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Personal tax

IR35 cases in the Court of Appeal (Lecture P1316- 18.30 minutes)

At the end of April, the Court of Appeal released its judgments in two IR35 cases:

- In Kickabout Productions Ltd it upheld the Upper Tribunal's finding that the intermediaries legislation applied to the services provided by Paul Hawksbee. There was sufficient mutuality of obligation and control, with other factors adding little to the case.
- In Atholl House Productions Ltd the Court of Appeal accepted the hypothetical contracts satisfied mutuality of obligation and control but remitted the case back to the Upper Tribunal to apply the correct test when assessing whether overall a contract of employment would have existed under hypothetical contracts between Kaye Adams and the BBC.

Kickabout Productions Ltd v HMRC [2022] EWCA Civ 502

Paul Hawksbee provided his services to Talksport as a radio presenter through his personal service company, Kickabout Productions Ltd.

HMRC argued that the intermediaries legislation applied to the services provided by the taxpayer on the basis that the hypothetical contract between Mr Hawksbee and Talksport was equivalent to a contract of employment.

The First Tier Tribunal had allowed the company's appeal but the Upper Tribunal had overturned this decision, agreeing with HMRC. They had found that Paul Hawksbee's services were agreed for a fixed period presenting a daily three-hour show Monday to Friday. He had to make himself available for at least 222 days per year, giving Talksport 'first call' on his services which pointed to employment status. Talksport had the right to decide on both form and content of each show, controlling when and where the work happened. Although the Upper Tribunal considered factors like sick and holiday pay, training, and pensions, the Tribunal concluded that these were insignificant in this case.

Kickabout Productions Ltd appealed to the Court of Appeal, on the grounds that the Upper Tribunal had erred in its:

1. interpretation of the contracts as regards the obligation of Talksport to provide work;

2. approach to the jurisdiction of the Upper Tribunal to remit or remake the lower Tribunal's decision;

3. evaluation as to the issue of control over Paul Hawksbee by Talksport; and

4. approach to its evaluation regarding stage three of the *Ready Mixed Concrete (RMC)* test.

The Court of Appeal dismissed the company's appeal on all four grounds.

As a result of the express terms of the contract between Talksport and Kickabout Productions Ltd, mutuality of obligation existed. Talksport was obliged to offer a minimum number of programmes which Paul Hawksbee was required to present.

With all of the First Tier Tribunal's findings of facts available to them, the Upper Tribunal was well-placed to remake the decision.

The Court of Appeal agreed with the Upper Tribunal's decision over control. Kickabout Productions had not identified any error of principle or approach taken by the Upper Tribunal. No irrelevant factors had been taken into account nor had relevant factors been disregarded.

Finally, the court considered none of the criticisms of the Upper Tribunal's evaluation of the facts were well founded. The absence of workers' rights in the contract did not count greatly in determining Paul Hawksbee's status as if there was an employment relationship, he would enjoy the rights conferred under employment law. Further it was reasonable to conclude that a two-year contract could still represent employment as under 'modern employment conditions, many employees would regard a two-year engagement, terminable during the term on not less than four months' notice, as providing significant security, all the more so when combined with an obligation on the parties to negotiate in good faith for an extension'.

Kickabout Production Ltd's appeal was dismissed.

HMRC v Atholl House Productions Ltd [2022] EWCA Civ 501

Kaye Adams hosted a BBC radio show, with her services provided through her personal service company, Atholl House Productions Ltd.

HMRC taxed the services provided under the IR35 rules on the basis that, if she had provided her services directly to the BBC, she would have been classed as an employee.

Kaye Adams appealed to the First Tier Tribunal who found in her favour. HMRC appealed to the Upper Tribunal who dismissed HMRC's appeal. The Upper Tribunal considered the content of the actual contract as well as that of a hypothetical contract. Applying the three Ready Mixed Contract tests, the Tribunal concluded that mutuality of obligation existed and that the BBC did have sufficient control over when, where and how work was carried out. Finally, the Tribunal considered the third test to see if there were sufficient other factors that would override mutuality of obligation and control. Was Kaye Adams in business on her own account? The Tribunal accepted that she was already carrying on similar activities on her own account when she took on the BBC contract. Consequently, the BBC work was part of her existing business and was not a contract of employment. IR35 did not apply.

HMRC appealed to the Court of Appeal who found that the Upper Tribunal's approach was flawed. It was not enough to conclude that being in business on her own account meant that this hypothetical contract could not be a contract of employment.

The hypothetical contract needed to be analysed taking into account the specific circumstances that would have been known to both parties or were reasonably available to both parties. The Court of Appeal found that this was an analysis that had not been correctly made and remitted the case back to the Upper Tribunal, allowing both parties the chance to argue that further facts should be taken into account.

Fixed protection reinstated (Lecture P1316- 18.30 minutes)

Summary – A taxpayer's fixed protection 2016 was reinstated, as his auto-enrolment into a pension scheme had been undertaken without correctly notifying him.

Ian Moan worked in the financial services industry as a financial adviser. In 2016 he had a job interview to join Newcastle Financial Advisers Limited as a divisional manager.

At interview, he informed the company that he was awaiting a pension valuation from his previous employer. As he expected to have exceeded the standard lifetime allowance, which had just been reduced from £1.25 million to £1 million, he would be seeking to benefit from fixed protection 2016. This would allow him to keep his lifetime allowance at the higher figure provided he did not become a member of or accrue any further benefits under a registered pension scheme. Consequently, he stated that he would not wish to participate in the company's registered pension scheme.

In September 2016, at a meeting with the company's HR department to discuss and sign various joining documents, he confirmed that he did not wish to be enrolled in any pension scheme. He signed his contract of employment on 10 September 2016 but deliberately did not sign the payroll deduction form, on the understanding this meant he would not become a member of the pension scheme. He started work on 17 October 2016 and, hearing nothing further, believed that his wish not to join the pension scheme had been actioned.

The company supplied him with a smart phone for accessing his emails, diary and contacts list when he was working out of the office (approximately 95% of his time). Unfortunately, the smart phone was old and synchronisation was unreliable and had a habit of simply deleting emails, especially larger emails with attachments. Sometimes no synchronisation would take place for days at a time and then as many as 60 emails might be delivered all at once, causing the phone to crash. Some emails were delivered without the attachments they had been sent with. The problem was eventually resolved by him buying his own iPhone.

At the end of June 2017, he was finally able to gain online access to his payslips. At this time, he realised that pension contributions were being made on his behalf. He asked his employer to cancel his enrolment and refund his contributions, which they confirmed they would do.

Following this, Ian Moan applied to HMRC for a reference number confirming his Fixed Protection 2016, which they issued on 6 July 2017. However, when the company's pension scheme subsequently refused to cancel his enrolment, HMRC revoked his Fixed Protection 2016.

Ian Moan appealed, claiming that his employer had told him that provided he did not sign a payroll deduction form, he would not be auto-enrolled. Further, due to IT issues, he denied having been "given" the information; he had never seen the relevant email and attachment.

Alternatively, he pointed out that the wrong date had been included in the email the pension provider supplied had sent.

Decision

The First Tier Tribunal found that the relevant email was received into Ian Moan's email account, he deleted it, either without opening it at all or after briefly scanning it and dismissing it as "just more junk email". The email stated that the automatic enrolment date was 1 February 2017. The Tribunal concluded that receipt of the email on 6 March 2017 resulted in the information contained in it being "given" to Mr Moan.

Moving to the alternative argument, the Tribunal upheld the appeal agreeing that the wrong auto-enrolment date was on the email, making it technically an invalid notice. The Tribunal confirmed that Ian Moan's automatic enrolment date was his start date of 17 October 2016. Even if his notice of deferment had been given in time, the maximum permitted deferral would have been three months after the starting day, so by 17 January 2017. However, the date given in the notice emailed on 6 March 2017 stated that the automatic enrolment date was 1 February 2017. This was clearly incorrect, making the notice invalid. As Ian Moan's opting out notice had been given in time, the Fixed Protection was reinstated

Ian Moan v HMRC (TC08449/V)

Sub-agent fraud (1) – SEIS claim

Summary – The sub-agent who submitted the taxpayer's return had not been authorised to act on his behalf. Consequently, he had not caused the loss from a fraudulent SEIS claim either deliberately or carelessly.

Shaun McCumiskey's life was in turmoil. In 2015, he lost his job, separated from his wife and was "sofa surfing". He began drinking and gambling and attempted to commit suicide. He used "pay day" loans to get by, which were eventually cleared by his parents.

In 2015/16, he had undertaken a small amount of work as an electrician, earning about £2,500 and needed to file a tax return for 2015/16. He knew Stefan Brown, a director of Alpha Tax Consultants Limited and appointed this company as his agent to file his return and handed the relevant information concerning his affairs to Stefan Brown. He was later told that the matter was 'sorted' and that 'he hadn't anything to pay'.

In March 2019, Shaun McCumiskey received a letter from HMRC about a claim for seed enterprise investment scheme (SEIS) relief.

He told the HMRC that he had never heard of SEIS, had made no such investment and had not claimed relief. It transpired that a Self Assessment return had been submitted by Capital Allowance Consultants Limited in Shaun McCuskey's name. This return contained £30,000 of income and a fraudulent SEIS claim in respect of an alleged investment of £15,000.00. HMRC had paid £7,500 into a bank account of a nominee of Capital Allowance Consultants Limited without, as HMRC concede, checking the validity of the claim.

IHMRC considered there had been a loss of tax because of the SEIS relief claim and issued a discovery assessment to recover the tax refunded.

Shaun McCuskey appealed.

Decision

The First Tier Tribunal found that Shaun McCuskey had appointed Alpha Tax Consultants Limited as his agent, which HMRC accepted. At no point had he given this agent permission to appoint Capital Allowance Consultants Limited as a sub-agent and so Capital Allowance Consultants Limited could not be regarded as acting on his behalf.

The Tribunal found that Shaun McCuskey had not caused the loss deliberately or carelessly. Given his mental state and lack of tax knowledge, he could have done nothing to prevent the loss to HMRC.

Further, the Tribunal stated that given that this was his first year of trading as an electrician, it seemed very unlikely that he could have satisfied the typical profile of SEIS investors. There would have been sufficient information on his tax return for HMRC query the validity of his claim.

The appeal was allowed.

Shaun McCumiskey v HMRC (TC08459)

Sub-agent fraud (2) – EIS claim

Summary – Under the circumstances, the taxpayer was given permission to appeal late. With nine other similar cases involving a fraudulent sub-agent, HMRC's time and costs involved would be limited.

This was a similar case with a fraudulent claim made by Capital Allowances Consultants Limited.

Mr Huntly was an electrician who worked in the offshore oil and gas industry. His work pattern was 8/10 weeks on the rigs and two weeks off. Contact with Mr Huntly when he was on the rigs was difficult at best and impossible at worst. His wife, who had recently had a baby, did not attempt to forward mail to Mr Huntly when he was on the rigs.

Mr Huntly asked his accountant Stefan Brown to file a return to claim expenses incurred in providing equipment he had incurred wholly, exclusively, and necessarily for the purpose of his employment and to recover any consequential tax due to him due to any period of unemployment. However, as in the previous case, it was Capital Allowances Consultants Limited who filed his return filed tax returns for 2015/16 and 2016/17 and claimed EIS relief in both years. HMRC allowed the claims without checking their validity and made payments to Capital Allowances Consultants Limited. The company paid 30% of each payment to Mr Huntly and retained the rest. He was expecting a tax rebate for equipment purchased and used wholly exclusively and necessarily in his employment and a repayment of tax overpaid under PAYE because of periods of unemployment

Suspecting fraud, in 2018, HMRC opened an enquiry, later issuing discovery assessments to recover the sums paid. Mr Huntly called HMRC within 30 days of receiving the assessments. instead of having his right to appeal explained, he was instructed to look at HMRC's website. He believed that he had appealed and that his only option was to pay the tax.

