Tolley®CPD

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Prepared from material up to 15 May 2020

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Personal tax

Job Retention Scheme extension (Lecture P1196- 31.15 minutes)

Closure to new entrants from July 2020:

The government has stated that the scheme will close to new entrants from 30 June 2020, meaning that the final date by which an employer can furlough an employee for the first time will be the 10 June 2020. Any later, and the need for the current three-week furlough period to be completed by 30 June would not be satisfied.

Employers have until 31st July to make any claims in respect of the period to 30 June.

Flexible furlough

From 1 July 2020, the scheme will only be available to employers that have previously used the scheme to furlough employees.

Employers can bring back to work employees who have been furloughed for any amount of time, but the employer will be responsible for paying for the work done, including ERs NIC and pension contributions. The grant will continue to be available for the hours not worked.

To be eligible for the grant, employers must agree with their employee any new flexible furloughing arrangement and confirm that agreement in writing. Employers will need to report <u>hours worked</u> and the <u>usual hours</u> an employee would be expected to work in a claim period and in order to accommodate these planned changes, from 1 July, claim periods will no longer be able to overlap calendar months and must be for a minimum of a week.

Employers can claim the grant for the <u>furloughed hours</u> when their employees are not working calculated by reference to their usual hours worked in a claim period:

- July: Government pays 80% of wages up to a cap of £2,500 as well as employer National Insurance Contributions (ER NICs) and pension contributions for the hours the employee does not work.

- August: Government pays 80% of wages up to a cap of £2,500 for the hours the employee does not work but now employers pay the related ER NICs and pension contributions.

- September: Government pays 70% of wages up to a cap of £2,187.50 for the hours the employee does not work with the employer paying 10% up to £312.50. Employers pay the related ER NICs and pension contributions on the full 80%.

- October: Government pays 60% of wages up to a cap of £1,875 for the hours the employee does not work with the employer paying 20% up to £625. Employers pay the related ER NICs and pension contributions on the full 80%.

The table below summarises the position:

Month	Regular pay		Base cap *		Employers NIC		3% pension	
	Grant	ER	Grant	ER	Grant	ER	Grant	ER
Jul	80%	0%	£2,500	-	100%	0%	100%	0%
Aug	80%	0%	£2,500	-	0%	100%	0%	100%
Sept	70%	10%	£2,187.50	£312.50	0%	100%	0%	100%
Oct	60%	20%	£1,875	£625	0%	100%	0%	100%

* The base cap will be proportional to the hours not worked. So the full cap in the table above will only apply where the employee continues to be furloughed for 100% of the time. If an individual returns to work, the cap will be proportionately reduced.

Further guidance on this flexible furloughing scheme and how employers should calculate claims will be published on 12 June 2020.

https://www.gov.uk/government/news/chancellor-extends-self-employment-support-scheme-and-confirms-furlough-next-steps

Working for linked organisations **(Lecture P1196- 31.15 minutes)**

HMRC guidance makes it clear that while furloughed, employees cannot be asked to do any work that either makes money or provides services to their employer's organisation or any organisation linked or associated with their organisation.

The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction states that a furloughed employee must cease all work in relation to their employment including work for a person connected with their employer.

The Direction defines what constitutes a connected (linked or associated) employer by referring to the definitions within s993 ITA 2007and s 1122 CTA 2010, s1122.

S993 ITA 2007 and S1122 CTA 2010

An individual ("A") is connected with another individual ("B") if—

(a) A is B's spouse or civil partner,

(b) A is a relative of B,

(c) A is the spouse or civil partner of a relative of B,

(d) A is a relative of B's spouse or civil partner, or

(e) A is the spouse or civil partner of a relative of B's spouse or civil partner.

Partners in a partnership are connected in a similar way.

A company is connected with another company if—

(a) the same person has control of both companies,

(b) a person (“A”) has control of one company and persons connected with A have control of the other company,

(c) A has control of one company and A together with persons connected with A have control of the other company, or

(d) a group of two or more persons has control of both companies and the groups either consist of the same persons or could be so regarded if (in one or more cases) a member of either group were replaced by a person with whom the member is connected.

A company is connected with another person (“A”) if—

(a) A has control of the company, or

(b) A together with persons connected with A have control of the company.

And finally, also in relation to a company, any two or more persons acting together to secure or exercise control of the company are connected with—

(a) one another, and

(b) any person acting on the directions of any of them to secure or exercise control of the company.

Non-discretionary payments **(Lecture P1196 - 31.15 minutes)**

HMRC has updated its guidance in this area. As we know, the amount used when calculating 80% of employees’ wages is regular payments that employers are obliged to make, including regular wages and non-discretionary amounts for overtime, fees and commission.

Non-discretionary payments only includes payments where there is a contractual obligation to pay them and to which the employee has an enforceable right. Variable payments become non-discretionary if they are always paid.

Payments for overtime worked are classed as non-discretionary when the employer is contractually obliged to pay the employee at a set and defined rate for the overtime that they have worked.

https://www.gov.uk/guidance/work-out-80-of-your-employees-wages-to-claim-through-the-coronavirus-job-retention-scheme#history

Employment allowance (Lecture P1196 - 31.15 minutes)

Once claimed, the Employment Allowance gives £4,000 relief against Employers NICs on salary paid.

When the Coronavirus Job Retention Scheme (CJRS) was first announced in March 2020, there was some doubt about how this regime would interact with the Employment Allowance for 2020/21.

If the £4,000 Employment Allowance is claimed, the furlough claim should not include employers NICs. In order to maximise the grant claim, the Employment Allowance should be set against working employees first.

However, there is no legal requirement to make the claim at the start of the tax year and so employers should consider deferring the Employment Allowance claim until it is needed. It could be deferred until:

- July 2020 when staff start working part-time and the employer is paying for hours worked; or

- August 2020 when the furlough grant stops covering employers NIC on furlough pay.

COVID-19 reimbursed home expenses (Lecture P1196 – 31.15 minutes)

To support employees who are working from home and need to purchase home office equipment as a result of the coronavirus outbreak, a temporary tax exemption and National Insurance disregard will come into effect to ensure that the expense will not attract tax and NICs liabilities where reimbursed by the employer.

To qualify for this relief the expenditure must meet the following conditions:

1. The equipment must be obtained for the sole purpose of enabling the employee to work from home as a result of the coronavirus outbreak, and

2. The provision of the equipment would have been exempt from income tax if it had been provided directly to the employee by or on behalf of the employer (under s316 of ITEPA 2003).

The exemption is a temporary measure and will have effect from the day after the regulations come into force until the end of the tax year 2020/21.

HMRC will exercise its collection and management discretion and will not collect tax and NICs due on any reimbursed payments made from 16 March 2020 (the date the government recommended working from home) to the date these regulations take effect.

https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-05-13/HCWS237/

Reimbursed home-office expenses (Lecture P1196 – 31.15 minutes)

S.316 ITEPA 2003 says that the provision of home-office equipment for an employee doesn't give rise to a taxable benefit as long as the equipment is only used for business purposes ('sole purpose') and so any private use is insignificant. "Provision" means that the employer owns the equipment and makes it available to an employee. So normally, these rules will not apply where an employer reimburses the cost of equipment that the employee has bought themselves. Such a reimbursement would be taxable and Class 1 NICable.

This has now been relaxed, effectively extending the reach of S.316 to items purchased by an employee and reimbursed by the employer. So yes, if an employee now has to work at home due to Covid, he can buy a desk, chair, monitor, headphones etc, and get the costs reimbursed with no taxable benefit.

If there is significant private use of items, there would still be a taxable benefit as before.

Contributed by Steve Sanders

Non-refunded tickets for charity events (Lecture P1196 - 31.15 minutes)

Where a charity event is cancelled, the charity is normally obliged to refund the ticket holder for the cost of their ticket. Should that individual wish to gift aid those proceeds to the charity, this must be made as a subsequent donation back to the charity under the gift aid rules.

In an attempt to reduce the administrative burden on charities where events are cancelled due to the coronavirus, HMRC has announced a simple, but temporary, process for claiming gift aid without the need for this two-stage process.

Provided the ticket holder is given the option of a full refund but chooses to gift aid the money back to the charity, HMRC has confirmed that gift aid can still be claimed even if the charity does not actually issue a refund.

The ticket holder must still complete the required gift aid declaration.

To qualify for this simplified process, the charity must:

- contact the individual who previously purchased the tickets of the cancelled event;
- explain that the individual is entitled to a refund but may wish to donate the cost of the ticket to the charity;
- make it clear that the individual does not have to donate the refund but if they choose to donate it, it's non-refundable;
- make sure the individual has enough tax to cover the donation;
- document the conversation with the individual and keep records of this;
- ensure that there is a Gift Aid declaration in place for the individual.

www.gov.uk/guidance/processing-ticket-refunds-for-cancelled-charity-events-during-the-coronavirus-covid-19-pandemic

Lifetime ISA rules changed (Lecture P1196 – 31.15 minutes)

The Lifetime ISA scheme is aimed at younger people and seeks to encourage them to save to buy their first home or provide funds for retirement. Under this scheme, the government pays a 25% bonus into the account on up to £4,000 of savings invested by the individual each year. So where an individual invested £4,000, with the government adding the £1,000, the fund balance would be sitting at £5,000.

Where funds are withdrawn for an unintended purpose, the government makes a 25% charge, claiming back £1,250, equivalent to 6.25% of the money originally invested.

Due to COVID-19, the Treasury is introducing temporary legislation, effective between 6 March 2020 and 5 April 2021, to reduce the charge to 20%. This means savers will get back all the money they originally put in (£5,000 x 20% = £1,000), subject to any investment losses incurred on stocks and shares Lifetime ISAs.

The rule change will be backdated to 6th March, so anyone who has withdrawn their money early already paid a 25% charge will have the difference refunded.

https://www.gov.uk/government/news/lifetime-isa-rules-changed-to-help-people-whose-incomes-are-affected-by-coronavirus

Should off-payrolling go ahead in the? (Lecture P1196 - 31.15 minutes)

As we know, the government plans to extend the off-payroll working rules used in the public sector to large and medium sized businesses in the private sector. However, due to Covid-19, the start date has been delayed until April 2021.

On 27 April 2020, the House of Lords Economic Affairs Finance Bill Sub-Committee published the findings of their 12-week inquiry into off-payroll working. Disappointingly for HMRC, the sub-committee opened their report by saying:

> " the IR35 rules— the government's framework to tackle tax avoidance by those in 'disguised employment'—have never worked satisfactorily, throughout the whole of their 20-year history."

Most taxpayers and their agents would not disagree.

In principle, the IR35 legislation makes sense where workers are abusing the tax system by trading through a personal service company, when for all intents and purposes they are effectively employees in disguise. Surely they should be taxed as such. However, the sub-committee concludes that the current IR35 rules fail to address a number of issues including the fact that:

- The rules are already resulting in unintended behavioural consequences. Despite the delay to April 2021, some contractors are already being laid off, while others are struggling to have contracts renewed;

- Everyone struggles with the status determination process and the ongoing deficiencies of HMRC's check employment status for tax (CEST) tool that many say is not fit for purpose; At present, the support offered by HMRC in determining status falls short of what is required;

- Both clients <u>and</u> contractors have benefited from the resulting tax treatment of contractors working though a personal service company so it seems unfair that under the off-payrolling rules, the contractor would effectively bear cost of the client's National Insurance Contributions in addition to their own, greater employment taxes;

- Having been classified as a deemed employee subject to PAYE, including national insurance, the worker is not entitled to any of the standard employment rights that attach to employee status;

Finally, the sub-committee commented that it does not seem right that private sector companies become 'responsible for enforcing a regime which HMRC has struggled with'. Surely, 'privatising tax compliance' cannot be right!

