needed if ‘contributions paid’ covered all shares transferred?

Decision

The Upper Tribunal accepted that, viewed in isolation, “paid” could be broad enough to encompass non-monetary payments. The Tribunal stated that the outcome of HMRC’s appeal depended on whether “paid” in s188(1) must be construed, not in isolation but in the context of Chapter 4 of Part 4 FA 2004, as “paid in money”.

The Upper Tribunal accepted HMRC’s argument about s195. In their view, it made no sense to restrict relief for transfers of eligible shares to a period of 90 days from acquisition if transfers of non-eligible shares or other assets were not so limited. This inconsistency disappeared if “contributions paid” was interpreted as restricted to monetary contributions.

Finally, the Upper Tribunal stated that their reading of “contributions paid” as restricted to monetary contributions was supported by s161 FA 2004 that applies for the interpretation of Chapter 3 of Part 4 of FA 2004 This section specifically states that:

> “‘Payment’ includes a transfer of assets and any other transfer of money’s worth”.

Why was such clarification not also used for ‘contributions paid’ in Chapter 4 of Part 4? As a result, the Upper Tribunal concluded that it was Parliament’s intention that this extended meaning did not apply elsewhere in the statute.

HMRC v Sippchoice Limited [2020] UKUT 149 (TCC)

Deficiency relief on insurance bonds (Lecture P1202 – 15.11 minutes)

Losses on insurance bonds

If the bond is eventually surrendered for an overall loss, this loss cannot be set against capital gains or income to save tax at marginal rates. Indeed, if two investment bonds are surrendered, one showing a profit (i.e. chargeable event gain) and the other a loss, they cannot be matched off.

There is a very limited form of loss relief, known as corresponding deficiency relief (‘deficiency relief’), under ITTOIA 2003 s.539. This is only available where there has been an earlier chargeable event gain on the same bond. As most investors try to avoid making partial encashments that might trigger chargeable event gains, this relief will not be encountered too often in practice.

Advisors should be aware of it (and its limitations) though, as for some taxpayers it may produce a sizable tax saving on eventual surrender of the bond, should the investment perform poorly.

Example – Ricky

Ricky invested £50,000 into a UK investment bond on 3 October 2011. On 16 March 2013 he withdrew £20,000 from the policy by part surrender. On 5 December 2019 he surrendered the policy for £32,500.

His only taxable income (after personal allowance) in 2019/20 is employment income of £42,800 and the higher rate threshold for 2019/20 was taxable income of £37,500.

Solution

In policy year 2 (ending on 2 October 2013) there was a withdrawal of £20,000. This part surrender gave rise to a chargeable event gain on 2 October 2013 of £15,000, being £20,000 – [£50,000 @ 5% x 2].

Note that as it is a part surrender, any tax charge on this gain would have arisen on Ricky in tax year 2013/14 (i.e. the tax year in which the policy year ends).

When the final surrender happens in December 2019, the gain calculation on the surrender compares the total benefits received with the total amounts invested, and then gives a further deduction for chargeable event gains that have arisen in earlier years (to avoid double counting).

For Ricky, these amounts are:

Total benefits: £20,000 + £32,500 = £52,500.

Total invested: £50,000

Previous gains: £15,000

The gain calculation is £52,500 - £50,000 - £15,000 = - £12,500.

This deficiency is less than the amount of earlier gains, so the amount of deficiency available for relief is £12,500 and will be used against Ricky's 2019/20 total taxable income as follows:

- Ricky has taxable income in the higher rate tax band of £5,300 (42,800 – 37,500);
- This higher rate liability is relieved by deficiency relief of £5,300;
- Effectively, the basic rate band is extended by £5,300, so that Ricky doesn't suffer any higher rate tax;
- The balance of the deficiency relief (£12,500-5,300 = £7,200) is lost, as there is no form of carry back or carry forward.

Note that, if the total benefits in the above calculation are less than the sum of the total invested plus the previous gains, any deficiency relief is restricted to the level of the previous gains.

For example, if the final surrender amount had been £27,500 rather than £32,500, the deficiency would have been £17,500 (20,000 + 27,500 – 50,000 – 15,000), but any deficiency relief would have been limited to a maximum of £15,000.

Contributed by Kevin Read

Capital Taxes

CGT on UK residential property (Lecture P1203 – 12.41 minutes)

For UK residential property disposals completed on or after 6 April 2020, the vendor has 30 days following completion in which to report and pay any CGT due on the disposal (Sch 2 FA 2019).

However, HMRC have issued the following reminder to property owners when they sell:

> 'In most cases, you do not need to pay the tax when you sell your main home.'

Essentially, the FA 2019 regime is aimed at disposals of buy-to-let properties, second homes, holiday homes and houses or flats which have not been occupied as a main residence throughout the period of ownership.

Other categories of property disposals which are not within the ambit of these FA 2019 rules include:

- properties where the gain falls within the owner's annual CGT exemption for the tax year in question;
- properties which have been transferred to a spouse or civil partner;
- properties which have been given to a charity; and
- properties which were acquired to develop and resell (given that the sale will be a trading transaction, the profits from which are chargeable to income tax).

This chapter only focuses on the position for UK residents.

In order to report the relevant transaction, it is necessary to use the new HMRC online service. Note that, unlike NRCGT, this does not involve a special type of tax return. The first step is for the vendor to create a CGT on UK property account. This requires:

- a Government Gateway user ID; and
- a password.

The vendor is then allotted a special CGT on UK property account number, eg. XGCGTP000002024, which indicates that the account has been created so that he (or she) can proceed to the account in order to answer various questions and provide the information requested. Clearly, if the vendor does not already have a user ID, he will have to apply for one.

The following information will be needed in connection with this account and so it is sensible to have these details ready:

- full address of the property and its postcode;
- date when the property was acquired;
- date when contracts were exchanged;
- completion date;
- cost (or value) of the property on acquisition;
- sale proceeds (or value) on disposal;
- the costs of buying, selling and making improvements to the property; and
- any tax reliefs, allowances or exemptions which are available for the disposal.

By answering the questions which HMRC ask in relation to the disposal transaction, a picture is built up of the gain on the property and the tax payable on it. This is the sum which must be settled within the 30-day time limit.

Interest will always be charged if any CGT remains unpaid after 30 days. However, in the light of COVID-19, HMRC have announced that vendors will not receive a late filing penalty for any transactions completed between 6 April 2020 and 30 June 2020 (inclusive). Disposals completed on or after 1 July 2020 will receive a late filing penalty if they are not reported within 30 days.

It will be a good idea for the vendor to print out a copy of the payment on account return for his records. The reason for this is that, once a return has been sent to HMRC, it will not be available to review or amend online. It will be necessary to contact HMRC directly in order to make an amendment to a return which has already been submitted.

In most cases, the vendor will still have to complete a self-assessment tax return by the normal due date. The return requires details of all income and gains for the tax year in question and so this includes gains which have already been reported. In some instances, figures which were originally estimated may be replaced by final amounts so that a further CGT payment or a repayment of CGT will be due.

Contributed by Robert Jamieson

Excepted assets **(Lecture P1204 – 23.36 minutes)**

It was never intended that business relief should be given for that part of any value transferred attributable to 'excepted assets' under S112(2) IHTA 1984 as assets which:

- have not been used wholly or mainly for the purposes of the company's business throughout the last two years (or their period of ownership, if less); and
- are not required for future use in the business.

The rationale is to prevent an individual from artificially increasing the amount of his relief entitlement by 'parking' private assets (such as a residence) in his company.

Typical examples of excepted assets are Stock Exchange investments, rental properties and substantial cash balances. However, it now appears that the provision may be less problematic than was once thought. Consider, for example, a manufacturing company which also carries on some property letting activities. Provided that the company satisfies the 'wholly or mainly trading' test set out in S105(3) IHTA 1984, business relief will be available.

In the past, it was understood that this relief would then be restricted to the extent that the value of the property letting assets impacted on the value of the shares, but HMRC Inheritance Tax accept that the word 'business' in S112(2) IHTA 1984 can cover both trading and investment businesses and so, as long as the company's assets are used in one or other of its business activities, none of them will be treated as excepted assets. Business relief should be given without restriction.

The rule excluding excepted assets from business relief is relaxed in the case of property where:

- part of the land and buildings is used exclusively for business purposes; but
- the whole of the land and buildings would otherwise have to be treated as an excepted asset because it was not used wholly or mainly for business purposes.

In these circumstances the part used exclusively for business and the rest of the property are treated as separate assets, with the value of the land and buildings as a whole being apportioned between the two parts (S112(4) IHTA 1984).

Illustration 1

Andrew is a dentist who runs a successful practice from his home in London SW3. The large house is mainly a residence for Andrew and his family, but three rooms on the ground floor are reserved as Andrew's surgery, his office and a waiting room for his patients.

Given that these three rooms are used exclusively for business purposes, they are regarded as a separate asset in the context of the IHT value of Andrew's practice, even though the house as a whole would not be treated as being used wholly or mainly for the purposes of Andrew's dental business.

Barclays Bank Trust Co Ltd v CIR (1998) is an important case on the meaning of 'excepted assets'. At the date of the shareholder's death, the deceased's company had cash balances of around £450,000. HMRC Inheritance Tax accepted that £150,000 of this amount was needed for future business use, but they argued that the remaining £300,000 was surplus to the company's requirements. The Special Commissioner agreed with HMRC Inheritance Tax. An asset consisting of money was not required for future business use merely because it might be needed should the appropriate opportunity arise in, say, two, three or seven years' time. There had to be evidence at the date of death that the money would be used for some given project or some palpable business purpose. Therefore, the cash balance of £300,000 constituted an excepted asset.