Mr Huntly was then working on oil rigs offshore and it was not until December 2019 that he engaged Independent Tax. Nine other offshore workers were also registered with Independent Tax, all victims of Capital Allowances Consultants Limited's fraud

It took a further 10 months before an appeal was submitted due mainly to COVID-19 and procedural difficulties.

When Mr Huntly appealed 20 months late, HMRC refused the appeal. As a result, he applied to the First Tier Tribunal to allow a late appeal.

Decision

The First Tier Tribunal concluded that the delay was serious and significant, but it believed that Mr Huntly would have been worried when he received the tax demand and so failed to read the correspondence fully. However, he did call HMRC 'incredibly' swiftly. HMRC seemed to suggest that there were no legitimate grounds for appeal and that his only option was to pay the tax. Mr Huntly believed he had done everything that he could. As soon as it was clear that no appeal had been filed, Mr Huntly's agent filed an appeal. The Tribunal concluded that he had acted as quickly as possible.

The Tribunal concluded that both Mr Huntly and HMRC had been victims of fraud. HMRC's 'pay now enquire later' policy and their failure to make a validity check before issuing the repayment had allowed the fraudulent claim. Without a late appeal, Mr Huntly would be disadvantaged. Capital Allowances Consultants Limited was not Mr Huntly's agent and the returns filed were not his.

The Tribunal highlighted that Mr Huntly's appeal may well be joined by nine similar cases, none of which would be fact heavy and so HMRC's time and costs associated with investigating the facts would be limited.

The appeal was allowed.

J Huntlv HMRC (TC08466/V)

Capital taxes

The importance of a contract (Lecture P1317 – 6.07 minutes)

During 2013/14, two taxpayers (Michelle McEnroe and Miranda Newman) sold their respective 50% shareholdings in Kingly Care Partnership Ltd (KCPL). The sale and purchase agreement stated that the consideration for the sale of these shares was £8,000,000.

At the time of the sale, KCPL owed its bankers an amount of just under £1,100,000.

On the day of the sale, the buyer's solicitors transferred £8,000,000 to the bank's solicitors. The latter then passed sufficient funds over to the bank to redeem the loan owed by KCPL. The balance was then paid to the vendors' solicitors.

In due course, the two former shareholders submitted tax returns which showed the consideration for the sale of each of their shareholdings to be 50% of approximately £6,900,000.

HMRC enquired into the tax returns and eventually issued closure notices, confirming that the consideration in each case should be 50% of £8,000,000. The taxpayers asked for an independent review of this disagreement and, when the response of the review was to concur with HMRC's position, they appealed to the First-Tier Tribunal.

The only point of dispute in this case (McEnroe v HMRC (2022)) was whether the consideration for the shares should be:

£8,000,000; or

£8,000,000 less the bank debt.

The grounds of the taxpayers' appeal is set out in the case report as follows:

'(i) The consideration of £8,000,000 was a payment for the sale of the shares and the discharge of the bank debt. This must be properly apportioned and, under such an apportionment, £1,100,000 should be apportioned to the bank debt.

(ii) The agreement, properly construed, is that the buyer paid some £6,900,000 for the shares and circa £1,100,000 to repay the bank debt.

The sellers never received £8,000,000. The amount of £1,100,000 moved directly from the account of the buyer to the bank to discharge the debt. The sellers did not receive any value for this, as there was no personal guarantee given by either seller (this appears to be contradicted by the sale and purchase agreement which says there was a personal guarantee – a point confirmed by the taxpayers' evidence before the First-Tier Tribunal).

The appellants' treatment of the transaction in their returns also accords with the buyer's treatment of the transaction.

The contract interpretation needs to consider the whole aspect of the transaction, and not just the literal interpretation of the contract.

There is evidence that the amount of the bank debt was not intended to be treated as consideration for the shares.'

Judge Sarah Allatt opened her judgment by examining the law surrounding the calculation of chargeable gains, in particular Ss38 and 52 TCGA 1992. She then made reference to several cases, including the High Court's decision in Spectros International plc v Madden (1997) which also involved payment of a bank loan in addition to payment for shares. However, she did not agree with the vendors that the contract was for the sale of their shares and the discharge of the debt (see (g)(i) and (ii) above). She stated:

> 'The contract alludes to the fact that the debt will be discharged, but it does not say anything about how this is to be done and does not refer to the £8,000,000 being anything other than consideration for the shares.'

The judge also pointed out that, although there was testimony that the sale and purchase agreement did, in both the heads of terms and in earlier drafts, refer to the fact that the sale price was for the acquisition of KCPL on a debt-free basis, this statement did not make it into the final sale and purchase agreement. As she remarked:

> 'It does not follow that what was discussed beforehand is necessarily what the final agreement needed to reflect, as naturally a draft is for discussion and is not a final document.'

Given that the final version of the contract was not ambiguous, the judge dismissed the taxpayers' appeal. They had not discharged the burden of proof to demonstrate that their assertion about the lower quantum of the sale consideration was correct.

This all goes to emphasise the importance of ensuring that the terms of a contract properly reflect all the parties' intentions.

Contributed by Robert Jamieson

Recommendations under consideration **(Lecture P1318 – 19.53 minutes)**

The Office of Tax Simplification (OTS) made 14 recommendations in their second report on CGT – subtitled 'Simplifying practical, technical and administrative issues' – which was published in May 2021.

On 30 November 2021, the Financial Secretary to the Treasury wrote to the Chair of the OTS (Kathryn Cearns) and the Tax Director (Bill Dodwell) to respond to their reviews into IHT and CGT and to update them on various Government decisions in relation to the 14 recommendations referred to above.

Out of these 14 recommendations, five were accepted, four were rejected and the remaining five were stated to be 'under consideration'. This short article highlights the five topics which may, hopefully, be the subject of future legislative modification.

Reporting and paying CGT

One of the concerns outlined by the OTS was that only a very small number of taxpayers choose to report their capital gains early using the voluntary 'real time' transaction CGT service which was introduced in 2016. This medium ensures that people do not have to register for self-assessment to notify HMRC of their gains (or losses) if they would not otherwise be required to submit a tax return. It is typically used to inform HMRC about gains on shares or personal possessions such as paintings and antiques.

Unfortunately, at the present time, the 'real time' service cannot be used by agents (probably because the idea was originally targeted at unrepresented taxpayers). It is therefore necessary for the taxpayer to set up his own HMRC Government Gateway details and to provide the relevant disposal information in a PDF document, along with a computation of the gain and the accompanying CGT liability.

The OTS recommended that the Government should formalise the administrative arrangements for the 'real time' transaction CGT service, effectively making it a standalone CGT return which would be usable by agents. In response, the Government have said that they will consider implementing this idea as part of their delivery of the Single Customer Account.

Share pooling

Listed share holdings of a particular type are normally grouped together (or 'pooled') for CGT purposes when all or some of the shares are sold. This is intended to operate as a simplification measure which means that taxpayers do not have to keep track of which of a collection of identical assets have been disposed of. However, this rule can give rise to greater complexity in some scenarios such as where an individual has several investment managers to look after their overall investment portfolio.

The OTS recommended that the Government consider whether individuals holding the same share in more than one portfolio should be treated as holding them in separate share pools. The Government reply to this suggestion is that they fully understand the scope of the recommendation but that they need to give the matter further thought in order to determine the full implications of the proposal. The speaker feels that this idea is unlikely to be implemented, given the relatively small number of (mainly wealthy) taxpayers who have multiple portfolios. Indeed, it seems probable that virtually all such individuals will anyway have an adviser to look after their tax affairs.

Main residence relief nominations

It is well known that, where someone occupies two or more residences, it is possible to make a nomination under S222(5) TCGA 1992 as to which home that person wishes main residence relief to apply. This written nomination must normally be submitted to HMRC within two years of the date on which the additional property was acquired. The nomination can then be amended at any time in the future. As the OTS remark:

> 'The nomination does not need to follow the reality of how the homeowner splits their life between their homes and no account needs to be made of how much time is spent in each home, as long as each home is a residence.'

If the taxpayer, in these circumstances, does not nominate a particular property, the relief will apply to the property which is de facto the person's main residence. This is based on a range of factors such as how long they spend there or where their family live. Of course, a nomination overrides this rule.

The OTS recommended that the Government should review the practical operation of the main residence relief nomination and raise awareness of how the legislation works. In particular, they put forward the idea that nominations could be made on disposal rather than under the present two-year arrangements and that the whole process would be improved by the introduction of a standard nomination form or letter template. The Government have merely promised to review the position with regard to nominations, taking into account existing guidance, the concerns raised and the recent changes brought in by FA 2020.

Tax status of corporate bonds

'Corporate bond' is a generic term for debts or securities issued by a company in order to raise finance. The tax status of a bond depends on whether it is classified as:

- a qualifying corporate bond (QCB); or
- a non-qualifying corporate bond (non-QCB).

A QCB is defined in S117 TCGA 1992. It can be described as a debt:

- which is issued on normal commercial terms (note that HMRC indicate that most interest-free lending counts as a normal commercial loan);
- which is denominated in sterling; and
- where there is no provision for conversion into, or redemption in, another currency.

Any corporate bond which is not a QCB is a non-QCB. QCBs are exempt from CGT, whereas non-QCBs are taxable.

The OTS recommended that it should be possible to insert a permanent irrevocable upfront provision in the legal documentation for a bond, specifying that it is subject to CGT. In the absence of this statement, a bond would automatically be regarded as a QCB and therefore exempt from tax. This proposal would avoid the need for the inclusion of complex clauses in the bond documentation which serve no purpose other than to determine the tax status of the bond and which frequently make it difficult for the parties involved to know which type of corporate bond they hold. In her reply to the OTS, the Financial Secretary to the Treasury wrote that the bond market and the tax rules have changed considerably since the introduction of the blanket CGT exemptions for QCBs and gilt-edged securities. The Government therefore intend to consider this point further within the context of a wider review into the purpose and functioning of these CGT exemptions.

Investment incentives

The Enterprise Investment Scheme and the Seed Enterprise Investment Scheme are intended to provide financial support for growth investment in start-up and early-stage companies. In the latest year for which statistical information is available, it is reckoned that more than 40,000 taxpayers use one or other of the two schemes every year.

Both reliefs have what the OTS describe as 'restrictive eligibility criteria' which require a specific clearance from HMRC, but they provide a complete exemption from CGT as well as an upfront income tax relief. The OTS have heard from several respondents to their evidence-gathering campaign that the legislation is overly limiting and can cause practical problems for genuine applicants. In addition, they have identified a number of specific areas which, if properly addressed, could better enable the reliefs to achieve their policy objectives, including:

- the short deadline for issuing shares;
- the interaction with business asset disposal relief;
- the cumbersome application process; and
- the link between the income tax relief and the CGT exemption.

The OTS recommended that the Government should re-evaluate the rules for these two schemes with a view to ensuring that procedural or administrative issues do not impede their successful operation. In their reply, the Government say that they accept the desirability of reviewing these schemes, but they will do so in the context of a reappraisal of appropriate income tax and CGT rates.

Contributed by Robert Jamieson

SDLT not payable at 15%

Summary – Having allocated the relevant costs on a 'just and reasonable' basis, the main house was not taxable at 15%. All three dwellings were eligible for Multiple Dwellings Relief.

Marcus and Marcus Limited provided supported living and other support and care services for adults with autism and/or learning difficulties.