What to do now

The sub-committee concluded that considering the tax perspective alone was unlikely to deliver the optimal solution for our workers and economy as a whole. They believed that the government should reassess the "flawed" IR35 framework. By going ahead with the current plans for the off-payroll system in the private sector, this would result in an unfair system whereby significant numbers of contractors would become "zero rights" employees, taxed as an employee but without the rights that come with employment. They stated that we need a flexible workforce, where both employees and contractors play a vital role but in a way that is considered fair from both an employment and tax viewpoint.

Having considered a number of alternatives to off-payrolling that have been discussed over the years, the sub-committee finally recommended using the delay in implementation of the off-payrolling rules due to Covid-19 to:

- look back at the off-payroll rules in the public sector to see just how those rules are likely to impact the private sector labour market. The sub-committee noted that in the public sector, as a result of blanket assessments, contractors were likely to have been miscategorised and taxed incorrectly. Some contractors ceased working in the public sector altogether, causing recruitment and retention problems. Is this something that we want to see repeated in the private sector? The government should spend time analysing the potential impact of the off-payrolling rules on the wider labour market, particularly the gig economy.

- consider how to implement the Taylor Review recommendations by making the taxation of labour more consistent across different forms of employment (including national insurance), and improving the rights and entitlements of workers.

Times are changing?

If you remember when announcing the Self-Employed Income Support Scheme, the chancellor stated:

> *"It is now much harder to justify the inconsistent contributions between people of different employment statuses".*

With so many struggling financially due to Covid-19, and the government supporting both employees and the self-employed in trouble at this difficult time, the government is going to need to raise serious money going forward. Will this provide the ideal opportunity for the government to look to make both taxes and workers rights fairer in the future?

The sub-committee concluded the government should announce by October 2020 whether they will go ahead with the April 2021 launch date, or whether it will be further delayed.

The government should use this time to identify appropriate alternative solutions to the off-payroll rules and in so doing, it recommended applying the following six principles:

1. **Certain**—All parties should have certainty about the tax treatment that will apply.
2. **Simple**—. Any solution should be as simple as possible.
3. **Fair**—Treatment as an employee for tax should only apply if there are employment rights and risk-sharing between employer and contractor.
4. **Supportive of growth**—Solution should respect and preserve flexibility in the UK labour market.
5. **Administratively straightforward**—Any alternative needs to be straightforward to operate, and not excessively burdensome to administer.
6. **Enforceable**—Any new proposal should be manageable for HMRC.

https://publications.parliament.uk/pa/ld5801/ldselect/ldeconaf/50/50.pdf

Transfer of assets abroad – Valid Motive

Summary - The transfer of assets abroad rules did not apply when a company's gambling business was transferred to a Gibraltar based company.

Four members of the Fisher family were sole directors and shareholders of Stan James (Abingdon) Ltd, a betting business that consisted of betting shops in the UK, the taking of bets over the telephone, and more recently, internet betting.

The four family members were:

- Stephen Fisher and his wife Anne who were at all material times resident and ordinarily resident in the UK;
- Their son, Peter, who ceased to be resident in the UK in 2004;
- Their daughter, Dianne, who was non-resident in the UK.

With the introduction of online betting, customers were able to place bets in jurisdictions with substantially reduced rates of betting duty. Consequently, to remain competitive, the directors made the commercial decision to move their gambling business to a Gibraltar company, Stan James Gibraltar Ltd.

HMRC sought to tax the individuals on the profits of the new company, in proportion to their shareholdings, arguing that they had made a transfer of assets abroad.

The Transfer of Assets Abroad legislation (s739 ICTA 1988) taxes individuals who are ordinarily resident in the UK as receiving income that accrues to another ‘person’ who is resident abroad, if the individual has a power to enjoy that income. In case of Stan James, most of the income on which Stephen, Anne and Peter Fisher were charged to tax was reinvested in the company and so they did not receive it. However, the charge applies even if the individual never receives the income nor derives any benefit from it.

There is a ‘motive’ test (S741) that disapplies the Transfer of Assets Abroad legislation where the individual(s) can show that their motive for the transfer was not for tax avoidance but rather for bona fide commercial reasons.

Ultimately, the First Tier Tribunal found in HMRC’s favour for Stephen and Peter Fisher, who were UK nationals, but against HMRC for Anne Fisher, who was a UK resident Irish national. They stated that as the Transfer of Assets Abroad code restricted her rights of freedom of establishment, the legislation had to be interpreted so as to conform with EU law. This meant the references to “tax avoidance” in the legislation had to be interpreted as restricted to situations in which tax was avoided by artificial means. As that was not the case here, Anne Fisher was covered by the motive test. However, as Gibraltar and the UK are not separate states for this purpose, Stephen and Peter Fisher were not so entitled.

The parties appealed to the Upper Tribunal.

Decision

The Upper Tribunal stated that the Transfer of Assets Abroad legislation is aimed at persons looking to avoid income tax. The First Tier Tribunal had already concluded that avoidance of income (or corporation) tax was not a purpose of the transfer.

Additionally, the legislation requires the transfer of the assets to be made by the individual and that clearly was not the case here, as it was company assets being transferred. The Upper Tribunal stated that even if a group of shareholders had a controlling interest in a company and collectively brought about the transfer by the company of its assets, there is a fundamental conceptual difficulty in treating them as if they had each individually transferred all the company’s assets. In any case, none of the taxpayers in this case had a controlling interest and although Stephen and Peter Fisher were collectively responsible as directors for effecting the transfer, together they held only 50% of the shares. It was not possible to impute the transfer to any of the taxpayers in this case as “quasi-transferors”.

The Upper Tribunal found in favour of the Fishers but, nevertheless, they went on to consider the other issues.

The Tribunal concluded that there was a valid ‘motive’ defence. Even if the Transfer of Assets Abroad code applied to the avoidance of betting tax, making tax avoidance a possible motive, in this case the transaction was made for the purpose of saving the business, to ensure that customers remained loyal to the firm.

Finally the Tribunal considered the right of freedom of establishment (or the right of free movement of capital) with the consequence that it must be interpreted in a manner that would make it compatible with EU law. It was common ground that Gibraltar is outside the UK for the purposes of the Transfer of Assets Abroad code, but treated as if it were part of the UK for EU law. The Upper Tribunal concluded that, unlike Anna Fisher, Stephen and Peter Fisher, as UK nationals, did not enjoy any freedoms in respect of matters that were wholly internal to their Member State. However, the Tribunal found that the principles would extend to Stephen Fisher, the husband of the Irish national, as interference with his freedoms would impede hers. Peter Fisher, the adult son, could not have relied on the defence.

Peter Fisher, Stephen Fisher, Anne Fisher v HMRC [2020] UKUT 0062 (TCC)

Transfer of Assets Abroad – No Valid Motive or DTR

Summary – The taxpayers did not satisfy the transfer of assets abroad 'motive' test or qualify for relief under the double tax treaty with Mauritius.

SA Properties Ltd, an Isle of Mann company, was a property investment company. As a non-resident company, its profits (capital gains) were not subject to UK capital gains tax.

The company entered into an agreement with Wolverhampton and Dudley Breweries under which the company agreed to buy the bulk of a property in Yarm for £1.25m, with the remainder being purchased by a property developing company. SA Properties Ltd paid a non-refundable deposit of £125,000.

Sometime after, it was realised that going ahead with the purchase would have resulted in SA Properties Ltd undertaking property development, which would have led to the company carrying on a trade in the UK, the profits of which would have been subject to UK tax. However, defaulting on the purchase would have meant forfeiting the £125,000 deposit.

Based on advice received, in place of SA Properties Ltd, a new company ABP Properties Limited, was incorporated in Mauritius. This company bought and developed the property instead. Mauritius was chosen specifically because of the terms of that jurisdiction's double taxation agreement with the UK.

Each of the taxpayers took out a life policy with Credit Suisse Life & Pensions (Bermuda) Ltd, a Bermudan based company that wholly owned ABP Properties Limited. The taxpayers' entitlements under the life policies were linked to ABP.

HMRC issued discovery assessments to charge income tax to each of the three taxpayers arguing that, under the Transfer of Assets Abroad legislation, they were liable to income tax on the income of ABP Properties Limited, a company registered in Mauritius,

The taxpayers accepted that they had made a transfer that, together with associated operations, meant that income arose to ABP Properties Limited, a person not resident in the UK and that they had a power to enjoy that income. Falling foul of the Transfer of Assets Abroad regime, their share of that income was chargeable to tax on them. However, they argued that their income was exempt under the motive test. Their intention was to obtain a pension and there was no tax avoidance purpose, as treaty relief should have been available.

The First Tier Tribunal agreed with HMRC. The Transfer of Assets Abroad legislation applied but the taxpayers' deemed income could not be relieved under the treaty.

The taxpayers appealed to the Upper Tribunal arguing that:

1. The First Tier Tribunal did not afford the taxpayers the benefit of the motive test and there was no evidence of tax avoidance;

2. The double tax treaty with Mauritius gave the taxing rights to Mauritius and that the Transfer of Assets Abroad rules did not override those rights.

Decision

Although the taxpayers claimed that pension planning was their motive for buying the property, this did not mean that how they went about acquiring the property did not involve tax avoidance. The Upper Tribunal agreed with the First Tier Tribunal's finding that tax avoidance was a motive. The original purchase plan was changed to avoiding tainting the UK company and Mauritius was chosen as the new company's base in order to benefit from its advantageously low tax rate.

The Upper Tribunal also upheld the First Tier Tribunal's decision that although Mauritius would have taxing rights over ABP Properties Limited's income, it did not override the Transfer of Assets Abroad legislation. The tax treaty covered the tax treatment of ABP Properties Limited trading profits and not the UK's rules relating its UK residents. Under the Transfer of Assets Abroad regime, the UK was not taxing trading profits but rather deemed income to be taxed as miscellaneous income. HMRC did have rights to attribute the company's income to the taxpayers to be taxed in the UK as their income.

Interestingly, the Upper Tribunal highlighted that if the treaty had allowed for double tax relief, the taxpayers should have included the deemed income in their tax returns, together with a claim for the DTR that was available.

The taxpayers' appeal was dismissed.

Comment: Andrew Hubbard stated in his Tolleys weekly case summary:

> "The Tribunal decided that the particular treaty in question here did not override the anti-avoidance provisions, but even if it had the taxpayer was too late to claim double tax relief. This creates an interesting dilemma. If a taxpayer doesn't believe that there is any UK income caught by the transfer of assets legislation it will not be included on his/her tax return and therefore there will be no need to claim relief. But if it subsequently is shown that there was UK income and double tax relief was due the taxpayer would be out of time to make a claim."

Andrew Davies, Paul Mcateer, Brian Evans-Jones v HMRC [2020] UKUT 0067 (TCC)

High-income child benefit charge **(Lecture P1196- 31.15 minutes)**

Child Benefit is payable every four weeks to an individual who is responsible for bringing up a child who is:

- Under 16 but it stops on 31 August on or after your child's 16th birthday); or
- Under 20 and remains in approved education or training.

Currently the claimant receives £21.05 per week for their first child and a further £13.95 per week for each additional child.

National insurance credits and the state pension

In addition to the cash benefit that is received, where a child is under 12, registering for child benefit means that the claimant receives National Insurance credits that count to towards the state pension entitlement. Where beneficial, these National Insurance credits can be transferred from the spouse or partner who received Child Benefit for a child under 12 to the other partner. To do so, an application must be made. This is important where the person is not working.