HMRC's success in the Barclays Bank case could well be described as a pyrrhic victory in the sense that the decision provided tax advisers with invaluable information about how to sidestep an excepted assets charge in the future. Many companies with large cash balances were henceforth encouraged to have regular board meetings where one of the items on the agenda was a discussion of the uses to which they might put their surplus funds. This meant that, in later years, it became harder for HMRC Inheritance Tax to advance the same arguments that had won them the day in 1998.

Another aspect that is often worth exploring, given the use of the word 'business' in S112 IHTA 1984, is this. Could it nowadays be argued, where a trading business holds substantial cash balances that are actively managed on a regular basis, that this constitutes an ancillary investment activity which cannot be caught by the excepted assets legislation?

There is no guidance in the IHT legislation (or in the Inheritance Tax Manual) as to precisely how the apportionment between any excepted assets and the remaining value of the business should be calculated. The method set out in Illustration 2 below is suggested as a just and reasonable approach.

Illustration 2 - Hector Enterprises Ltd

The balance sheet of Hector Enterprises Ltd, an unquoted trading company, shows net assets of £1,600,000 (at current market value). This includes a significant sum for goodwill and a holding of quoted shares worth £285,000. Hector has transferred his 65% shareholding in the company, worth £936,000, to a discretionary trust for the benefit of his daughters (the other 35% is held by Hector's sister). The value transferred by Hector is:

		£
Value of shareholding		936,000
Less:	Value attributable to excepted asset	
	(285,000/1,600,000 x 936,000)	166,725
		769,275
Less:	Business relief (100%)	769,275
		–
Add;	Value attributable to excepted asset	166,725
		166,725

Contributed by Robert Jamieson

Trust rescission (Lecture P1201 – 22.54 minutes)

Summary – The taxpayer had made a serious mistake that did not involve high-risk tax planning but rather, it was due to out of date advice that resulted in significant additional tax charges. It would be 'unconscionable and unjust' not to rescind the settlement.

Dr Heather Suckling, aged 80, was a retired GP whose disabled daughter, Cassandra, lived with her as she was unable to work or look after herself. She also has a son, Bill, who suffered from multiple sclerosis.

Dr Suckling had practised with three other GPs from a property where they owned equal shares in a 999-year lease. On retirement, the former GPs decided to keep the property and sub-let it. At the time of the hearing it was let on a 20-year lease due to expire in 2021, with Dr Suckling being entitled to gross rental income of £21,500 pa.

On death, Dr Suckling wanted her children to become entitled to the rental income from the property. By leaving her share of the property to them in her will, she understood that on her death, her 25% share in the property would be liable to IHT. However, she was concerned that her children would be unable to manage the property themsleves and, following discussion with her former GP partners, agreed that they would take on the management of the property overall, such that they would also manage her share of the property for the benefit of her children as trustees.

A family friend was a solicitor, a member of STEP and Solicitors for the Elderly. On her advice, on 13th June 2016, Dr Suckling established an interest in possession trust. Her understanding was that the overall effect of setting up the trust would be tax neutral. While alive, she would continue to receive and pay tax on the rental income and on death, her estate would still pay IHT on her share of the property. Following her death, her share of the property would be managed by the trustees for the benefit of her children.

Unfortunately, the advice given was based on the tax position before 22 March 2006, when it was possible to establish a lifetime trust with a qualifying interest in possession. In October 2017, her then accountant advised that her understanding was not correct, as the advice that she had been given by her 'solicitor friend' was out of date and wrong. Under current law, she had created a relevant property trust, resulting in a number of CGT and IHT consequences that she was not aware of.

For CGT purposes, this was a settlor-interested trust, with the trust creation giving rise to a chargeable gain that could not be deferred using holdover relief.

For IHT there was:

- an immediately chargeable transfer of value on creation of the trust;
- an on-going IHT charge every 10 years; and
- a gift with reservation of benefit, so that her share of the property was still chargeable in her estate on death.

Clearly this was inconsistent with Dr Suckling's previous understanding. She was forced to change solicitors as her previous solicitor friend's firm refused to help. Through them, Dr Suckling applied to set aside the trust that she had created on the grounds of equitable mistake, claiming that when she established the trust, she did not appreciate that it would result in immediate Inheritance Tax and Capital Gains Tax consequences.

Decision

The Court referred to the case Pitt v Holt concerning the rescission for equitable mistake of a voluntary disposition:

> "The equitable jurisdiction to set aside a voluntary disposition on the ground of mistake was exercisable whenever there was a causative mistake which was so grave that it would be unconscionable to refuse relief …"

The court was satisfied that the trust was not set up as a tax mitigation exercise but rather, to enable Dr Suckling to ensure that the property could be managed for her children in a tax neutral manner. She had clearly attempted to understand the tax implications but she had no idea that the advice she received was out of date and wrong.

Dr Suckling had made a mistake that resulted in both CGT and IHT liabilities that she was not expecting. This was a significant and serious mistake. In the court's opinion, had the correct advice been given in the first place, Dr Suckling would not have entered into this trust.

In concluding the judge stated that:

> "It would be unconscionable and unjust to leave the mistake uncorrected and I will therefore grant rescission of the Settlement."

Suckling v Furness and others [2020] EWHC 987 (Ch)

GAAR opinion on reducing estate's value (Lecture P1201 – 22.54 minutes)

Four months before Mrs A died, she set up a company, using about £750,000 to subscribe for two types of shares: 720,000 Gifted Shares and 30,000 Retained Shares. Both types of shares carried full voting rights and equal rights to dividends and capital. The initial directors of the company were Mrs A and her son, Mr B.

Two months before Mrs A died, the directors set up a trust with £100 from the company as well as a gift by Mrs A to the Trust of her Gifted Shares. The beneficiaries were defined as employees, including executive directors and former employees, and their descendants.

Following her death, Mrs A's retained shares passed to her sons, Mr B and Mr C and Mrs B became a director of the company. The company's accounts for its first trading year showed net assets of just over £700,000 consisting of a property, listed investments bought after Mrs A's death and cash of about £480,000. Other than about £9,000 of rental income, there was no other income and little active business. In the 12 months that followed, little had changed, other than further properties had been acquired funded by loans and the rental income reported was £13,000. After Mrs A's death, Mrs B became a director, but neither Mr B nor Mrs B received any remuneration and at no time did the company have any other employees.

In this case, Mr B claimed that the transfer by Mrs A was not chargeable to IHT being an exempt transfer under s28 IHTA 1984, meaning also that the reservation of benefit rules do not apply either. S28 IHTA 1984 provides that a transfer by an individual of shares in a company is exempt from IHT if the transfer is to a trust for the benefit of employees.

GAAR's opinion

The panel stated that:

> "If this had been a family company with a long standing workforce (whether or not including family members), gifting shares into the Trust might have had the legitimate aim of ensuring employees were incentivised to continue the business after the settlor's death and of diversifying share ownership or the benefits of share ownership."

However, in this case, there were no other employees and, with no active business, employees were not needed. This was not a trust set up for the benefit of employees. The panel concluded that the arrangements were used solely to benefit family members, structured to sidestep IHT where the donor does within 7 years following a gift.

The panel stated that the most comparable transaction would be to treat this as a lifetime gift to a family trust, outside s28 IHTA 1984, resulting in a 40% IHT charge as Mrs A died within three years. As Mrs A was also a trust beneficiary, the trust fund is also potentially subject to tax on her death under the gifts with reservation of benefit rules.

The entering in to and carrying out of the tax arrangements was not a reasonable course of action in relation to the relevant tax provisions.

https://www.gov.uk/government/publications/gaar-advisory-panel-opinion-of-2-march-2020-reducing-an-estates-value-for-inheritance-tax-via-subscription-for-shares-in-a-new-company-and-gifting-s

Paddock - grounds or agricultural property (Lecture P1201 – 22.54 minutes)

Summary - A paddock adjoining a cottage was part of its grounds, making it residential property for SDLT purposes.

In 2017, Lynda Helen Myles-Till acquired a property for £1,332,500 that included a cottage, a detached double garage, a garden to the rear of the house and a grass-covered field known as the "paddock". The paddock had previously been part of a neighbouring farm but that was no longer the case; it was not in use at the time of the sale and was owned by the seller.

HMRC argued that the paddock was part of the 'grounds' and in July 2018, having checked Lynda Helen Myles-Till's amendment to her SDLT return for the property, HMRC issued a closure notice to the effect that the "paddock" was "residential property", and that the amount of SDLT due, plus interest, was just over £21,000.

In November 2018, following an unsuccessful statutory review, an appeal was lodged with the First Tier Tribunal arguing that the paddock was not 'grounds, but rather agricultural property, making the land purchase mixed use.

Decision

The Tribunal stated that the question to be decided was whether the paddock was land that was not residential property as defined in s116(1) FA 2003 and so liable to SDLT at lower rates.

With no statutory definition for ‘grounds’, a term that is now rather out-of-date, the Tribunal relied on two recent cases (*Hyman and Hyman v HMRC [2019] UKFTT 469 (TC)* and *Goodfellow and Goodfellow [2019] UKFTT 750*). In addition they considered HMRC’s guidance in its manuals that they commented were both “helpful and balanced”, and the definition of ‘grounds’ in the Oxford English dictionary. The Tribunal stated that to constitute grounds, the paddock had to be an appendage to the cottage with no self-standing function. The paddock was comparable in size with the grounds of other residential properties in the area and it was not in commercial use when bought.

