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CONTENTS

Personal tax

Employed doctor's expenses (Lecture P1381 – 21.03 minutes)

Summary – Expenses claimed by the taxpayer were largely denied as they were not incurred necessarily for use in performing the duties of his employment.

Dr Nduka worked in several NHS hospitals as an employed doctor. In December 2016 he was suspended from the medical register for four months by the General Medical Council due to misconduct.

In his 2016/17 tax return, he included a claim for employment-related expenses of £43,500 relating to the following items:

- £27,830 for legal fees relating to his suspension;
- £11,800 for accommodation;
- £3,000 for dental costs;
- £499 for his subscription to the Royal College of Obstetricians and Gynaecology.
- The balance related to other costs relating to travel to attend clinics, computer costs, training and childcare costs paid to his wife.

With HMRC having opened an enquiry into his tax return, Dr Nduka initially provided a list of expenses but this did not match what was contained within his tax return. With Dr Nduka refusing to attend a meeting, HMRC closed the enquiry and disallowed the expenses.

Dr Nduka appealed.

Decision

Having produced three different list of expenses, Dr Nduka settled on the third but was unable to provide supporting evidence for many the sums claimed. Consequently, the First Tier Tribunal allowed the claim for his professional subscription but denied the rest.

- Despite the legal fees being related to his work, the Tribunal found that these were not necessarily incurred in the performance of his duties. They were personal expenses, incurred to enable him to continue working as a registrar.
- The accommodation costs were disallowed as although his employer may have required him to live where he did, they were not incurred 'wholly, exclusively and necessarily' in the performance of his duties. There were days and nights when he was off duty and the flat was simply his home.
- The dental costs and childcare costs were personal expenses and so were disallowed.
- His travel costs related to normal commuting when travelling to his permanent, and not temporary, workplaces.

Finally, the cost of the computer was disallowed as his employment contract did not require him to have his own computer and there was no proof of purchase. Had it been allowed, the cost would have been time apportioned to reflect any private use.

Dr Harry Nduka v HMRC (TC08818)

CJRS and social media (Lecture P1381 – 21.03 minutes)

Summary – As a result of a director's online activity during lockdown the director was ineligible for payments under the Coronavirus Job Retention Scheme (CJRS).

Glo-Ball Group Limited incorporated on 21 September 2018 and ran parties, discos, community events and after-school clubs for children aged 0 to 11 years old. It also runs parent and baby groups. The company's directors and employees were Michelle Dowler and Samuel Dowler.

Before and after lockdown, the company would hire a hall at which it intended to put on classes, would then advertise those classes via social media including Facebook. 90% of its customers came from online interest, with both directors spending a great deal of time on social media generating business interest. This was estimated to be around 15 hours a week.

All company activities stopped during the pandemic and between 23 March 2020 to 30 September 2021 the company made claims under the CJRS, a period during which no furloughed employees were allowed to work. While furloughed, Michelle continued posting on the company's Facebook pages, typically only once a week to advertise a virtual event, ask clients to support the company's nomination for an award and informing customers of the company's plans once lock down ended.

HMRC raised assessments to recover the grants paid arguing that the director had been working while furloughed and so was ineligible for support under the CJRS. Following review, Glo-Ball Group Limited appealed to the First Tier Tribunal.

Decision

Under the CJRS, directors were still allowed to carry put their statutory duties but were not permitted to undertake any other work.

The First Tier Tribunal found that the director's postings on Facebook was work undertaken "to maintain and enhance the goodwill of the appellant's business and to maintain its brand awareness". The Tribunal acknowledged that the director's activities were understandable but stated that:

> "the concept of work, in our view, does not distinguish between work which might have an immediate impact on revenue generation and activities which might have an impact on the ability of a business to generate revenues in the future. Both activities comprise work."

As she had not ceased all work during the furlough period, she was ineligible to claim under the CJRS for the period 1 March 2020 to 30 June 2020. This also made her ineligible under the more flexible CJRS scheme that followed between 1 July 2020 and 31 October 2020.

Glo-Ball Group Limited v HMRC (TC08823)

Loans were employment income (Lecture P1381 – 21.03 minutes)

Summary – Assessments raised by HMRC were valid in-time assessments, with the loans representing taxable employment income.

Dr Sheth used two "contractor loan" tax avoidance schemes that involved him providing services to a UK employer, but via the medium of a contract of employment with an offshore employee benefit trust. Under this scheme, he was employed by the offshore entity, who paid him a modest salary with the balance of monies payable by way of a loan from the trust. He received money from the employment benefit trusts as follows:

- 2009/2010 he received £72,577 from an offshore trust relating to Sanzar;
- 2010/2011, he received £45,869 from the same Sanzar offshore trust, and £16,673 from either Darwinpay or a trust relating to Darwinpay.

HMRC's view was that the loans from the employee benefit trust were earnings under s. 62 ITEPA 2003 and so raised discovery assessments to collect the tax payable.

Dr Sheth disagreed, arguing that:

- the assessments raised were invalid and were not served on him properly;
- loans were not taxable employment income.

He also raised a number of procedural and other arguments including the fact that he had repaid some of the loan.

Decision

There was no disputing that Dr Sheth had participated in the loan schemes as they were disclosed in his tax returns. The First Tier Tribunal concluded the evidence confirmed that the loans received replaced salary for employment services provided. Consequently, he was liable to income tax on those loans. Whether he intended to repay those loans was irrelevant.

The Tribunal turned to the issue of whether the discovery assessments were valid, finding that they were. The First Tier Tribunal rejected the taxpayer's argument that the whitespace disclosure on his tax return was sufficient to alert a hypothetical officer to a potential insufficiency of tax. The DOTAS disclosures were said to be "confusing, misleading, and as far as that contractor loan scheme is concerned, deficient of relevant factual and statutory information."

The Tribunal accepted that the disclosure might have alerted the hypothetical officer to undertake further enquiries into the nature of the loans. However, this was not enough as the disclosure must put the hypothetical officer on notice of an actual insufficiency. Referring to HMRC v John Hicks [2020] UKUT 12, the Tribunal stated:

> "That disclosure set out brief but comprehensive details of the individual to whom it applied (a self-employed trader carrying on a business on a commercial basis with a view to profit); the tax magic (the trader acquires at a discount the right to receive dividends declared but not yet paid); the statutory provision which is relevant (the income is not taxable due to section 730 TA 1988); the result (a net

loss for tax purposes to the trader); and the tax benefit for the trader (a trader who works more than 10 hours a week can obtain sideways loss relief)."

The Tribunal found that Dr Sheth's disclosure dealt with few, if any, of these points 'in any, or any adequate detail.' HMRC was entitled to raise the discovery assessments.

The appeal was dismissed.

Dr Pradip Kumar Sheth v HMRC (TC08790)

Restricted stock units were part of employee package

Summary - Restricted stock units issued to the taxpayer, following the acquisition of a company in which he held a minority shareholding, were not granted in consideration for the sale of his shares. As a result, he was not entitled to deduct the consideration given for his shares in calculating his income tax liability when the units vested.

Louis Moore was a director and minority shareholder in Wombat Financial Software Inc (Wombat). In March 2008, upon the company being acquired by NYSE Euronext, he was granted 151,630 Restricted Stock Units.

It was common ground that these units were employment-related securities options and that an income tax liability would arise when the options vested. S.480 ITEPA 2003 provides that, for the purpose of computing that income tax liability, 'any consideration given for the acquisition of an employment-related securities option' is a 'deductible amount'. Louis Moore claimed the units he acquired were granted in consideration for the sale of his shares, which he valued at $10million, and, accordingly, $10million (discounted to $9million for uncertainty) was the deductible amount.

HMRC opened an enquiry into the relevant years and issued closure notices reversing the effect of the deductions. This was on the basis that, pursuant to s.421A(3) ITEPA2003, consideration which constitutes performance of any duties of, or in connection with, an employment is not a deductible amount. HMRC claimed that, properly viewed, the units were not granted in consideration for Louis Moore's shares but, instead, as part of an incentivisation package designed to retain him as an employee following the acquisition. Accordingly, the consideration given for the units fell within the exclusion contained in s 421A(3).

The only issue in dispute before the First Tier Tribunal was whether the units were granted in consideration for Louis Moore's shares. If that was the case, HMRC accepted that this consideration formed a deductible amount.

Decision

The First Tier Tribunal concluded that the units did not form part of the sale consideration but were, instead, issued to encourage key employees to remain in the business.

This was because, among other things:

- there was nothing in the transaction documentation to indicate that any part of the units was granted in consideration for shares. In fact, the Restricted stock units

agreement made it clear that they were intended to be related to continued employment;

- other shareholders who were awarded units, and who signed the same agreement, did not consider that their units were granted in consideration for their shares;

- the total consideration for the acquisition provided was $200m rather than $225m (which would have had to be the case if the units were part of the consideration); and

- NYSE Euronext's regulatory filings in the US described the units as granted for the purpose of employee retention.

The First Tier Tribunal also rejected the argument that the units were linked to equity because Louis Moore did not have a written contract of employment with NYSE Euronext. The Tribunal found that NYSE Euronext had clearly proceeded on the basis that Louis Moore was an employee, despite the absence of a written contact, given the significant nature of the tasks performed by him following the acquisition and the level of remuneration he was paid.

Louis Daniel Moore v HMRC (TC08806)

Adapted from the case summary in Tax Journal (12 May 2023)

Capital taxes

Invalid negligible value claim (Lecture P1381 – 21.03 minutes)

Summary – The First Tier Tribunal had no jurisdiction to consider HMRC's refusal of a negligible value claim that was not made in the form required.

In his 2015/16 self-assessment tax return Robert Williams claimed a £200,000 loss (s.253 TCGA 1992) in relation to a loan made to a Sierra Leone trading company.

HMRC enquired into this return. During which time, it was established that the loan had been converted into shares in a British Virgin Islands company, the trading company's parent company.

Robert Williams's capital contribution for the shares was £250,000 of which £200,000 was payment for the loan and £50,000 was plant and machinery given to the company. This was supported by a shareholder agreement. HMRC asked if Robert Williams wished to make a negligible value claim (s.24 TCGA 1992) and requested further information to enable such a claim to be considered.

In March 2019, having provided the information requested, Robert Williams' accountants confirmed that their client:

- was withdrawing their claim for losses under s.253 TCGA 1992;
- did wish to make a negligible value claim.

On 15 July 2019, HMRC wrote stating that in the absence of any valid negligible value claim under s 24 TCGA, the loss of £200,000 would be removed from the 2015-16 capital gains tax computation. HMRC then issued a closure notice to amend the return and remove the loss from the tax return.

Robert Williams appealed on the grounds that the negligible value claim was valid and HMRC applied for that appeal to be struck out as the appropriate claim had not been made.