Only one benefit per child

On separation: only one person will receive the chid benefit, even if custody of the child/ children is being shared.

Families joining together: in this case the eldest child in the new family qualifies for the £21.05 rate and the other eligible children qualify for the £13.95 rate.

Earning over £50,000

Since 2012/13, an individual has been subject to the High Income Child Benefit Charge (HICBC) where they or their partner receive child benefit and either of them has adjusted net income of more than £50,000. The charge claws back:

- an equivalent sum to all the child benefit paid if that person's income is £60,000 or more; and
- a tapered proportion of the child benefit if the person's income falls between £50,000 and £60,000.

Where the partner's income is also over £50,000 the person with the higher income is responsible for paying the tax charge.

'Partner' in this context would include someone who:

- the individual is married to (even if not living with them);
- in a civil partnership with; or
- living with.

Where the HICBC applies, an individual can choose to not register for Child Benefit and avoid the HICBC charge. However, this action will deny the National Insurance credits discussed above. To ensure that full credit is received towards the State Pension, the individual can choose to:

1. Register and receive Child benefit and then settle their HICBC as part of their year end self assessment tax return;

2. Register for Child Benefit but choose not to receive payments by 'opting out';

Registering for Child Benefit in this way also means that the children will automatically receive their National Insurance number shortly before reaching 16. They will not have to apply for one themselves.

Anyone choosing option 1 has a legal obligation to declare the amount of Child Benefit they or their spouse/partner receive, by registering for Self-Assessment (if they are not already registered) and filling in a tax return each year. For some, whether they exceed the £50,000 threshold will not be clear-cut and their position could vary from year to year, depending on their adjusted net income.

Adjusted net income

The benefit is calculated on adjusted net income for a full tax year and is calculated as total taxable income, before deducting any personal allowances but after deducting Gift Aid and pension contributions.

Once this figure exceeds £60,000, the full Child Benefit will be lost through the charge.

Recent tribunal cases

A number of recent Tribunal cases have considered the position for individuals who have fallen foul of the rules, resulting in penalties being raised by HMRC for failing to notify liability to the charge.

In *Thomas Anthony Rogers v HMRC (TC07608),* the taxpayer was employed throughout the year ending 5 April 2018 and enrolled in the PAYE system. His wife received Child Benefit throughout the whole of that tax year in respect of their children. HMRC imposed a penalty for failure to notify HMRC of chargeability to income tax. There was no dispute that the charge was payable, or that he had not filed a self-assessment return for 2017/18 in time, or notified HMRC of chargeability to tax. The only issue was whether he has a reasonable excuse. Thomas Rogers claimed that he was unaware of the HICBC, having received nothing in writing explaining the charge when the couple applied for the benefit back in 2015. The First Tier Tribunal found that he and his wife were told about the charge when claiming child benefit as the claim form asks whether "you or your partner have an individual income of more than £50,000 a year" and sets out other relevant information. As Thomas Rogers did not attend the hearing, the Tribunal could not make any findings, even on the balance of probabilities, as to whether he genuinely did not know of the HICBC and whether this would have amounted to a reasonable excuse.

In Simon Clarke v HMRC (TC07637) HMRC informed Simon Clarke in 2018 that he was liable to the HICBC for 2013/14 to 2015/16, raising assessments for the relevant years and imposing penalties for late notification. Like Thomas Rogers, Simon Clarke accepted the assessments but appealed the penalties arguing that he was unaware of the HICBC. He argued that HMRC’s guidance implied that he should not be charged penalties. This guidance contained a flow chart stating that taxpayers would have their penalty refunded or cancelled for the years 2013/14 to 2015/16 if their income increased to over £50,000 since the charge was introduced in 2013 and they had not made a new child benefit claim. This applied in Simon Clarke’s case. Further, it stated that penalties would not be cancelled where taxpayers were already liable to the charge in 2012/13 and to whom HMRC had sent targeted letters. Simon Clarke was not liable to the charge in 2012/13 and he claimed that he had never received HMRC’ letter. HMRC could not produce a copy of the letter and so the appeal was allowed and the Tribunal cancelled the penalties.

So the key to his success was that although the couple were claiming child benefit at the time of HMRC’s media campaign to raise awareness of the new HICBC, he was not liable to the charge at that time, as his income was too low. With HMRC also unable to demonstrate that they had written to him about the charge should his circumstances change, the guidance relating to penalties was relevant to him.

In Richard Cook v HMRC (TC07641) HMRC wrote to Richard Cook stating that their records indicated that the recent changes to Child Benefit for people on higher incomes might apply to him but that he had not registered to receive a Self Assessment tax return for the tax years ended 5 April 2014, 2015 and 2016. He replied that his partner had claimed the child benefit without his knowledge, and that for a proportion of that time they were separated.

He accepted that the HICBC was payable but, like others before him, challenged the penalties, but this time, in a pretty aggressive manner by writing to HMRC and saying:

> “As you seem to be largely incompetent at dealing with any form of appeal, I’ll help you here: I DO NOT regularly read or listen to the media and (as you should be aware, given the information is readily available to you!), was a PAYE taxpayer in the years leading up to this change, and since this came into force – so, just remind me again how I was supposed to know?!”

HMRC referred to their extensive media campaign about the change in the law around child benefit and that Richard Cook had been specifically written to in August 2013 but, in any event, ignorance of the change in the law does not constitute a reasonable excuse. The First Tier Tribunal dismissed the taxpayer’s claim stating that he had did not satisfy them, as a matter fact, that he was unaware that his partner was claiming Child Benefit. Further, in this case, ignorance of the law could not constitute a reasonable excuse.

Tax credit entitlement

On 4th May 2020, HMRC confirmed that individuals who are working reduced hours or being furloughed by their employer will not have their tax credits payments affected if they are still employed or self-employed.

HMRC will treat such individuals as working their normal hours until the Coronavirus Job Retention Scheme and Self-Employment Income Support Scheme close, even if they are not using either scheme.

https://www.gov.uk/government/news/tax-credits-customers-will-continue-to-receive-payments-even-if-working-fewer-hours-due-to-covid-19

Capital Taxes

Mortgage repayment and proceeds (Lecture P1196 - 31.15 minutes)

Summary – The proceeds used to repay the mortgage was not deductible in arriving at the gain on sale of the property and the taxpayer had been careless in not reporting any gain on his tax return.

In April 2006, Daniel Unger's father inherited a property from his late partner. Its probate value was £375,000. In May 2007, under a deed of variation, his father became the bare trustee of the property, holding the property on bare trust for beneficiaries – 50% to Mr Unger and the remaining 50% shared between other family members.

In August 2009, while still living in the property, Mr Unger's father took out a mortgage:

- £325,000 was used to acquire an extension of the lease; and
- the remainder was used to fund the father's living and care costs.

When his father died in 2013, the property was sold to an independent third party for £1.3 million. Daniel Unger did not include the disposal of the property on his tax return for 2013/14.

HMRC opened an enquiry into the return and, on 26 July 2017 issued a closure notice stating that additional tax close to £72,000 was due. On 31 October 2017, HMRC raised a penalty assessment of just under £14,000.

During the course of the enquiry, Daniel Unger accepted that a capital gain should have been included in his 2013/14 return. He stated that he had not included it on the return because he was relying on advice received from professional advisers that no tax was due on the disposal. This advice had been verbal and he had not followed up to get this in writing.

Based on fairness rather than law, Daniel Anger argued that the amount used to repay the mortgage should be excluded from the consideration because:

- The circumstances of this disposal were not normal ones;
- His father had in fact borrowed the money, not him;
- The mortgage funds had been used to pay for the lease extension and to fund his father's living and care costs towards the end of his life; and
- The repayment of the mortgage had reduced the amount of money the beneficiaries had received.

Decision

Unsurprisingly, the First Tier Tribunal stated that there was nothing in legislation that would mean the proceeds should be reduced by the amount of the mortgage redemption payment.

They stated that:

> "It simply cannot be the case that a taxpayer can reduce their potential capital gains tax liability on sale by mortgaging the property, and effectively withdrawing cash from it (save for the circumstances where those mortgage monies are then used wholly and exclusively for the purposes of enhancing the value of the property and that enhancement is reflected in the asset at the time of disposal, in which case it is not really the mortgage that reduces the capital gain, but the expenditure)."

The Tribunal considered whether HMRC had correctly calculated the penalties for being careless in omitting the gain from his return. Rather than tell his accountant about the disposal, he had sought advice from the solicitors who were dealing with the disposal. The Tribunal concluded that, even if he did have the phone conversation with the solicitors, it was not reasonable to rely on oral advice alone and he should have provided details of the disposal to the agent preparing his return. Daniel Unger had not shown that he took reasonable care in the preparation of his tax return for 2013/14.

Daniel Unger v HMRC (TC07543)

Summary of IHT processing changes

HMRC has published a number of administrative changes to facilitate IHT transactions during the coronavirus pandemic.

Form IHT 400

HMRC are accepting printed signatures on IHT400 forms where there is a professional agent acting, and both:

- The names and other personal details of the Legal Personal Representatives or trustees are shown on the declaration page;
- The account includes a clear and unambiguous statement from the agent to confirm that all the Legal Personal Representatives or trustees have seen the account and have agreed to be bound by the declaration.

HMRC has suggested the following wording for this statement:

> "As the agent acting on their behalf, I confirm that all the people whose names appear on the declaration page of this Inheritance Tax Account have both:
>
> - seen the Inheritance Tax Account, and
> - agreed to be bound by the declaration on (page 14 of the IHT400)."

HMRC will no longer print and stamp the IHT421 (inheritance tax probate summary form) and return it to customers but instead will email it directly to the HM Courts and Tribunals Service and will inform the agent or Legal Personal Representative when they have done this either by writing, or by adding a note to the IHT calculation.

Form IHT100

Until further notice, HMRC will accept forms IHT100 that are not physically signed from unrepresented trustees OR from professional agents. HMRC will accept the forms from trustees acting without the help of a professional agent if:

1. the names and personal details of the trustees are shown on the declaration page

2. the account has been seen by all the trustees and they all agree to be bound by the declaration

The trustees must include the following statement:

> 'As trustee acting in this matter, I confirm that all the people whose names appear on the declaration page of this Inheritance Tax Account are the trustees and have both seen the Inheritance Tax Account and agreed to be bound by the declaration on page 8 of the IHT100.'

Provided points 1 and 2 above apply, the same applies to professional agents who must include the following statement:

> 'As the agent acting on their behalf, I confirm that all the people whose names appear on the declaration page of this Inheritance Tax Account have seen the Inheritance Tax Account and agreed to be bound by the declaration on page 8 of the IHT100'

IHT payments

Payment of Inheritance Tax cannot be made by cheque but should instead be made by Faster Payments (online or telephone banking), CHAPS or Bacs to HM Revenue and Customs' (HMRC) account.

HMRC advise that where a payment has been made by an uncleared cheque since 6 April 2020 it should be cancelled and one of the methods above should be used in its place.

IHT repayments

To facilitate any repayments, HMRC will need bank details to enable them to pay using Faster Payments. These should be sent in a letter with 'Repayment - further details' at the top of the letter to:

> Inheritance Tax
>
> HM Revenue and Customs
>
> BX9 1HT

All the people who originally signed the form IHT400 or form IHT100 must sign this letter. Provided that the name of the account is not being changed, the agent's signature, rather than the personal representatives or trustees, is acceptable.