The appeal was dismissed.

Lynda Helen Myles-Till v HMRC (TC07633)

Refund of higher SDLT (Lecture P1201 – 22.54 minutes)

Under certain circumstances, higher rates of SDLT are due when buying a second residential property (or a part of one) for £40,000 or more, and the individual already owns another residential property.

If the owner subsequently sells or gives away their previous main home within 3 years of buying the new one, they can apply for a refund of the higher SDLT rate part of their Stamp Duty bill.

New guidance from HMRC confirms that under exceptional circumstances, taxpayers will still be able to apply for a refund if:

- they bought a new home on or after 1 January 2017;
- have been unable to sell their previous home within 3 years; and
- the delay is due to events that are outside the taxpayer’s control.

The guidance specifically states that this may include delays due to the outbreak of the coronavirus (COVID-19) pandemic or due to an action taken by a public authority, preventing the sale.

https://www.gov.uk/guidance/stamp-duty-land-tax-buying-an-additional-residential-property#history

Administration

Firewall issue – late appeal allowed

Summary – Failed email delivery meant that a notice to serve an appeal was invalid but the late appeal was allowed due to the size of the debt and the fact that the case was arguable and had reasonable prospect of success.

On 12 April 2013, following an investigation, HMRC issued closure notices for 1999/00 and 2002/03 and discovery assessments for 2000/01, 2001/02, 2004/05 and 2005/06 assessing additional tax totalling nearly £209,000 together with a penalty assessment of £177,000.

In February 2015, after an unsuccessful internal review by HMRC, Jeffrey Ashfield's accountant claimed to have filed an appeal with the First Tier Tribunal by email. The email was more than 10MB in size, and so it is likely that was rejected by the tribunal's firewall. Although the accountant did not receive any acknowledgement from the tribunal, the Tribunal stated that it was unlikely that she realised that she should have received one.

In July 2015, after HMRC referred the amount due to its debt management department, the adviser notified HMRC by email that an appeal had already been lodged and included a copy of her email to the Tribunal. HMRC's firewall blocked this email as well but, once alerted by HMRC, the email was resent as four smaller emails.

All then went quiet until February 2019 when the debt management department told the taxpayer the debt had been released for collection. At this point, the accountant sent a letter to the tribunal, enclosing a copy of the email February 2015 email in which she had attempted to lodge the appeals, but also stating that HMRC were aware that this case "was taken to tribunal".

In August 2019, HMRC objected to the late notice of appeal.

Decision

The First Tier Tribunal identified two questions that they needed to address:

1. Was the email allegedly sent to the tribunal in February 2015 a valid appeal? and

2. If that was not a valid appeal, should the tribunal now grant permission for a late notification of an appeal?

The Tribunal stated that for a notice to be validly served by email, the Tribunal must have received it. The Tribunal confirmed that unless a person's email server can be treated as having that same duty of delivery as is ascribed to the Royal Mail, they did not believe that s7 Interpretation Act can be of direct relevance to the submission of an appeal by email.

The Tribunal stated that there is no legal guidance to rely on as to what might constitute service of a notice by email. Considering the facts presented to them, there was no evidence that the Tribunal's server had blocked the email, a known risk when sending emails. Particularly given that HM Courts and Tribunals Service guidance regarding how documents can be served on the courts contains a clear statement that the total size of an email, including any attachments, must not exceed 10 MB. In the Tribunal's view it was not sufficient for the notice to be received by the tribunal's server, even if that had actually happened. The Tribunal concluded that on the balance of probabilities, the notice of appeal sent on 20 February 2015 was not received by the tribunal service and so was not validly served.

The Tribunal moved on to consider whether they should allow the late appeal. The Tribunal commented that the length of the delay, at over four years, was extremely serious and significant but the reason for the delay was the belief that a valid appeal had been made on 20 February 2015, within the appropriate time limit.

However, the Tribunal stated that by denying permission for a late appeal, the potential prejudice to Jeffrey Ashfield was extremely serious, resulting in a debt of around £386,000 plus interest.

On this basis, taking into consideration the fact that the case was arguable and "not without any reasonable prospects of success," the Tribunal allowed the late appeal.

Jeffrey John James Ashfield V HMRC (TC7604)

LLP filing a corporation tax return

Summary – Despite not trading with a view to a profit, an enquiry into an LLP partnership return and subsequent closure notices were valid. The LLP should have filed a corporation tax return.

Inverclyde Property Renovation LLP and Clackmannanshire Regeneration LLP made claims for business property renovation allowance. HMRC opened enquiries into the LLPs' tax returns and subsequently issued closure notices concluding that the LLPs were not carrying on a business with a view to profit and not therefore entitled to claim the allowance.

The profits of an LLP are normally taxed on theirs members but if an LLP is not trading with a view to a profit, the LLP becomes liable to corporation tax. So what happens when an LLP submits a partnership return but HMRC challenges that return, concluding it was not carrying on a business, should not have submitted a partnership return and in fact chargeable to corporation tax?

The LLPs argued that HMRC had had no power to open an enquiry under the income tax self-assessment provisions and so there had been no valid closure notices under section 28B TMA 1970. They believed that any enquiry should have been made under the corporation tax self-assessment provisions (Sch. 18 FA 1998). The First Tier Tribunal agreed. No valid closure notices had been issued.

HMRC appealed to the Upper Tribunal, arguing HMRC had issued notices to file a partnership return as it was reasonable to assume that this was correct at the time.

Decision

The Upper Tribunal concluded that the TMA 1970 provisions were capable of applying to LLPs, even if when not carrying on business with a view to profit. Their decision was reached based on legislation as it currently stands and did not take any account of clause 101 of the Finance Bill currently before Parliament. If enacted, this clause would insert a new section 12ABZAA into TMA 1970 on the very issue and put beyond doubt that the legislation would work as designed and intended.

The Upper Tribunal remade the decision, holding that the closure notices were validly issued. Having done so, The Upper Tribunal remitted both appeals back to the First Tier Tribunal to deal with the allowances claim.

HMRC v Inverclyde Property Renovation LLP and Clackmannanshire Regeneration LLP [2020] UKUT 161 (TCC)

Deadlines

1 July 2020

- Bring back to work employees that have been furloughed under the CJRS
- Pay corporation tax for periods to 30 September 2019 if not liable to instalments

5 July 2020

- Apply for a PAYE settlement agreement for 2019/20
- Non-resident landlords' scheme forms NRLY and NRL6
- Report non-cash benefits not from a registered pension scheme

6 July 2020

- Forms P9D, P11D, P11D(b) for 2019/20 must be filed
- Provide employees with 2019/20 benefits information
- Taxed award scheme return deadline
- Details of redundancy packages 2019/20 exceeding £30,000 to HMRC
- File forms 42

7 July 2020

- Electronic filing and payment (if not deferred) of VAT for 31 May 2020
- Election to aggregate beneficial loans in 2019/20
- File forms EMI40

13 July 2020

- Must have claimed first grant under the Self Employed Income Support Scheme

14 July 2020

- CT61s for quarter ended 30 June 2020

19 July 2020

- Settle PAYE liabilities for month ended 5 July 2020 if by cheque
- Pay PAYE for quarter to 5 July 2020 if average monthly liability is less than £1,500
- Pay 2019/20 class 1A NI by cheque

22 July 2020

- PAYE liabilities if paid online

31 July 2020

- Last CJRS claims for the period to 30 June 2020
- Second 5% surcharge for unpaid 2018/19 balancing payments
- 2019/20 second instalment SA liabilities due, unless deferred due to COVID-19
- Tax credits claims to be finalised and renewed
- Companies House should have received accounts of:
    - private companies with 31 October 2019 year end
    - PLCs with 31 January 2020 year end

News

Reconsider Private Residence Relief (PPR) change in Finance Bill

As we know, the Finance Bill seeks to lower the PRR deemed final period of occupation exemption from 18 months to 9 months.

As a result of COVID-19 there is a real possibility that the housing market will remain slow for some time, with houses taking much longer to sell. If the planned change goes ahead, this could leave some sellers with an unexpected tax liability because it takes longer than nine months to sell.

The CIOT has asked the government to consider delaying this change in relation to home sales, to take account of the impact of coronavirus (COVID-19) on the property market.

Companies House – temporary document upload service

Companies House has developed a temporary service to upload certain documents to Companies House as an emergency response to the coronavirus outbreak.

Before COVID-19 companies were already able to and should continue to upload a number of documents including:

- filing accounts
- filing a confirmation statement
- making changes to a company
- closing a company

New temporary service

The new temporary system already allows a number of documents to be uploaded, with the plan being to expand the range of documents over the coming weeks and months.

Currently, the following can be uploaded using the new system:

- apply for rectification by the registrar of companies (RP02A and LL RP02A);
- apply for rectification of a change of registered address (RP02B and LL RP02B);
- object to a request to rectify the register (RP03 and LL RP03);
- apply to remove material about a director (RP06);
- apply to change a disputed registered office address (RP07 and LL RP07);
- correct a date of birth (RPCH01 and RP LLCH01).

Going forward, Companies House are looking to add a number of other uploads to the list, including the ability to:

- Give notice of restriction on the company's articles (CC01);
- Give notice of removal of restriction on company's articles (CC02);
- Change of company's objects (CC04);
- Change constitution by enactment (CC05);
- Change constitution by order of court or other authority (CC06).