Decision

The First Tier Tribunal confirmed that, when making a negligible value claim, there is no specified time requirement for the claim to be made.

The Tribunal noted that as the negligible value claim was not made within the taxpayer's 2015/16 Self Assessment tax return, it was necessary to refer to Schedule 1A TMA 1970 which sets out the necessary components of a claim. The negligible value claim can be made in any form, provided that certain requirements are satisfied. The accountants' letter dated September 2018 did not satisfy those requirements as it did not contain a declaration signed by the taxpayer to the effect that 'all of the particulars given in the form are correctly stated to the best of the information and belief of the person making the claim' as required by paragraph 2(4) of Schedule 1A.

S.31 TMA 1970 contains no right of appeal against HMRC's decision not to admit a negligible value claim that is not in the required form. As result, the First Tier Tribunal did not have the jurisdiction to determine this case or to consider the conduct of HMRC not to allow the claim or refer the taxpayer to the appropriate guidance.

HMRC's application to strike out the appeal was allowed.

NOTE: Andrew Hubbard (Taxation, 1 June 2023) stated that as there is no time limit for making a negligible value claim, he could still do so. He stated that:

> "So, as the judge remarked, it would still be open for the taxpayer to put in a fresh claim in valid form but that would trigger a loss in the current year (or under TCGA 1992, s 24(2) in the previous two years). It wouldn't reinstate a claim for the year which the taxpayer had originally sought to use the loss so, in practice, the ability to remake the claim might not be of any practical benefit to the taxpayer."

Robert Williams v HMRC (TC08820)

Reporting capital gains on property **(Lecture P1382 – 18.55 minutes)**

HMRC and the Treasury have been concerned for many years about the time-lag between individuals making capital gains and the reporting and payment of tax. Until the new rules were introduced for non-residents from April 2015 and for UK residents from April 2020 (with a temporary postponement of a few months for Covid-19), the capital gain would be reported on a self-assessment tax return (SATR) which would be due on the 31st January following the end of the tax year.

This meant that if, for example, one made a gain on the 10th April 2019, this would fall into the 2019/20 tax year and the resultant gain would only be reportable and tax payable on the 31st January 2021, a gap of nearly 22 months. HMRC's three concerns were that:

1) The passage of time would make the information less reliable,

2) Marrying up information received from the SATR with information received considerably earlier from the Land Registry and potentially Stamp Office,

3) There is more chance that the tax money that should have been set aside for tax would have been spent in the intervening 22 months.

HMRC therefore devised and implemented a plan whereby at first it was non-UK residents who were required to file a return reporting chargeable gains on UK property within 30 days of completion. This was then extended to commercial property sold by non-UK residents in 2019 and then finally to UK residents from April 2020.

Residents and non-residents

Despite non-residents being brought into the CGT regime, there remain significant differences between the filing requirements for UK and non-UK residents.

Whenever a non-resident makes a disposal there is a requirement for a property tax return to be completed, irrespective of whether CGT is payable.

UK residents are only required to complete the property CGT return if there is a chargeable gain which results in a payment of Capital Gains Tax. Accordingly, for UK residents, if there is no CGT due because of: brought forward losses, covered by the annual exemption, losses made on the transaction, then no separate return is required. Clearly, a UK resident will need to include any capital losses in their self-assessment tax return or in some other disclosure to HMRC to take advantage of those losses against future gains.

The imposition of this extra reporting requirements has not been without initial teething problems and ongoing issues. The first point of contention was when HMRC started levying penalties for either failing to file a return or failing to file a return on time even when there was no CGT to pay.

The courts in about half the cases found in favour of the taxpayer and revoked the penalty. It is however less likely now that given the amount of time since this additional reporting was imposed that the courts would look so leniently on failure to file.

Completion not exchange

It is the exchange of contracts which normally creates the Capital Gains Tax liability itself. So for example, if I exchange on a property I am selling on the 5th April 2023 then it would fall into the 22/23 tax year and the rules, annual exemption and rates for that year is what I would use.

It is the completion date which sets off the clock on the 60 days. Therefore, one needs to be particularly careful when the exchange and completion dates are in different tax years. The only way in which the additional reporting can be avoided when there is a chargeable gain is if the self-assessment tax return is completed within 60 days of the completion on the property.

Effect of reduction in Annual Exemption

The Chancellor announced on the 17th November 2022 that the annual exemption would be cut to £6,000 for 2023/24 and £3,000 for 2024/25. If these plans go ahead, there will be more individuals who will be required to file property returns as they will have CGT to pay on their properties.

Who is within the scope of CGT?

CGT is broadly levied on gains made on all UK residential property. The principal private residence relief then takes a large proportion of transaction on residential property out of the chargeable gains net. However, the main area where CGT is levied would be where a second property is being acquired or the individual is ineligible for principal private residents relief (see non-resident rules which are beyond the scope of the webinar).

Acquisition costs

Acquisition cost or deemed acquisition cost. This is normally the cost paid for the property but could be a deemed cost if the property was acquired through inheritance where one would use the probate value or a transaction between connected persons (normally family) which would then need to be adjusted to market value at the time.

If the acquisition was before March 1982, then there is compulsory rebasing to the 31st March 1982 value.

Improvement cost

It is necessary to distinguish between revenue expenditure on the property and capital. In this case capital expenditure is deductible against a capital gain whereas revenue expenditure would not.

This makes capital expenditure more valuable from a tax perspective where there is no revenue stream e.g. a second property not let out.

Incidental costs of acquisition

These would be solicitors' fees, estate agent fees, stamp duty etc.

Disposal proceeds

This would either be the actual disposal proceeds or the deemed disposal proceeds if between connected persons.

Incidental costs of disposal

Incidental costs of disposal also need to be taken into account and maybe incurred after completion which complicates the timing of the return.

Although theoretically the property return is not a payment on account, there are quite often elements which cannot be ascertained at the time or could be subject to change. For example, there may be costs which cannot be accurately identified by the return is due. If market value is not being used, then it may be that one needs a surveyor to go back and value the original transaction e.g. market value at time of acquisition or March 1982 values.

Treatment of losses

Capital losses can be carried forward from prior years and from self-assessment losses and gains are aggregated in the same year in order to come up with a blended and final chargeable gain.

By contrast, the property return does not allow you to take account of future chargeable losses even if they are relatively certain if they have not crystallised.

For example, Kirsty makes a gain of £20,000 on a property she sells in June 2022. She knows that she will make a loss of approximately £10,000 in September 2022. Whereas for the self-assessment tax return after the end of the tax year, the loss reduces the chargeable gain, this is not the case for the property return and she would have had to report and pay tax on the June gain. She can then claim the loss on the SATR when all the chargeable gains and losses for the tax year are taken into account.

The second challenge is that individuals do not necessarily know their marginal rate of tax. It is possible that all the gain is chargeable at 28% as a higher/additional rate taxpayer. But it is possible, particularly for retired individuals who have limited amounts of income or indeed individuals who are non-resident in the UK and therefore have limited taxable income in the UK, to have a part or all the gain chargeable at the rate of basic rate taxpayers which is 18% for residential property.

There could of course be a combination of the two. For example, if an individual has £40,270 of income and a £20,000 chargeable gain after all exemptions, that would leave £10,000 to be charged at basic rate for CGT on residential property i.e. 18% and 10% to be charged at the higher rate i.e. 28%.

You should note that commercial property is charged at CGT normal rate at 10% for basic rate taxpayers and 20% for higher/additional rate taxpayers.

Administrative issues

The administrative challenges of filing the property return are not to be underestimated. If you are filing a return on behalf of your client and in most circumstances, this needs to be done online, then you need to get authorisation for filing the return which is separate from the normal agent authorisation. You may have to explain to a client, who may have been your client for many years that they will need to authorise you to prepare and file the return on their behalf.

Secondly, whereas most agents would use commercial software that they have brought or where they retain the records of carry-forwards, carry-backs and elections, this is not possible for the property return which is an HMRC form. It is therefore necessary to keep those records and potentially reinput them onto the self-assessment tax return if that is required.

Payments

The payment of CGT is due 60 days after the completion of the return. If a further payment is due, then interest will be chargeable. If however there is a refund due, that may show on the self-assessment tax return but there is no mechanism currently in place for HMRC to automatically refund the CGT overpaid. This means that the agent often needs to chase HMRC for outstanding refunds.

In certain circumstances where taxpayers are vulnerable or disabled, paper returns may be accepted. There is also a facility to amend returns if new information comes to light.

Things to watch out for

1) Property outside the UK is not subject to these rules.

    - If a UK resident is liable to tax on gains of property outside the UK, these are reported in the same manner on the SATR returns.

2) The additional filing requirement does not apply to commercial property.

    - Accordingly, if one sells as a unit a flat over a shop. The property return would relate to the gain on the flat, not the shop.

HMRC of course has access to information from the Land Registry and the Stamp Office in order to verify details of any chargeable gains made. It also uses artificial intelligence to compare details of transactions as recorded by the Land Registry and distinguish them from what has been put on the property tax return.

Contributed by Jeremy Mindell

Losses on shares from deceased estates (Lecture P1383 – 12.43 minutes)

There is an important IHT relief which has been available for many years and which is set out in ss.178 – 189 IHTA 1984. It is in urgent need of Government review.

One of the problems commonly faced by the personal representatives of a deceased taxpayer is that they may need to sell assets included in the estate in order to settle debts and the IHT liability, but they cannot do so until they have obtained a grant of representation which can take several weeks (and often much longer).

During the period between the date of death and the subsequent sale date, the market value of investments may have fallen and, in appropriate circumstances, a relief can be claimed for losses on sales of holdings of shares or securities which are quoted on a recognised stock exchange.

The relief also extends to sales of:

- units in authorised unit trusts;
- shares in open-ended investment companies; and
- shares in any common investment fund.

Unquoted shares and shares traded on the Alternative Investment Market are not eligible for this relief.

The basic rule is that the relief is only available in respect of sales of qualifying investments made by the personal representatives within the period of 12 months immediately following the death. All sales must be taken into account, including those which have realised a profit. In other words, the relief is based on the *net* loss from all the sales within this 12-month period.

However, if the personal representatives purchase qualifying investments at any time between the date of death and two months after the last sale within the relief, the loss on sale is reduced by the proportion which the aggregate purchase prices bear to the aggregate sale prices.

In this regard, the personal representatives' action checklist should therefore include the following:

- consider selling within 12 months of the date of death all qualifying investments which have dropped in value;
- retain qualifying investments which have risen in value (but, if need be, sell them more than two months after the last 'loss on sale' disposal); and
- review the estate portfolio of investments in good time before the 12-month period expires.