Gift to political party

Summary – Gifts to UKIP, when UKIP had no members elected to the House of Commons at the previous general election, did not qualify as exempt gifts for IHT.

Between 7 October 2014 and 31 March 2015 Arron Banks and a company controlled by him made donations to UKIP of just under £1 million, claiming they were IHT exempt.

S24 IHTA 1984 provides an IHT exemption for donations to political parties provided that, at the last general election preceding the gifts:

(a) two members of that party were elected to the House of Commons, or

(b) one member of that party was elected to the House of Commons and not less than 150,000 votes were given to candidates who were members of that party....”

At the UK general election on 6 May 2010, UKIP did not succeed in having any of its 558 candidates elected as an MP, although it did secure 919,471 votes (3.1% of the total votes cast). As expected, HMRC disallowed the political party exemption.

Arron Banks accepted that s 24 IHTA 1984 did not apply to his donations but argued that the provisions of the Inheritance Tax Act were unlawfully discriminatory under the European Convention on Human Rights on the grounds of political opinion.

The First Tier Tribunal dismissed his appeal, finding that although the legislation was not compatible with the European Convention on Human Rights, they had no power to rewrite the legislation.

Decision

The Upper Tribunal concluded that the First Tier Tribunal had erred in law in concluding that the tax relief denied Arron Banks was as a result of discrimination on the grounds of his political opinion under Article 14 of the European Convention on Human Rights.

The Tribunal went on to say that that the law was intended:

> “to provide tax relief on donations to political parties that are participating in Parliamentary democracy by being represented in the House of Commons, and not in respect of individual independent MPs. That is a rational and legitimate aim. The focus is on Parliamentary activity”.

This legislation could apply to any political party, provided that party met the conditions set out in s24 IHTA 1984. The Tribunal found that there was no discrimination against Arron Banks on the basis that he was a UKIP supporter. UKIP supporters were not any more adversely affected as a group than other parties who were not represented in the House of Commons.

The Tribunal concluded that the differential treatment of political parties was compatible with the European Convention on Human Rights. The only reason that Mr Banks’s donations to UKIP did not qualify for tax relief was because UKIP did not have an MP elected at the 2010 general election.

Arron Banks v HMRC UT/2019/0024

Ecotourism business that never was

Summary – Although the company qualified for the trading exemption meaning that the 15% SDLT flat rate did not apply, the property was held to be residential rather than mixed use property.

Pensfold was a company registered in the Cayman Islands. On 12 January 2017 the company acquired Pensfold Farm, including 27 acres of land previously used for grazing for £2,825,000.

The plan was to develop the property at Pensfold Farm into an eco/agritourism venture. The intention was to add a tennis court and changing facilities in an existing barn, to create a new lake, introduce alpacas as well as rare breeds of sheep, pigs and cattle and provide facilities for ponies and an entertainment barn. The project was delayed after purchase while the state, and possible uses, of the land considered.

The SDLT return was submitted showing £130,750 SDLT payable on the basis that the property was non-residential and claimed relief from the 15% higher rate of SDLT that is due under Schedule 4A FA 2003 on purchases by limited companies of an interest in a single dwelling costing more than £500,000.

In May 2017 HMRC opened an enquiry into the return. During this time, the company stopped work on the project as they were aware that any additional SDLT payable would make the project financially unviable.

In April 2018 HMRC issued a closure notice on the basis that the property was residential and no relief was due. This increased the SDLT due to £423,750. On the same day HMRC issued a penalty notice charging a penalty of £112,805, which was 38.5% of the additional SDLT due.

Pensfold appealed arguing that the property was non–residential and that the 15% higher rate did not apply as the company believed it met the trading exemption under Para 5B, Sch4A FA 2003.

Decision

Paragraph 5B requires that the property was acquired "with the intention that it will be exploited as a source of income in the course of a qualifying trade" with "reasonable commercial plans" in place to carry out that intention without delay, "except so far as delay may be justified by commercial considerations or cannot be avoided".

The First Tier Tribunal was satisfied that the Para 5B trade exemption was in point as there was a clear intention to carry out their trade; the law only required 'reasonable commercial' plans to be in place, rather than the detailed plans suggested by HMRC. There was no requirement for the trade to actually be carried on for the relief to apply. Further, The Tribunal confirmed that the delays, to draw up detailed plans and to await the outcome of HMRC's enquiry, were clearly for commercial reasons.

The Tribunal moved on to consider if the property was residential or mixed use, concluding that it was wholly residential. The land was not being grazed on when it was bought and, grazing was not mentioned in either the sales literature or purchase contract. The Tribunal commented that “had the land, all 27 acres of it, been subject to grazing rights that would have made the plans to develop a rare breeds farm rather difficult to implement.”

Finally the Tribunal cancelled the penalties, as by seeking professional legal advice, Pensfold had taken reasonable care.

The appeal was allowed in part.

Pensfold v HMRC (TC07609)

Administration

Statutory Sick Pay Rebate Scheme (Lecture P1196 - 31.15 minutes)

HMRC has confirmed that the coronavirus Statutory Sick Pay Rebate Scheme will launch online on 26 May, enabling employers with fewer than 250 employees to claim coronavirus-related Statutory Sick Pay (SSP). Tax agents will also be able to make claims on behalf of their clients.

Eligible employers

The employer must:

- be claiming for an employee who is eligible for sick pay due to COVID-19;
- have had a PAYE payroll scheme in operation before 28 February 2020;
- have had fewer than 250 employees across all PAYE schemes on 28 February 2020;
- be eligible to receive State Aid under the EU Commission Temporary Framework.

The repayment will cover up to 2 weeks starting from the first qualifying day of sickness, if an employee is unable to work because they either:

- have coronavirus (COVID-19) symptoms;
- cannot work because they are self-isolating because someone they live with has symptoms;
- are shielding and have a letter from the NHS or a GP telling them to stay at home for at least 12 weeks.

The employer can claim for periods of sickness starting on or after:

- 13 March 2020 - if the employee had coronavirus or the symptoms or is self-isolating because someone they live with has symptoms;
- 16 April 2020 - if the employee was shielding because of coronavirus.

The weekly rate was £94.25 before 6 April 2020 and is now £95.85.

The scheme covers all types of employment contracts, including:

- full-time employees;
- part-time employees;
- employees on agency contracts;
- employees on flexible or zero-hour contracts;
- fixed term contracts (until the date their contract ends).

Records must be kept

Employers must keep records of SSP paid and want to claim back from HMRC for 3 years after the date that they receive the payment for their claim including:

- the dates the employee was off sick;
- which of those dates were qualifying days;
- the reason the employee said they were off work - if they had symptoms, someone they lived with had symptoms or they were shielding;
- the employee's National Insurance number.

https://www.gov.uk/guidance/claim-back-statutory-sick-pay-paid-to-employees-due-to-coronavirus-covid-19

Coronavirus Bounce Back Loan (Lecture B1196 – 26.09 minutes)

This scheme was launched on 4 May 2020 and will help small and medium-sized UK businesses negatively affected by COVID-19 apply for loans of between £2,000 and £50,000, with loan terms of up to six years.

The amount of the loan cannot exceed 25% of turnover.

The scheme will be delivered through a network of accredited lenders with the government guaranteeing 100% of the loan. Under the scheme:

- There will be no fees or interest charged during the first year, nor will any repayments be due;
- After the first year, interest will be charged at an agreed rate of 2.5%;
- Lenders are not permitted to take personal guarantees or take recovery action over a borrower's personal assets (such as their main home or personal vehicle).

To apply

In the first instance, businesses should apply to their own bank online but may also consider approaching other lenders if they are unable to access the finance they require. The business will need to fill in a short application form online, self-certifying that the business is eligible for a loan. If eligible, the bank will carry out standard customer fraud, Anti-Money Laundering and Know Your Customer checks.

Who is eligible?

The business will be required to self-declare to the lender that it:

- has been impacted by the coronavirus (COVID-19) pandemic;
- was not a business in difficulty at 31 December 2019 (if it was, the business must confirm their business complies with additional state aid restrictions under de minimis state aid rules);
- is engaged in trading or commercial activity in the UK and was established by 1 March 2020;
- is not using the Coronavirus Business Interruption Loan Scheme, the Coronavirus Large Business Interruption Loan Scheme or the Bank of England's Covid Corporate Financing Facility Scheme, unless the Bounce Back Loan refinances 100%;
- is not in bankruptcy or liquidation or undergoing debt restructuring at the time it submits its application for finance;
- derives more than 50% of its income from its trading activity (this requirement does not apply to charities or further-education colleges);

Bounce Back Loans are available to businesses in all sectors, except the following:

- Credit institutions (within the remit of the Bank Recovery and Resolution Directive);
- Insurance companies;
- Public-sector organisations;
- State-funded primary and secondary schools.

https://www.gov.uk/guidance/apply-for-a-coronavirus-bounce-back-loan

https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/bounce-back-loans/for-businesses-and-advisors/

Top-up to local business grant funds (Lecture B1196 – 26.09 minutes)

On 2nd May, the government announced a discretionary fund for local authorities to help small businesses with ongoing fixed property-related costs.

Local authorities are being asked to prioritise businesses in shared spaces, regular market traders, small charity properties that would meet the criteria for Small Business Rates Relief, and bed and breakfasts that pay council tax rather than business rates. But local authorities may choose to make payments to other businesses based on local economic need.

To qualify, businesses must:

- have less than 50 employees;
- demonstrate that they have seen a significant drop of income due to COVID-19.

There will be three tiers of payment:

1. Maximum £25,000;
2. £10,000 grants;
3. Local authorities will have discretion to make payments of any amount under £10,000.

Guidance will be provided to local authorities and It will be for councils to adapt the scheme to local circumstances.

https://www.gov.uk/government/news/top-up-to-local-business-grant-funds-scheme

RTI and the Coronavirus Job Retention Scheme

At the end of April 2020, HMRC published guidance that explains the RTI reporting requirements where payments are made to employees under the Coronavirus Job Retention Scheme.

The guidance details which reports should be sent and when for employers who:

- are waiting to receive the grant before paying any wages;
- paid wages prior to receiving the grant;
- have not paid employers in full;
- have not paid employees at all;
- reported wages in March but then did not pay them.

https://www.gov.uk/guidance/reporting-payments-in-paye-real-time-information-from-the-coronavirus-job-retention-scheme#if-youre-using-the-grant-to-pay-wages

Accountant ceasing to act and cashflow issues

Summary – The company did not have a reasonable excuse for filing their tax return late as the directors were experienced business people with funds in the bank.

Caris Properties Limited developed and sold high-end properties, with a typical value in excess of £2 million. The company's corporation tax payable for its year ended 30 September 2016 was due on 1 July 2017 and its filing deadline was 30 September 2017.

The return was ready to be filed by the end of June but the company made a conscious decision to delay filing it until the filing deadline of 30 September 2017. Unusually, the company claimed that they believed that by not filing the return, HMRC would not demand payment of the corporation tax due in July. This would give the company a further three months to raise money to pay the tax.

Before the end of September, the company's accountant ceased to act for the company and the return was not filed until 1 May 2018, seven months late.

HMRC issued a £200 late filing fixed penalty under para 17 schedule 18 FA 1998 that the company settled. On 18 May 2018, HMRC issued a tax-geared penalty of £34,870.58 under para 18, being 10% of the unpaid corporation tax liability for the 2016 accounting period end.