After this, they are expecting to allow users to upload resolutions and articles of association through the service. Significant work is also underway to allow us to release a large number of insolvency forms to be submitted via the upload service in the following weeks.

https://www.gov.uk/government/publications/sending-your-forms-to-companies-house-during-the-coronavirus-outbreak/about-the-upload-service

Business Taxation

Extended CJRS (Lecture B 1201 – 23.12 minutes)

As promised, on 12 June, the Government published details of the furlough scheme extension that will run from 1 July to 31 October 2020.

To be eligible for this new scheme, employees must already have been furloughed for a full three weeks at some point before 30 June 2020; so any three week furlough period claimed for under the original scheme counts. The only exception to this is where employees are returning from family-related leave, like maternity leave.

Part time working

From 1 July, part-time working is allowed, and the three week furlough rule disappears so employers can bring back furloughed employees for any amount of time, but:

- employers must agree with their employee any new flexible furloughing arrangement and confirm that agreement in writing;
- the employer will be responsible for paying for the work done, including employers NIC and pension contributions;
- the grant will continue to be available for the hours not worked;
- from 1 August 2020, employers will start to take responsibility for some of the furloughed costs.

Employers can claim the grant for the furloughed hours when their employees are not working calculated by reference to their usual hours worked in a claim period. In summary, the grant will work as follows:

- July: Government pays 80% of wages up to a cap of £2,500 as well as employer National Insurance Contributions (ER NICs) and pension contributions for the hours the employee does not work.
- August: Government pays 80% of wages up to a cap of £2,500 for the hours the employee does not work but now employers pay the related ER NICs and pension contributions.
- September: Government pays 70% of wages up to a cap of £2,187.50 for the hours the employee does not work with the employer paying 10% up to £312.50. Employers pay the related ER NICs and pension contributions on the full 80%.
- October: Government pays 60% of wages up to a cap of £1,875 for the hours the employee does not work with the employer paying 20% up to £625. Employers pay the related ER NICs and pension contributions on the full 80%.

Dealing with the transition

From 1 July 2020, when the new scheme starts, claims must be split around 30 June 2020. Grant claims for periods up to 30 June 2020 must be submitted by 31 July 2020. It makes sense to submit all claims under the old scheme before considering claims under the new scheme.

Under the new scheme, claims cannot straddle a calendar month as each month rules change. It may be necessary for employers to split claims around the month end. Normally, claim periods cannot be shorter than a week but this is permitted where an employer is splitting period around a month end.

Claims cannot be made more than 14 days before the end of the date of the claim so 18 July 2020 for pay period to 31 July.

Reporting

From 1 July 2020, employers will need to report the usual hours and the hours worked, with the hours worked appearing on payslips. It would seem sensible to also show an employees furloughed hours.

HMRC guidance includes a number of worked examples for salaried, varied hours and zero hour employees.

Decisions to be made

Clearly, employers will need to consider which employees they will need going forward as after July, furloughing will start to cost the employer money. Inevitably, some employers will need to start thinking about redundancies that will open up a whole new can of worms.

https://www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme

https://www.gov.uk/government/publications/find-examples-to-help-you-work-out-80-of-your-employees-wages/examples-of-how-to-work-out-80-of-your-employees-wages-national-insurance-contributions-and-pension-contributions#fixed-hours

Amending claims under the CJRS **(Lecture B 1201 – 23.12 minutes)**

Employers and their agents have not always calculated the correct employee costs to claim under the Coronavirus Job Retention Scheme.

Too much claimed

The claim process has now been amended to enable over-claims to be corrected in a later claim period. When applying through the Coronavirus Job Retention Scheme application process, employers are now asked if they need to reduce the amount claimed in the current period to take account of a previous error. Where this is the case, HMRC will reduce the next claim to reflect this and employers should then keep a record of this adjustment for six years.

If the employer does not plan to submit any further CJRS claims, they to find out how to pay back any overclaimed amounts. HMRC will give them a payment reference number and directed to make a payment to HMRC Cumbernauld

Not enough claimed

Where an employer or their agent has under-claimed in a period, perhaps by omitting employer NICs costs or employer pension contributions, they must contact HMRC directly via the coronavirus technical line on 080 0024 1222. HMRC will be able to put through a claim for the additional grant due and provide a reference number to support this extra claim..

Where the employer has claimed the Employment Allowance (now £4,000 per year), any employer's NIC covered by that allowance should be excluded from the CJRS claim.

https://www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888764/Factsheet_for_SEISS_and_CJRS_schemes.pdf

Recovery powers for COVID-19 schemes **(Lecture B 1201 – 23.12 minutes)**

HMRC is not expected to penalise employers for genuine errors. However, new draft clauses to be included in the Finance Bill plan to give HMRC powers to recover payments to which recipients were not entitled to under both the Coronavirus Job Retention Scheme (CJRS) and the Self-Employment Income Support Scheme (SEISS).

The draft clauses give HMRC powers to raise a tax assessment equal to the amount to which traders and employers or were not entitled (or they have not used to pay furloughed employee costs).

Under the new rules HMRC will be able to make a company officer jointly and severally liable for any tax charge raised in relation to any CJRS payment.

Further, HMRC will be able to charge a penalty for any deliberate non-compliance.

In making grant payments, HMRC has relied on both employers and the self-employed to follow the rules correctly. At this stage, it is not clear how much time and money HMRC will be given to making compliance checks to ensure:

- Employers calculated their CJRS grant correctly;
- Furloughed employees were not working up to the end of June;
- The self-employed satisfied the self- declared eligibility criteria.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888811/Taxation_of_coronavirus_support_payments_-_draft_explanatory_note.pdf

Employment allowance and the CJRS **(Lecture B 1201 – 23.12 minutes)**

Last month we mentioned the possibility of deferring when the Employment Allowance is claimed. The idea was supported by the ICAEW's Tax Faculty who stated that claiming the employment allowance later in the tax year, once the Coronavirus Job Retention Scheme had ended, appeared to be permitted by the legislation which does not require an immediate claim to employment allowance and allows claims to be backdated four years. The Tax Faculty did say that they had asked HMRC to confirm that this was an acceptable practice.

Lecturers on this service had received verbal confirmation from HMRC that deferring the allowance claim to a post furlough period was permitted. And when claimed the whole £4,000 was available.

After various HMRC updates on 12 June, it now seems that HMRC will not allow this practice. HMRC now say that employers can claim the Employment Allowance when they like but they need to either:

- not claim the employer NICs grant;
- reduce the grant claimed to take account of the Employment Allowance;
- contact HMRC via the employer helpline to restrict the value of their Employment Allowance claim.

The guidance states that attempting to get relief for the same NIC costs twice is a fraud and may result in claims being investigated.

https://www.gov.uk/guidance/calculate-how-much-you-can-claim-using-the-coronavirus-job-retention-scheme#employallow

SEISS extension **(Lecture B 1201 – 23.12 minutes)**

This first payment under this scheme allowed eligible self employed traders and partners in a partnership to claim a taxable grant worth 80% of their average monthly trading profits, paid out in a single instalment. We were initially told that the payment covered 3 months' worth of profits, and it was capped at £7,500. Anyone who is eligible and wants to make a claim under the scheme must do so on or before 13 July 2020.

As we know, this scheme has now been extended allowing eligible self employed and partners in a partnership to apply for a second grant. Provided that their businesses have been adversely affected by COVID-19, they can claim for the second grant even if they did not make a claim for the first grant. In their guidance, HMRC has included some examples of when this might apply. Unfortunately, the second grant has the same eligibility criteria as the first, so if an individual was ineligible for the initial grant, they are also ineligible for second.

Under the second grant, eligible individuals will be able to apply in August for a grant calculated as 70% of the average monthly trading profits, paid in a single instalment covering a further 3mths' worth of profits, capped at £6,570 in total.

Although the eligibility criteria for the second grant are the same as the first, there seems to be some confusion over the period that is covered by the two grants. With the initial announcement of the scheme on 26th March 2020, together with the Coronavirus Job Retention Scheme operating in March, many assumed that the first grant covered the three months, March, April and May. Indeed, it seems that HMRC were confused over the period covered as it has been reported that an HMRC webinar run on 18th June told potential claimants that the second grant applied to June, July and August. However, guidance clearly states that claims for the first grant can be made up until 13 July, and that the second grant applies for businesses that have been adversely affected on or after 14 July 2020. So it seems that the first grant is available to businesses adversely affected up to 13 July 2020, and the second grant is available to businesses affected after that date. All other eligibility criteria remain the same.

https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme

https://www.gov.uk/guidance/how-different-circumstances-affect-the-self-employment-income-support-scheme#adversely-affected-examples

Redundancy (Lecture B1203 – 14.05 minutes)

With the gradual phasing out of the job retention scheme from 1 July 2020, employers will need to assess their post lockdown staffing requirements and many redundancies are expected.

When employers are considering 20 or more redundancies they will need to follow a collective consultation process. As part of this process they must notify the Redundancy Payment Service (RPS) via Form HR1 <u>before</u> a consultation starts. This process must start no later than 30 days before first redundancy if 20 – 99 proposed redundancies or 45 days before first redundancy if 100 or more redundancies. There are unlimited fines for failure to notify the RPS.

There is no requirement to notify RPS if < 20 proposed redundancies.