Example

Norman died on 1 June 2023, leaving the following holdings of qualifying investments:

12,500 ordinary shares in A plc (worth £100,000); and

6,000 ordinary shares in B plc (worth £30,000).

On 1 May 2024, Norman's personal representatives sold both holdings for a total of £110,000. However, on 15 June 2024, they purchased 8,000 ordinary shares in C plc (another qualifying investment) for Norman's estate at a cost of £28,000.

On a claim being made under S179 IHTA 1984, the loss on sale which is deducted from the probate value of Norman's qualifying investments is:

	£
Original loss on sale (130,000 – 110,000)	20,000
Less: Reinvestment: (28,000/ 110,000 x 20,000)	5,091
	14,909

Unfortunately, as the Association of Taxation Technicians (ATT) have pointed out, many estates are presently struggling to obtain their grant of representation in time to allow the 12-month loss on sale relief to operate.

As a result, the ATT are suggesting that this 12-month rule should be extended to two years. Given the well-documented problems which HMRC and the rest of the civil service are suffering as a result of the COVID-19 pandemic, this idea will hopefully be taken up sooner rather than later.

Contributed by Robert Jamieson

Avoidance scheme was no mistake **(Lecture P1381 – 21.03 minutes)**

Summary - The transfer of shares to an employee benefit trust which was part of an inheritance tax scheme was not a 'mistake'.

Mr and Mrs Bhaur were partners in a property partnership that owned 35 properties.

Looking to substantially reduce any inheritance tax payable, the couple entered into a scheme under which the business was transferred to an employee benefit trust, which excluded Mr and Mrs Bhaur but benefited younger family members, including their son.

After it became apparent that the scheme was ineffective, the couple applied to the High Court for the last of these transactions to be set aside on the grounds of mistake.

The High Court dismissed the claim, holding that there had not been a mistake (i.e. relating to a past or present matter) but instead a misprediction (relating to a possible future event); the couple had miscalculated the consequences to them if the scheme went wrong.

The couple appealed.

Decision

The Court of Appeal observed that the distinction between a mistake and a misprediction could be blurred. It was not necessary to make the distinction here, because, even if there were a mistake, whether relief should be granted would depend on whether it would be 'unconscionable or unjust' for the donee to retain the benefit of the transfer.

The claimants may have been mistaken in their understanding of the possible adverse consequences if the scheme failed, but they knew that there was a risk and decided to take it anyway.

Additionally, the Court of Appeal held that the scheme being an entirely artificial tax avoidance scheme 'was a very weighty factor against the grant of any relief'.

It therefore concluded that it would not be unjust or unconscionable to refuse relief and so dismissed the appeal.

Bhaur and others v Equity First Trustees (Nevis) Ltd and others [2023] EWCA Civ 534

Adapted from the case summary in Tax Journal (2 June 2023)

Concession not confined to six years

Summary – Credit under extra-statutory concession (ESC) B18 was allowed for payments out of income received more than six years before the year in which the payment was assessed.

The taxpayers were beneficiaries of a Guernsey-resident retirement trust.

Their adviser asked HMRC to confirm that extra-statutory concession ESC B18 applied to allow tax credits on distributions with no limitation for payments out of income received by the trustees more than six years before the year of assessment of the payment.

HMRC said credit under ESC B18 was limited to payments out of income received not more than six years before the year of assessment of the payment. The adviser asked HMRC to reconsider, but before HMRC replied, the distributions were made to the taxpayers. The income, on which they paid tax, was treated as their income for 2018/19. The beneficiaries claimed tax credit of UK income tax paid by the trustees on UK source income arising for all years – based on the 1999 version of ESC B18 which is the most recent.

HMRC allowed the claims for the years from 2012/13 but rejected those for the years before that.

The High Court dismissed the taxpayers' appeal, saying the concession in its entirety intended the six-year time limit to apply. The taxpayers appealed.

Decision

Lord Justice Newey in the Court of Appeal said that 'read naturally', the text of the 1999 concession supported the taxpayers' case.

The ordinarily sophisticated taxpayer would:

- take EU law into account, i.e. that read in the way suggested by HMRC, the concession could favour UK trusts over non-UK ones;
- not be expected to research earlier versions of the concession to understand the current version.

The appeal was allowed.

Murphy & Linnett v HMRC [2023] EWCA Civ 497

Adapted from the case summary in Taxation (1 June 2023)

Pony paddock not residential for SDLT (Lecture P1381 – 21.03 minutes)

Summary – A commercially let paddock acquired at the same time as a house and its grounds qualified as mixed use for SDLT purposes.

On 11 December 2020 Taher and Zahra Suterwalla acquired a house to be used as their home. The purchase included an indoor swimming pool, tennis court, pavilion and gardens as well as a paddock to the rear of the property. The paddock was not visible from the house and access was via a small gate.

The couple filed the relevant SDLT return on the basis that the property was mixed use as, on completion, the paddock was let on a commercial basis under a one-year grazing lease.

In August 2021, HMRC opened an enquiry into the return. In November 2021 HMRC issued a closure notice amending the SDLT return to charge SDLT at the residential rate on the basis that the paddock was part of the grounds.

Following a review, the couple appealed.

Decision

The First Tier Tribunal disagreed with HMRC's claim that the entire property was residential as it was registered in a single folio and was sold as an equestrian property. The Tribunal found that:

- there were two separate folios:
  - ON53530 being the dwelling house, gardens and tennis court; and
  - ON277027 being the paddock.
- nowhere in the sales brochure was the word "equestrian" used and there were no stables or other suitable accommodation for housing horses appearing in the sales brochure.

Further, the Tribunal found that:

- The grazing lease, which was effective from the completion date, was of commercial benefit to the couple. "Although the rent was not large, it was more than a peppercorn and the advantage of … horses keeping the grass in order was of considerable financial benefit to the Appellants."

- The lessee was able to access the paddock from the bridle path without having to enter the couple's garden;

- The couple would not have bought the paddock if it had been possible to exclude it from the purchase. It was not needed for their reasonable enjoyment of the dwelling having regard to its size and nature.

The First Tier Tribunal found that the property purchase qualified to use the non-residential rates for SDLT purposes.

The appeal was allowed.

Mr Taher Suterwalla and Mrs Zahra Suterwalla v HMRC (TC08826)

Administration

Late filing penalties relating a chargeable gain

Summary – With the First Tier Tribunal failing to consider certain factors, the case has been remitted back to the lower tribunal.

Peter Marano accepted that the discovery assessment raised by HMRC for some £5.7 million was valid. The discovery assessment was based on a taxable capital gain, which had previously disclosed to HMRC, and which Peter Marano had voluntarily paid during the 2012/13 tax year.

However, Peter Marano challenged the First Tier Tribunal's decision that the related penalties issued under Schedule 55 FA2009 for his failure to file his 2012/13 Self Assessment tax return were not valid.

The penalty assessments:

- totalled £574,422, representing 5% of the discovery assessment under each of Schedule 55 paras 5 and 6;

- did not take account of the voluntary prepayment of his 2012/13 tax liability.

The First Tier Tribunal had found that the voluntary disclosure and prepayment did not amount to special circumstances justifying a reduction in the amount of the penalties due.

Consequently, Peter Marano appealed to the Upper Tribunal on the following grounds:

1. There was insufficient evidence that the penalties were authorised by an HMRC officer;

2. The penalties had not been correctly notified to him;

3. The tax-geared penalties should have taken into account the tax already paid;

4. There were special circumstances that the First Tier Tribunal had failed to consider when deciding the level of the penalties that were payable.

Decision

The Upper Tribunal dismissed the first arguments stating that:

- S.103 FA 2020 has retrospective effect and ensures that HMRC's use of automated systems to issue notices represents valid authorisation;

- Peter Marano had been made aware of the notices by his accountants, meaning the notification was valid. Also, his argument that sending the notice his LLP's address did not amount to personal notification was dismissed.

Moving to whether the tax-geared penalties should have taken into account the tax already paid, the Upper Tribunal concluded that they should not. Had the penalties been for the late payment of tax, Sch, 56 would have required the payment penalties to be calculated by reference to the amount of tax 'unpaid'.

However, this case involved late filing, rather than late payment penalties, meaning that Sch. 55 required the penalties to be based on the amount shown in the hypothetical return that should have been filed.

Finally, the Upper Tribunal considered whether the First Tier Tribunal had taken into account any relevant special circumstances. It concluded that the First Tier Tribunal had erred in law on the following grounds:

1. The early payment of tax could constitute special circumstances that might result in a reduction in penalties;

2. The First Tier Tribunal should have taken into account the fact that HMRC had been notified in detail of the tax liability before the return was due and the size of the penalty.

As a result, the case was remitted back to the First Tier Tribunal for a new panel to consider special circumstances.

Interestingly, the Upper Tribunal concluded by stating:

> "We emphasise here that while we consider the materiality of the error as sufficient to set aside the decision on the basis that it might have been different, it is entirely possible that a tribunal might reach the same decision as originally reached by the FTT."

Peter Marano v HMRC [2023] UKUT 00113 (TCC)

Information request was reasonable **(Lecture P1381 – 21.03 minutes)**

Summary – The taxpayer's company appeared to be his 'personal service company' and should not be 'deployed as a smokescreen to deflect' HMRC from enquiring into the taxpayer's personal tax affairs'.

Dr Edward Leen was a clinical consultant who worked in the NHS and in private practice.

All his private consultancy fees were declared through his company, GRI Research Laboratories Ltd.

During an enquiry into his Self Assessment tax return, HMRC requested details of his consultancy work completed for various named entities, documents to show if consultancy fees had been declared through another entity and bank statements. Dr Leen did not reply, so HMRC issued a notice under Sch.36 FA 2008 requesting the information.

Dr Leen's agent told HMRC that the consultancy fees had been declared through GRI Research Laboratories Ltd and provided a breakdown of the fees received and a copy of the company return.

This resulted in HMRC finding discrepancies between the company turnover and the sums shown on Dr Leen's bank accounts, as well as a reduction in shareholder funds without corresponding dividends or salaries. HMRC wrote to the agent with questions about this and sent the taxpayer a second Sch. 36 FA 2008 notice asking about these discrepancies.

Dr Leen appealed, saying that GRI Research Laboratories Ltd was separate from him and its records could not be reasonably required for checking his personal tax position.

Decision

The First Tier Tribunal accepted that HMRC had reason to suspect that some fees did not appear to have been included in GRI Research Laboratories Ltd's turnover. While the discrepancy may not have been intended to mislead HMRC, an explanation was reasonably required. The Tribunal was satisfied that there were grounds for HMRC to suspect the taxpayer's return was inaccurate.

The First Tier Tribunal confirmed the notice and the appeal was dismissed.