In February 2015, the company bought a property for £875,000 that consisted of a number of separate buildings: the main house, an annexe, an office and a summerhouse. The previous owner had lived in the main house as their home and used the other buildings to run a children's nursery:

- The Annexe was divided into two separate buildings with self-contained living facilities;
- The office containing office furniture and filing cabinets appeared to be an office for the nursery business; and
- The summerhouse, also referred to as the "shed" was used by Marcus and Marcus Limited to provide a quiet relaxation room for its clients. Mr Marcus could not recall what the summerhouse was being used for when he bought the property, and whether there was any indication that it belonged to the main house or the nursery business.

Marcus and Marcus Limited submitted an SDLT return stating that the amount of SDLT was £33,750. At the time, the company would have been subject to SDLT at the rate of 15% but its advisors had stated that it was entitled to relief on the basis that the property was acquired for the purposes of a qualifying property rental business.

In November 2015, HMRC opened an enquiry into the SDLT return and in May 2016 issued a closure notice, stating that SDLT was due at the rate of 15%, with the total amount due being £131,250.

Later, HMRC suggested that they might be prepared to accept a late claim for Multiple Dwellings Relief (MDR) on the basis that the annexe contained two "dwellings", separate from the main house. This would involve apportioning the consideration between the three dwellings on a "just and reasonable" basis.

- If the value apportioned to the main house was more than £500,000, on the law as it stood at the time of purchase, the rate of SDLT on it would be 15% but the two annexe dwellings could benefit from MDR;

- If the value apportioned to the main house was £500,000 or less, MDR would be available in respect of all three dwellings.

Part of the reason for this suggestion was that, by this time, the law had changed and the 15% charge no longer applied owing to the nature of the company's business. HMRC made the offer in an attempt to be fair and reasonable.

Both parties agreed that the consideration must be apportioned on a 'just and reasonable' basis using the floor area of the respective buildings. However, HMRC included both the summerhouse and office as part of the main house, taking the value of the main over the £500,000 threshold. The company argued that both the summerhouse and office were used for the nursery and so should be included in the Annexe valuations. On this basis, the main house's allocation of the price paid would have been below the £500,000 and MDR could be applied to all three dwellings.

The company appealed.

Decision

In order to reach their decision, the First Tier Tribunal identified two questions that needed to be answered:

1. What constituted each of the "dwellings"?

2. Having established what is comprised in each dwelling, what was a just and reasonable apportionment of the consideration between them?

Both parties accepted that, at the time of purchase, the main house, the flat in the annexe and the nursery area in the other part of the annexe were all "suitable for use as a dwelling". The issue was how to allocate the office and the summerhouse between the three dwellings.

The First Tier Tribunal found that:

- the office was not occupied or enjoyed with the main house as it was part of the former nursery; consequently, it was part of the annexe;

- the summerhouse was occupied or enjoyed with the main house; there was no evidence to support the claim that it was used as an activity area for the nursery.

Moving on to the apportionment of the consideration, the Tribunal accepted that market value is not necessarily the only way to determine a "just and reasonable" apportionment. The Tribunal stated that, in this case, apportionment could be made on a number of bases: market value, size, value to the company on the basis of intended use or value to a hypothetical purchaser such as a developer, among others. What is "just and reasonable" in a particular case will depend on the facts and circumstances of that case, including the parties' views, in the context of the applicable law.

The Tribunal accepted that floor area was appropriate in this case. The company intended to use all of the buildings and it regarded the annexe as at least as important as the main house, as the rare configuration of the annexe made it ideal for use as accommodation for two particularly challenging clients. The office and the summerhouse were also important in expanding the services and facilities that the company could offer to its residential and non-residential clients.

Using this basis, the value of the main house fell below the £500,000 threshold. Consequently, all three dwellings were eligible for MDR. Assuming that the original calculations were correct, the Tribunal confirmed that the company should have paid SDLT of £13,749 and so was due a refund of £20,001.

Marcus and Marcus Limited v HMRC (TC08476)

Administration

Director's Personal Liability Notice (Lecture P1316- 18.30 minutes)

Summary – A Personal Liability Notice (PLN) issued to a director, who failed to settle his company's NIC debt due before the company was liquidated, was upheld.

Michael Eames was the sole director and shareholder of A1 Recovery Portsmouth Limited, a company that entered compulsory liquidation on 3 July 2017, owing HMRC £108,000 in NIC plus interest.

A1 Recovery Portsmouth Limited began operating in January 2016 and made a payment in respect of PAYE/NICs on 23 February 2016, in respect of the January 2016 period.

The company continued to make net payments to employees but made no further PAYE and NIC payments until a time to pay arrangement was entered into with HMRC on 26 July 2016. The company made three payments in relation to the time to pay arrangement of £7,000 each in July 2016, August 2016 and September 2016 but no further payments were made thereafter. The company made and continued to make net payments to employees but the accruing NICs liabilities in those months and thereafter were also not paid to HMRC.

Michael Eames had been the sole director and shareholder of two previous companies, A1 Recovery Limited and A1 Recovery & Garage Services Limited, both of which had gone into liquidation owing PAYE and NICs of £70,000 and £79,000 respectively.

All three companies undertook maintenance and repair work on motor vehicles and provided roadside recovery services on a contract basis for national breakdown assistance services. As each company failed, its successor company acquired the business and assets of its predecessor company in order to commence trading.

Michael Eames was also the director and shareholder of a number of other companies and was disqualified from acting as a director for six years from 6 February 2019 although he remains a director of one of the companies with the permission of the court. This disqualification arose from the liquidation of A1 Recovery and Garage Services Limited.

Michael Eames was issued with a Personal Liability Notice for the £108,000 of NICs owed, with HMRC believing that he had prioritised the company making payments to himself and to related companies rather than settling the amounts due to HMRC.

Michael Eames argued that his failure to pay was not attributable to his neglect but was due to 'poor business decisions made in good faith in a difficult marketplace and that Mr Eames lacked any formal qualifications.' Without payment, the other companies would have failed.

Further, he argued that, if he was to be liable for anything, it should be limited to the NICs unpaid after the time to pay arrangement broke down as his behaviour before that could not be described as neglect.

Decision

The First Tier Tribunal found that Michael Eames was well aware that there were substantial risks involved with his business as he had had two previous companies undertaking the same type of business. Both of which had failed owing substantial amounts to HMRC.

Michael Eames was aware that the NICs were due monthly and should have prioritised their payment. The Tribunal concluded that allowing a company to accrue a large NICs debt before seeking a payment arrangement, and then failing to ensure that the company made the required payments under that arrangement was not a reasonable course of action and did not mean that there was no neglect by Michael Eames.

The Tribunal stated that a prudent and reasonable person in his circumstances would:

- not have prioritised payments to connected companies, and themselves, over payment to HMRC;

- have taken steps to conduct the company's business in a different manner in order to minimise the risk of repeating the difficulties that had arisen with his previous companies.

The First Tier Tribunal found that the company's failure to settle its NIC debt was attributable to Michael Eames neglect.

The appeal was dismissed.

Michael Eames v HMRC (TC08450)

Application for a retrospective extension of time

Summary - HMRC's application for a retrospective extension of time for having submitted its statement of case more than three years late was dismissed, despite this dismissal resulting in the taxpayer winning her appeal.

Caroline Sweby's appeal was classified as a standard case, which meant that HMRC was required to deliver its statement of case to the First tier Tribunal and Caroline Sweby within 60 days of the Tribunal sending the notice of appeal to HMRC.

Originally, the statement of case was due in 2016, but HMRC successfully applied for an extension of time until 60 days after the release of a First Tier Tribunal decision in three appeals that were heard together, which concerned a similar scheme and claim for losses.

However, HMRC missed that extended deadline (16 September 2018) and, due to a series of clerical/administrative errors, including HMRC's misapprehension that Caroline Sweby's appeal had been stayed until determination of a further First Tier Tribunal case that was heard in March 2021, failed to apply for a further extension of time.

HMRC finally submitted its statement of case on 1 December 2021.

Decision

In deciding to dismiss HMRC's application, the First Tier Tribunal applied the guidance of the Upper Tribunal in *Martland* [2018] UKUT 178 (TCC), which applies not only to late appeal applications, but also to applications for relief from sanctions for failure to comply with rules, directions and orders.

In accordance with *Martland*, the First Tier Tribunal dismissed HMRC's application for a retrospective extension of time because:

- HMRC's delay was serious and significant: the statement of case was submitted more than three years late;
- the reasons for HMRC's failure to submit the statement of case on time were caused by a series of its own administrative errors, all of which had no (or very little) merit; and
- the prejudice likely to be caused to the appellant as a result of retrospectively permitting the severely delayed submission of the statement of case (i.e. HMRC's pleadings) was more significant than the prejudice to HMRC of not allowing its application.

Caroline Sweby v HMRC (TC08453)

Adapted from the case summary in Tax Journal (29 April 2022)

Information notices: Tax-related penalties (Lecture P1319 – 9.35 minutes)

Background

Information notices are an important weapon in HMRC's armoury of compliance enforcement measures. The information powers legislation features its own penalty regime for offences, which include penalties for failing to comply with an information notice, and for obstructing an HMRC officer during an inspection which has been approved by the tax tribunal (FA 2008, Sch 36, para 39-40).

Turning the screw

For those offences, there's an initial penalty of £300. If the failure or obstruction continues, further penalties of up to £60 per day may be imposed. In addition, a tax-related penalty can be imposed by the Upper Tribunal (UT) where a person fails to comply with an information notice or deliberately obstructs an inspection, and that failure continues after an initial penalty has been imposed. An authorised HMRC officer must have reason to believe that the result of the non-compliance is that the person has paid, or is likely to pay, significantly less tax than would otherwise have been the case.

HMRC must make an application to the UT for the tax-related penalty within 12 months of a 'relevant date' defined in the legislation. For an information notice where the person has a right of appeal, the relevant date is the later of the date on which the person became liable to the initial penalty; or the end of the period for appealing against the information notice; or if an appeal has been made, the date on which the appeal is determined or withdrawn. In

any other case, the relevant date is the date on which the person became liable to the initial penalty.

The amount of any tax-related penalty is decided by the UT. In deciding on the amount of the penalty, the UT is required to have regard to the amount of tax which has not been, or is not likely to be, paid by the person. The tax-related penalty is payable in addition to the initial and any daily penalties already imposed. HMRC must notify the person about their liability to a tax-related penalty (FA 2008, Sch 36, para 50).

How much is enough?

In practice, the tax-related penalty is normally only considered for the 'most serious' cases where tax is at risk because of a failure to comply with an information notice (see CH270400). The task at risk must be 'substantial' (CH26720).

The UT's task in deciding on an appropriate level of tax-related penalty will probably be a difficult one, because HMRC needs the information and documents requested in the information notice to establish the amount of tax unpaid. This means that the UT must use its best judgment; but even so, it's likely that the tax-related penalty may not be an accurate reflection of the tax actually at risk.

Case law

In Tager & Anor v Revenue and Customs [2018] EWCA Civ 1727. Mr Tager, an eminent barrister, was issued with an information notice. He only partially complied with the notice, and HMRC issued fixed and daily penalties. Mr Tager was also the personal representative of his late father's estate. Following the submission of an inheritance tax (IHT) return in respect of the estate, HMRC raised various queries, and later issued information notices. Penalties were imposed for non-compliance. HMRC subsequently applied to the UT for tax-related penalties for continued failure to comply with the information notices, in both his own capacity and as a personal representative. Based on its conclusions about the tax at risk, the UT imposed tax-related penalties amounting to just over £1,246,000 (i.e., £75,000 in respect of personal tax, and £1,171,000 in respect of IHT), but these were subsequently reduced (following the correction of errors) to £1,075,210.