Caris Properties Limited appealed, arguing that it had a reasonable excuse. The company had experienced cashflow difficulties arising from the poor property market conditions. The company was unable to settle its accountant's invoice, who ceased to act for the company, without filing of the corporation tax return. Caris Properties Limited claimed that they were not aware of this.

HMRC rejected the appeal, arguing that insufficiency of funds is excluded from giving rise to a reasonable excuse.

Decision

The First Tier Tribunal confirmed that the company's understanding of the law was wrong. Delaying filing would only have delayed the demand for the corporation tax payment; it would not have changed the due date, which remained payable from 1 July 2017.

The Tribunal highlighted that a tax-geared penalty can only be imposed under paragraph 18 in cases where there is a twin failure to file a corporation tax return and pay the associated corporation tax. Failing to file their return had led to a sizeable penalty for Caris Properties Limited that could have been avoided, had the company's directors kept on top of their compliance obligations and filed the return on time.

Due to the inconsistent evidence that was presented, the Tribunal was unable to make a conclusive finding of fact as to the true reason for the decision to hold back the corporation tax filing. The Tribunal were also unable to ascertain why the accountant had ceased to act, whether it was due to a disputed invoice, failing to pay the invoice or some other reason. Whatever the reason, relying on the accountant was not a reasonable excuse as the directors were both experienced business persons who should have followed up the matter to ensure that the corporation tax return had been filed.

Finally, the Tribunal concluded that the insufficiency of funds argument also failed. Profit on ordinary activities before taxation for the year was £1,743,529 (compared with £448,312 for 2015) and the bank balance stood at over £800,000.

The appeal was dismissed and the penalty of £34,870.58 was upheld.

Caris Properties Limited v HMRC (TC07481)

Deadlines

1 June 2020

- SME corporation tax for periods to 31 August 2019 where not paying by instalments
- Check for revised HMRC advisory fuel rates

7 June 2020

- Electronic filing (+ payment if not deferred) of VAT for quarter ended 30 April 2020

14 June 2020

- Quarterly corporation tax instalment for large companies depending on year end)
- EC sales list for quarter ended 31 May 2020 due (paper form)

19 June 2020

- PAYE/NIC/CIS/student loans payment for month to 5 June 2020 (non electronic)
- File monthly CIS scheme return

21 June 2020

- File online monthly EC sales list
- Submit supplementary intrastat declarations for May 2020

22 June 2020

- Electronic payment of PAYE/NI/CIS for month ended 5 June 2020

30 June 2020

- Accounts to Companies House for:
  - private companies with 30 September 2019 year end
  - public limited companies with 31 December 2019 year end
- CTSA returns filed for companies with accounting periods ended 30 June 2019

Other news

National heritage property and the conditional exemption

Under the Conditional Exemption Tax Incentive Scheme certain buildings, land, works of art and other objects are exempt from both Inheritance Tax and Capital Gains Tax but only if certain conditions are met.

As a result of Covid-19, HMRC has stated that they will not consider that these conditions have been broken where property closure or opening is delayed due to the social distancing requirements imposed by the government. Where possible, once government advice changes, HMRC will expect such property owners to make their property available later in the year to make up for any lost days.

Further, if a conditionally exempt item is on loan to a museum, gallery or other venue which closes, HMRC will not treat the withdrawal of public access to the object as if conditions have been broken.

https://www.gov.uk/government/publications/capital-taxation-and-tax-exempt-heritage-assets

Consultation deadlines extended

The government is extending the deadlines for a number of tax policy consultations by three months, to ensure those affected by coronavirus-related disruption retain their opportunity to comment.

- HMRC charter (5 August 2020)
- Taxing asset holding companies in alternative fund structures (19 August 2020)
- Plastic packaging tax policy design (20 August 2020)
- Notification of uncertain tax treatment by large businesses (27 August 2020)
- Preventing abuse of R&D tax relief for SMEs: second consultation (28 August 2020)
- Tackling construction industry scheme abuse (28 August 2020)
- Raising standards in the tax market (28 August 2020)
- Taxation impacts arising from the withdrawal of LIBOR (28 August 2020)
- Hybrid and other mismatches (29 August 2020)
- Vehicle excise duty (3 September 2020)

Questions to ask your IT provider

The day-to-day management of looking after a businesses' IT systems is often outsourced, but HMRC say that system security should be everyone's responsibility.

In ‘Agents and HMRC working together April – May 2020 - Issue 77’ HMRC has provided a list of 50 questions aimed at promoting conversation between Small to Mid-sized tax agents and their IT providers. HMRC acknowledge that not all of questions will be appropriate, or even sufficient, but it provides a good starting point to ensure that the level of security implemented takes into account the level of risks involved.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879454/Agent-Update-WT-77_v6_Accessible.pdf

GAAR panel opinion: miscellaneous income losses

The arrangements considered by the panel involved a pair of mirror-image barrier contracts relating to the sterling/US dollar exchange rate. The contracts involved transactions under which the individual exchanged cash for Certificates of Deposit and Gilts with amount dependant on the value of an index at a specified date.

The individual's 2013/14 tax return showed an income tax loss relief claim of £250,000 in respect of the Certificates of Deposit. However, the Individual claimed that the corresponding gain on the Gilts was CGT exempt.

Unsurprisingly, HMRC sort the GAAR panel's opinion arguing tax avoidance was the sole reason for entering into the arrangements: a tax deduction was claimed without any economic loss being suffered.

The GAAR panel's conclusion was that the arrangements were designed in order to obtain a tax advantage. Entering into these contrived and artificial arrangements was not a reasonable course of action in relation to the relevant tax provisions.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872762/GAAR_Advisory_Panel_opinion_12_February_2020.pdfSubscribe

Business Taxation

Self Employed Income Support Scheme (SEISS) update (Lecture B1196 – 26.09 minutes)

As we reported last month, the scheme allows the self employed and individual partners in a partnership to claim a taxable grant of 80% of their average monthly trading profits, paid out in a single instalment covering 3 months, but capped at £7,500.

Go live for this scheme was 13th May and HMRC updated its guidance on the scheme several times in early May before it went live.

Specific circumstances

On 1 May 2020, HMRC published separate guidance for some very specific circumstances covering:

- Returns that are late, amended or under enquiry
- Partnerships;
- Parental leave
- Loan charge cases
- Farmer's averaging relief
- Non-residents and those who claim the remittance basis
- Those who are above the state aid limits

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

What is meant by 'adversely affected by coronavirus'?

Remember, one of the conditions to be eligible for SEISS is that a business must be 'adversely affected by coronavirus'. In its updated guidance, HMRC provided some useful examples of what is meant by this:

- Individual who was unable to work due to shielding, self-isolating, being on sick leave or COVID-19 caring responsibilities;
- Individual who had to scale down or temporarily stop trading because an interrupted supply chain, lack of customers or staff.

Taxpayers should keep any evidence that their business has been adversely affected by coronavirus such as:

- business accounts showing a reduction in turnover;
- confirmation of any coronavirus-related business loans you have received;
- dates your business had to close due to lockdown restrictions;
- dates you or your staff were unable to work due to coronavirus symptoms, shielding or caring responsibilities due to school closures.

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

Preparing for launch

At the beginning of May, Tax agents and accountants were contacted by HMRC updating them on what was happening with the Self Employed Income Support Scheme. HMRC stated that clients would be required to complete the claim themselves but have asked that agents guide their clients through the eligibility criteria and the process for checking and claiming.

During the week commencing 4 May 2020, based on returns that taxpayers had filed over the last three years, HMRC contacted taxpayers that they believed may be eligible to apply for the grant by email, SMS message or letter. Each taxpayer should have received one form of contact, the format being determined by the information that HMRC held on their system. It is likely that a good number of taxpayers may not have received this notification, especially if they have been self-isolating at a different address to where they usually reside or perhaps have changed address or mobile number but have not updated their contact details with HMRC.

HMRC provided a simple online eligibility checker at *https://www.tax.service.gov.uk/self-employment-support/enter-unique-taxpayer-reference* to help taxpayers and their agents confirm whether they were eligible for the grant. All that was needed was the taxpayer's UTR and national insurance number. No income figures were needed as HMRC's system could draw on tax return information filed using just the UTR and NI number for each person. Taxpayers were told immediately if they were eligible and were asked to provide an email address and optional mobile number for further correspondence including a reminder of when to apply.

The application process went live on 13 May 2020 but not all taxpayers could access the system at once. Having established that they were eligible, taxpayers were allocated their application date at some point between 13 and 18 May.

The application process

On their designated time and date, taxpayers logged in to their government gateway account, or selected the option to create an account, to complete the application process.

Once logged in, taxpayers were asked to confirm that they:

- Had traded in 2019/20;
- Intend to trade in 2020/21;
- Have been adversely affected.

Taxpayers were then told what their total grant would be, given a calculation of how HMRC had calculated this figure, with the average trading profits figure used clearly stated.

HMRC recommended that even if the taxpayer disagreed with the amount shown, they should complete the claim process to guarantee at least some money in 6 days time. At the end of the claim process they were advised what action they should take to have their grant reviewed.

Taxpayers were required to submit a declaration confirming that their business had been adversely affected, that they had provided accurate information and that if information changed, they would contact HMRC to amend the claim. They were then advised to print and or save a document detailing the grant awarded, claim reference number, date submitted, averaging and grant calculation, as well as the taxable profits for each year from 2016/17 to 2018/19.

Taxpayers were advised to keep a copy of these records as well as evidence that their business had been adversely affected by coronavirus.

Rejected

There have been reports that some taxpayers have been incorrectly assessed for eligibility by HMRC's tool or that the grant amount has not always been correctly calculated. It is likely that some taxpayers will not have interpreted the rules correctly for example, their self-employment income may not have been more than half of their total taxable income. Maybe they forgot to take into account some pension income or for a period they had been employed, paying tax through the PAYE system. For others their circumstances may be less than straightforward.

Clearly rejected taxpayers should start by checking through all of the SEISS eligibility criteria and may need our help in doing this. If a taxpayer still feels that they have been wrongly rejected, they can ask for the decision to be reviewed online or by phone.

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

SEISS deadline and second grant (Lecture B1196 – 26.09 minutes)

On 29 May 2020, the government confirmed that:

- applications for the first grant will close on 13 July 2020;
- a second and final grant will be available from August 2020.

This second grant is not quite as generous as the first, with eligible individuals able to claim a taxable grant of 70% of their average monthly trading profits, paid out in a single instalment covering three months' worth of profit, and capped at £6,570 in total.

The eligibility criteria are unchanged and once again, taxpayers will need to confirm that their business has been adversely affected by COVID-19. To be eligible, a taxpayer does not need to have claimed the first grant.

Additional information on the second grant will be available on GOV.uk on 12 June 2020.

SEISS and newly incorporated companies (Lecture B1196 – 26.09 minutes)

The Low Incomes Tax Reform Group has warned owners of newly formed limited companies that it is unlikely they are eligible for the SEISS grant.

Remember, HMRC's eligibility checker confirms that people may be eligible based on the information HMRC holds from tax returns for 2018/19 or earlier. It does not consider later years. For these years, claimants are required to declare they meet the following conditions:

- They traded in the tax year 2019/20;
- They intend to continue to trade in the tax year 2020/21; and
- They carry on a trade that has been affected adversely by COVID-19.

Where a self-employed trader has incorporated in these later years, although they may still be trading and adversely affected by Covid-19, they are no longer self employed and so unlikely to be eligible for the SEISS. They now trade as a company making them ineligible.

https://www.tax.org.uk/media-centre/press-releases/litrg-press-release-covid-19-grant-warning-new-limited-companies

Helping struggling companies (Lecture B1196 – 26.09 minutes)

As we know, the government has introduced a number support options to help us through the COVID-19 crisis including the Coronavirus Job Retention Scheme, SEISS, the option to defer VAT payments as well as a number of loans and grants that have been made available. But what else can owner managed companies consider doing to improve their cash flow position?