Edward Lam Shang Leen v HMRC (TC08812)

Adapted from the case summary in Taxation (18 May 2023)

HMRC's Complaints Process **(Lecture P1385 – 11.38 minutes)**

This article covers HMRC's complaints process and the circumstances in which advisers dealing with tax enquiries and disputes should consider using it.

The need for a complaints process

Advisers will be aware that HMRC have extensive powers to investigate a taxpayer's affairs. In addition, HMRC officers have wide-ranging information and inspection powers. It is inevitable that, given the large number of enquiries and disputes that HMRC handle, mistakes occur, or something goes wrong, and there needs to be recourse for taxpayers to seek redress, and, where appropriate, compensation. HMRC's Complaints Handling Guidance recognises that there will be complaints, and that some of these complaints will be justified (see CHG305).

HMRC has a complaints procedure for taxpayers, and their agents, to use when appropriate. The process is not a remedy for all grievances there may be against HMRC, and advisers need to ensure that the complaints process is the appropriate route to use.

The complaints process used to be contained in a Code of Practice, but is now found on the gov.uk website, https://www.gov.uk/complain-about-hmrc.

What can you complain about?

The complaints process can be used if your client is unhappy with the service provided by HMRC. This can include where there have been unreasonable delays, or other unsatisfactory service, including mistakes and poor or misleading advice.

If an HMRC officer has failed to follow the correct procedure, perhaps by not issuing the relevant factsheet at the right time, that may be a justifiable cause for a complaint. Whether it is worth pursuing a complaint in any given situation is considered later in this session.

What can't you complain about?

The complaints process is not appropriate for dealing with all grievances about HMRC. Where the client disagrees with a tax decision or a penalty, the appropriate appeals procedure, or judicial review, as relevant, should be followed.

In addition, complaints about serious misconduct by HMRC staff are dealt with by a different process. The gov.uk website states that serious misconduct includes assault leading to death or serious injury, corruption, fraud, and unauthorised disclosure of customer information. HMRC's handling of these complaints is overseen by the Independent Office for Police Conduct.

How to complain

While other parts of HMRC are encouraging interaction with it through online channels, that does not apply to the complaints process, at least as far as agents are concerned. Advisers will need to complain on behalf of their clients by post, as the online process is, currently, reserved for taxpayers complaining directly to HMRC. That can be expected to change in the future.

It is recommended that advisers submit their complaints in writing, in accordance with the procedure, to ensure an audit trail, rather than complaining by telephone. The relevant contact details can be found on the gov.uk website, at the following link: https://www.gov.uk/government/organisations/hm-revenue-customs/contact/complain-about-hmrc.

The postal address given for complaints about a compliance check or a HMRC enquiry is:

> Customer Compliance Complaints
> HM Revenue and Customs
> BX9 2AB
> United Kingdom

The complaint should set out all relevant facts, and refer to any material correspondence or documents, evidencing the poor service by HMRC. Where HMRC have not followed their procedures, or the HMRC Charter (see https://www.gov.uk/government/publications/hmrc-charter/the-hmrc-charter), this should be referenced in the complaint. The submission should also indicate the required remedy, and this should be established with the client. There is not a time limit for making a complaint, although HMRC indicate that they would expect a taxpayer to let them know about poor service "as soon as possible".

Full details of any costs incurred should be provided and supported by receipts. The usual costs in such circumstances may include, postage, phone charges, and professional fees. When considering whether to refund the claimed costs, HMRC will take a view as to whether those costs are reasonable. The complaint should also detail any compensation sought in addition to the costs incurred, including for anxiety and distress. This should be included in the initial complaint. The level of compensation paid by HMRC, if any, in excess of claimed costs, is, in most cases, likely to be minimal, and will be made on an ex-gratia basis.

Where the client has suffered a financial loss due to the HMRC mistake or delay, you can seek a refund of those amounts. In addition, compensation may be sought for worry and distress, where the client was aware of the HMRC error.

HMRC operates a two-tier structure for its complaints process. Initially, the complaint is subject to a 'first tier' review. HMRC do not provide a timetable for their response to a complaint, but they should respond quickly. Advisers should consider chasing HMRC if they have not received a response within four weeks. A further delay in dealing with a complaint may form the basis for a separate complaint or add to any claim for compensation.

If the client is not happy with the substantive response from HMRC to the First-Tier review, the case can be escalated to a tier two complaint. The case is reviewed by a different officer, who will report their findings. The original complaint handler's position may be upheld, or the tier two complaint handler may reach a different decision. The tier two review is the end of the HMRC complaint process. If the client remains unsatisfied with the outcome, they will have recourse to the Adjudicator's Office, and, potentially, the Parliamentary and Health Service Ombudsman (which is accessed through the client's MP). The Adjudicator's Office will only consider the complaint after it has been subject to a first and second tier review by HMRC.

HMRC state, on the gov.uk website, that they "will not treat you differently because you've made a complaint", and "They will handle your complaint fairly, confidentially and investigate the issues thoroughly". Advisers should ensure that these aims are met.

The complaints process should not be used as a reason to withhold payment from HMRC, where there is tax due. Advisers should ensure that their client continues to make any payments that are due, subject to the appeals and postponement process, to avoid the imposition of interest or penalties.

Is it worth complaining?

Each case must be considered on its merits, taking into account what has gone wrong, the level of culpability, the impact on the client, and the client's wishes. The adviser may consider that the matter can be resolved by liaising with the enquiry officer, without recourse to the formal complaints procedure.

When advising my clients, my starting point is that it is usually better to finalise the enquiry, or resolve the dispute, before making a formal complaint. Making a complaint can be a distraction, and cause delay, or additional delay, while the matter is being investigated by HMRC. There will, however, always be exceptions, and advisers will need to form a view taking into account the circumstances of the case. It may be necessary to make a complaint while the enquiry is ongoing, and, if so, advisers should ensure that they have established the relevant facts, and collated any supporting documents, including those relevant to a claim for compensation.

Advisers should be aware that the client may decide not to pursue a complaint. When the enquiry is finalised, the client may be happy that a conclusion has been reached, and not instigate a complaint, particularly where there has not been a significant loss.

Contributed by Phil Berwick, Director at Berwick Tax

Deadlines

1 July 2023

- Corporation tax for periods to 30 September 2022 if not liable to pay by instalments

5 July 2023

- Application for a PAYE settlement agreement for 2022/23
- Non-resident landlords' scheme forms NRLY and NRL6

6 July 2023

- Forms P9D, P11D, P11D(b) for 2022/23 must be submitted
- Taxed award scheme returns
- Report redundancy packages 2022/23 worth more than £30,000 to HMRC
- File forms 42

7 July 2023

- Electronic filing and payment of VAT liability for 31 May 2023
- Election to aggregate beneficial loans in 2022/23
- File forms EMI40

14 July 2023

- CT61s for quarter ended 30 June 2023.

19 July 2023

- PAYE liabilities for month ended 5 July 2023 if by cheque
- PAYE for quarter to 5 July 2023 if average monthly liability is less than £1,500
- Payment of 2022/23 class 1A National Insurance by cheque

22 July 2023

- PAYE liabilities if paid online
- Pay 2022/23 class 1A National Insurance online

31 July 2023

- Accounts to Companies House - private companies with 31 October 2022 year end and public limited companies with 31 January 2023 year end.
- Second 5% surcharge for unpaid 2021/22 balancing payments
- 2022/23 second instalment SA liabilities due
- Tax credits claims to be finalised and renewed
- CTSA returns for accounting periods ended 31 July 2023

News

Holiday for Self Assessment helpline (Lecture P1381 – 21.03 minutes)

On 8th June 2023, HMRC announced that for three months from 12 June 2023 it will trial directing self-assessment queries from its helpline to its digital services, including its online guidance, digital assistant and webchat.

Apparently, HMRC claim that this will free up the equivalent of 350 full-time advisers to take urgent calls from taxpayers who really need to speak to an adviser.

The helpline will re-open on 4 September 2023 to enable taxpayers to receive expert support in the 5 months running up to the 31 January Self Assessment deadline.

The Chartered Institute of Taxation (CIOT) President Gary Ashford said:

> "This helpline closure is another flashing indicator that HMRC can't cope with everything it is being tasked with."

https://www.gov.uk/government/news/hmrc-to-trial-seasonal-self-assessment-helpline--2

Voluntary NIC Deadline Extended Again (Lecture P1381 – 21.03 minutes)

On 12th June 20023, HMRC announced that individuals now have until 5 April 2025 to fill gaps in their National Insurance record from April 2006 that may increase their State Pension.

With the deadline extended, taxpayers now have a longer period to be able to fund any gaps, if they choose to do so.

All relevant voluntary National Insurance contributions payments will be accepted at the rates applicable in 2022 to 2023 until 5 April 2025.

https://www.gov.uk/government/news/deadline-for-voluntary-national-insurance-contributions-extended-to-april-2025

Update on Progress of Employment Bills (Lecture B1383 – 20.19 minutes)

A number of employment bills have passed through the House of Commons and need to be debated in the House of Lords before becoming law.

Workers (Predictable Terms and Conditions) Bill

The government gave its backing on 3rd February 2023 to the Workers (Predictable Terms and Conditions) Bill as it passed its second reading and it is now with the House of Lords for 2nd reading 16 June 2023. The new rights under this Bill will apply to workers and employees, including those employed through agency work, who have been engaged for at least 26 weeks.

Under the Bill workers may apply for a change to their terms and conditions to obtain a more predictable working pattern if:

- they have been employed by same employer for a prescribed period yet to be set by regulations, 26 weeks expected;
- their existing work pattern is uncertain in terms of the hours they work;
- the times they work or their fixed term contract period the worker will be able to request a change to their working pattern to make it more predictable;
- their fixed term contract is for less than 12 months they can make a request that it be extended to more than 12 months.

A maximum of 2 applications can be made in a year. The employer must reply to the worker within one month of the application and is able to reject the application on similar basis to flexible working requests. These include – burden of additional costs, detrimental in meeting demands of clients, detrimental effect of recruiting staff, impact of other aspects of business, insufficient work during periods when worker proposes to work and planned structural changes.

Employment Relations (Flexible Working) Bill

This bill is with the House of Lords committee 13 June 2023. It proposes changes to the Employment Rights Act 1996 to make provision in relation to the rights of employees and other workers to request variation to terms and conditions of employment including working hours, times and locations.

An employee may not make more than 2 applications during any 12 months. The employer shall not refuse the application unless the employee has been consulted about the application. Once the application has been made the employer will have 2 months in which to respond whereas currently, they have 3 months.

Miscarriage Leave Bill – amendment of Employment Rights Act 1996

This bill proposes to make provision for not less than 3 days leave for people who have experienced a miscarriage under 24 weeks. This may be paid as statutory bereavement pay to parents.