However, on appeal, the Court of Appeal noted that the tax unpaid was now agreed to be income tax of £1,250 and IHT of just under £195,500. Taking everything into account, the court concluded that the appropriate penalties to impose would be: (a) £20,000 for failure to comply with the relevant income tax notices; and (b) £200,000 for the failures to comply with the IHT notice.

Subsequently, in Mattu v Revenue and Customs [2021] UKUT 245, the full amount of tax at risk was considered to be almost £2 million. However, the UT applied a discount of 50% to this figure because the tax liability figure remained uncertain, and also took various points into account by way of mitigation. Having regard to the principles of fairness and proportionality, the UT eventually determined the penalty at £350,000.

In Revenue and Customs v AML Tax (UK) Ltd [2022] UKUT 81 (TC), HMRC believed that the potential tax at risk due to AML's non-compliance with the information notice was £1.34 million. HMRC applied to the UT for an additional penalty by reference to this amount of tax, subject to some discount to reflect uncertainty in the amount of tax involved and certain other factors. The UT took into account relevant factors, including in particular the high level

of uncertainty as to the tax at risk. The UT concluded in the circumstances that a penalty of £150,000 would be appropriate.

Other points

There is a general right of appeal against the imposition of a penalty in respect of non-compliance with an information notice, or the amount of the penalty (FA 2008, Sch 36, para 47). However, that right of appeal applies to a decision of HMRC to charge the initial or daily penalties, or to HMRC's decision about the amount of such penalties. There is no similar right of appeal in respect of tax-related penalties imposed by the UT.

As with some other tax compliance provisions, there is no liability to a penalty for failing to comply with an information notice or obstructing an inspection, if HMRC (or the tribunal, on appeal) is satisfied that the person has a 'reasonable excuse' for their non-compliance, and the person has put right their action or inaction without unreasonable delay after the excuse has ended (FA 2008, Sch 36, para 45). However, the 'reasonable excuse' defence applies to initial and daily penalties, but not tax-related penalties.

Contributed by Mark McLaughlin

Penalty for errors (practical examples) – (Lecture P1320 – 12.37 minutes)

In other articles I have covered various aspects of penalty mitigation. This article will consider the calculation of penalties (as they relate to errors in a return or document submitted to HMRC), under the provisions of Finance Act 2007. This will assist advisers who are involved in cases where these penalties are in point.

Penalty calculation

It is important to consider the various elements of the penalty calculation in the correct order, and these are noted below:

1. Work out the potential lost revenue ("PLR"), which can arise from
    a. Correcting an inaccuracy in a return or document;
    b. An incorrect repayment;
    c. An incorrect claim;
2. Determine the category of behaviour;
    a. Reasonable care;
    b. Careless;
    c. Deliberate but not concealed;
    d. Deliberate and concealed;
3. Establish whether the disclosure was unprompted or prompted;
4. Determine the penalty range;
5. Apply the reduction of the quality of disclosure; Advisers should note that HMRC will usually seek to restrict the maximum reduction they give for the quality of the

disclosure to 10 percentage points above the minimum of the penalty range where the taxpayer has taken a significant time (typically three years or more) to make the disclosure. This is not a statutory reduction in relation to onshore liabilities;

6. Work out the penalty (as a percentage);
7. Work out the penalty (in financial terms);
8. Consider other reductions;
9. Consider the suspension of the penalty (only for careless behaviour).

Advisers need to remember that the above process must be followed for each offence. There may, for example, be different categories of behaviour that apply, and only one part of a disclosure may be unprompted.

Example 1

The relevant information regarding the error is as follows:

- PLR £3,000
- Careless behaviour
- Unprompted disclosure
- Abatement for quality of disclosure
  - Telling 30%
  - Helping 40%
  - Giving 30%

Applying the various elements of the penalty calculation, as above, we get the following:

1. PLR £3,000
2. Careless behaviour
3. Unprompted disclosure
4. Penalty range is 0% to 30%
5. The penalty abatement for the quality of the disclosure is 100% (30% + 40% + 30%)
6. The resulting penalty is 0%
7. The resulting penalty is £0
8. It is not necessary to consider other reductions (as the penalty cannot be reduced below 0%)
9. It is not necessary to consider suspension of the penalty (as the penalty is £0)

Example 2

This example relates to multiple errors.

The relevant information regarding the errors is as follows:

Error 1

- PLR £600
- Careless behaviour
- Prompted disclosure
- Abatement for quality of disclosure
  - Telling 20%
  - Helping 40%
  - Giving 30%
- Calculation
  1. Penalty range is 15% to 30%
  2. The penalty abatement for the quality of the disclosure is 90% (20% + 40% + 30%)
  3. The resulting penalty is 16.5%
  4. The resulting penalty is £99
  5. Subject to potential suspension

Error 2

- PLR £800
- Deliberate behaviour without concealment
- Prompted disclosure
- Abatement for quality of disclosure
  - Telling 20%
  - Helping 40%
  - Giving 30%

- Calculation

1. Penalty range is 35% to 70%
2. The penalty abatement for the quality of the disclosure is 90% (20% + 40% + 30%)
3. The resulting penalty is 38.5%
4. The resulting penalty is £308

Error 3

- PLR £1,600
- Careless behaviour
- Unprompted disclosure
- Abatement for quality of disclosure
  - Telling 30%
  - Helping 40%
  - Giving 30%
- Calculation

1. Penalty range is 0% to 30%
2. The penalty abatement for the quality of the disclosure is 100% (30% + 40% + 30%)
3. The resulting penalty is 0%
4. The resulting penalty is £0
5. No need to consider suspension of penalty

Error 4

- PLR £24,000
- Deliberate behaviour
- Unprompted disclosure
- Abatement for quality of disclosure
  - Telling 30%
  - Helping 40%
  - Giving 30%

- Calculation

1. Penalty range is 20% to 70%

2. The penalty abatement for the quality of the disclosure is 100% (30% + 40% + 30%)

3. The resulting penalty is 20%

4. The resulting penalty is £4,800

Practical points

Some penalty calculations will be relatively straight-forward. Where there are multiple errors, it is important to ensure that each one is considered separately, as there may be different relevant mitigating factors for each error, which will impact on the penalty due.

HMRC will issue a penalty calculation letter, which sets out their view of the various aspects, as noted above. Advisers should ensure that the content of the letter is consistent with any discussions held with HMRC regarding penalty abatement. In particular, it is important to ensure that any comments provided by HMRC in relation to the quality of disclosure reflect the facts of the case and are represented in the resulting percentage reductions shown in the calculation letter.

Contributed by Phil Berwick (Director, Berwick Tax)

P11d: key issues (Lecture B1320 – 20.21 minutes)

For each company, the issues which might be relevant when completing P11ds (or indeed deciding whether to complete them) will be different. Whilst we cannot consider all aspects which might be relevant for everyone, the aim of this session and these notes is to consider some areas which we know cause problems for employers or where we know HMRC are very concerned about compliance.

General issues

The PAYE manual published by HMRC sets out the requirements which each P11d must meet and the Quality Standard checks that are carried out based on these standards. It requires that the P11d must include:

- the employer's reference
- the employee's name and National Insurance number (Ex-pat scheme employees often have no NINO and so the P11D should not be rejected for this reason);
- if the employee's National Insurance number is not known, it must provide their date of birth and gender;
- where a car that has been provided to an employee, it must include its list price;

- where box 10 in section F (total cash equivalent of car fuel provided) is completed, box 9 (total cash equivalent of cars provided) must also be completed;

- where a beneficial loan to an employee has been provided and it is reported in section H, box 15 (cash equivalent of loans) must also be completed (in cases where an employee has more than two loans, the employer is allowed to attach a copy of the P11D WS4 working sheet and write 'see attached' in box 15 in section H and so the form should not be rejected for this reason);

- where the P11D information is submitted in list format rather than on P11D forms, then HMRC's quality standard requires it must:

  - be presented in an easy-to-read format using a font size no smaller than 11-point Arial when printed
  - be organised by employee, not by type of benefit
  - include the employer's reference
  - include each employee's name, national insurance number, date of birth and gender
  - include all the expenses and benefits provided to an employee on the same list – HMRC cannot accept separate lists for each benefit
  - show the code letters assigned to each benefit as on form P11D – these are the letters in the dark blue boxes at the left of each section of the form
  - where the list contains payrolled benefits, the front of the list and each of its pages, must be clearly marked 'PAYROLLED'.

The following is a list of the common errors made when submitting P11ds:

- *duplicated information submitted***,** for example where P11D information has already been filed online, the employer may submit the same information on paper to 'ensure HMRC have received it';

- using a paper form that relates to the *wrong tax year;*

- not ticking the *'director'* box if the employee is a director;

- not including some form of description or abbreviation, where amounts are included in sections A, B, L, M or N of the form;

- leaving the *'cash equivalent'* box empty where a figure has been entered in the corresponding 'cost to you' box;

- where a benefit has been provided for mixed business and private use, some employers only enter the value of the private-use portion but *full gross value of the benefit must be reported;*

- not completing the *fuel benefit* where this applies.

Other areas of interest

The number of areas where there are potential issues is endless in reality but there are some common areas where problems occur more regularly.

Qualifying business expenses

Since 6 April 2016, business expenses that are deductible by employees became exempt if reimbursed by employers, subject to conditions. They are not reportable by anyone. In the case of tax-deductible allowances, these and any other bespoke matters previously included in dispensations, need to be covered by separate agreements with HMRC (called approval notices). At the same time, any reimbursement of travel and some other expenses and certain benefits in conjunction with salary sacrifice schemes became taxable.

Conditions A and B must be met in order for the exemption to apply:

A. The payer or another person operates a system for checking that the employee is incurring and paying amounts in respect of expenses of the same kind and that a deduction would be allowed under the above exempt headings, e.g. travel.

B. Neither the payer nor any other person operating the system knows or suspects, or could reasonably be expected to know or suspect, that the employee has not incurred and paid an amount in respect of the expenses or that a deduction as above would not be allowed.

Benchmark rates

Regulations were also issued in 2015 which define the approved way of calculating and paying or reimbursing standard meal allowances for the purposes of the new expenses exemption and apply to payments made in 2016/17 and subsequent tax years. For these purposes, a sum is calculated and paid or reimbursed in an approved way if it is paid or reimbursed to an employee in respect of meals purchased by the employee in the course of qualifying travel and either:

- one meal allowance per day paid in respect of one instance of qualifying travel, the amount of which does not exceed:

  a £5 where the duration of the qualifying travel in that day is 5 hours or more;

  b £10 where the duration of the qualifying travel in that day is 10 hours or more; or

  c £25 where the duration of the qualifying travel that day is 15 hours or more and is on-going at 8pm.

or:

- an additional meal allowance not exceeding £10 per day paid where a meal allowance in sub-paragraph (a) or (b) is paid and the qualifying travel in respect of which that allowance is paid is on-going at 8pm.

'Qualifying travel' means travel for which a deduction from the employee's earnings would be allowed under Chapter 2 or 5 Part 5 ITEPA 2003.

There is a further condition, which was introduced in 2019/20:

- the payer or another person operates a system for checking that the employee has undertaken the qualifying travel in relation to which the amount is paid or reimbursed; and

- neither the payer nor any other person operating the system knows or suspects, or could reasonably be expected to know or suspect, that the travel was not undertaken.

There is now also a statutory ability to use the FCO subsistence rates of overseas travel.