In 'Top talking points' Tolleys has identified a number of areas that could be considered by owner managed business companies including:

- Time to pay arrangements with HMRC;
- Maximising capital allowance claims;
- Surrendering losses in return for R&D tax credits;
- Loss relief claims by carrying back losses 12 months or, if closing down, by claiming terminal loss relief;

More drastic action would require careful consideration of the commercial, tax and legal implications that these actions entail. Among others, Tolleys highlight the following possibilities:

- Reducing debt by waiving loans from shareholders, considering a debt equity swap or taking advantage of the corporate rescue exemption where loans with third parties are released;
- Incentivising staff to stay with their struggling employer by using non-cash arrangements like EMI share options;
- Dividend deferral and cancellations;
- Restructuring to protect profitable parts of the business using a statutory demerger or by selling off the loss-making part through a hive down.

Ultimately there may nothing worth salvaging, leaving no choice but to wind up the business in the most tax efficient way possible;

Tolley 'Top talking points' *6 May 2020*

No sideways loss relief for farming losses (Lecture B1196 – 26.09 minutes)

Summary –The organic farming business did not pass the 'reasonable expectation of profits' test and so was not run on a commercial basis. Sideways loss relief was denied

In January 1995 Ardeshir Naghshineh bought a farm in Norfolk with about 75 acres of agricultural land. This was a working farm run on a conventional basis. Ardeshir Naghshineh believed that he could obtain premium prices for organic farm produce compared to conventional produce and so decided to convert the farm to organic production. To benefit from economies of scale, over the years he acquired more land until, by 2007, he owned some 438 acres.

Over the years he carried on various different agricultural and non-agricultural activities on the farm, with the activities in question often changing from year to year. He paid his workers extremely well, as he felt that they should be rewarded in a similar way to those employed by his other businesses. This resulted in significantly higher remuneration costs in relation to the farm than might otherwise have been the case.

Following the financial crisis in 2007/08 there was a downturn in the organic produce market and in 2009/10 Ardeshir Naghshineh reverted to conventional farming methods. In addition to his farming activities he also ran a produce box scheme, holiday lets, a farm shop and a micro-brewery.

The farm made losses every year to 2011/12 and Ardeshir Naghshineh claimed sideways loss relief against general income for these losses. The business finally became profitable in the year to 31 March 2013 and subsequent years.

HMRC refused the loss relief claims for 2007/08 to 2011/12 on the basis that sideways loss relief for farming businesses should be denied as he had made losses in each of the previous five tax years (s67 ITA 2007).

At the First Tier Tribunal hearing, an expert had stated that when converting from conventional to organic farming, the first fully organic harvest would not be until 2003 and it would then take another ten years to become profitable. Based on this evidence, the First Tier Tribunal found that a competent organic farmer would not have expected to make a profit during the tax years in question and the appeal was allowed.

HMRC appealed to the Upper Tribunal.

Decision

The Upper Tribunal identified what they believed to be the correct approach to take in applying the reasonable expectation of profits test at s68(3)(b) ITA 2007. Having determined what activities were actually carried out at the beginning of each loss making period (2007/08 to 2011/12 inclusive), how long would a competent farmer in 1995 have expected it would take for those activities to become profitable.

Looking at 2007/08, the first year where relief was denied, Ardeshir Naghshineh 's activities had changed significantly from those back in 1995. By then he was carrying out mixed-use organic farming. So the Upper Tribunal 'artificially' considered when it would have been reasonable to expect profits to arise from his 2007/08 activities if those activities had been carried on in 1995.

Using this approach for 2007/08, together with expert evidence, the Upper Tribunal concluded:

> 'if the competent farmer had been assumed to be carrying on those activities in 1995, he would reasonably have expected them to become profitable (accepting for this purpose the expert evidence) by the early 2000s… Even if the competent farmer could reasonably have expected the profitability not to arise until ten years after 1995, that would still have been before the first period of loss under appeal.'

Ardeshir Naghshineh did not meet the reasonable expectation of profit test and sideways relief was not available.

HMRC v Ardeshir Naghshineh [2020] UKUT 0030 (TCC)

No sideways loss relief for LLP (Lecture B1196 – 26.09 minutes)

Summary - A non-active partner in an LLP was denied sideways loss relief of £25,000 as he provided no evidence that he was carrying on a trade, commercially or otherwise.

Christopher Grinyer was a member of an LLP and for 2010/11 he:

- reported his share of the LLP's trading loss as £422,312;
- claimed loss relief of £25,000 against general income in that year; and
- carried forward the balance of the loss, £397,312, to future tax years.

There was no dispute that the maximum loss relief claim, if any, against general income in the tax year 2010/11 was £25,000. That was because in that year Christopher Grinyer had not been an active partner and had worked for less than 10 hours per week.

HMRC enquired into his personal tax return but not that of the LLP and later denied the sideways loss relief claim and the balance of carried forward losses. HMRC stated that the LLP was not carrying on a trade, or alternatively, was not carrying on a trade commercially.

Christopher Grinyer argued that HMRC could only deny the sideways loss relief claim on his personal tax return if they had also enquired into the LLP's tax return, which they had not done.

Neither HMRC nor Christopher Grinyer advanced any argument, or provided any evidence, on whether the trade existed and if it existed, whether it was run on a commercial basis.

Decision

The First Tier Tribunal disagreed with Christopher Grinyer confirming that HMRC can enquire into anything contained in his personal tax return. As a result, It was up to Christopher Grinyer to prove that there was a trade and that it was being carried on commercially. With no such evidence provided, the Tribunal dismissed the appeal.

Christopher J Grinyer v HMRC (TC07560)

Double capital allowances!

Summary – Arrangements seeking to create capital allowances equal to nearly double the expenditure actually incurred failed.

The scheme in this case is of mainly historical interest because legislation was introduced by FA 2011 to counteract it. However, the case has wider value because of the extensive and extremely insightful analysis of the current state of the Ramsay principle of statutory interpretation.

Under the arrangements, Cape Industrial Services Limited sold certain plant and machinery at market value to a banking company, SG Leasing (June) Limited. At the same time, two further transactions were entered into:

1. SG Leasing (June) Limited granted Cape Industrial Services Limited a long funding finance lease of the same assets for a period of four weeks, for weekly rentals; and

2. Cape Industrial Services Limited granted SG Leasing (June) Limited a put option to require Cape Industrial Services Limited to purchase the assets on termination of the lease at their predicted market value.

   At the end of the term of the lease, SG Leasing (June) Limited exercised the put option and Cape Industrial Services Limited purchased the assets for the option price.

Cape Industrial Services Limited contended that the capital allowances consequences of the transactions were as follows:

- On the sale of the assets to SG Leasing (June) Limited, Cape Industrial Services Limited was required to bring into account a disposal value equal to the net proceeds;
- Cape Industrial Services Limited was then entitled to allowances on entering into the lease;
- As the qualifying expenditure was the same amount as the disposal value, the two effectively cancelled each other out;
- On termination of the lease, a disposal value had to be brought into account, but the amount of this was nil;
- Allowances could then be claimed on the option price paid to repurchase the assets.

Decision

Following a detailed analysis of the line of cases beginning with WT Ramsay Ltd v CIR [1981] STC 174, the First Tier Tribunal decided that, on a composite approach, Cape Industrial Services Limited made no real disposals of the assets and so were not entitled to allowances on the option price paid under the put option. The transactions comprised a set of steps specifically designed to operate as a composite whole and to give the legal effects that would usually attract allowances but without any enduring commercial consequences. Although Cape Industrial Services Limited had given up ownership of the assets, with all of the legal and commercial effects that entailed, they did so only to generate the desired allowances and for the bare minimum of time considered necessary to achieve that result.

The First Tier Tribunal disagreed that the composite approach was no longer good law. The case law showed that, although it was not a free-standing principle of jurisprudence, it was part of what could be required under a purposive approach to construction of the applicable tax statute.

Cape Industrial Services Limited Robert Wiseman And Sons Limited v HMRC (TC07648)

Adapted from case summary in Tax Journal

Exchange losses and 'fairly represent'

Summary - The Court of Appeal upheld the decision of the Upper Tribunal that three companies could claim relief for exchange losses arising on loan relationships and were not prevented from doing so by the (now repealed) 'fairly represent' requirement.

Three UK-resident subsidiaries in the UK sub-group of a multinational group were involved in an internal restructuring in which they were transferred out of the UK sub-group. As a result of the restructuring, the companies changed their functional currencies from sterling to US dollars. At the time of the transfer, each held substantial sterling intercompany debt receivables, and when preparing their US dollar accounts, they recognised large foreign exchange adjustments through non-distributable reserves in their statements of total recognised gains and losses (STRGL) in respect of them.

The companies claimed tax deductions on account of the STRGL exchange losses on the basis that they gave rise to exchange losses for the purposes of the loan relationships rules. HMRC issued each of the companies with closure notices disallowing the deductions.

The only issue before the Court of Appeal was whether the STRGL exchange losses 'fairly represented' losses of the taxpayers for the purposes of FA 1996 s 84(1).

Decision

The court concluded that the 'fairly represent' test did not apply to the STRGL exchange losses at all. The mechanism by which the STRGL exchange losses were brought into the loan relationships regime was the Exchange Gains and Losses (Bringing into Account Gains or Losses) Regulations, SI 2002/1970, reg 13 and not the computational provision in s 84(1). Regulation 13 provided simply that exchange gains and losses falling within its scope 'shall be brought into account' as a credit or debit for the purposes of the loan relationships rules, so that they were not passed through the 'fairly represent' test at all

The court also held that, if the 'fairly represent' test had applied, it would have been satisfied on the facts. Because the loan relationship debits were exactly the same as the STRGL exchange losses, they fairly represented the exchange losses arising to the companies from their loan relationships.

Why it matters: This decision provides further guidance on the meaning of the 'fairly represent' wording that used to appear in the loan relationships computational rules. Both Rose and Coulson LJJ were of the opinion that the presence or absence of a tax avoidance purpose should not be determinative of the issue, and the presence or absence of an 'asymmetry' in the tax treatment of a transaction was also not a factor that needed to be present. Furthermore, the hurdle of 'manifest absurdity' was too stringent a test.

The court considered the decision in GDF Suez Teesside v HMRC [2018] EWCA Civ 2075 (where the Court of Appeal agreed that 'fairly represent' requirement allowed the accounting override in a tax avoidance case). Unlike GDF Suez, however, Smith & Nephew concerned exchange gains and losses, and in coming to its conclusion that HMRC's appeal on the 'fairly represent' point should be dismissed, the court placed significant weight on the particular legislative mechanism in which certain exchange gains and losses were brought into account under the loan relationships rules at the relevant time.

The 'fairly represent' element of the loan relationships computational provisions was repealed for accounting periods commencing from 1 January 2016, so this decision has limited direct significance going forwards. However, as Rose LJ noted, a large amount of tax turns on the correct interpretation of these words and other cases on the point are waiting in the wings.

Smith & Nephew Overseas Ltd v HMRC [2020] EWCA Civ 299,

Adapted from the case summary in Tax Journal

Cross-border group relief claims failed

Summary – The First Tier Tribunal rejected a claim for group relief by seven UK companies for losses of £228m incurred by a Danish company in the same worldwide group.