Legal advice should be taken when considering redundancy and the lawyers will be able to advice on the consultation process. As an outline, the employer will need to consult with Union representatives or elected staff representatives or directly with staff if neither present. The employer would need to provide them with the required redundancy information in writing eg reasons, numbers, selection plans, dates etc. The employer must respond to questions on a timely basis and then issue notifications of redundancies when conclusions have been reached.

The business must make a decision as to who to make redundant but the decision must be fair so as to avoid unfair dismissal claims. Fair selection policies could include:

- Skills, qualifications and aptitude;
- Standard of work and/or performance;
- Attendance;
- Disciplinary record.

Employers must give their staff due notice of their redundancy. This would normally be the longer of their contractual notice period and the statutory notice period. The statutory notice period is at least a week if employed for up to two years or if over two years a week for each year of employment up to a maximum of 12 weeks.

Employers may not be in a position to recall furloughed employees so many may start the consultation procedure during furlough. Where notice is given in the furlough period the government should continue to cover 80% of the furloughed pay but the employer must top up to 100% as the employee is entitled to their full pay during their notice period. The grant will not cover any PILONs, accrued holiday pay or statutory redundancy payments.

To be eligible for statutory redundancy pay an individual must:

- Be an employee with a contract of employment;
- Have at least 2 years continuous service;
- Have been dismissed, laid off or put on short term working.

The statutory redundancy pay rates are based on complete years of employment counting back from the date of dismissal.

- Half a week's pay for each full year of employment up to their 22nd birthday;
- A week's pay for each full year of employment after their 22nd birthday;
- 1.5 weeks' pay for each full year of employment after their 41st birthday.

The length of service is capped at 20 years and the weekly pay is capped at £538 (£560 in Northern Ireland). Employers can pay more if they wish.

Employees do not pay tax on their first £30,000 of redundancy pay. And they do not pay national insurance on any redundancy pay. Employers pay national insurance on redundancy pay > £30,000.

PILONs and accrued holiday pay are taxable and subject to NIC.

The statutory redundancy payments might make some employers insolvent and in this instance they should contact the Insolvency Service's Redundancy Payments Service. Loans are available where the employer is a viable concern.

Where employers are insolvent and unable to continue trading, employees can claim their notice pay, accrued holiday and statutory redundancy pay from the government.

Treatment of contract termination payment

Summary – A £1 million payment received by a partnership was payment to cancel a client's management training programme taxable as partnership trading receipts rather than a capital payment for the loss of a proprietary performance management system.

Kieran Looney, was the nominated partner in Kieran Looney Associates.

The partnership provided a management training programme for Trafigura's senior management under a three year contract that ran from 14 January 2009. The contract provided for:

- an annual fee of £3 million to be paid for each of the three years of the contract;
- payment of a non-refundable deposit of £2.4 million immediately on signing the contract and a further 600,000 on 1 August 2009.

The contract covered the initial part of the curriculum and three years' subsequent use of 'Materials' on licence. During the three-year contract, the 'Materials' remained the absolute property of the partnership. However, provided that the entire three-year program was completed and the contract's early termination provision was not invoked, Trafigura would be granted a lifetime licence over the Materials at no extra cost.

As things turned out, Trafigura gave notice of early termination less than a year into the program and paid the £1 million early termination fee to Kieran Looney Associates on 29 October 2009.

Kieran Looney argued that this fee was capital compensation received for the continued use of the intellectual property, the unique computerised management performance system, which Trafigura continued to use, even after the contract had been terminated. He argued that the early termination clause term in the agreement was designed to compensate him for that use, as he realised that once the system was in place it would be very difficult to ensure it was not used by Trafigura after the contract terminated.

HMRC disagreed, arguing that the payment was taxable trading receipts.

Decision

The Upper Tribunal agreed with the First tier Tribunal's decision. The payment was compensation for lost revenue from the three-year contract being terminated early. As such, it should be treated as trading income. There was no evidence, in the contract or otherwise to support Kieran Looney's argument.

In addition, Kieran Looney had argued that the £3 million paid prior to the contract being terminated, were not partnership trading receipts but rather trading receipts of a company that he owned. He claimed that there was an unwritten agreement between the partnership and company to transfer the income and expenses under the Trafigura training contract. Again, with insufficient evidence, this claim was denied.

The appeal was dismissed.

Kieran Looney; Kieran Looney Associates v HMRC [2020] UKUT 0119 (TCC)

FTSE 100 betting

Summary – Claims for 'trading' loss relief on contracts dependent on movement in the FTSE 100, linked to interest-free loans were rejected as the taxpayers were not carrying on a trade, and nor were the activities run on a commercial basis.

The taxpayers entered into 'Pendulum contracts' with Pendulum Investment Corporation, a company incorporated in the Seychelles company. The contracts were a simple bet that the FTSE 100 would have moved up or down from its level at the date of the contract by a specified range of points at specified dates in the future.

The contracts consisted of phases with the first phase ending seven days after the date of the contract. Subsequent phases ended two, seven, fifteen and twenty five years after the date of the Pendulum Contract. If the taxpayer was unsuccessful at the end of the first or any subsequent phase, save the last, the Pendulum Contract continued to the next phase. If the FTSE 100 was above or below the relevant pre-determined values at the end of a phase, Pendulum Investment Corporation would pay the taxpayers a profit based on percentages set out in the contract. If Pendulum Investment Corporation was required to pay an amount at the end of any phase then the Pendulum Contract terminated. If it had not ended before, the contract would end 25 years after its start date.

To fund their activities, the taxpayers obtained loans from Bayridge Investments LLC, a Delaware company. The loans were interest free, unsecured loans and repayable at the end of any phase of the contract where the taxpayer became entitled to a payment from Pendulum Investment Corporation. If the taxpayer was unsuccessful in every phase, they were repayable in 50 years (25 years after the end of the relevant contract). By the time of repayment, the value of the amount originally advanced would have been eroded by 50 years' inflation.

All three taxpayers were unsuccessful in the first two phases of some or all of their contracts creating, in their opinion, losses that could be claimed against other taxable income, arguing that the losses arose from their trading activity as derivative traders.

HMRC argued that the arrangements did not constitute a trade and ultimately issued closure notices refusing the taxpayers' loss relief claims.

The taxpayers argued that they entered into the Pendulum Contracts in the course of existing trades in derivatives.

Decision

The First Tier Tribunal concluded that the Pendulum arrangements were a tax avoidance scheme.

The way the arrangements were marketed and economics of the scheme showed that the taxpayers did not and never would have any liability to repay the purported loans.

Prior to these contracts, the taxpayers had been buying and selling low value derivatives. The First Tier Tribunal concluded that this activity did not amount to ongoing trades.

The taxpayers’ aim with these large contracts was solely or mainly to generate significant tax losses to set against their other taxable income. The Tribunal commented on the taxpayers’ casual attitude to due diligence, supporting documentation as well as risk indicated that these were speculative contacts that were not carried on on commercial basis, nor with a view to a profit. The Tribunal dismissed the appeals stating that 'activities that are pure speculation, without the application of a profit-making system, may not amount to the carrying on of a trade'.

Although not needed, the First Tier Tribunal went on to consider whether, if the Pendulum Contracts had formed part of a trade, were the profits and losses of that trade correctly calculated in accordance with GAAP?

The Tribunal found themselves in the difficult position of having to choose between two conflicting expert opinions. As they could not decide which of the two opinions was more likely to be the correct accounting treatment, the taxpayers failed to discharge the burden of proving that they calculated their losses in accordance with GAAP and so the Tribunal concluded that the losses had not been calculated under GAAP.

Rodney Sherrington, Paul Waite, John Metcalfe v HMRC (TC07629)

Court of Appeal denies derivatives loss

Summary – The £39m accounting loss from the derecognition of a derivatives contract was denied as, although it was a loss, it did not ‘fairly represent’ the loss that had actually arisen.

The case concerned the application of the derivative contracts rules to a scheme involving the issue of bonus shares that carried a right to substantially all of the returns on certain derivatives.

Union Castle entered into a scheme to reduce the tax impact of transferring derivatives to its parent by retaining the derivatives but issuing bonus shares which effectively transferred the economic benefit of the derivatives to its parent.

Consequently, Union Castle derecognised 95% of the value of its derivatives in its GAAP-compliant accounts resulting in an accounting debit that was then claimed as a loss under the derivative contracts rules. The central provision at the relevant time was FA 2002 Sch 26 para 15.

HMRC disallowed Union Castle’s claimed deduction.

Decision

The key issues argued before the Court of Appeal were:

1. Whether the accounting debit resulting from the derecognition constituted a 'loss' for tax purposes?

2. If it was a loss, did it 'arise from' the derivative contracts? and

3. Did the loss 'fairly represent' a loss arising from derivative contracts?

The court agreed with the Upper Tribunal that:

- putting the 'fairly represents' requirement to one side, the derivative contract loss was determined by accounting entries and so there was a loss; and
- it was not tenable to say that the loss arose from the derivative contracts as opposed to the issue of the bonus shares, because the derecognition and the issue of the bonus shares were inseparable.

Contrary to the Upper Tribunal, the Court of Appeal found, that the 'fairly represent' requirement for deductibility was not met, being influenced by the recent judgments on the equivalent 'fairly represent' wording in the loan relationships rules in GDF Suez [2019] 1 All ER 528 and Smith & Nephew [2020] EWCA Civ 299.