Trivial benefits

The exemption for trivial benefits commenced from 6 April 2016 and again it is another area where there is much confusion as to what is covered. HMRC have issued some guidance on the operation of the exemption which stresses that the rules are as follows:

- Cost of the benefit must not be over £50 (including any VAT, whether recoverable by the business or not);

- The benefit must not be in the form of cash or a voucher redeemable for cash;

- The benefit must not be provided as part of salary sacrifice arrangements or any other contractual obligation; and

- The benefit must not be provided in recognition of particular services.

The following examples were given.

Tip 1 – Other contractual obligation

Contractual obligations can take a variety of forms, so the phrase should be read widely to include anything the courts would deem as a contractual agreement, for example:

- *A side letter to the main contract document*

- *A staff handbook*

- *A letter of appointment*

- *A redundancy agreement*

- *An employer union agreement*

- *Any legitimate expectation.*

A 'legitimate expectation' might apply even where there is not a strict contractual obligation. For example, your employees may be provided with a cream cake every Friday. Although there is no contractual obligation, there would be a legitimate expectation – your employees expect to be provided with a cream cake every Friday.

Tip 2 – Digital platforms

If you pay for an 'app' which enables your employees to access discounted products or services which the employee then pays for, the benefit provided by you is not the actual product or service supplied by the digital platform, for example, the provision of medical advice or the hailing of a taxi. The benefit is the access to the 'app' itself.

For the exemption to apply the total cost of providing the 'app' must be no more than £50, as well as meeting all the rules detailed above. If, however, you pay for the products or services obtained by your employees, the total cost should be considered for the purposes of 'the benefit'. For example, if medical advice obtained through an app is charged to you at £49 per session, once an employee obtains more than one session of medical advice in the year the benefit for that employee is no longer 'trivial' for the purposes of applying this exemption. This is because the cost of the benefit will exceed £50.

Tip 3 – Particular service

If a benefit has been provided to an employee as a reward for services, or because it is in recognition of something they have had to do as part of their employment duties then the benefit will not qualify as a trivial benefit.

As an example, an employer may require some of its employees to work through their lunch hour and provide them with lunch. The meal has been provided because of the work they are undertaking. The benefit does not satisfy the trivial benefits condition, so the exemption will not apply.'

Temporary Workplaces

s.338 ITEPA 2003 denies a deduction from earnings for travel expenses incurred in 'ordinary commuting', which is travel between:

- the employee's home and a permanent workplace; or
- a place that is not a workplace and a permanent workplace.

A permanent workplace is defined in s.339 as a place the employee regularly attends in the performance of the duties of the employment and which is not a temporary workplace.

A temporary workplace is a place the employee attends to perform a task of limited duration or for some other temporary purpose.

A workplace is not regarded as temporary if the employee's attendance is during a period of continuous work of a significant extent (being at least 40% of working time) lasting:

- More than 24 months; or
- Comprising all, or almost all (i.e. at least 80%) of the period for which the employee is likely to hold the employment.

It becomes permanent at the time that it is reasonable to assume one of the above is true. This could be at the start of the work, or during it (for example, if an existing 18-month secondment is extended by another 12 months).

Example

Karen works for a firm of architects at its Petersfield branch. She is sent to work full-time at the branch in Andover for 15 months, at the end of which she will return to the Petersfield branch. Andover is approximately 36 miles north-west of Petersfield.

Although she is spending all her time at the Andover branch, it will not be treated as her permanent workplace, as her period of attendance will not exceed 24 months. Therefore, Karen can claim a deduction for the costs of travel to and from her home to the Andover branch.

The allowable travel is from Karen's home (or other starting point) to the temporary workplace, even if this is shorter than the journey to her permanent workplace, or she drives past her permanent workplace to get there. If her employer only reimburses the difference in mileage between the two journeys, the employee can claim a deduction for the balance.

Note that if Karen was recruited on a 15-month contract to work at the Andover office, this would be her permanent workplace (as she would be working there for all of her period of employment) and no travel would be deductible.

Subsistence costs

Where travel is deductible, any reasonable subsistence costs (for example hotels and evening meals) will also be deductible, although this is not likely to be relevant in Karen's case, given the distances involved.

Separate temporary workplaces or one permanent workplace?

It is possible for different workplaces situated close together to be regarded as one (s339(7)). This says that, when determining where a temporary workplace is, you should ignore any modification of the place at which duties are performed if it does not, or would not, have any substantial effect on the employee's journey, or expenses of travelling, to and from the place where they are performed.

In the recent case Narinder Sambhi v HMRC (TC07717), the appellant was on a long-term secondment from Birmingham to London, working at various different sites in south and central London, whilst staying in east London.

The First Tier Tribunal found that

- the journey times to each site from his accommodation differed by no more than half an hour; and

- the cost varied by no more than £14.

In the Tribunal's view, the change of worksites was not substantial. His work at various sites in Greater London would therefore be treated as one workplace, which had become a permanent workplace after he had been in London for more than two years.

What does the employment contract say?

Contractual terms are very important in establishing whether somewhere is a permanent or temporary workplace. For example, if an employee is being taken on to carry out several short-term assignments at various sites, they will all be permanent workplaces if each location is dealt with under a separate contract. In contrast, if all the work is covered under a single contract, it is likely that many of the locations will be regarded as temporary workplaces, with travel allowable.

In both N Ratcliffe v HMRC TC2814 and Paul Nowak v HMRC (TC07307), the appellants worked at various locations for their employer, but where work at a particular site was covered by a separate contract, that site was held to be a permanent workplace, with travel not allowable for the employee.

Other issues

Sometimes the completion of P11ds throws up questions about the way that things are being treated now or have been treated in the past. Here are a few questions which I have been asked over recent years.

Leased cars

There was a recent tax case about the tax treatment of leased cars and this is an arrangement which has been common in the past as a mechanism for avoiding the car benefit which arises where an employer provides a car for the private use of the employee. Care should be taken to follow the decision when completing this year's P11ds.

In this case, the company had entered into lease agreements to lease cars to be used by the two directors, with all costs being debited to the joint directors' loan account, which was always in credit. The company remained the registered keeper of the vehicles at DVLA. The vehicles were treated as if they were effectively private vehicles with the company paying a mileage allowance when the cars were used on company business. They were not included on the company's balance sheet as assets of the business.

HMRC wanted to charge a benefit in kind. The company initially argued they were merely acting as an agent for the directors but then also argued that there was no benefit to the directors as they had paid all of the costs relating to the cars.

The FTT agreed there was a benefit in kind as the directors had derived a benefit due to the beneficial rates at which the vehicles could be leased by their company. The costs they incurred were deductible from the benefit calculated under general principles but there was still a benefit to be taxed.

School fees

A large household name firm had been paying the school fees for one of their employees. The company was paying the school fees directly to the school under a signed vendor form with them. They had assumed that this meant that the contract was with them. They had also assumed that this meant that there was no tax and NIC implications for the payments.

What is the correct position?

The issue about who is liable to pay the school fees is relevant as it determines whether or not the employer is meeting the pecuniary liability of the employee. If that is the case, the value of the benefit is liable to tax and Class 1 primary and secondary NICs as it forms part of the employment income of the employee. In practice, the NICs would be collected via the payroll with the tax being collected via coding adjustments after having been put on the P11d.

Simply having a vendor agreement with the school would not be sufficient to avoid this as it would depend on who the contractual agreement with – in very basic terms, who would the school go after if the fees were not paid? It is almost always the parents. It is increasingly difficult to find that schools are willing to actually agree contracts with the employer to the entire exclusion of the parents.

If the contract is with the employer, there are still tax implications, but it is a benefit in kind so that it goes on the P11d with Class 1A NICs being paid by the employer.

The same is true of any other payment being made by the employer where the actual liability rests with the employee. The most common example is mobile phone contracts in the name of the employee rather than the employer.

Company 'training' event

Another large company held a company conference which involves team building events as well accommodation/dinner/ drinks/transport. Event schedule as per below.

Travel 9.30 – 12.00

Lunch 12.00 - 13.30

Conference 13.30 – 15.00

Team Activities 15.00 – 18.00

Check in Hotel 18.00 – 19.00

Evening Dinner/Drinks 19.00 – 22.00

Band/DJ 22.00 – 01.00

The company was asking the following questions. Tthey were intending to pay any tax on a PAYE settlement agreement rather than via the P11d route although the technical arguments are the same:

1) The company is paying for staff to travel to the conference venue, buses, trains etc- would these need to be declared on the PSA as part of the teambuilding?

2) We have a few temporary staff who will be attending- they are not on the payroll - do we have to pay a special higher tax rate for them? Or approach it with the income tax bands based on the equivalent yearly salary? Or is this not allowed?

Does this also have an impact on the VAT we are allowed to claim back? Does there need to be some proportional allocation with both PSA and VAT?

3) The staff are being given branded merchandise e.g. jackets, rucksacks and water bottles - do these need to be declared on the PSA as gifts? Or does the fact they are branded exempt them? or they are uniform related?

4) Where the setting up costs for the conference itself, e.g. sound, lighting & lecterns etc, can we exclude this from the PSA as part of the conference? – but any similar equipment needed for the team building/ entertainment side of things we would need to declare as part of the teambuilding?

5) How we deal with the lunch and evening dinner/drinks?

In reality the tax treatment is going to depend on the extent to which the primary purpose of the event is training or whether it is going to be argued by HMRC that it is really just entertaining of staff with a notional amount of training involved. If it is split between the two, then it may be that the entertaining part can fall within the £150 annual party exemption if it is to happen every year although I suspect the cost per employee would be more than that if it includes accommodation and hospitality.

Contributed by Ros Martin

Deadlines

1 June 2022

- Corporation tax for periods to 31 August 2021 for SMEs not paying by instalments

7 June 2022

- Electronic filing and payment of VAT liability for quarter ended 30 April 2022

14 June 2022

- Quarterly tax instalment for large companies (depending on accounting year-end)

19 June 2022

- PAYE/NICs/CIS/student loan payment liabilities for month to 5 June 2022
- File monthly CIS return

21 June 2022

- File online monthly EC sales list (business based in Northern Ireland selling goods)
- Supplementary intrastat declarations for May 2022 - arrivals and despatch for a business in Northern Ireland

22 June 2022

- PAYE/CIS liabilities for month to 5 June 2022 (Electronic payment)

30 June 2022

- Accounts to Companies House
  - private companies with 30 September 2021 year ends
  - public limited companies with 31 December 2021 year end
- CTSA returns for companies with accounting periods ended 30 June 2021
- CT61 – quarterly period ends
- VAT partial exemption annual adjustments for March year end if not adjusted in March quarter
- Returns by savings institutions made under the European Savings Directive for 2021-22 must be received by HMRC

News

Helping with the increased cost of living

On 26th May 2022, the Chancellor announced the introduction of:

- a temporary windfall tax for oil and gas companies operating in the UK and the UK Continental Shelf;

- a number of new payments to be made to help families deal with the increased cost of living.

Windfall tax

This new *Energy Profits Levy* will be payable at a rate of 25% on profits arising on or after 26 May 2022. The levy will be applied to the company's ring-fenced profits. There will be a new investment allowance on investment expenditure (capital expenditure and some operating and leasing expenditure) calculated at 80%, which can immediately be used to reduce profits subject to the levy.

The government has confirmed that this is a temporary tax which will be phased out when oil and gas prices return to more normal levels. The legislation will include a sunset clause, which will remove the tax after 31 December 2025.

Household payments

The government announced that:

- The Energy Bills Support Scheme will be doubled to a one-off payment to households of £400, and this will no longer be repayable. This support is in addition to the £150 Council Tax rebate for households in England in Council Tax bands A-D, which was announced in February, and which millions of households have already received;

- Individuals on means-tested benefits will receive a tax-free £650 Cost of Living Payment in two instalments, the first from July, the second in the autumn. This will be paid directly into individual's bank accounts so no claim is needed.