Pensions (Extension of Automatic Enrolment) No 2 Bill

This bill is with The House of Lords for its 2nd reading. It proposes removing the current lower age limit, of 22 years, for auto enrolment and removing the current lower qualifying earnings limit of £6,240.

Carer's Leave Act 2023 - New Right for Unpaid Leave for Carers

Following the "Carer's Leave Consultation" there was clear support for the introduction of a leave right for unpaid carers. The Carer's leave Act received Royal assent on 24 May 2023 and is expected to come into force in 2024.

Carers leave will be a right, from day one of employment, for unpaid carers to take up to one week, 5 working days, unpaid leave each year to look after the person for whom they care.

Employees, where eligible, will be able to take the leave either individual day or half days up to a block of one week. The employee will be required to give notice of the leave the same as for annual leave being twice the length of the leave required plus one day. It is likely the employer will have limited scope for rejecting requests for the leave.

The entitlement to statutory carer's leave will:

- Be available to employees regardless of length of service – so from day one;
- Depend on the carer's relationship with the person being cared for – using the definition of dependant as in right to time off for dependants – spouse, civil partner, child, parent;
- Depend on the person being cared for having a long-term care need – long term illness or injury (mental or physical), a disability as defined by Equality Act 2010 or issues related to old age. There would be limited exemptions from the "long term care" requirement such as re a terminal illness.

Extension of Redundancy Protection for New Parents and Pregnant Employees

The Protection from Redundancy (Pregnancy and Family Leave) Act received Royal Assent on 24 May 2023. The Act will enable redundancy protection to apply to all pregnant women as well as new parents returning to work after leave. It is expected to come into force from 2024.

The "protection period" will be extended to run from the date the employee notifies her employer she is pregnant to 18 months after the birth. This means that a new mother returning to work after a year of maternity leave has a further 6 months redundancy protection. The extended protection will also be available to parents returning from adoption or shared parental leave.

Currently employees on maternity leave who are at risk of redundancy must be offered suitable alternative roles where they exist before making them redundant. This special protection ends when the maternity leave ends or two weeks after pregnancy ends for women not entitled to maternity leave.

Employment (Allocation of Tips) Act 2023

The Employment (Allocation of Tips) Bill is now an Act and law by gaining Royal Assent on 2 May 2023.

The Act imposes unlawfulness for employers to withhold tips from staff and is expected to come into force in 2024.

The legislation will make it illegal for employers to withhold tips from workers. The move is set to help around 2 million people working in one of the 190,000 businesses across the hospitality, leisure and services sectors, where tipping is commonplace and can make up a large part of their income. This will ensure customers know tips are going in full to workers and not businesses, ensuring workers receive a fair day's pay for a fair day's work.

80% of all UK tipping now happens by card, rather than cash going straight into the pockets of staff. Businesses who receive tips by card currently have the choice of whether to keep it

or pass it on to workers. These proposals will create consistency for those being tipped by cash or card, while ensuring that businesses who already pass on tips fairly aren't penalised.

The legislation will include:

- a requirement for all employers to pass on tips to workers without any deductions other than PAYE and NIC;
- a Statutory Code of Practice setting out how tips should be distributed to ensure fairness and transparency;
- new rights for workers to make a request for information relating to an employer's tipping record, enabling them to bring forward a credible claim to an employment tribunal.

Under the changes, if an employer breaks the rules, they can be taken to an Employment Tribunal, where employer can be forced to compensate workers, often in addition to fines.

ACAS is drawing up a code of practice for employers.

Neonatal Care (Leave and Pay) Act 2023

The Neonatal Care (Leave and Pay) Act 2023 received Royal assent on 24 May 2023.It is anticipated that it will be effective from 2025 but could be 2024. This Act will allow parents, from day one of employments, to take up to 12 weeks of paid leave in addition to the usual statutory maternity and statutory paternity leave and pay periods. This will be an employment right from day one of employment.

The criteria are:

- the admission to hospital lasts for a continuous period of 7 days or more;
- the baby is neonate - aged 28 days or less.

Gender Pay Gap Reporting and Ethnicity Pay Gap Reporting

Whilst the reporting of the gender pay gap between men and women is compulsory for employers with over 250 employees the reporting of the ethnicity pay gap is currently voluntary.

Gender pay gap - employers with 250 or more employees working in England, Scotland or Wales, on the snapshot date, 31 March for public sector and 5 April for the private and voluntary sector must report their percentage gender pay gap annually within 12 months. For the 2022 reporting the reporting dates were 30 March 2023 and 4 April 2023. The report is published on the employer's website and GOV.UK website. For the private and voluntary sectors, the report must be accompanied by a written statement confirming their accuracy, signed by a senior person as set out by law.

Employees, workers on full pay at the snapshot date, including part times, apprentices, zero hours and casual workers are included in the calculation. Excluded from the count are partners, directors, agency workers and those on reduced pay.

The calculation is for the mean and median hourly gender pay gap, the mean and median gender pay gap, proportion of females and males receiving bonuses, proportion of females and males in each pay quartile. Employees not identifying as male or female can be excluded.

Pay includes – shift premiums, allowances, piecework pay and pay for leave BUT excludes overtime pay, pay in lieu of notice, redundancy pay and any other termination payments.

Ethnicity gender pay gap - The Department for Business and Trade published a comprehensive guide for employers on ethnicity pay gap reporting which was updated on 26 May 2023. This comprises:

- Introduction and overview;
- Understanding and reporting your data;
- Collecting ethnicity data;
- Preparing your payroll data;
- Making your calculations.

The Labour party say that if they win the next election this will become mandatory for employers.

Contributed by Alexandra Durrant

Business Taxation

SEISS conditions not met (Lecture B1381 – 20.46 minutes)

Summary – The taxpayer did not trade in 2019/20 and so was not eligible for the first two payments under the Self Employment Income Support Scheme.

David Hamill applied and received the first two support payments under the Self Employment Income Support Scheme (SEISS).

Later, in response to an email from HMRC, he confirmed that he had been self-employed in 2018/19 and had submitted his tax return before 23 April 2020. However, he also stated that he had not traded in 2019/20 because, despite trying to find work, he had been unsuccessful. As a result, he had signed on for Universal Credit, which he was still doing at the time of his reply.

HMRC contacted him regarding his trading status and he stated that he had ceased trading on 31 October 2018, which he told HMRC when submitting his Self Assessment return for 2018/19. Indeed, no Self Assessment tax returns had been lodged for 2019/20 or 2020/21. As a result, HMRC stated that no grant was due.

David Hamill appealed, stating that:

- at all times he had been totally honest and transparent in his dealings with HMRC.
- when he had claimed SEISS 1, he had been told that he was entitled to it.
- HMRC had emailed him telling him to apply for SEISS 2 and he had thought that because he had been entitled to the SEISS 1, he would be entitled to the second.
- because HMRC had confirmed his entitlement to the two SEISS payments, it was totally wrong to "have changed the rules, post payment, purely for financial and political gain."

Decision

The First Tier Tribunal accepted that David Hamill had intended to trade in 2019/20 but ultimately had not done so and ceased trading in 2018/19.

At the time that the SEISS grants were paid, HMRC had no way of checking whether David Hamill had traded post 2018/19 as the due date for filing a tax return for 2019/20 was not until 31 January 2021; some time after the SEISS claims were made.

The Tribunal accepted that David Hamill had been mistaken by thinking he was entitled to the grants, and no one could blame him for that. Despite this, the fact was, he was never eligible for the support payments and HMRC was correct to recover the sums paid.

The appeal was dismissed.

David Hamill v HMRC (TC08827)

Director's receipt was a distribution (Lecture B1381 – 20.46 minutes)

Summary - Payment to a shareholder was a distribution, meaning the taxpayer could not claim a loan relationship debit in respect of the sum paid.

Shinelock Ltd was a property rental company that was owned by its director/shareholder, Mr Ahmed, who was non-UK resident.

In March 2009, a property was acquired for £725,000, registered in the company's name but the deposit was paid for by Mr Ahmed. During ownership, the property was rented out and the rental income was paid into an account specified by Mr Ahmed, over which the company had no control.

In return for financing the purchase, it was verbally agreed that when sold, a sum equal to any gain made on sale would be paid to Mr Ahmed. On sale, £305,000 of the £1.03 million proceeds was duly paid to Mr Ahmed.

Mr Ahmed reported the disposal in his UK Self Assessment tax return but, as a result of his non-UK resident status, no tax was due as the sale occurred before the non-resident rules changed for disposals of UK property.

Following an enquiry, HMRC concluded that Shinelock Ltd was liable to corporation tax on the property gain. The company accepted that it was the beneficial owner of the property but argued that the payment to Mr Ahmed was deductible as a non-trading loan relationship deficit, as the gain represented the sum owed in loans to Mr Ahmed.

HMRC disagreed, stating that the payment was a distribution.

The First Tier Tribunal dismissed the appeal, finding that there was neither a distribution., nor a loan relationship debit.

The company appealed to the Upper Tribunal.

Decision

The Upper Tribunal found that the property was beneficially and legally owned by the company throughout the period of ownership. During that time, it was shown in the company's accounts, together with the relevant rental income, interest charge and expenses.

The gain, paid as a sum to Mr Ahmed, formed part of the company's business which included the acquisition, holding and disposal of the property. As a result, the payment of the gain to Mr Ahmed, shareholder, constituted a distribution under s.1000 CTA 2000, (being a distribution in respect of 'special securities' under paragraph F). Special securities includes where consideration is given dependent on the results of the business as was the case here.

The Upper Tribunal considered s.307 CTA 2009 on when loan relationship transactions should be brought into account for tax. To recognise a debit for tax purposes, it must be recognised in the company's profit and loss account as prepared in accordance with GAAP. The company's accounts did not recognise the gain on the property or the payment to Mr Ahmed.

The company's appeal was dismissed.

Shinelock Limited v HMRC [2023] UKUT 00107 (TCC)

HMRC spotlight on school fees 'schemes' (Lecture P1384 – 14.05 minutes)

HMRC has recently published a Spotlight (62) on a tax avoidance scheme relating to school fees. To put this in context, the Spotlight regime was instigated some years ago by HMRC where the department has identified a scheme which they believe does not work. These are schemes which HMRC has not yet had the opportunity to formally challenge but where they are indicating, in advance, that they will enquire into any taxpayer who has utilised the planning. So, these are meant to act as a warning. If someone uses a scheme which has been highlighted by a Spotlight, it is likely HMRC will argue that a deliberate offence has been committed and so penalties will be higher if it is shown not to work.