Esso and six other companies were all UK-resident and, for the accounting periods ended 31 December 2001, 2002 and 2003 claimed group relief for losses of £228.7 million incurred by a Danish-resident company, EMDH:

- The only link between EMDH and the appellants was that their ultimate parent was a US corporation, EMC.
- EMDH's immediate parent was a company resident in Luxembourg.

In 2012, the business of EMDH was transferred to a Danish permanent establishment of a Norwegian group member (N), and the company was liquidated in 2013, thereby extinguishing all of its losses.

It was agreed between the parties that, under the UK law then in force, the only exception to the requirement that both the surrendering and the claimant companies should be within the scope of UK corporation tax was that provided for by the CJEU decision in Marks and Spencer Plc v Halsey (Case C-446/03) for 'final losses'.

Decision

The main issue was that the UK companies and the Danish company were indirectly linked through the Danish company's immediate parent resident in Luxembourg. The First Tier Tribunal followed the decision of the CJEU in Skatteverket v Holmen AB (Case C-608/17), in which it was held that the concept of 'final losses' in Marks and Spencer does not apply where, as in this case, an intermediate parent is in a different EU member state from the member state where the loss-making subsidiary exists. As the Danish loss-making company's intermediate parent was resident in Luxembourg, the claims for relief were denied.

Although not strictly necessary, the First Tier Tribunal considered further arguments of the appellants in case it was wrong on the Holmen issue. In particular, it held that the appellants had not established any basis on which, in a situation where the UK had no powers of taxation or otherwise over either EMDH or its parent, UK legislation infringed their freedom of establishment, and therefore EU law was not engaged directly. Furthermore, there was no discrimination within the non-discrimination article of the UK/ US double tax treaty which would entitle the appellants to rely on EU law.

Finally, the losses of EMDH were not definitive at the date of claim; although EMDH had exhausted all possibilities of using its losses, the reason for that was purely a result of Danish domestic legislation applicable to the transfer of its business to the permanent establishment of N.

The First Tier Tribunal held that group relief was not available and dismissed the appeals.

Impact of Brexit: Although the UK is no longer a member of the EU, European jurisprudence was still relevant here because the losses were incurred before Brexit day. Indeed, given that the losses here arose as far back as 2001, it is clear that it will be many years before all pre-Brexit issues will have worked their way through the appeals process.

Esso Exploration & Production UK Ltd and others v HMRC (TC07620)

Adapted from the case summary in Tax Journal

Land Remediation Relief denied

Summary – The cost of repairing underground iron gas pipes was not the remediation of land, and so not eligible for Land Remediation Relief.

Northern Gas Networks Limited owned and operated one of the eight regional gas distribution networks in the UK. As a result of a hive down, it acquired an extensive system of gas pipelines from its parent, National Grid Transco, with a significant portion being made of iron.

Iron had been recognised as giving rise to serious safety issues, as over time, the pipes could fracture allowing gas to escape from the pipes but also there was a significant risk of gas explosions. Consequently, the government introduced the "30/30 Programme", so called because the programme required the replacement or improvement, over a 30-year period, of "at risk" mains pipelines located within 30 metres of a building.

Northern Gas Networks Limited spent around £109m on this work and up until 1 April 2009, when the legislation changed, Northern Gas Networks Limited believed that they were eligible to claim Land Remediation Relief at a rate of 150% against taxable profits. (Para 12 Sch 22 FA 2001)

HMRC disagreed.

Decision

The First Tier Tribunal denied Land Remediation Relief on the expenditure on the grounds that it was not qualifying land remediation expenditure; the expenditure incurred was not "on" or "in relation to" the land. They did not see how the expenditure incurred in replacing or improving the pipes could properly be said to have been "on land" (for the purposes of paragraph 2(2)), incurred in carrying out any operations or taking any steps which were, in either case, "in relation to land" (for the purposes of paragraph 4(2)) or "on the land" (for the purposes of paragraph 7(2)).

Further, Northern Gas Networks Limited's parent, National Grid Transco, had contaminated the land and the rights to that land had been acquired from that parent. Since the parent company had a "relevant connection" to Northern Gas Networks Limited, the criteria for Land Remediation Relief were not met.

The appeal was dismissed.

Northern Gas Networks Limited v HMRC (TC07615)

VAT

Zero rating accelerated (Lecture B1196 – 26.09 minutes)

Following the decision in News Corp UK & Ireland Limited v HMRC [2019] UKUT 404 (TCC), Budget 2020 announced that VAT on e-publications would be reduced from December 2020. As a result of the outbreak of COVID-19, the date has been brought forward to 1 May 2020.

Zero-rating is limited to electronic versions of books that can be read or looked at. Supplies of audiobooks remain taxable at the standard rate whether supplied in a physical or digital format.

www.gov.uk/guidance/zero-rate-of-vat-for-electronic-publications

Notifying option to tax extended (Lecture B1196 – 26.09 minutes)

Notice 742A: Opting to tax land and buildings has been updated to help businesses during the coronavirus outbreak.

Between 15 February and 31 May 2020, the time limit to notify an option to tax land and buildings has been temporarily extended from 30 days to 90 days.

Notifications can be emailed to: optiontotaxnationalunit@hmrc.gov.uk

Notifying as a business

The form can be submitted with an electronic signature but supplementary evidence must be supplied showing that the signature is from a person authorised to make the option on behalf of the business.

Examples of supplementary evidence include emailing the form:

- with an email from the authorised signatory to the sender within the business, giving authority to use the electronic signature;
- from the authorised signatory with their sign off in the email and the form;
- with an email chain or a scan of correspondence showing the authority given by an authorised signatory.

Notifying as an agent

A similar process applies to agents who are notifying the option to tax on behalf of their clients.

Agents must send proof that:

- the signature is from a person authorised to make the option on behalf of the business;
- authority has been granted by the business to use the electronic signature.

Examples include emailing the form with a:

- current email or email chain from an authorised signatory of your customer's business, giving you authority to use this signature and send it to us on their behalf;

- scan of correspondence showing authority is granted by an authorised signatory to use their electronic signature on the form and to also send this form to us on their behalf.

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

Fish and chips not declared (Lecture B1196 – 26.09 minutes)

Summary – Under-declared business revenue and insufficient business records led to the taxpayer failing to register his business for VAT with effect from August 2010.

Since December 2009, Tahsin Dagdelen owned the Deep Sea Fish Bar, a take-away fish and chip shop. In November 2015 HMRC wrote, saying that they were unable to trace a VAT registration number for the business and that if the business was not VAT-registered, it should complete a questionnaire and provide monthly turnover figures for the period from December 2009 to November 2015.

In January 2016, having received the turnover figures, HMRC established that Tahsin Dagdelen did not use till rolls but wrote down his sales. He did not take credit cards. Ultimately, HMRC determined that he had underdeclared his trading income for several years, and that he should have been VAT registered since 2010.

Decision

The First Tier Tribunal considered that the evidence presented by both parties was rather sparse but based on the information supplied concluded that:

- this was a business which, on its own declared turnover, was operating very close to the registration threshold throughout ownership;

- the turnover declared showed a level of consistency which was not credible and that the actual turnover was higher than that declared;

- there was a high rate of non-declaring of transactions based on the agreed fact that only 9 out of 19 transactions made or overheard were recorded during self-invigilation; and

- at other times Tahsin Dagdelen was responsible for writing down orders in the absence of till rolls and the Tribunal had no reason to expect that such record-keeping would be any more or less accurate than that during the period of self-invigilation.

The First Tier Tribunal agreed with HMRC's conclusions and upheld the determinations, penalties and compulsory VAT registration. The Tribunal also confirmed that the discovery assessments were not stale.

Tahsin Dagdelen (T/A Deep Sea Fish Bar) v HMRC (TC07517)

Reasonable excuse and flawed special circumstances

Summary – Given the circumstances it was reasonable for the company to have relied heavily on their accountants to ensure that the company's financial position reported to HMRC was correct.

Udlaw Limited supplied mobile home holiday lettings at a holiday park in Cornwall. It was VAT registered and was the representative member of a VAT group.

HMRC assessed the company for under-declared output tax of £24,933. This related to inaccurate VAT returns for the periods 1 January 2014 to 30 June 2017 that had arisen as a result of a 20% retention by the company for commission to an agency who assisted in the letting of the holiday homes, and for expenses to a group company incurred in relation to the lettings that were exempt.

Udlaw Limited accepted that the output VAT was payable and indeed paid the amount due as soon as it was assessed. The amount in dispute was the penalty that was assessed on the basis that the inaccuracies in the returns were a result of the company failing to take reasonable care.

The company used accountants to assist in its financial operations and to compile its annual accounts. One element of their responsibility was to reconcile the money received from the supplies of holiday lets as shown by the sales invoices and reflected in the VAT returns with the annual accounts and the money credited to the company's bank account.

During the period in question, the company's accountant amalgamated with another firm of accountants, the Sully partnership which then amalgamated with Haines Watts. At the hearing, it was argued that during these transition periods, the accountants had not undertaken the reconciliation exercise between the annual accounts and the VAT returns, and it was that which had resulted in the under-declaration of VAT. Mr Gleeson, who ran the company, was suffering with prostate cancer and subsequently died in April 2017. He was preoccupied prior to his death with his wife's death in 2015 and with the sale of the holiday park that he found difficult to accept. As the Tribunal stated: "The apple of his commercial eye, the holiday park, was loss-making and was to be sold."

Mr Gleeson's daughter argued the company had a reasonable excuse for failure to perform the necessary reconciliation as during this time her father relied heavily on his accountants.

Decision

The First Tier Tribunal were surprised that the accountants had not questioned whether the 20% should have been deducted from turnover for VAT purposes nor the difference between the cash and accounting position. Under normal circumstances, HMRC could have validly argued that this was something that could readily have been carried out by the company themselves.

However, given Mr Gleeson's circumstances, the Tribunal had some sympathy. Under the circumstances it was wholly acceptable for Mr Gleeson to have relied heavily upon his accountants to ensure that the company's financial position reported to HMRC was correct. The company did take reasonable care and the appeal was allowed.

Although not necessary, the Tribunal went on to highlight three occasions when HMRC considered whether or not there were special circumstances: in an email, in the penalty explanation schedule and at the hearing itself. On each occasion, HMRC gave no reasons for coming to its decision and they held that this rendered their decision an unreasonable one. The Tribunal concluded that if HMRC had considered all of the factors that were before them on each occasion that they came to a conclusion about special circumstances, they would inevitably have come to the same conclusion. Had the Tribunal not allowed this appeal on the basis that the company had taken reasonable care in completing its returns, they would have reduced the penalty to zero on the basis that there were special circumstances.

Udlaw Limited v HMRC (TC07548)

Payment handling charges

Summary – The £5 handling charge was an integral part of the supply of media services and so a taxable supply. Alternatively, if the Tribunal was wrong, then the supply of payment handling services was an ancillary supply, and so not exempt.

Since 2007, Virgin Media Limited has provided TV, broadband and telephone services to UK resident customers under the Virgin Media brand. The company is the representative member of a VAT group.

Virgin Media Payments Limited, a wholly owned subsidiary of Virgin Media Limited, and VAT group member, is responsible for processing customer payments. Where customers do not pay by direct debit, the bill includes a monthly payment handling charge of £5. This appeal concerns the correct VAT treatment of that handling charge.

Decision

It was not disputed that there were a number of key issues for the Tribunal decide. At the conclusion of the case report, the Tribunal provided an overall summary of their findings, before going on to answer each of the questions in turn.