- Pensioner households will receive a one-off extra tax-free £300 Pensioner Cost of Living Payment as a top-up to their annual Winter Fuel Payment;

- In September, a tax-free £150 Disability Cost of Living Payment will be made to individuals who receive certain disability benefits including the Disability Living Allowance and Attendance Allowance.

The Government is also providing an extra £500 million of local support, via the Household Support Fund, which will be extended from this October to March 2023. The government will issue additional guidance to Local Authorities to ensure support is targeted towards those most in need of support, including those not eligible for the Cost of Living Payments set out on 26 May 2022.

https://www.gov.uk/government/publications/cost-of-living-support

Increase in late payment interest rate

From 16 May 2022, the interest on underpaid instalments for companies within the quarterly instalment regime increased to 2% from 1.75%.

From 24 May 2022, HMRC announced that the late payment interest rate has increased to 3.5%.

However, the interest rate applied to overpayments of tax remains unchanged at 0.5%. This will only increase once the Bank of England base rate reaches 1.5%.

Recovering SEISS overpayments

Where an amendment has been made to a taxpayer's tax return for any of the years 2016/17 to 2019/20 after 3 March 2021, their entitlement to SEISS 4 and 5 may have changed.

From April 2022, HMRC has been writing to taxpayers whose entitlement to these grants has gone down by more than £100, asking them to repay the overpaid amount. For example, if they are now eligible for the lower grant at 30%, but claimed the higher 80% grant, HMRC will ask them to repay the difference.

HMRC will explain how the repayment has been calculated and the steps that taxpayers must now take to repay the amounts due.

2022/23 Working from home tax relief **(Lecture P1316- 18.30 minutes)**

From 6 April 2022, the guidance for claiming tax relief on expenses for working from home has changed.

During the COVID pandemic, the government relaxed the eligibility rules regarding claiming home office relief in 2020/21 and 2021/22. During this time, Individuals could claim the tax relief in full for each tax years provided they were required to work from home for a limited period.

From 6 April 2022, the government has tightened up on the rules and individuals can cannot have just chosen to work from home.

In 2022/23, HMRC guidance states that to be eligible to make the claim, one of the following must apply:

- there must be no appropriate facilities available for the individual to perform their job on their employer's premises;
- the nature of the job requires them to live so far from their employer's premises that it is unreasonable for them to travel to those premises on a daily basis; or
- the individual is required, under government restrictions, to work from home.

Where an employer now allows staff to work flexibly as it suits each individual, the home office relief is no longer available.

https://www.tax.service.gov.uk/claim-tax-relief-expenses/disclaimer

UK revokes Moscow stock exchange's status

HMRC is considering revoking its classification of the Moscow stock exchange (MOEX) as a recognised stock exchange.

HMRC has invited comments, including on a draft revocation order, before the decision is finalised. The consultation closed on 2 May 2022.

This would mean future investors would no longer be able to access certain UK tax benefits when trading securities on MOEX, such as exemption from withholding tax on interest-bearing qualifying Eurobonds and eligibility for inclusion in an ISA.

Access to those reliefs would remain in place for existing investments.

Adapted from Tax Journal (29 April 2022)

Business Taxation

Suppressed restaurant cash takings (Lecture B1316 – 21.31 minutes)

Summary - HMRC's calculations based on evidence that included an undisclosed bank account and test meals were an appropriate way to determine the additional tax owed by a restaurant owner.

Wuttinan Kotpat, a sole trader, operated a Thai restaurant that he had acquired in July 2013.

HMRC officers undertook a lunchtime test meal at his restaurant in February 2016 and further test meals in June 2016. A few months later, HMRC opened an enquiry into Mr Kopat's 2014/15 tax return, requesting various requested information and documents.

A month later, at a meeting between HMRC, Mr Kopat and his accountant, Mr Kopat explained the systems that he had in place for dealing with cash sales. The business had no till or cash register and cash takings were recorded by keeping handwritten meal tickets which were passed to his accountant. He confirmed that this cash was often used to pay both suppliers and employees, as well as his own drawings (up to £250 per week). With no records of these drawings, the accountant confirmed that drawings were calculated as an estimated balancing figure when preparing the balance sheet.

HMRC concluded that Mr Kopat had failed to declare all of his cash takings as:

- only two of the six test meals carried out by HMRC had been included in the records provided by Mr Kotpat to HMRC; and

- HMRC found evidence of a second business bank account but that Mr Kotpat had failed to declare takings paid into this account.

HMRC issued a discovery assessment for 2013/14 and three closure notices for 2014/15, 2015/16 and 2016/2017 on the grounds that cash takings were underdeclared.

Mr Kotpat appealed. He argued that HMRC had not provided any clear evidence to support their case. He stated that he had not understated cash takings nor omitted any takings generally, including those relating to any test meals. HMRC had not provided any receipts supporting the test purchases, only handwritten notes outlining HMRC acting as customers, which he contended did not prove that they had made the alleged purchases. HMRC had based their assessments on inaccurate assumptions and that the amounts misrepresented the business.

Decision

The First Tier Tribunal found that the evidence provided confirmed that there was a second bank account, albeit not in Mr Kopat's name. The business had access to a second bank account with HSBC.

The Tribunal confirmed that the test purchases were evidence that cash takings were not fully recorded but were not used as the basis of the assessments that were raised. HMRC's assessments were based on material available to them using best judgement. Indeed, the card/cash split used was favourable to Mr Kotpat by comparison with the split available from his own records

The First Tier Tribunal agreed with the assessments raised and upheld the penalties raised in the basis of deliberate behaviour.

Wuttinan Kotpat v HMRC (TC08448)

Wind tunnel and suppressed purchases (Lecture B1316 – 21.31 minutes)

Summary – The partnership deliberately failed to keep accurate records and filed inaccurate returns. A wind tunnel outside of the shop was no excuse for missing purchase invoices.

Tasleem and Salim Balesaria were married and formed a partnership, which traded as Best on Convenience Store from premises in Blackpool.

On 12 November 2012, HMRC opened an enquiry into the partnership's income tax return for the tax year ended 5 April 2011. With both purchases and sales found to be missing from the accounting records, HMRC opened a COP9 investigation. This resulted in HMRC amending the partnership's income tax returns, assessing Mr and Mrs Balesaria to income tax, and the partnership to VAT, in respect of undeclared income. Input tax was not an issue because the business used the flat rate scheme, and the assessment was calculated in line with the scheme. Further, HMRC charged penalties for deliberate and concealed, and for dishonest, behaviours.

The assessments were arrived at by using 2010/11 as the base year, and then calculating an average purchases suppression rate, which was then extrapolated to other years and used to calculate projected unrecorded takings on these purchases.

The couple said that the suppression of purchases was not deliberate. It was caused by the fact that the street outside the shop was like a wind tunnel, and so when they unloaded stock from their car, any invoices in the boot would blow away. They were asked why they did not take precautions to prevent this from happening, and the response from both of them was that they were busy with the shop and did not learn from their mistakes.

Further, the couple argued that HMRC's projection of sales was not consistent with the financial difficulties faced by the business, and the fact that working capital was funded by business and personal loans.

Decision

Unsurprisingly, the First Tier Tribunal concluded it was not credible that invoices blew down the street on pretty much every occasion that they opened the boot of their car. The Tribunal found that the missing invoices were thrown away deliberately in order to conceal the true extent of their stock purchases.

Further, the Tribunal did not believe that the audit rolls from their till were thrown away through carelessness virtually every time. The Tribunal found that the audit rolls were

thrown away deliberately in order to conceal the true extent of the partnership's gross daily takings.

The First Tier Tribunal agreed with HMRC that the partnership failed to keep the required records and filed inaccurate returns.

However, the appeal was allowed in part as HMRC's suppression rate had failed to take into account the fact that some banked amounts were loan monies being received and that the business was winding down in the period from April to October 2012.

Best on Convenience Store v HMRC (TC0842/V)

Transition: Change of Date - Key Issues (Lecture B1317 – 10.24 minutes)

Most unincorporated businesses that do not have a 31 March or 5 April year-end should be encouraged to change their accounting date before 2024/25, when the new 'tax year' basis of assessing profits will be in place. If they do not, their future tax returns are going to require the apportionment of profits from two different accounting periods, probably with estimated figures (that will require subsequent adjustment) being used from the latter period.

Many small practitioners have clients who are partners in large professional firms. These firms may decide to stick with their existing year-end (which is often 31 December, particularly if the firm trades internationally), so ongoing apportionments will remain likely for such clients.

If a change of accounting date is made in the transition year (2023/24), the extra profits assessable that year (after deducting any overlap profits that the business is carrying forward) will be 'transition profits', meaning that they will:

- automatically be spread over five years for income tax purposes, starting in 2023/24 (with the option to elect out of the spreading in any year so as to bring extra profits into charge early); and

- be excluded from the definition of 'adjusted net income' (ANI), which is used for determining personal allowance abatement and whether any High Income Child Benefit Charge is payable.

In contrast, if the change is made a year earlier (in 2022/23), any additional profits after deduction of overlap profits will be fully chargeable in that year and included in ANI. Unless profits would otherwise be unusually low in 2022/23, changing in 2023/24 is clearly more tax-efficient and better for cash flow.

Basis periods

Under the existing current year basis rules, if an accounting date is to be changed from (say) 30 December to 31 March, this could be effected by preparing

- a long period of account for the fifteen-month period; or

- two separate sets of accounts, for year-ended 31 December and the three months to 31 March.

As the former option would then (for tax purposes) involve time-apportioning the 15-month period's profits after capital allowances into 12-month and 3-month periods, these two methods produce rather different results. There would be no time-apportioning if separate accounting periods are chosen and capital expenditure would be allocated to the period in which it is incurred.

Impact of the FA2022 transition year provisions

When changing accounting date, there seems to be nothing in the transition year provisions of FA2022 Schedule 1 to prevent you either preparing separate accounts or apportioning one long period of account, whichever is more beneficial. If two separate accounts are prepared and expenditure on plant is incurred in the 12-month period, the capital allowances will reduce profits that are not eligible for spreading and will reduce ANI.

However, as periods of account exceeding eighteen months are not recognised as a change in accounting date for tax purposes [ITTOIA 2003, s.217(3)], those with current accounting dates early in the tax year will need to prepare two separate sets of accounts to effect a change.

With the split between 'normal' and transitional profits in 2023/24 being so important, some clarification on these basis period issues from HMRC would be welcome.

2024/25 may seem a long way off but the transition year basis period for traders with a 30 April year-end began on 1 May 2022. Whether, when and how to change accounting date is something that should be being discussed urgently with clients.

Contributed by Kevin Read

Transition: Change of Date - Practical Concerns (Lecture B1318 – 11.21 minutes)

Michelle is a self-employed electrician and keen sailor. Her annual profits before capital allowances are £60,000, which accrue at a rate of £2,000 pm from April to September (when she spends a lot of time on the water) and £8,000 pm for the other six months of the year. She has negligible other income.

She has a December year-end and in the transition year to the new basis of assessment (2023/24) decides to change her accounting date to 31 March (which the new rules allow to be treated as a 5th April year-end, thus avoiding the need for ongoing apportionment of profits from two different accounting periods each tax year). She has £3,500 of overlap profits being carried forward from commencement of trade.

Two separate sets of accounts

If she makes up two separate sets of accounts, her results will be:

- y/e 31 December 2023: £60,000;
- 3m to 31 March 2024: [(3 x £8,000) - £3,500] = £20,500.