In addition, the promoters of such schemes may have to comply with DOTAS (the Disclosure of Tax Avoidance Schemes) although it is important to note that there is only a requirement under DOTAS if the scheme meets one of the prescribed hallmarks. It is possible that it falls under hallmark 9 relating to financial products. Any person who has already promoted such schemes to clients may need to consider if making a protective notification under DOTAS as a promoter.

Promoters may also be pursued under the 'enablers' regime if this type of scheme is promoted widely.

Not all schemes highlighted by Spotlights reach the point where they are considered by the Tribunal or GAAR panel. It is unclear why this might be the case – that people are put off or simply settle with HMRC where it has been used or HMRC decide in the end that it does not merit challenging.

This Spotlight is interesting because it highlights something which is common enough that many people will have considered this type of planning.

HMRC's view on how the scheme works (taken from the Spotlight)

The arrangements seek to avoid tax by allowing the directors, who are also the main shareholders (the owners) of a company, to divert dividend income from themselves to their minor children.

The arrangements work as follows:

1. a company issues a new class of shares which usually entitles the owner of the shares to certain dividend and voting rights;

2. Person A, usually a grandparent or sibling of the company owner, purchases the new shares for an amount significantly below market value;

3. Person A usually gifts the shares to a trust or declares a trust over the shares for the benefit of the company owner's children;

4. Person A or the company owners vote for substantial dividend payments in respect of the new class of share;

5. this dividend payment is paid to the trustees of the trust;

6. as the beneficiaries of the trust, the company owner's children are entitled to the dividend.

The company owner's children pay tax on the dividend received. However, they pay much less tax than if the company owners received the dividend due to their children's:

- £12,570 tax-free personal allowance;
- £1,000 dividend allowance;
- eligibility to the dividend basic tax rate.

Spotlight 62 goes on to say that it is HMRC's view that this is caught by the settlements provisions and states that arrangements which operate in a similar way may also be caught by this legislation. There are no further details about the specific technical arguments which HMRC might use.

Income from a settlement

S.629 ITTOIA 2005 states that income from a settlement is treated as the income of the settlor where it is paid for the benefit of the relevant children of the settlor.

The definition of settlement is 'any disposition, trust, covenant, arrangement or transfer of assets' and can include a series of transactions. The use of the word 'arrangement' within this definition means that it covers a wide range of situations and it would not be advised to rely on being able to argue that this is not an arrangement. A settlor is any person who makes a settlement. It is well established that this can include someone who is indirectly involved.

The use of grandparents to subscribe for the shares and then transfer those to the settlement from which their grandchildren benefit was always thought to avoid the application of those provisions.

However, the argument made by HMRC here may well derive from the fact that the parents of the children have allowed valuable shares in the company to be issued at less than market value so that they are, in fact, also an indirect settlor in relation to the settlement.

The 1988 case of Butler v Wildin BTC475 considered this argument. Two brothers (one who was an accountant and one who was an architect) held shares in a company which also issued shares to their minor children using funds provided by their grandparents. They developed a property and dividends were paid out to their children which the Courts found were caught under the Settlements provisions. The fact that the brothers worked for the company for no consideration, and therefore inflated the profit available for distribution to their children, was found to be an arrangement within these provisions as they had intended to confer a benefit on their children by not being paid for what they did.

There is also an example in the HMRC Trusts Settlements and Estate Manual at paragraph 4300 which states:

> Mr J owns 60 of the 100 issued £1 shares in J Limited. Mr J is the sole company director and is the person responsible for making all the company's profits because of his knowledge, expertise and hard work. On starting up the company, Mr J allowed his mother to subscribe £40 for 40% of the shares and shortly

> afterwards she gifted them to her grandchildren… The true settlor here is Mr J rather than the children's grandmother. S.629 therefore applies and attributes the dividends received by the children to Mr J for tax purposes.

This example suggests that the 'scheme' which is being attacked would include situations where the shares are issued at a time when a company has no value and no distributable reserves.

Further guidance (at para.4325 of the same manual) states that HMRC will look at situations where the following apply:

- disproportionately large returns on capital investments;
- differing classes of shares enabling dividends to be paid only to shareholders paying lower rates of tax;
- dividends being waived so that higher dividend;
- income being transferred from the person making most of the profits of a business to a friend or family member who pays tax at a lower rate.

This is wider than the specific circumstances outlined above but HMRC do acknowledge (as noted above) that other similar arrangements which operate in the same way may also be caught. On this basis, this type of planning may now become too risky. Advisors may also need to consider if they wish to continue to pay dividends on shares where this structure has been put in place in the past.

Contributed by Ros Martin

Capital allowances and gains on property **(Lecture B1382 – 14.50 minutes)**

When a business is buying a property, it will typically negotiate a price for the building as a single entity and consider if that figure can be split in order to get a better tax outcome.

The cost of a building is going to be capital in nature and the legislation specifically states that you cannot get capital allowances on buildings unless you have a building which has a function beyond that of just being a building. This is rare and commonly challenged by HMRC. However, the price being paid might include the purchase of assets which do qualify for capital allowances.

Fixtures

The most obvious example is integral features. These are specific assets which can qualify for allowances although the expenditure falls within the special rate pool and so attracts a lower rate of writing down allowance than the main pool. Subject to falling within one of the specific exclusions, such expenditure can qualify for annual investment allowance.

Integral plant is defined as:

- Electrical systems including lighting systems;
- Cold water systems;

- Space or water heating systems, air conditioning or ventilation systems and any floor or ceiling forming part of those systems;

- Lifts, escalators and moving walkways; and

- External solar shading and active facades.

These items are often referred to as 'fixtures' although the legislation refers to these as integral plant.

It is important, however, to acknowledge that you cannot always get capital allowances on the fixtures within a building which is purchased.

If you are buying a building which includes fixtures, the availability of capital allowances depends on the meeting of two requirements:

1. The pooling requirement;

2. The fixed value requirement (occasionally replaced by the disposal value statement).

The pooling requirement applies only where the vendor could have claimed capital allowances in the past. If they could not (perhaps because the expenditure was incurred before 2008 when the integral features provisions were introduced) then the purchaser does not have to meet either of the above requirements and can claim capital allowances on an apportionment of the sale price. The pooling requirement is that the vendor has pooled the expenditure into a capital allowances pool before sale – there is no need to have claimed any allowances but it must have been pooled.

The fixed value requirement is that the value of the assets has been agreed between someone who has brought a disposal value into account and the purchaser. This is to ensure that the same value is used on both sides of the transaction.

How does this affect the capital gains position of either party? The simple answer is that it doesn't. Any amount which is allocated to integral features does not alter the price of sale or purchase for capital gains purposes.

Example

A is selling property to B for £3million. The base cost was £1.5million.

A has pooled value of fixtures and claimed capital allowances; the current tax written down value is £100,000 and the original value allocated to that in the purchase of this property was £225,000.

The parties want to know what the best figure is to allocate to the fixtures in terms of optimising the tax position for each party. Indexation is ignored.

Capital gains

The capital allowances position has no impact on the capital gain of the company:

Sale price	3,000,000
Less Cost	1,500,000

Gain	1,500,000

The purchase price for the new owner is £3million.

Capital allowances

We will consider three options: we allocate (a) £225,000, (b) £100,000 or (c) nil.

Fixtures sale price	*BA for A*	*BC for A*	*Acquisition cost for B (eligible for CAs)*
(a) £225,000 (max.)	Nil	£125,000	£225,000
(b) £100,000	Nil	Nil	£100,000
(c) £1	£99,999	Nil	£1

B is likely to be able to claim annual investment allowance on the expenditure, assuming the assets qualify in general terms and the parties are not connected. The final decision may well depend on the negotiating powers of each side.

Structures and buildings allowance

If someone is buying a building from a previous owner (who is not the one who has built the property), then they will only be able to claim structures and buildings allowance (SBA) if the previous owner has incurred qualifying expenditure. No balancing charge or allowance arises to the vendor and the new owner simply continues to claim what the previous owner was claiming. The new owner may be able to claim their own SBA if they undertake renovation subject to the relevant conditions being met.

There is an impact on the capital gains calculation though. Any SBA that has been claimed has to be added to the proceeds, thus increasing the gain or reducing the losses.

Example

X Ltd constructs offices for rental for £2 million excluding land and it is determined that £500,000 relates to fixtures. SBAs are claimed on the balance of £1.5 million. This is allowed at a rate of 3% per annum, so £45,000 per year.

After seven years, the office is sold to a business for £3 million and (for a reason which is never particularly specified) agrees to allocate only £1 to the fixtures so that X Ltd does not get a balancing charge on the sale (all the value having been relieved using AIA)

The gain appears to be £1 million – as noted above, the value of the fixtures is not adjusted in either the sale price or the cost. But the SBA claimed (being £315,000 on the basis of £45,000 for 7 years) is added to the gain, so the total gain is £1.315 million.

The new owner can continue to claim £45,000 per year of SBA.

Contributed by Ros Martin

Capital allowances on hydroelectric scheme (Lecture B1381 – 20.46 minutes)

Summary – Expenditure incurred on building various underground conduits and tunnels forming part of a hydroelectric power generation scheme qualified for plant and machinery capital allowances.

SSE Generation Limited had claimed capital allowances on the construction of a hydroelectric scheme in Scotland. The scheme involved a power station generating electricity using high pressure water to drive a turbine.

The case heard by the Supreme Court concerned items which were conduits of various kinds that channelled water to, through and from the power station.

Under its common law definition, both parties agreed that the disputed items were 'plant'. The issue was whether the expenditure was excluded under s.22 CAA 2001 (List B) as expenditure incurred on a 'tunnel, bridge, viaduct, aqueduct, embankment or cutting'. If classed as 'tunnels' or 'aqueducts' under List B, the expenditure would not qualify for capital allowances.

Decision

The Supreme Court stated that the items within List B were grouped thematically, with item 1 (tunnel, bridge, viaduct, aqueduct, embankment or cutting) containing structures relating to the "construction of transportation routes or ways."

The common meaning of 'tunnel' could mean any type of 'subterranean passage'. However, when read in the context with the other words within item 1 (so with 'bridge' and 'viaduct'), it must mean an underground passageway allowing access from one place to another of persons or means of transport.

The Court rejected HMRC's argument that 'aqueduct' simply meant a water conduit. The ordinary meaning of the word "aqueduct" could mean either a conduit or elevated structure to carry water. However, when read in context together with 'viaduct', it was clear that that the latter applied.

With the List B references to 'tunnels' and 'aqueducts' limited to structures used for transportation, List B did not include expenditure on structures forming part of such an electricity generating scheme.

HMRC's appeal was dismissed.