The court followed GDF Suez, concluding that it was a separate and overriding condition that had to be satisfied in computing the debits and credits to be brought into account. The debit required to be made in Union Castle's accounts by the derecognition did not, as a matter of legal analysis or economic reality, fairly represent a loss to Union Castle for the purposes of para 15: Union Castle had lost no asset nor incurred any liability other than a liability to pay a dividend; and the payment of a dividend was not a loss, rather the distribution of profits.

Finally, on the 'gateway' issue that was relevant only to the Ladbrokes appeal (heard together), the court agreed with the Upper Tribunal that (at the relevant time) a debit or credit recognised in equity was to be treated in the same way as a debit or credit that was brought into account in determining the company's profit or loss, and was, therefore, subject to the requirements of para 15.

The appeals were dismissed.

The Union Castle Mail Steamship Company Limited v HMRC; Ladbrokes Finance Group Plc v HMRC [2020] EWCA Civ 547

Adapted from the case summary in Tax Journal 1 May 2020

Corporate leasing partners

The two appellant companies entered into a series of complex transactions under which they became partners in a number of leasing partnerships. They incurred costs in acquiring their interests in the partnerships and subsequently made further capital contributions to them.

Shortly afterwards, the partnerships sold off their assets, receiving large sums of money that generated profits in their hands. Much of the money was then paid over to the appellants.

There were three issues for the court to consider:

1. Were the capital contributions deductible in computing the taxable profits of the solo financial trades carried on by the appellants?

The court agreed with the Upper Tribunal that they were not incurred wholly and exclusively for the purposes of those trades. The contributions were made at least partly for the purposes of the partnerships' businesses, enabling them to buy assets and pay off loans. They were therefore not allowable deductions in the appellants' financial trades.

2. Was HMRC entitled to argue for adjustments to the appellants' self-assessments which were higher than the adjustments which had been contained in the closure notices given to the appellants?

   The alternative arguments had been outlined in covering letters attached to the notices. The court upheld the First Tier Tribunal's decision that HMRC was entitled to argue for the adjustments. It was for the First Tier Tribunal to decide what is the subject matter of an appeal and to determine whether the context of the closure notice and the surrounding circumstances demonstrates that the subject matter is broader than the particular conclusion and adjustments in the closure notice. In such circumstances, HMRC can put forward arguments, even if they result in a larger amount of tax provided that they deal only with the same matters identified in the closure notice.

3. Was the 'no double taxation principle' applied to exclude from the profits of the appellants' financial trades amounts which were also treated as income of the separate trades which the appellants were deemed to carry on as partners in the partnerships?

   The court held that the principle did apply. In reaching this decision, the court ruled that HMRC should not be allowed to introduce new arguments at the hearing which were different from those presented in the closure notice, to the First Tier Tribunal to the Upper Tribunal and in their written submissions before the hearing. In essence, what their new argument amounted to was that if they were to start from scratch in deciding how to tax the appellants they would have taken a completely different approach. It was too late to start from scratch at the hearing before the Court of Appeal.

Investec Asset Finance Plc and another v HMRC [2020] EWCA Civ 579

Adapted from the case summary in Tax Journal

Corporation tax by instalments (Lecture B1204 – 13.58 minutes)

The rules for payment by instalments are found in The Corporation Tax (Instalment Payments) Regulations 1998 (SI 1998/3175 as amended).

Companies with a corporation tax liability of no more than £10,000 in a 12-month accounting period (reduced pro-rata for short periods) do not have to make instalment payments.

Each instalment (in a 12-month period) is 25% of the expected UK corporation tax liability for that accounting period.

Interest is charged on each instalment on the difference between the actual instalment that was paid and the amount that should have been paid based on the final agreed liability. The interest is a tax-deductible expense for the company.

If a company's profits exceed £1.5 million pa, the instalments are due:

1. By the 14th day of 7th month of accounting period;
2. By the 14th day of 10th month of accounting period;
3. By the 14th day of 1st month of following period;
4. By the 14th day of 4th month of following period.

'Profits' for this purpose are the total profits chargeable to corporation tax plus exempt dividends received, other than dividends from 51% related companies.

The profits are divided by the number of "51% related companies" (as defined by s273F CTA 2010 and used when dividing the upper and lower profit limits between companies).

S.1119 CTA 2010 defines a "51% related company". Broadly, 51% means holding greater than 50% of the ordinary share capital or being entitled to greater than 50% of the profits available for distribution, or being entitled to greater than 50% of the assets available for distribution in the event of a winding up.

Related companies

Two companies A and B are related if:

a) A is a 51% subsidiary of B;
b) B is a 51% subsidiary of A; or
c) Both A and B are 51% subsidiaries of the same company.

The companies are related for the entire accounting period for tax purposes, even if they were only actually related for a part of it.

Dormant companies are ignored, as are pure parent companies with no management expenses that merely hold investments in 51% subsidiaries where their only income is dividends from the subsidiaries which is then distributed to its shareholders. This means that such a company cannot make other payments (such as to a charity).

Foreign companies are included (since s273F does not specifically exclude them).

The previous concept of 'associated companies' no longer exists and therefore, if a client who is an individual controls two separate companies, they are not related.

Therefore, if one of the companies had a profit of £1.4 million and the other had profit of £1.3 million chargeable to corporation tax, neither would be required to make instalment payments of their corporation tax liability.

Very large profits

Statutory Instrument 2017 No. 1072 - The Corporation Tax (Instalment Payments) (Amendment) Regulations 2017 amended the Instalment Payments regime for companies with very large profits for accounting periods beginning on or after 1 April 2019.

If profits exceed £20 million p.a. (again divided by the number of 51% related companies), instalments are accelerated so that all of the estimated corporation tax liability is paid within the accounting period. This requires careful cash management and amounts are due:

1. By the 14th day of 3rd month of the period;
2. By the 14th day of 6th month of the period;
3. By the 14th day of 9th month of the period;
4. By the 14th day of 12th month of the period.

Example 1

You provide corporation tax compliance support for ABC Limited, a UK company which is a subsidiary of a multi-national group.

You have established from the parent company that there are 124 group companies which are 51% related companies of the parent, including ABC Limited.

In its year ended 31 December 2020, ABC Limited has expected profits chargeable to corporation tax of approximately £100,000 and did not receive any dividend income, similar to previous years.

Should the company have pay tax by instalments for this accounting period?

Analysis

The regular profit limit will be no £1.5 million divided by 124 companies, i.e. £12,097.

The very large profit limit will be £20 million divided by 124 companies, i.e. £161,290.

ABC Limited's profits are large but not very large.

As ABC Limited's tax liability is £19,000, i.e. it exceeds £10,000, it should pay instalments of £4,750 by 14 July 2020, 14 October 2020, 14 January 2021 and 14 April 2021.

Example 2

You have two other UK resident clients, DEF Limited which is 75% owned by ABC Limited.

ABC Limited is 60% owned by XYZ Inc, an American company, which has over 100 non-UK 51% related companies.

ABC Limited expects profits chargeable to corporation tax of £300,000 in its year ended 31 December 2020 and dividends from DEF Limited of £100,000.

DEF Limited expects profits chargeable to corporation tax of £900,000 and will not receive any dividends.

Both companies have had similar profits in previous years.

Are either of the companies required to make instalment payments and, if so, how much and when are these due?

Analysis

The profit limits for instalment payments of ABC Limited will take into account the worldwide group as it is a 51% related company of all these companies (being commonly 51% held by the same parent).

Its limits are therefore a maximum of (£1.5 million ÷ 101 companies) £14,851 and (£20 million ÷ 101 companies) £198,020.

Its relevant profits are £300,000 (the dividends from DEF Limited are ignored), therefore it is liable to pay corporation tax of (19%) £57,000 by 4 instalments of £14,250 on:

1. 14 March 2020;
2. 14 June 2020;
3. 14 September 2020;
4. 14 December 2020.

DEF Limited is not a 51% related company of XYZ Inc as XYZ Inc only owns 45% (60% x 75%) of DEF Limited.

But DEF Limited is a 51% related company of ABC Limited so its profit limits are £750,000 and £10 million respectively.

With expected profits of £900,000, DEF Limited must pay its estimated corporation tax of (19%) £171,000 in 4 instalments of £42,750 on:

1. 14 July 2020;
2. 14 October 2020;
3. 14 January 2021;
4. 14 July 2021.

Conclusion

If acting for a UK subsidiary of a multi-national group, it is vital to establish the number of worldwide 51% related companies accurately, in order to advise the company on when its corporation tax payments are due.

As can be seen above, in a large global group, profits do not have to very large to trigger payments in months 3, 6, 9 and 12 of the company's accounting period.

Contributed by Malcolm Greenbaum

Share options and accounting debits

Summary –Debits recognised in the accounts in relation to share options were also allowed for tax purposes, even though HMRC considered those debits were not expenses incurred wholly and exclusively for the purposes of the trade.

The taxpayer companies were wholly-owned subsidiaries of Smith & Williamson Holdings Ltd (SW) and employed staff who they made available to other group companies in return for a fee. SW established an employee benefit trust which granted options to staff employed by the taxpayer companies to acquire shares in SW.

When options were granted to the employees, the subsidiary companies would recognise in their accounts a capital contribution received from SW equal to the fair value of the options. This indebtedness to SW, the parent company, was settled on a monthly basis, with the cost passed on to the other group companies which used the services of the taxpayer companies' employees, as part of the fee for those services. This recharge was treated as a reducing the capital contribution.