The latter are 'transition profits', which do not count as adjusted net income for PA abatement nor High Income Child Benefit Charge (HICBC) purposes. They are subject to automatic spreading over 5 years starting in 2023/24, so that only £4,100 will be subject to income tax in 2023/24, in addition to the £60,000 from the standard basis period. The income tax liability on the transition profits will be calculated as the difference between the tax liability (with the inclusion of the transition profits) and the liability with the transition profits excluded.

Suppose she spends £18,000 on a new van during the 15 months and claims annual investment allowance (AIA). If the van is bought in the 12m period, the standard basis period profits will reduce to £42,000. She may therefore want to elect out of the full spreading to bring more transition profits into charge and use up her basic rate band. The expenditure will also save her being subject to the HICBC if she has any qualifying children.

If instead the van is purchased in the 3m to 31 March 2024, the AIA will reduce the transition profits to £2,500 and the standard basis period profits will be unaffected. Thus, she will have reduced the profits that are being spread, so it is clearly beneficial to buy the van in the preceding 12-month period.

Long period of account

What would happen if, instead, she changed her accounting date by making up a 15-month set of accounts to 31 March 2024? In this situation, the profits after capital allowances are time-apportioned to get a split of the standard basis period profits and the transition profits. The profits after capital allowances (£60,000 + £24,000 - £18,000 = £66,000) are therefore split as follows:

- Standard basis period: £66,000 x 365/456 days = £52,829
- Transition basis period: £66,000 x 91/456 days = £13,171.

The overlap profits (£3,500) are deducted from the transition basis period to give transition profits of £9,671, which will be spread over 5 years. Thus, her taxable profits for 2023/24 will be £52,829 plus £1,934 = £54,763. She remains a higher rate taxpayer (despite her purchase of the van) and may be subject to the HICBC, based on her adjusted net income of £52,829.

Note that these accounting date issues need to be considered before capital expenditure is incurred and before the accounts are signed off. *Rupert Grint v HMRC [2019] UKUT 0028* confirmed both that the actual accounts cannot be substituted by different ones for tax purposes and that a set of accounts exceeding eighteen months is ineffective for change of accounting date purposes.

Contributed by Kevin Read

Understated s.455 charges **(Lecture B1316 – 21.31 minutes)**

Summary – HMRC were correct to issue their closure notices, discovery assessments and penalty notices relating to a number of transactions that had been incorrectly accounted for

Mr and Mrs Soto each owned 50% of the ordinary shares in La Luz Residential Home Ltd, a residential care home.

In August 2015, HMRC opened an enquiry into the company's tax return for the period ended 31 July 2014. At the same time, HMRC also opened enquiries into Mr and Mrs Sotos' Self Assessment tax returns for 2013/14.

HMRC identified ten areas where transactions had not been correctly accounted for tax, the majority of which were adjusted for through the current or loan accounts, resulting in further amounts due under s.455 CTA 2010.

By 2017, the enquiries were closed, with HMRC issuing discovery and closure notices for the:

- company's accounting periods ended 31 July 2010 through to 2015;
- couple's affairs covering the periods 2010/11 to 2014/15.

Penalties were issued in the basis of deliberate underpayment of tax.

All assessments and closure notices were appealed. Those issued to La Luz Residential Home Ltd were appealed out of time however, HMRC accepted the out of time appeals.

Decision

The First Tier Tribunal commented on the parties' failure to cooperate with HMRC's enquiry and a failure to provide information as and when requested.

The Tribunal also noted that there were inconsistencies across the documents that were provided to HMRC and those filed at Companies House. For example, the amended accounts for the accounting period ended 31 March 2015 were apparently signed before the originals. The Tribunal was not confident as to the provenance of the accounts and documents relied on in this case. Where there was any divergence between working papers and filed accounts those filed with Companies House were preferred.

The First Tier Tribunal considered each area in turn, including:

- expenditure on a property owned by the Sotos but recorded as an asset in the company's books. HMRC stated that the expenditure should have been debited to the Sotos' loan accounts with tax under s.455 CTA 2010 payable;
- dividends credited too early to the directors' current and loan accounts meaning that s.455 CTA 2010 relief was denied at that time;
- various items of the couple's private expenditure being deducted as the company's expenditure, which should be disallowed, with the knock-on effect creating further s.455 amounts payable;
- Unsupported management fee of £15,000 which should be debited to the loan account;
- Rental income was omitted from the couples' personal tax returns.

Overall, the assessments made by HMRC were upheld, together with the penalties for deliberate behaviour.

La Luz Residential Home Ltd, Mrs M D Soto, Mr M A Soto v HMRC (TC08430)

Oil royalties subject to UK tax

Summary –Payments were taxable as income from immovable property but losses on the loan were not deductible.

The taxpayer, RBC, made loans through its Canadian head office to a Canadian oil company, S, to fund exploration in the UK continental shelf. That company sold its interests to the BP group in exchange for various sums, including an entitlement to contingent royalty payments on production from the oil field. S went into receivership and its rights to future payments were assigned to RBC. BP later sold its interests to another company, T Ltd, which then became responsible for making the payments. It accounted for these as a deduction from its ring-fenced profits of its UK oil exploitation trade. The bank, which had written off the loan, treated the payments as recovery of the bad debt.

HMRC considered the payments were taxable in the UK as profits of a ring-fence trade.

The First Tier Tribunal dismissed the bank's appeal.

Decision

The Upper Tribunal had first to consider whether the UK had the right to tax the payments, under article 6(2) of the UK/Canada double tax treaty, as income from immovable property. The judges held this was the case.

The Upper Tribunal held that the payments were taxable under s.1313(2)(b) CTA 2009 because they represented profits arising from the benefits of the assets to be produced by exploration activities.

Finally, the Upper Tribunal concluded the bank was not entitled to deduct the losses on the original loan. The loan was made in the ordinary course of the bank's business. As such it was outside the ring fence and could not be set off against the ring fence income.

The appeal was dismissed.

Royal Bank of Canada v HMRC [2022] UKUT 00045 (TCC)

Adapted from the case summary in Taxation (7 April 2022)

Manufactured overseas dividends

Summary – The Supreme Court has found in favour of HMRC in a test case on the recoverability of withholding tax suffered on manufactured overseas dividends.

The taxpayers were the trustees of the British Coal Staff Superannuation Scheme. They claimed repayment of withholding tax on manufactured overseas dividends (MODs) which were exempt from UK tax.

HMRC refused the claims. The First-tier Tribunal dismissed the trustees' appeal but the Upper Tribunal overturned that decision. The Court of Appeal upheld the Upper Tribunal's decision so HMRC appealed.

In essence, the case concerned whether, on a true economic analysis, the MODs regime was a disincentive to the acquisition of overseas shares by a UK tax-exempt investor.

Decision

Lord Briggs and Lord Sales give a joint judgment in the Supreme Court. Lord Reed, Lord Hodge and Lord Hamblen agreed. They said the regime did not discourage overseas investment because their purpose was to create an income stream for the lender that was equivalent to dividends had the shares continued to be held in-house. The payment of MODs was 'specifically crafted so as to precisely replicate the lender's net dividend income (i.e. the net dividend income which it would have received if it had held the shares) not to provide any share of the benefits derived from the uses to which the borrower wished to put the shares'.

The benefit to the lender of any additional benefits generated by the borrower's use of the shares was to be found in the size of the lending fee.

Further, even if it had decided that the MODs regime had breached EU law, it would have been 'disproportionate' to require HMRC to repay the taxes in full.

HMRC's appeal was allowed.

HMRC v Coal Staff Superannuation Scheme Trustees Ltd [2019] EWCA Civ 1610

Adapted from the case summary in Taxation (5 May 2022)

Planning for the 25% corporation tax rate **(Lecture B1319 – 19.27 minutes)**

Companies will be keen to mitigate the effects of the 25% tax rate which starts from 1 April 2023.

The small profit rate of 19% will continue to apply where the small profits limit is not exceeded.

This is where augmented profits (including non-group distributions received) are at or below £50,000 pa. The £50,000 limit is divided by the number of companies who were associated with the relevant company at any point in the accounting period.

We are concerned where augmented profits will exceed the small profit limit. Above this, profits are taxed at a marginal rate of 26.5% until they exceed the upper profit limit of £250,000 pa (divided by the number of associated companies) when they are taxed at 25%.

Associated companies

Two companies are associated where one controls the other (i.e. like 51% groups today), or both are controlled by the same person or group of persons.

Dormant companies are ignored as are pure holding companies that just receive dividends and pay them on to shareholders.

Control

Control is where a person can exercise or acquire direct or indirect control over the company's affairs. This will definitely be the case if they own or can acquire:

- More than 50% of the share capital or issued share capital, or
- The majority of the voting rights, or
- Entitlement to majority of distributable profits, or
- Entitlement to > 50% of assets available to participators.

It includes where two or more persons satisfy these conditions.

But when attributing rights of others (e.g. associates such as spouse, siblings etc.) companies are only associated if there is substantial commercial interdependence between them (e.g. economic links, financial links and organisational links).

Husband and wife scenarios

If H&W each own (say) 50% of A Ltd and of B Ltd, the two companies are associated.

But if H owns 100% of A Ltd and W owns 100% of B Ltd, normally we would attribute H's interest to W and W's interest to H so the companies would be treated as under common control, but for this purpose A Ltd and B Ltd will only be associated if there is substantial commercial interdependence between them. If they operate separately, they will not be associated.

Timing of revenue and expenses

If augmented profits are likely to exceed the lower profit limit and can any profit be accelerated into earlier year?

For example, trying to complete long-term contract work before 1 April 2023 (or the accounting period that straddles this date).

Or can allowable expenditure be delayed until after 1 April 2023 to get tax relief at higher level? This might be possible for discretionary expenditure such as directors pension contributions.

If the company is planning to acquire an electric car for employees or directors, it might be worth considering leasing the car rather than purchasing it, if it would be purchased when the rate of corporation tax is still 19%.

Leasing the car would spread the expense over the lease term. Typically, an electric car is leased for 48 months, so, assuming it could be delivered to the company in, say, November 2022, the vast majority of the expense would be recognised in periods after the corporation tax rate has increased.

Buying the car in November 2022 would result in a 100% first-year allowance but would only save tax at 19%.

An additional feature of car leasing is that if the car is used for some business purposes, 50% of the VAT on the rentals can be reclaimed. No VAT is recoverable if a car is purchased (or hire-purchased) unless the car is used 100% for business use which is extremely rare.

Ultimately, whether to purchase or lease a car is a commercial decision based on which minimises the overall cost to the company, but tax can play a large part in this analysis.

Use of losses

Losses arising in recent accounting periods might be better carried forward than used in the current and previous period(s) to save tax at higher rates than 19%.

This depends on the probability that the company will make taxable profits in excess of the small profit threshold in future years.

Consideration can be given, where relevant to tailoring the use of brought forward losses to reduce future profits to the small profit limit and carry forward the remainder. This would ensure that the losses save tax at more than 19% but would delay loss relief. It is also dependent on the company achieving profits in excess of the small profit rate in later periods.

Possible restructuring to save some tax?

Consideration should be given to the impact of associated companies and considering if restructuring is worthwhile to reduce the number of associates to save some corporation tax.

Additionally, restructuring might mitigate the impact of dividing the quarterly instalment payment limits by the number of associates from 2023.

Example 1

Individual client owns 2 companies, each with profits of £800,000. At present, they do not have to pay tax by instalments.

The first accounting period beginning from 1 April 2023 will be within the instalment regime, but QIPs will not apply in that period, but from the following accounting period.

Example 2

If one company has profits of £800,000 and the other has profits of £600,000, it might be advantageous to merge them. The first company would then avoid the need to pay QIPs going forward.