HMRC v SSE Generation Ltd [2023*] UKSC 17*

Withholding tax on interest paid by UK borrower

Summary – The taxpayer should have withheld tax when paying interest. The UK/ Guernsey double taxation agreement did not apply and the loans, taken together, provided continuous finance.

Hargreaves Property Holdings Ltd was the UK resident parent of a group of companies engaged in UK property development, construction and investment.

The group's business was funded by loans.

In 2004, the group restructured its loans with a view to ensuring that the loan interest no longer had a UK source.

At the same time, the lender assigned the principal to a Guernsey company or Guernsey trust. The interest and principal under the relevant loan was then repaid using amounts advanced by the lender.

From 2012, after being assigned to the Guernsey entity, the interest was assigned to a UK incorporated and tax resident company before the sums were repaid.

HMRC said Hargreaves Property Holdings Ltd should have withheld income tax (s.874 ITA 2007) when paying the interest and raised assessments.

The First Tier Tribunal dismissed the company's appeal.

Decision

Agreeing with the First Tier Tribunal, the Upper Tribunal rejected Hargreaves Property Holdings Ltd's argument that the interest was within s.933 ITA 2007 and therefore excepted from s.874, because the recipient was UK resident and beneficially entitled to the income. The Upper Tribunal concluded that it would be 'extraordinary if one could avoid the imposition of the s.874 collection mechanism simply by interposing a company … which has no commercial function other than to sidestep the withholding provisions'.

The Upper Tribunal also agreed with the First Tier Tribunal that the UK/Guernsey double taxation agreement did not apply given the absence of a claim for relief.

On Hargreaves Property Holdings Ltd's assertion that some of the loans were for less than a year, the Upper Tribunal said the First Tier Tribunal was correct to decide that the loans, taken together, provided a 'continuous provision of finance'. Further, if the company's approach was correct, the withholding provisions could be avoided 'by the simple device of restructuring a long-term investment as a series of short-term loans'.

Finally, on the source of the interest payments, the Upper Tribunal held that the First Tier Tribunal had not made an error of law. It was entitled from the evidence to reach the conclusion that the payments arose in the UK and not from overseas, as claimed by the company.

Hargreaves Property Holdings Ltd's appeal was dismissed.

Hargreaves Property Holdings Ltd v HMRC [2023] UKUT 00120 (TCC)

Adapted from the case summary in Taxation (8 June 2023)

New oil and gas tax changes

On 9th June 2023 HM Treasury announced that the Energy Profits Levy, which puts a marginal tax rate of 75% on North Sea oil and gas production, will remain in place until March 2028.

It will fall back to 40% when prices consistently return to normal levels for a sustained period.

The tax rate for oil and gas companies will only return to 40% if both average oil and gas prices fall to, or below, $71.40 per barrel for oil and £0.54 per therm for gas, for two consecutive quarters.

https://www.gov.uk/government/news/new-oil-and-gas-tax-changes-set-to-protect-energy-security-and-british-jobs

Sale of a company following a hive-down **(Lecture B384 – 26.18 minutes)**

Introduction

In a previous session, we looked at the tax implications of hiving a trade and its assets to a new company owned by the existing group. This usually precedes a sale of the new company to a third party.

This session considers the tax implications of the sale on the vendor and the purchasing company.

Potential chargeable gain on disposal of Newco

There are two issues to consider:

1. Whether the vendor company qualifies for SSE on disposal of shares in Newco;

2. If not, then possible de-grouping gains if Newco received chargeable assets or intangible assets at NG/NL on the hive down.

De-grouping charges (s.179 TCGA 1992)

Where chargeable assets have been previously transferred within a 75% gains group at NG/NL and the recipient company leaves the 75% group within 6 years of receiving the asset, a gain arises, calculated as the market value of the asset when it was received minus the indexed cost to transferor company.

This is generally taxed on the company leaving the group, but the gain can be transferred to another 75% group company using a s.171A election.

Where the de-grouping gain arises as a result of a disposal eligible for substantial shareholding exemption (SSE – see later), the de-grouping gain is treated as part of the consideration for the sale of the shares (S.179(3D)), and is also exempted.

De-grouping charges and intangibles (s782A CTA 2009)

A similar treatment to the above applies to de-grouping charges involving intangible assets where the share sale is eligible for SSE, but there is one difference.

Instead of calculating a profit or loss by reference to the market value of the intangible when it was transferred to the receiving company and then exempting it, the intangible retains its tax written value going forward (it is not rebased to current market value).

Example

A Ltd is the parent company of a trading group. In May 2023, the long-held trade of a subsidiary, C Ltd is hived down to Newco Ltd including:

- Land and buildings: market value £500,000, indexed cost to Dec 17 £310,000
- Intangible asset: market value £200,000, tax WDV £120,000

In June 2023, the shares in Newco Ltd are sold to a third party for £2.1 million. Amortisation on the intangible of £8,000 was charged for June 2023.

Assuming the share sale qualifies for SSE, what are the tax implications relating to the land and buildings and intangible asset?

Analysis

A de-grouping gain arises on the land and buildings of (500 – 310) £190,000. This is added to the share consideration of the sale of Newco and so is exempted by SSE.

The base cost of the land and buildings in Newco is £500,000 going forward (as it is deemed to dispose and reacquire them for this amount).

The intangible asset does not give rise to a de-grouping charge where SSE applies to the share sale.

The base cost of the intangible asset is £120,000 (i.e. the tax WDV when transferred to Newco).

Amortisation of the intangible will be deducted in the CT600 but based on the tax WDV when acquired (£120,000) not the market value at that date (£200,000).

If Newco is amortising £200,000 in its accounts, this will lead to a partial disallowance in the CT computation.

SSE conditions

Broadly, the vendor must have held 10% or more of a trading company for a period of 12 months in the previous 6 years.

The 10% means 10% of ordinary share capital, entitlement to 10% of profits available for distribution, and entitlement to 10% of assets available to equity holders in a winding up.

There is no minimum percentage holding to qualify if the shares are worth more than £50m.

Whilst the company being sold must be a trading company, the vendor does not need to be.

If a trade is hived down to a new company then sold shortly afterwards, the 12 month test will not be satisfied, but Para 15A, Schedule 7AC TCGA 1992 allows the inclusion of periods where another group company carried on the trade transferred to Newco

Para 15A, Sch 7AC TCGA 1992

(2)…the period for which the investing company is treated as holding a substantial shareholding in the company invested in is extended in accordance with sub-paragraph (3) if the following conditions are met.

a) immediately before the disposal, the investing company holds a substantial shareholding in the company invested in,

b) an asset which, at the time of the disposal, is being used for the purposes of a trade carried on by the company invested in was transferred to it by the investing company or another company,

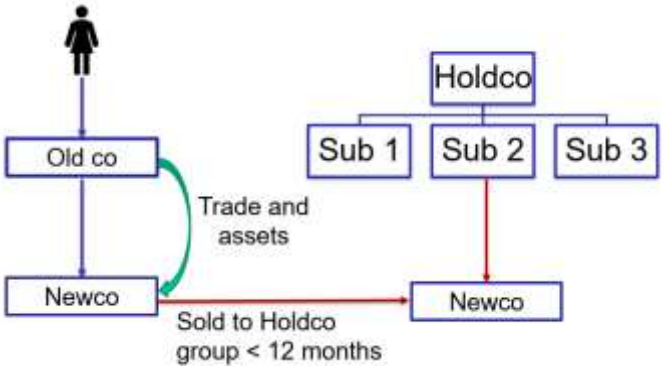
c) at the time of the transfer of the asset, the company invested in, the investing company and, if different, the company which transferred the asset were all members of the same group, and

d) that the asset was previously used by a member of the group (other than the company invested in) for the purposes of a trade carried on by that member at a time when it was such a member.

2A) …irrelevant (to do with oil and gas businesses)

(3) The investing company is to be treated as having held the substantial shareholding at any time during the final 12 month period when the asset was used as mentioned in sub-paragraph (2)(d) (if it did not hold a substantial shareholding at that time)

But what If there was no group before the hive down?



Analysis

There was no group in place when Old co was running the trade so S2(d) Para 15A, Sch 7AC TCGA not satisfied. No SSE is available on disposal of Newco

Degrouping gains will arise on chargeable assets and intangible assets transferred to Newco.

If a dormant company was owned by Old co prior to the hive down, s2(d) would have been satisfied and SSE would have been available. The trade would have been run by a member of

the Old co group (i.e. it plus the dormant company constitutes a group). This seems strange, but with no dormant company, SSE is not available.

Other conditions to use Sch 7AC.15A

S19(1): The newco must be a trading company immediately after the sale of the shares

S19(2B): The company invested in is treated as having been a trading company at any time during the final 12-month period when the asset was used as mentioned in paragraph 15A(2)(d) (by another group member)

A newco (or previously dormant company) needs to trade for at least a day to meet s15A 2(b) (to 'use the asset in a trade').

Preservation of trading losses when company changes ownership

"Major change in nature or conduct of trade" (MCINOCOT) provisions (s673 CTA 2010) operate to restrict losses carried forward where there is a change in ownership of a company. This is a much more sensitive test than the usual (pre-1 April 2017 loss) carry forward rules.

- If a MCINOCOT occurs in the 8 year-period from 3 years before the change in ownership to 5 years after, losses cannot be carried forward beyond the date of change in ownership.

- If the MCINOCOT occurs before the change in ownership, no losses can be carried forward for the new owner to use.

- If the MCINOCOT occurs in the 5 years after change of ownership, losses carried forward at the change of ownership are cancelled retrospectively.

Post 1 April 2017 pre-acquisition losses brought forward of an acquired company cannot be group relieved to the new group members for 5 years.

What is a MCINICOT?

Major change in

a) Type of property dealt in; or

b) Services or facilities provided; or

c) Customers, outlets or markets; or

d) If the level of business has become negligible and revived.

HMRC examples – no MCINOCOT

- A company manufacturing kitchen fitments, in three obsolescent factories moves production to one new factory (increasing efficiency)

- A company manufacturing kitchen utensils replaces enamel with plastic, or a company manufacturing time pieces replaces mechanical by electronic components (keeping pace with developing technology)

- A company operating a dealership in one make of car switches to operating a dealership in another make of car satisfying the same market (not a major change in the type of property dealt in)

- A company manufacturing both filament and fluorescent lamps (of which filament lamps form the greater part of the output) concentrates solely on filament lamps (a rationalisation of product range without a major change in the type of property dealt in)

- A company whose business consists of making and holding investments in United Kingdom quoted shares and securities makes changes to its portfolio of quoted shares and securities (not a change in the nature of investments held)

HMRC examples - MCINOCOT

- A company operating a dealership in saloon cars switches to operating dealership in tractors (a major change in the type of property dealt in)

- A company owning a public house, switches to operating a discotheque in the same, but converted, premises (a major change in the services or facilities provided)

- A company fattening pigs for their owners, switches to buying pigs for fattening and resale (a major change in the nature of the trade, being a change from providing a service to being a primary producer)

- A company switches from investing in quoted shares to investing in real property for rent (a change in the nature of investments held).'