The principal question was whether the debits to the accounts of the taxpayer companies, required by generally accepted accounting practice (GAAP) and resulting from the grant to the employees by the EBT of options to acquire shares in SW, were allowable as deductions in the computation of their profits for the purposes of corporation tax.

The First Tier Tribunal had allowed the companies' appeals against closure notices disallowing the deductions and the Upper Tribunal had dismissed HMRC's appeal.

Decision

Dismissing HMRC's further appeal, the Court of Appeal upheld the Upper Tribunal decision. The court noted that CTA 2009 required the profits of a trade to be calculated in accordance with GAAP, subject to any adjustments required by tax law. The debits in the accounts for the options were required by IFRS 2 and would be treated as incurred wholly and exclusively for the purposes of the taxpayer companies' trade, i.e. being the provision of their employees' services to other group companies at a profit.

HMRC v NCL Investments Ltd and other [2020] EWCA Civ 663

Adapted from case summary in Tax Journal

VAT

Option to tax extended again (Lecture B 1201 – 23.12 minutes)

HMRC has further updated its guidance to cover the temporarily extended 90-day time limit to notify a decision to opt to tax. This now applies to decisions made between 15 February and 31 October 2020 .

https://www.gov.uk/guidance/changes-to-notifying-an-option-to-tax-land-and-buildings-during-coronavirus-covid-19

Under-declared fuel sales

Summary – With no means of calculating a best judgment alternative, the company's appeal against HMRC's assessment of nearly £700,000 for unrecorded fuel sales was allowed.

FW Services Ltd operated a petrol station in Northern Ireland. In April 2016, HMRC contacted the company to conduct a VAT audit of the company's business. Officers made a number of invigilation visits to the petrol station. Four of the five visits were carried out during the morning with one in the afternoon. Three of the visits were carried out on a Thursday and no visits were carried out at the weekend. Following these visits, HMRC raised assessments for the periods 08/15 to 10/17 totalling £686,054 for under-declared fuel sales. HMRC's assessment implied under-declared sales of over £4 million, so effectively they were claiming that more than £5,000 of cash takings each day was not reported.

FW Services Ltd denied that it owed any VAT to HMRC and claimed that their submitted returns were accurate and represented their true trading figures. The company claimed that HMRC's assessment was "grossly inaccurate" and was "baseless."

Decision

The First Tier Tribunal considered the basis on which HMRC had arrived at their assessment and were not impressed.

In the absence of any evidence that the company's unrecorded receipts averaged an additional amount of over £5,000 per day, the Tribunal concluded that the assessment was excessive. The Tribunal noted that HMRC produced no evidence and made no claim that the company operated a separate bank account for unrecorded cash sales.

Arriving at the VAT that was assessed, the rate had been calculated on the basis that there were sales at a consistent rate of fuel sold in each hour of the day, irrespective of the time of day or indeed the day of the week. The only adjustment made to the rate was for Sunday sales that were estimated at precisely half of weekday sales rate; no explanation was given as to why this was appropriate. When asked why evening and weekend visits had not taken place as part of the investigation, HMRC officer's stated that they could not do field work in the evenings and weekends because of restrictions on overtime working.

The appeal was allowed.

FW Services Ltd v HMRC (TC07636)

Annual payment: No prompt payment discount

Summary – The difference in price for paying 12 months of telephone line rental upfront, rather than the higher cost of paying monthly throughout the 12 month period, did not amount to a prompt payment discount.

Prior to 1 May 2014, para 4, schedule 6 VATA 1994 provided that where goods or services were supplied on terms permitting for a prompt payment discount, the consideration for VAT purposes should be reduced by the amount of the discount, irrespective of whether the discount was actually claimed.

In the period 28 August 2012 to 30 April 2014, Virgin Media Limited customers could choose to pay for their fixed line rental in one of two ways:

- Monthly payments of £13.90 for 12 months; or
- An upfront payment of £120 covering a 12 month.

Virgin Media Limited submitted its VAT returns on the basis that para 4, schedule 6 VATA 1994 applied, deeming the monthly customer consideration for VAT to be £10 (£120/12) rather than the £13.90 per month they actually paid.

Not surprisingly, HMRC disagreed and assessed on the basis that £13.90 was the appropriate VAT consideration to use..

Virgin Media Limited appealed but the First Tier Tribunal dismissed the appeal, finding that the supplies to monthly customers were not “supplied on terms allowing a discount for prompt payment”. The supply to monthly customers and the supply to upfront customers were different supplies on different terms.

Virgin Media Limited appealed to the Upper Tribunal.

Decision

Examining the contracts, the Upper Tribunal noted that:

- Upfront 12 month payers paid a fixed amount for the 12-month period, with no refund available if the contract was terminated early;
- Monthly customers could terminate their contract by giving 30 days' notice and Virgin Media Limited could vary the monthly price. Further, for a monthly customer to switch to an annual payment, they could only do so by making a full £120 advance payment.

The Upper Tribunal found that provision of fixed line rental by paying £120 in advance rather than as 12 monthly payments of £13.90 were subject to two different contractual arrangements, with different terms and so also, different supplies. Consequently, the annual customer price could not be regarded as a prompt payment discounted price for the monthly customers.

There was no discount for prompt payment and the appeal was dismissed.

Note: The prompt payment discount provisions that applied in this case were amended from 1 May 2014. Today, a reduced consideration for VAT purposes only applies where the terms of the discount are actually met.

Virgin Media Limited v HMRC [2020] UKUT 0100 (TCC)

Partial exemption – link between production costs and catering

Summary – With no direct and immediate link between the costs of staging an opera and the catering provided during performances, none of the production cost input tax could be attributable to the taxable catering supplies.

Tickets bought to attend an opera or ballet are exempt supplies under Group 13 Schedule 9 VATA 1994, meaning that if there are no other directly linked taxable supplies made, input tax on the costs of staging performances are not recoverable.

In this case, it was common ground that the Royal Opera House made a number of taxable supplies such as programme sales and production specific commercial sponsorship to which the production costs had a direct and immediate link. As a result of that link, the Royal Opera House was able to recover a proportion of the input tax associated with the production costs.

The dispute in this appeal related to the catering supplies made on the night of performances. The Royal Opera House argued that there was a direct and immediate link between the production costs and the taxable catering supplies of the Royal Opera House in its bars and restaurants before a performance and during the interval as well as sales of ice cream.

The First Tier Tribunal had agreed with the Royal Opera House and so the Royal Opera House was entitled to recover a proportion of the input tax incurred on production costs.

HMRC appealed to the Upper Tribunal.

Decision

The Upper Tribunal concluded the First Tier Tribunal had erred in their decision as it was incorrect to argue the performances, and so also production costs, were essential to the operation of the restaurants, bars and ice cream sales.

The staging costs were not a cost for making catering supplies, and so there was no direct and immediate link. Yes, there was an economic link between the costs of staging performances and the catering supplies but that was not enough.

HMRC's appeal was allowed.

HMRC v Royal Opera House Covent Garden Foundation [2020] UKUT 132 (TCC)

Debts over six months old

Summary - The "relevant date" for input tax recovery relating to supplies where the consideration remained unpaid had not been reached and so the input tax was reclaimable.

Premspec Group Ltd, Dean Electrical Wholesale Ltd and Swanson Mackay & Co Ltd were all UK companies under the control of Mr Boseley. Dean and Swanson were established wholesalers of electrical goods. Premspec was incorporated in October 2012 to operate as a distributor in its own right, importing electrical goods from Europe and China and selling to UK wholesalers (effectively, to companies like Dean and Swanson).

Suppliers in China demanded upfront payment for electrical items that could take six months or more to arrive. Premspec needed large quantities of stock to meet customers' needs but, as a start up business, had relatively weak credit status early on. Consequently, Mr Boseley, used Dean and Swanson to acquire the stock and then make those goods available to Premspec Group Ltd, but without requiring immediate payment.

Invoices were raised to reflect the intercompany stock transfers with each invoice bearing a date after the words "tax point", indicating when the invoice was issued. None of the invoices indicated the date on which the consideration was payable and there was no other supporting documentation confirming the settlement dates. As Mr Boseley controlled the three companies involved, he did not think it necessary to document the payment terms.

HMRC disallowed the input tax claims arguing that the consideration remained unpaid after six months after the date of the supply.

Under s26A VATA 1994, for input tax to be recoverable invoices must be settled before the 'relevant date', which is six months from the later of the date of supply or the date on which the sum became payable. The Premspec Group Ltd argued that there was an informal arrangement between the related companies that the payment was due within 10 years of one of Premspec Group Ltd commencing to trade and so the invoices were not yet payable.

Decision

The First Tier Tribunal found that an informal credit agreement existed between the companies, allowing The Premspec Group Ltd to settle invoices at some point up to ten years from starting to trade. This meant that the correct payment date could be up to ten years from trade commencing. The six month limit had therefore not been breached.

The appeal was allowed.

The Premspec Group Ltd V HMRC (TC07653)

Deferring VAT and Customs Duty

VAT payments

It seems a long time now since the government announced the possible deferral of VAT payments. As a result of COVID-19, UK businesses are eligible to defer their VAT payments for three months from 20 March 2020 until 30 June 2020. Remember, there is no need to apply for this deferral as it will automatically apply. Businesses will be given until the end of the 2020 to 2021 VAT year to pay any liabilities that have accumulated during the deferral period. HMRC will continue to process VAT refunds and reclaims as normal. Businesses were advised to cancel their VAT direct debits to HMRC so preventing payments being taken automatically.