The Tribunal found that it was Virgin Media Limited, the representative member of the VAT Group, was the taxable person making supplies. There was one taxable supply of media services where the £5 handling charge was an integral part of that supply. The Tribunal went on to say that if they were wrong, then the supply of payment handling services was an ancillary supply.

Considering the individual issues in turn:

1. Was there a supply by Virgin Media Payments Limited to customers not paying by Direct Debit?

   The Tribunal found that Virgin Media Payments Limited did not make a supply to these Virgin Media customers.

2. If there was a supply, then what was it? Did it have a free-standing fiscal identity or was it subsumed into the supply made by Virgin Media Limited?

   The Tribunal stated that if they were wrong then the only supply made by Virgin Media Payments Limited was to Virgin Payments Limited when acting as agent to collect, process and apply payments due by customers. That was intra group so there was no VAT consequence. Virgin Media Payments Limited did not have a free-standing fiscal identity for VAT purposes.

3. If the payment handling services were a supply, did they fall within the scope of the exemption for financial services (Group 5 Schedule 9 VATA 1984) as “the transfer or receipt of, or any dealing, with money” or as intermediary services in relation to the “transfer or receipt of, or any dealing with money” (items (1) and (5) respectively). If they were such an exempt supply did they then, in terms of Article 135(1)(d) of the Principal VAT Directive 9, amount to debt collection so as to be excluded from exemption?

   The Tribunal continued that, if they were wrong in that Virgin Media Payments Limited did make a supply of payment handling services to the customers, in light of the decisions in *Bookit* and *NEC* in particular*,* those were not exempt supplies.

HMRC’s final argument, should all else fail, that the essential aim of Virgin Media Payments Limited into the media services supply chain was to achieve a VAT advantage by securing categorisation of the charge within the VAT exemption and thus represented an abusive practice within the scope of the Halifax principle. The Tribunal stated that, in the event that they were wrong on all of the other issues, the essential aim of the transaction was not to secure a tax advantage so HMRC’s argument on abuse failed.

Virgin Media Limited and Virgin Media Payments Limited v HMRC (TC07536)

Company fraud causing cash flow crisis

Summary – A fraud committed by staff in 2017 was a reasonable excuse for the company’s late payment of VAT and that excuse still existed in January 2019.

The company owned a successful restaurant “The Boatyard” at Leigh on Sea, which was run by its owner and director, Mr Cross, for approximately 17 years. About three years ago, Mr Cross decided to retire and leave his experienced and well-trained staff to take over actively running the ship.

Mr Cross did not understand why the company was running out of money when there should have been over £200,000 in the bank. Forensic accountants discovered that the company had been the subject of a major financial fraud, instigated by his ‘trusted’ manager and possibly other staff as well. Despite customers paying their full bills, hundreds of electronically generated customer bills had been cancelled and replaced with bills for much smaller amounts for which money was banked. The company was faced with very large, unexpected cash flow difficulties, at a time when the profitable summer season was drawing to a close such that it looked as though the company might well go into liquidation or that HMRC would seek to wind the company up, unless they could somehow buy time.

Having immediately notified HMRC that the company would not be able to pay the VAT due for the 10/17 quarter, this first default put the company into the VAT default surcharge regime.

They then agreed a time to pay agreement. Over the next 14 months Mr Cross had numerous telephone conversations with HMRC, pre-warning them of the need to extend the time to pay agreement as further quarterly VAT payments became due. Throughout this period VAT returns were submitted on time but payment was late.

This case was the company’s appeal against an assessment for default surcharges for late payment of VAT resulting from the company’s third default.

Decision

The First Tier Tribunal concluded the facts of the case were sufficient to establish that the company did have a reasonable excuse for their default. Mr Cross acted in an objectively reasonable way.

The Tribunal found that the effects of the 2017 fraud were still, in January 2019, directly responsible for the company’s inability to pay its 01/19 VAT on time. It was entirely reasonable for the company not to have recovered financially within 16 months or so from the significant fraud and theft committed against them, particularly with a seasonal restaurant business and where only one summer season has elapsed.

HMRC validly raised the 01/19 VAT quarter penalty assessment, as there was no time to pay agreement in relation to that quarter in place. However, the company had established that it has a reasonable excuse for the late payment of VAT for the quarter under appeal.

The appeal was allowed and the penalty dismissed.

Mirencliff Limited v HMRC (TC07581)

Hillbillys Fried Chicken

Summary – A ‘best judgment’ assessment for undeclared VAT, for the incorrect recording of standard rated sales as zero-rated, was correctly assessed by going back four years, rather than one.

The company, 2 Strand Road Limited, traded as 'Hillbillys Fried Chicken' and had been registered for VAT since 28 October 2011.

The business was selling both onsite hot food as well as takeaways and declaring zero-rated sales of between £12,000 and £24,000 per quarter.

In April 2016, HMRC's wrote to the company stating that they intended to visit the premises to review the company’s VAT affairs from 01/13. A visit eventually took place in July 2017 when HMRC learned that the till reports did not show the split between zero-rated and standard-rated items, and further, did not support the amounts claimed on the VAT returns as zero-rated sales.

HMRC asked how the company decided what meals included zero-rated sides (coleslaw and cold dips) and which included standard-rated sides (curry sauce and gravy). In March 2018, a figure of 7% was eventually agreed as the figure for zero-rated sales and the tills were reprogrammed in about June 2018. HMRC used this percentage to raise a ‘best judgment' assessment covering the preceding four years.

In July 2018, HMRC officers made test purchases buying two meals, with the receipt showing £2.50 for two cold dips that were not provided. The company accepted that the zero-rated sales were overstated, but challenged whether HMRC could raise their assessment to VAT due going back four years, rather than one year only.

Decision

The First Tier Tribunal noted that both parties had agreed in March 2018 that 7% of total sales should be zero-rated (compared with 14% as originally claimed in the company’s VAT records). The 7% figure was assessed based on HMRC's 'best judgment' (VATA 1994, s 73(1)) that seemed to the First Tier Tribunal a sensible figure because later periods recorded 8% of sales as zero rated. The Tribunal confirmed that even if the 7% had been in dispute, they would have been satisfied that the assessment on that footing was right as it was a rational compromise, and there was no reason for HMRC to depart from that percentage when in July and August 2018, later test purchases still showed a discrepancy between the till receipts and what was actually passing over the counter to the customer.

The First Tier Tribunal found that HMRC’s note of the meeting when the ‘7% going back four years’ was agreed to be accurate, and was consistent with their letter, dated the very next day, with the relevant Schedules attached to it. Neither the company nor their accountant had put forward as evidence any note made at the time of the meeting. The best evidence was therefore the note from HMRC. The Tribunal concluded that assessing the past four years was reasonable as it was the error correction period allowed by the legislation.

The appeal was dismissed.

2 Strand Road Limited v HMRC (TC07537)

Undeclared tobacco

Summary – Calculating an average using all tobacco seizures during the period under investigation, rather than averaging based two days of imported tobacco, would have resulted in half the turnover calculated by HMRC, with no need for the taxpayer to register for VAT from 1 March 2020.

Christopher Kendrick lived in a static caravan in Morecambe with his partner and during the relevant period, both of them smoked approximately 3-4 pouches of tobacco between them in a week.

Between 4 December 2009 and 12 August 2013, HMRC seized seven packages of tobacco and used the first two seizures as the basis on which to calculate when they believed he would have reached the VAT registration threshold. On this basis, his daily turnover was around £2,000 a day, which meant that the VAT registration threshold of £68,000 (at the time) would have been reached after 34 days. Assuming that the sales started on 6 December 2009 (the day after the second seizure), the VAT registration threshold would be reached on 8 January 2010 and so Christopher Kendrick should have been registered from 1

March 2010. Extrapolating the numbers, this produced total turnover during the period from 1 March 2010 to 22 August 2013 of just over £1.3 million. HMRC issued a VAT assessment for approximately £220,000 and charged a penalty of a similar amount.

Christopher Kendrick claimed that he had met a man on a boat traveling from Zeebrugge to Hull who had offered to purchase tobacco for him and send it to him to avoid the need to travel abroad to purchase tobacco himself. He claimed that he used to receive a package roughly every 4-6 weeks but never knew how much would arrive. He appealed against HMRC's decision, acknowledging that he had sold small amounts of tobacco to family and friends but nothing like enough to come close to the VAT registration threshold.

Decision

The First Tier Tribunal stated that they did not think it was credible that somebody who he had only met once on a boat would agree to supply him with tobacco, without any agreement as to the amount to be supplied, and then expect to be paid in cash after the packages arrived.

However, the first package seized contained 22 kilograms of tobacco whereas the largest amount of tobacco in any subsequent seizure was only 7.5 kilograms, suggesting that the HMRC calculations were excessive. The Tribunal concluded that if HMRC had performed their calculations using an average of all seven packages seized, the daily turnover would have been around £1,000 a day and the threshold of £68,000 would not have been exceeded by January 2010. The Tribunal also expressed surprise that, if he was in fact receiving daily deliveries of tobacco, only seven packages were intercepted over a period of more than three and a half years.

Despite the fact that he had been selling illegally imported tobacco, the Tribunal concluded that based on the evidence before them, Christopher Kendrick had not exceeded the VAT registration threshold during the twelve months ending on 31 January 2010 and so was not required to be registered for VAT with effect from 1 March 2010.

However, they went on to say that HMRC would no doubt want to consider whether Christopher Kendrick should have been registered for VAT from some later date.

Christopher Kendrick v HMRC (TC07515)

Betting and gambling exemption

Summary - The First-tier Tribunal had not erred in law in finding that the UK's exemption for betting and gambling had breached the principle of fiscal neutrality.

The respondents (Rank and Done Brothers) made supplies to retail customers involving 'games of chance' gaming machines.

Rank's claim related to the period from 1 October 2002 to 5 December 2005. During this period gambling through fixed odds betting terminals (FOBTs) was exempt whilst gambling using certain slot machines was standard-rated.

Done Brothers' claim related to the period between December 2005 and January 2013. During this period gambling through FOBTs was standard-rated. This created a differential between (for example) roulette played via a FOBT (which was standard-rated) and roulette played online, in casino or via an electronic roulette machine (which was exempt).

Both respondents had successfully argued at FTT that during the respective claim periods, the games that were liable to VAT were similar for fiscal neutrality purposes to those which were exempt. This was on this basis that differences between the comparator games did not have a significant influence on the decision of the average customer to use one machine or another. Consequently, the principle of fiscal neutrality was breached.

On appeal, HMRC and the respondents agreed that an evaluation as to whether a breach of fiscal neutrality had occurred was to be undertaken taking into account the needs and point of view of the average consumer. However, HMRC argued that the FTT had erred in law by determining the needs of the average consumer by reference to evidence of their actual behaviour. Instead, it should have examined the 'real reasons' for consumers' decisions.

Decision

The Upper Tribunal was unconvinced by HMRC's arguments and stated that there was 'no authority' for the proposition put forward by HMRC that, in assessing the needs of the average consumer, the FTT must have before it and take into account evidence as to the reasons and possible preferences of individual consumers. Moreover, it did not accept HMRC's central proposition that the actual behaviour of average consumers is inherently unreliable, as what matters is establishing the 'real reasons' for their decisions. Evidence of decisions customers actually made was 'undoubtedly relevant' to the determination of fiscal neutrality. HMRC's appeal was dismissed.

HMRC v The Rank Group PLC and Others [2020] UKUT 0117 (TCC)

Adapted from the case summary in Tax Journal