Contributed by Malcolm Greenbaum

VAT and indirect taxes

Hardship application (Lecture B1381 – 20.46 minutes)

Summary – Accepting the director's oral evidence that the company had no assets, it could not generate any income and could not trade, the hardship application was allowed.

ABA Motors Limited was incorporated in March 2019 and traded by selling used cars and light motor vehicles. The company sourced vehicles for its customers from UK dealers, and then transfer the vehicles to its customers, who were based in southern Ireland. While exports of the vehicles were zero rated for VAT, the company was required to pay VAT to the UK dealer.

On 29 July 2021 HMRC raised assessments on the basis that ABA Motors Limited was involved in missing trader fraud, and so was not entitled to repayment of the VAT which it incurred on its purchases. The total amount of VAT assessed was £110,310.

The company failed to provide further information requested by HMRC which included details of assets, bank statements, accounts, financial investments, and other financial information. Consequently, on 23 June 2022, HMRC refused the hardship application.

The company appealed, making a hardship application to the First Tier Tribunal.

Decision

The First Tier Tribunal stated that it was for the company to establish hardship and agreed that, based on the available evidence, HMRC 'had no alternative but to refuse hardship'. However, the First Tier Tribunal stated that it could consider all of the evidence which had been presented on appeal, not just that which had been provided to HMRC.

The judge accepted the director's oral evidence which was found to be "comprehensive, coherent, and, to my mind, wholly plausible." Based on that evidence the First Tier Tribunal found that ABA Motors Limited had no assets, it could not generate any income and could not trade. The First Tier Tribunal stated that "It was not a question of hardship, it simply could not pay" the VAT bill.

The hardship application was allowed.

ABA Motors Limited v HMRC (TC08811)

Items qualifying for DIY housebuilders scheme (Lecture B1381 – 20.46 minutes)

Summary – The taxpayer was entitled to a VAT refund under the DIY housebuilder scheme where items had been correctly standard rated by suppliers. Where items should have been zero rated by suppliers, the refund was denied.

Steven Mort built a dwelling in Bury and submitted a claim for VAT to be refunded under the DIY Housebuilders scheme. Initially that was for VAT of £135,671.72 to be refunded but by the time of the appeal it had been agreed that the sum under appeal was just over £37,000.

HMRC accepted that the property qualified as a dwelling but continued to refuse the sum under appeal as under s.35 VATA 1994 a person lawfully constructing a building designed as a dwelling can recover VAT properly charged on goods used for that construction. However, the scheme does not allow VAT recovery where VAT has not been properly charged or on services.

Decision

In reaching their decision, the First Tier Tribunal considered each invoice in turn, concluding that Steven Mort was able to recover a further £17,000 of VAT.

Claims relating to laying tarmac for the path and drive, supplying and installing steel roof beams and wooden flooring were all denied. In each case, the First Tier Tribunal found that the service element of the supply was more significant that the goods. Under Items 2 Group 5 Schedule 8 VATA 1994, these items should have been treated as zero-rated services rather than as standard rated supplies of building materials. These claims were rejected.

However, some items were found to be correctly standard rated and so were allowed. These included supplying and installing shutters and a roller screen roof system, automated gates and insulated garage doors as well as the manufacture and supply of skirting, staircase components and fire doors. In each of these cases, the cost breakdown showed that the goods element of the invoice far outweighed the installation service proportion and so these claims were allowed.

Finally, certain elements were found not to be building materials at all but rather they were supplies of furniture. These were bedroom furniture, including a wardrobe 'system' described as "Furniture, headboard, bedside cabinets, mirrored wall and master dressing room furniture including lighting to wardrobes". The Tribunal found that this was not a 'basic' fitted wardrobe created within a building alcove, but rather this complex combination of shelving, rails and drawers, which cost around £80,000, was "an item of furniture in its own right." The related VAT was not recoverable.

Interestingly, the First Tier Tribunal criticised HMRC's approach in this case. Where VAT has been incorrectly charged and so is not recoverable by the 'homeowner', HMRC can choose to pursue such a case only where the supplier has not declared and paid the incorrectly charged VAT.

Steven James Mort v HMRC (TC08801)

Clearance application **(Lecture B1381 – 20.46 minutes)**

Summary - Without full and frank disclosure, the taxpayer had no legitimate expectation that the non-statutory clearance would not be revoked by HMRC.

The dispute concerned the VAT treatment of a training programme for airline cadets.

Briefly, each cadet had to pay a bond to the taxpayer to cover the costs of their training, on completion of which the bond was transferred to the relevant airline which employed the cadet.

The taxpayer had obtained a non-statutory clearance (NSC) from HMRC which gave a favourable VAT treatment, but HMRC later revoked the ruling on the basis that the taxpayer had not given full and frank disclosure in its application. In particular, it had not referred to the fact that in many cases the funding would be through a salary sacrifice arrangement. Had that been disclosed, HMRC would have not given the ruling.

The draft application for the ruling showed that the taxpayer's advisers had expressly referred to a potential salary sacrifice arrangement but the company had asked for the reference to be removed.

The taxpayer claimed it had legitimate expectation to rely on HMRC's ruling.

Decision

The High Court had 'no hesitation' in concluding that the inaccurate and misleading nature of the NSC request was material.

There had not been full and frank disclosure, and therefore the taxpayer had no legitimate expectation that the ruling would not be revoked by HMRC.

R (on the application of) Airline Placement Limited v CRC, King's Bench Division, 19 May 2023

Adapted from the case summary in Taxation (8 June 2023)

Online VAT payment plans

HMRC has confirmed that VAT-registered businesses owing less than £20,000 of VAT can set up a payment plan online.

In order to do so, the trader must:

- have filed their latest tax return;
- be within 28 days of the payment deadline;
- not have any other payment plans or debts with HMRC;
- plan to pay their debt off within the next 6 months.

However, this facility is not available for traders operating the Cash Accounting Scheme, Annual Accounting Scheme, or where they are making payments on account.

https://www.gov.uk/difficulties-paying-hmrc/pay-in-instalments

Revenue and Customs Brief 6 (2023)

Revenue and Customs Brief 6 (2023): VAT liability of digital publications provides an update on the VAT treatment of supplies of digital newspapers and other digital publications before 1 May 2020.

Following the Supreme Court decision in News Corp UK and Ireland Ltd [2023] UKSC 7, this new Brief replaces Revenue and Customs Brief 3 (2021).

The Supreme Court judgment confirmed HMRC's policy that supplies of digital publications before 1 May 2020 were standard rated, not zero-rated. The Supreme Court unanimously dismissed News Corp's appeal. Under the EU 'standstill provision' and the principle of 'strict interpretation', the 'always speaking doctrine' could not be applied to interpret newspapers in Item 2 of Group 3 as including digital newspapers prior to 1 May 2020.

HMRC is now in the process of writing to organisations that have submitted claims for overpaid VAT based on the earlier Upper Tribunal decision (UT/2018/0046). This is to establish, given the Supreme Court decision, whether they intend to proceed with their appeals.

This brief has no impact on the government's introduction of the new zero rate for supplies of certain digital publications (including e-newspapers), effective from 1 May 2020.

https://www.gov.uk/government/publications/revenue-and-customs-brief-6-2023-vat-liability-of-digital-publications-supreme-court-decision-in-news-corp-and-ireland-ltd

How many £85,000's do I get? (Lecture B1385 – 22.49 minutes)

The £85,000 limit applies to each person: a sole trader, a partnership or a limited company. So if a VAT registered sole trader was looking to buy a furnished holiday let (FHL) it would be unwise to buy it in their sole name. Income from FHLs is taxable and any taxable income that person has would fall under their sole trader VAT registration. VAT would need to be charged on their FHL income.

The client would be better advised to buy the FHL in joint names with their spouse. This would then be a partnership for VAT purposes and a fresh £85k limit would be at the partnership's disposal. No VAT would need to be charged on the partnerships FHL income until the partnership breached the £85,000 limit.

If the VAT registered sole trader was then considering buying a residential buy to let (exempt income) we would be advising the client to buy that property in their sole name. This would make the sole trader partially exempt but this would facilitate input tax recovery of up to £7,500 pa on their residential buy to let costs under the partial exemption de-minimis rules. VAT on repair costs, agent's fees, furniture etc would then become recoverable providing the total input tax on the buy to let costs were no more than £7,500 per VAT year and the sole trader turnover exceeded the rental income.

The trader would need to manage their costs on their buy to let as exceeding the £7,500 by £1 or more would mean £nil recover on the buy to let for that VAT year. VAT years are 31 March, 30 April of 31 May depending on their VAT stagger i.e. VAT quarters. It would be wise to spread a major refurbishment over two VAT years to maximise recovery i.e. keeping both years below £7,500. So if we assume the sole trader has a residential buy to let in their name and an FHL in joint names what would your advice be if he wanted to buy a second buy to let?

It would not be advisable to buy the third property in their sole name as that might jeopardise the input recovery on the first buy to let i.e. only one £7,500 de-minimis limit per person. Ideally the property should be bought in joint names so if the FHL ever breached the £85,000 limit it would open up input tax recovery on the buy to let as the partnership would have their own £7,500 de-minimis limit.

It should also be noted that partnerships with different partners are treated as different persons from a VAT perspective. So, a partnership of Mr and Mrs A and a second partnership of Mr A, Mrs A and Mr B would be two separate persons from a VAT perspective i.e. each would get their own £85k registration limit. It does not matter if Mr A and Mrs A have the controlling interest in the second partnership – the key issue is that the partnerships are not identical in terms of named partners.

If a client had two companies, then they would be two separate persons from a VAT perspective. Common control is irrelevant.

Aggregation

HMRC have the power to join (aggregate) businesses ("persons") together where they believe one business has been artificially separated so as to avoid one or more VAT registrations.

HMRC will look at the economic, financial and organisational links to determine whether a direction is needed. It should be noted that aggregation directions are only valid from the day they are issued i.e. they cannot be backdated.

So if the operator of a local laundrette formed three companies to operate their three laundrettes we may have an issue. Especially if the public perceived them to be one and the same e.g. same/similar names.

Aggregation directions are often sought in husband and wife situations e.g. sole trader hairdressers working from home (albeit different parts of the home) or a pub where one spouse trades as a sole trader for the wet sales and the other spouse trades as a sole trader for the food. The wet sale spouse is VAT registered, while the catering spouse is not.

Contributed by Dean Wootten