HMRC has confirmed to the ICAEW that where taxpayers wanted to defer VAT payments due between 20 March 2020 and 30 June 2020, but did not manage to cancel their Direct Debit in time, they can claim a refund.

Unless there is an announcement to extend the VAT deferral period, VAT payments will recommence from 1 July 2020 and direct debits should now be restarted as the 30 June deadline is passed.

Import VAT and Duty Deferment Accounts

HMRC's initial view was that import VAT and Customs Duty was payable as usual, but by 15th April the position had changed. Duty Deferment Account holders who were experiencing severe financial difficulties as a result of the COVID-19, and who were unable to make payment of deferred customs duties and import VAT on 15 April, May, and June could contact HMRC for approval to an arrangement for extended period for making full or partial payment without having their guarantee called upon or their account suspended.

The CIOT has produced a useful FAQs summary explaining how this deferral process works. Prior approval is from HMRC is needed and so the account holder should email the Central Deferment Office at cdoenquiries@hmrc.gov.uk, or phone them at 03000 594243. Alternatively they can make contact through the COVID-19 helpline on 0800 024 1222.

Separate arrangements are available for deferred excise payments. Businesses unable to pay excise duty owed to HMRC due to COVID-19 should contact the COVID-19 helpline to on 0800 024 1222 discuss an enhanced Time to Pay arrangement.

HMRC can only arrange Duty Deferment extended payment arrangements with the Duty Deferment Account holder. Where a customs agent or intermediary who holds a DDA is granted an extended payment arrangement, HMRC would expect the agent to pass on the benefit of the additional time to pay to the importer if the payment arrangement was agreed on the basis that they've been unable to secure payment from an importer.

https://www.tax.org.uk/policy-technical/technical-news/potential-extend-payment-period-customsimport-vat-duty-15-may

R&C Brief 7 (2020) (Lecture B 1201 – 23.12 minutes)

R&C Brief 7: Domestic reverse charge for construction services brief has announced that, due to the impact of COVID-19 on the construction industry, the introduction of the domestic reverse charge for construction services will be delayed from 1 October 2020 until 1 March 2021. From this date, a reverse charge will be needed on:

- supply of specified CIS building and construction services;
- goods supplied with those services.

It will apply to all types of contractor (gross, 20% or 30% contractors) where services are reported through the CIS system.

It will only apply to supplies between VAT registered sub-contractors and VAT registered contractors with one important exception.

However, the reverse charge will not apply when invoicing an end user so anyone who is not making an onward supply of construction services. This will include property developers who are looking to sell the property rather than making an onward supply of construction services. This end user status must be confirmed in writing.

Example

A VAT registered subcontractor invoices a VAT registered main contractor £10,000 on 31 March 2021 and that can include materials,

The sub-contractor must raise an invoice for £10,000 with no VAT charged, include narrative on the invoice “Reverse charge: Customer to pay the VAT to HMRC” and also make a Box 6 entry of £10,000 on VAT return

The main contractor must include the following entries on their VAT return:

- Box 1 Include £2,000 domestic reverse charge;
- Box 4 Reclaim the input VAT of £2,000 if fully taxable but not if partially exempt;
- Box 7 Include the £10,000 net value.

If the job was a <u>lower rated</u> job, then VAT in Box 1 and 4 would be £500 calculated at 5%

Other points to consider

It is the contractor who needs to determine the correct rate of VAT, not the sub-contractor who will be raising the invoice.

Current MTD accounting software should have the facility to be able to deal with the CIS reverse charge at either 5% or 20% so that the correct VAT treatment will be automatically applied on the taxpayer’s invoice and VAT return. Clearly clients, or their agents, must ensure that these tax rates have been set up on their accounting system before any CIS reverse charge invoices are raised by the sub-contractor and input by the contractor.

Reverse charge supplies are excluded from The Flat Rate Scheme so it is best to come out of the scheme and revert to normal VAT accounting so clients can recover input tax.

The main problem for sub-contractors under this new reverse charge system is a possible cash flow issue. The VAT being charged under the old system is often treated as short term funding by sub-contractors but from 1 March 2021, this money will no longer be invoiced and collected by them, so they should plan for this shortfall, especially in light of the 31 March 2021 deferral payments that may well be due as a result of Covid-19. Agents must warn their clients if this is likely to be an problem for their clients. However, CIS exclusive suppliers will become repayment traders from 1 March 2021 and so could consider applying to submit monthly returns.

https://www.gov.uk/government/publications/revenue-and-customs-brief-7-2020-domestic-reverse-charge-vat-for-construction-services-delay-in-implementation

R&C Brief 8 (2020): hire purchase goods and VAT partial exemption

Following the CJEU decision in VW Financial Services (UK) Ltd C-153/17, businesses supplying goods on hire purchase should be allowed to recover input tax on their overheads where recovery is fair and reasonable. Where a business can evidence the use of its overheads in transferring the asset as well as making the supply of credit, there is an entitlement to recover a proportion of the VAT incurred on overheads. There is no fixed rate which can apply to this, because the proportion will vary according to the type of hire purchase agreement being provided and the specific arrangements in place.

Revenue and Customs Brief 8 (2020): change to partial exemption VAT treatment

5% VAT on builder services for dwellings (Lecture B1205 – 12.34 minutes)

Background

The 5% rate of VAT applies to some builder services carried out on residential properties. As a lot of income generated from residential properties is exempt from VAT (eg rental income), it is important that property owners are clear about when the 5% VAT rate might apply instead of the usual 20%. The rate applies to materials provided by the builder as part of his work, a further potential VAT saving.

Residential conversion projects

Builder services that relate to the conversion of a non-residential building into dwellings are subject to VAT at 5% rather than 20%.

Example of residential conversions:

- Office block is converted into apartments;
- Barn is converted into a house.

Example of project which does not qualify: A bungalow is built on land next to a farmhouse but the two properties can only be sold together as a single purchase – the bungalow fails one of the conditions of a 'new dwelling' – the building work is standard rated.

Legislation – VATA1994, Sch 7A, Group 6.

There is often concern amongst advisers that in the case of a conversion to dwellings, the builder must be given a signed certificate from the developer confirming the creation of dwellings – and this should be available to HMRC in the event of a compliance visit. This is not necessary – and is confirmed by VAT Notice 708, para 17.1, which states that certificates are only needed when 0% or 5% VAT supplies are being made in connection with a building used for a ‘relevant residential purpose’ (eg elderly persons home) or for a ‘relevant charitable purpose’ (eg a place of worship).

Note - the 5% rate never applies to ‘professional services’ such as architects, surveyors, project managers, solicitors – their services are always standard rated.

Existing dwellings

The 5% rate applies to construction services for an existing dwelling under 2 circumstances:

1. Change number of units - after the building work has been carried out, there is a different number of dwellings than when the project started eg a detached house is converted into two semi-detached houses or vice versa. For this purpose, the conversion of a house into HMOs falls within the 5% rate;
2. Property empty for at least two years - work is carried out on a residential property that has not been lived in for at least two years at the time when the work starts. The builder will need third-party evidence of the empty period eg council tax data, electoral register information etc.

Recent tribunal case

Gareth Bertram (TC7524) supplied construction services in relation to 25 residential properties that were assets of a separate property company that he owned. These properties were mainly semi-detached houses which had adjacent land capable of building another dwelling. The houses were converted into HMOs (Houses of Multiple Occupation) and, in 14 cases, a new dwelling was created on the adjacent land. In 11 cases, the existing property was extended to create bigger HMOs. The property company then rented out the HMOs via a letting agency.

The taxpayer’s approach was simple: he claimed that his work for his property company was subject to 5% VAT. This made his record-keeping simple ie there was no need to worry about which jobs might be subject to 0%, 5% or 20% VAT, as HMRC felt was the case.

HMRC’s position was more complicated:

- The conversion work to HMOs was subject to 5% VAT but Mr Bertram could produce no evidence that he had created HMOs so the work was standard rated;
- The extensions were subject to 20% VAT because the building had not been empty for at least two years;
- In the case of a new dwelling built on adjacent land, the work would be standard rated until the point when planning permission had been received from the local authorities, and then subsequent services could be zero-rated ie the conditions for a new dwelling had been met.

HMRC raised an assessment for £59,184 for periods 12/14 to 3/17 based on a straight-line apportionment between the 25 properties.

The decision

It was difficult for the taxpayer to prove the conversion of the house into HMOs had taken place because neither statutory planning consent nor building control approval was needed. But the judge accepted that £1,000 per property was spent on certain basic works, such as fitting locks to each bedsit, and this work should be subject to 5% VAT. The appeal was dismissed on all other issues.

Learning points

If your clients are involved with building work on residential property projects, there are two main situations:

Project 1 – create an extra new dwelling on adjacent land and improve the existing dwelling – building work will be zero-rated in relation to work carried out on the new dwelling. It must meet all of the conditions of a dwelling specified in VAT Notice 708, para 14.2. Work on the existing dwelling will be standard rated unless it has not been lived in for at least two years, in which case 5% VAT will apply.

Note – the new dwelling must be capable of being sold in its own right, ie not only as part of a package that includes the original dwelling.

Project 2 – convert an existing dwelling into two or more dwellings eg a house is converted into a ground floor and first floor flat. As long as each newly created dwelling meets the conditions of a dwelling, then 5% VAT will apply to builder services.

Contributed by Neil Warren