Example 3

Two companies in a group. A Ltd has losses of £120,000 and B Ltd has profits of £300,000. Maximum group relief claims are made where possible.

At present, both pay corporation tax at 19%.

From April 2023 the LPL = £25,000 and the UPL = £125,000.

A pays no corporation tax, B pays tax of (25% x [300 – 120]), total = £45,000.

If they merge into one company, LPL = £50,000, UPL = £250,000. Profits = £180,000, tax = (50k @ 19% plus 130k @ 26.5%) £43,950. This saves £1,050, in theory annually if results are similar in future years.

The costs of restructuring need to be balanced against the tax saving.

Example 4

2 companies owned by 1 individual. A Ltd has profits of £10,000 and B Ltd has profits of £130,000.

At present, both pay corporation tax at 19%.

From April 2023, the LPL = £25,000 and the UPL = £125,000.

A would pay tax of (19% x 10k) £1,900, B would pay tax of (25% x £130k) £32,500, at total of £34,400.

If they merge into one company, the LPL = £50,000 and the UPL = £250,000. Merged profits = £140,000, and the corporation tax payable is (50k @ 19% plus 90k @ 26.5%) £33,350.

This again saves £1,050, possibly annually if profits are similar in future years.

Change of accounting date

Depending on seasonality of profits it might be worth moving the company's year-end either to, or from 31 March.

For example, if a company currently has a year-end of 30 September and does not change this, its profits will be taxed at 22% for the year ended 30 September 2023.

If it changes its year end to 31 March:

1. 6 months to 31 March 2023 will be taxed at 19% (with plant & machinery effectively getting relief at 24.7% with super-deduction);

2. 6 months to 30 September 2023 will be taxed at 25%/26.5% if above the lower profit limits (as part of the year ended 31 March 2024).

If the company's profits are generated more in the period October to March than in the period April to September, it might be worth changing the year end.

Example

A company with year ended 30 September is anticipating a taxable profit ignoring capital allowances of £560,000 in its year ended 30 September 2023 and this is expected to be stable going forward.

The company has historically earned 35% of its annual profits in the period April – September and 65% in the period October – March.

If the company retains its current year end, it will have a tax liability (ignoring capital allowances) of 22% x £560,000, i.e. £123,200 for its year ended 30 September 2023.

If it changes its reporting date to 31 March from 2023, then it will have a tax liability of

1.	6 months to 31 March 2023 (560,000 x 65% x 19%)	£69,160
2.	6 months to 30 Sep 2023 (part of y/e 31 Mar 2024) (560,000 x 35% x 25%)	£49,000
		£118,160

Changing the reporting date would save £5,040 of corporation tax. This is £560,000 x 15% seasonal bias* x (25% - 19%).

*The seasonal bias is the 65% of profit earned in the first 6 months minus 50% if there was no seasonality.

Contributed by Malcolm Greenbaum

VAT and indirect taxes

Split of standard and zero-rated sales (Lecture B1316 – 21.31 minutes)

Summary - HMRC had used best judgment. The five testing days were reasonable and, with the onus on the director to establish that the assessment was wrong, he had failed to do so.

This was an appeal against a VAT assessment of £18,063, issued in July 2018 in respect of the period ending 03/16 to the period ending 06/17.

In January 2014, Mangio Ltd opened a shop selling hot and cold takeaway food and drink. It also had eight stools for people eating food and drink on the premises.

The company underwent substantial change during the period that the assessment related to:

- leasing a coffee making machine, resulting in coffee sales increasing ten-fold;
- extending its opening hours from 5pm to 10pm;
- introducing deliveries through Seamless, Deliveroo, and Uber Eats.

The gross sales made during this period were not disputed but rather, the split between standard rated and zero-rated sales were challenged.

It was common ground that the way in which the till system was set up and used and that it had a number of shortcomings:

- It did not identify which customers were eating in the shop;
- It identified deliveries as zero-rated "corner shop" sales, and did not differentiate what type of food and drink was being delivered;
- It treated all sandwiches as cold food, whether or not they were toasted;
- It recorded ice cream and hot chocolate sales as zero-rated;
- A meal deal of a hot pasta dish, cup of coffee and salad box was treated as 30% standard rated, but HMRC increased this to 45%.

Using their power of best judgment, HMRC's assessment was calculated based on analysing five days of sales in June and July 2017. This showed that 82% of total sales were standard rated, rather than the 45% declared in the company's records.

Mr Delvecchio, Mangio Limited's director who worked in the shop, claimed that the assessment should be reduced by about £10,000.

Decision

The First Tier Tribunal found that Mangio Limited had been unable to discharge its burden of proof in establishing that HMRC's assessment was incorrect:

1. The company had not presented any evidence to show what the make-up of the sales in fact was during the relevant periods;

2. The company's proposed adjustments to HMRC's assessment were based on broad assertions as to the nature of eat-in sales, the percentage of sandwiches which were toasted, the make-up of delivery orders and number of pasta meal sales. There was no documentary evidence to support these assertions.

The appeal was dismissed.

Mangio Limited v HMRC (TC08422/V)

VAT reclaim on management fees denied

Summary - Input tax recovery for supplies made by an associated company that went into liquidation without accounting for the output VAT was denied.

Grantham Ceilings & Interiors Limited supplied building and construction services and was charged a standard rated management fee for services provided by Grantham Holdings Limited, an associated company. The company claimed input tax totalling £268,429 in respect of these supplies during the 06/17, 09/17 and 12/17 quarterly VAT periods. However, Grantham Holdings Limited failed to account for the output VAT, and after less than a year of operation, the company went into liquidation.

HMRC believed that the input tax claimed was done so fraudulently. With common directors, Grantham Ceilings & Interiors Limited would have known that Grantham Holdings Limited would not account for the output tax due.

The company appealed to the First Tier Tribunal arguing that Grantham Holdings Limited was set up to manage and implement a new payment bonus scheme, with no intention to use the company for fraud or abusive ends. Further, at the time of the supplies it was not known that the parent would suffer serious cash flow problems and that issues relating to one contract would cause the company's liquidation. The facts did not involve fraud but unfortunate commercial pressures.

Decision

The First Tier Tribunal recognised that 'the business was facing real commercial and financial pressures, but, despite advice to do so, it failed to take the open and honest course of contacting HMRC to explain the problems faced.' In fact, reassurances were made to HMRC that money would be forthcoming.

The Tribunal found that the VAT returns were submitted knowing that Grantham Holdings Limited would not pay its VAT liability and so were dishonest.

The appeal was dismissed.

Grantham Ceilings & Interiors Limited v HMRC (TC08429/V)

Gambling, hospitality and entertainment (Lecture B1316 – 21.31 minutes)

Summary – The standard method of attributing input VAT on premises costs between taxable and exempt supplies was replaced by an alternative method based on utilised floorspace.

Hippodrome Casino Limited was a partially exempt business that made exempt gaming supplies and taxable supplies of hospitality and entertainment. The company provided gaming facilities, eight bars, a steak-house restaurant with a celebrity chef, meeting rooms, conference facilities and a theatre.

The company argued that overhead expenditure should be apportioned between taxable and exempt supplies based on the floor area utilised by each activity, rather than the standard method based on respective turnover.

HMRC disagreed, arguing that the company's alternative method did not give a more reasonable apportionment than the standard method.

Hippodrome Casino Limited appealed.

Decision

The Tribunal stated that, not only were the theatre, restaurant and bars identifiable features of the Hippodrome, each was operated from clearly recognisable and defined spaces. This was also the case for the gaming areas. The Tribunal concluded that the supplies of entertainment and hospitality from these discrete and defined areas could not be regarded as merely an adjunct to, or an amenity for, gaming.

The First Tier Tribunal found in Hippodrome Casino Limited's favour, concluding that their floorspace based apportionment was a more appropriate methodology for calculating the input tax attributable to taxable and exempt supplies. This method provided 'a more fair, reasonable and precise proxy of its economic use of its overhead expenditure than the turnover based standard method, particularly given that most of those overheads are property related'.

Hippodrome Casino Limited v HMRC (TC08441)

Is a flapjack a cake? (Lecture B1316 – 21.31 minutes)

Summary – Products described as flapjacks were not cakes and so were subject to VAT at the standard rate.

Glanbia Performance Nutrition (UK) Limited, a member of the Glanbia Milk Limited's VAT group, was a manufacturer of nutritional sports and performance protein bars, shakes and powders.

Its customers own the product brands, and market and distribute the products to their customer bases as their own products. Glanbia Performance Nutrition (UK) Limited manufactures these products for these businesses to sell on.

In 2016, following a visit, HMRC became aware that the group had applied a zero rate of VAT to sales of 36 varieties of food products described by Glanbia Milk Limited as "flapjacks".

Later, in 2018, HMRC raised an assessment on the basis that supplies of each of the 36 products should have been standard rated 'confectionary' within the meaning of excepted item no. 2 in Group 1, Schedule 8 VATA 1994.

Excepted Item No.2 reads:

> "Confectionery, not including cakes or biscuits other than biscuits wholly or partly covered with chocolate or some product similar in taste and appearance."

Glanbia Milk Limited appealed, arguing that the products were zero rated as they were 'cakes' within the meaning of this provision.

Decision

It was not disputed that all of the products were 'confectionery' within the meaning of Excepted item No. 2 in Group 1 Schedule 8 VATA 1994.

The First Tier Tribunal referred to HMRC's internal manual 'VAT Food', which states in paragraph VFOOD 6200 that historically, flapjacks were accepted as a cake, and that traditional flapjacks can still be treated as a cake. However, many of today's 'flapjacks' are in fact cereal bars, which are standard-rated.

Did the products have sufficient characteristics of a cake to fall within the definition of a cake for purposes of Excepted Item 2? Analysing the products in detail, the Tribunal concluded that:

- The products were not predominantly made from flour, fat and eggs but rather oats, syrup and protein; protein is not something typically associated with cakes;
- The products in this case did not have the texture or appearance of a typical flapjack, let alone that of a typical cake. They were a dense, chewy consistency similar to a fruit or energy bar.
- The ordinary person would consider the products to be unsuitable as a dessert, as food to be consumed at an afternoon tea, or at a casual social function;
- All of the products were originally targeted at consumers in the sport nutrition market, not a place where you would expect cakes to be sold;
- When marketing the product, the word 'protein' rather than 'cake' featured on the products' wrappings.

The First Tier Tribunal found that the products were not 'cakes', and so were standard rated as "confectionery".

Glanbia Milk Limited v HMRC (TC08439/V)

Supreme Court denies postal VAT reclaim

Summary – Following the cases referral to the CJEU, the Supreme Court has now denied the reclaim of VAT on postal services where Royal Mail had incorrectly not charged VAT on the supply.

Zipvit Limited used a bespoke mailing service provided by Royal Mail under which all parties believed that the service was an exempt supply for VAT. However, following the CJEU decision in R (TNT Post UK Ltd) v HMRC, it was later found that these services should have been standard rated.

The company argued that the price it had paid was VAT inclusive and sought to reclaim input VAT totalling £415,746 but HMRC denied the claim.

Many cases stand behind Zipvit Limited's case, selected as a lead case, and the total amount of tax at stake is in excess of £1 billion.

Decisions

Having been dismissed at each stage in the appeal process, the case was referred by the Supreme Court to the CJEU for clarification of the VAT directive.

In January 2022, the CJEU issued its judgment, finding that the invoices issued by Royal Mail did not contain an amount of VAT, no VAT was paid and so no reclaim was possible.

Accepting that the CJEU's decision was clear, the appeal has now been dismissed by the Supreme Court, without the need for a further hearing.

Zipvit Limited v HMRC [2022] UKSC12